WTO DISPUTE ANALYSIS*

Centre for WTO Studies
Indian Institute of Foreign Trade
New Delhi

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Report of the Panel

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

(WT/DS414/R)
(Circulated on 15 JUNE 2012)

Parties:

Complainant:	United States (US)
Respondent:	China
Third Participants:	Argentina, European Union, Honduras, India, Japan, Saudi Arabia and Korea.

Panellists:

John Adnak (Chairman), Anthony Abad (Member), Jan Heukelman (Member)

I. BACKGROUND

This dispute concerns China's measures imposing countervailing duties and anti-dumping duties on grain oriented flat-rolled electrical steel (GOES) from the United States, as set forth in the Ministry of Commerce of the People's Republic of China (MOFCOM) Notice No. 21 (2010), including its annexes.[1]The US claimed that the measures were inconsistent with China's obligations and commitments under the General Agreement on Tariffs and Trade of 1994 (the *GATT 1994*), the Agreement on Subsidies and Countervailing Measures (the *SCM Agreement*) and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the *Anti-Dumping Agreement*).

An application for initiation of an anti-dumping and countervailing duty investigation was filed on 29 April 2009 by two Chinese steel producers, namely Wuhan Iron and Steel (Group) Corporation (WISCO) and Baosteel Group Corporation (Baosteel), alleging that 27 federal and state laws provided countervailable subsidies to the US producers of GOES. On June 1 2009, MOFCOM initiated anti-

* This issue has been prepared by *Shailja Singh*, Legal Consultant (Assistant Professor), Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi.

**This issue can also be accessed online at http://wtocentre.iift.ac.in/DisputeAnalysis.asp . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

[1] Final Determination (2010) No. 21 (10 April 2010) ("Final Determination"), Exhibit CHN-16 and Exhibit US-28

dumping, countervailing duty and injury investigations. The countervailing duty investigation was initiated in relation to 22 of the 27 federal and state laws that the applicants had alleged provided countervailable subsidies, and later 6 more programmes were covered by it on the basis of new subsidy allegations of the applicants.

After a round of preliminary determination, on April 10 2010, MOFCOM issued its final determination for the anti-dumping and countervailing duty investigations. MOFCOM calculated *ad valorem* subsidy rates of 11.7% for AK Steel Corporation (A K Steel), 12% for ATI Allegheny Ludlum Corporation (ATI) and 44.6% for "all others". MOFCOM applied a dumping margin of 7.8% to AK Steel, 19.9% to ATI and 64.8% to "all others". MOFCOM found that China's domestic GOES industry sustained material injury and that there was a causal link between the injury and the dumped imports of GOES from Russia and the dumped and subsidized imports of GOES from the United States. On 15 September 2010, US requested consultations with China, which were held on 1 November 2010. The consultations failed to resolve the dispute. On 11 February 2011, US requested that the Dispute Settlement Body (the DSB) establish a Panel to examine this matter.

II. KEY ISSUES AND PANEL FINDINGS

A. Whether China acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement in initiating an investigation with respect to certain programmes?

According to the US, the initiation by MOFCOM of the countervailing duty investigation in relation to 11 federal and state programmes was inconsistent with Articles 11.2 and 11.3 of the *SCM Agreement*. Furthermore, the US alleged that an objective investigating authority would not have found sufficient evidence to initiate the investigations. China on the other hand contended that the US had not made a *prima facie* case with respect to Article 11 claims. The Panel noted that the US claims were the first under Article 11.2 and 11.3 of the *SCM Agreement* in the context of the WTO dispute settlement, although the initiation of a countervailing duty investigation was considered in the context of the Tokyo Round Subsidies Code.

The relationship between Articles 11.2 and 11.3 of the SCM Agreement

According to the Panel, the obligation upon Members in relation to the sufficiency of evidence in an application finds expression in Article 11.3 of the *SCM Agreement*, which provides that an investigating authority must assess the accuracy and adequacy of the evidence in an application to determine whether it is sufficient to justify initiation. The obligation in Article 11.3 must be read together with Article 11.2 of the *SCM Agreement*, which sets forth the requirements for "sufficient evidence". Given this interpretation, the Panel considered it appropriate to make findings under Article 11.3, by reference to the requirements for "sufficient evidence" set forth in Article 11.2, but it did not consider it necessary to reach separate conclusions under this provision. (Paras 7.49-7.50)

Article 11.3 of the SCM Agreement

(***Key Question***: *What is the standard of review under Article 11.3 of the SCM Agreement?)*
Regarding the standard of review that the Panel should apply under Article 11.3 of the *SCM Agreement*, both parties agreed with the interpretation of the analogous provision under the *Anti-Dumping Agreement* adopted by the panel in *US – Softwood Lumber V*. The Panel agreed with the parties that its role was not to conduct a *de novo* review of the accuracy and adequacy of the evidence to arrive at its own conclusion regarding whether the evidence in the application was sufficient to justify initiation. Rather, the Panel must consider the reasonableness of MOFCOM's conclusions, by reference to the test articulated by the panel in *US – Softwood Lumber V*, i.e. a panel should determine "whether an unbiased and objective

investigating authority would have found that the application contained sufficient information to justify initiation of the investigation".[2] (Para 7.51)

The 'sufficient evidence' requirement under Articles 11.2 and 11.3 of the SCM Agreement

(***Key Question***: *Is the standard of evidence required to meet the threshold of sufficiency same or different for purposes of initiation of an investigation and for a preliminary or final determination?)*
A major issue in contention between the parties was the meaning of "sufficient evidence" under Articles 11.2 and 11.3 of the *SCM Agreement*. China argued that the standard for 'sufficient evidence' was much lower than that advocated by the US. The Panel noted that:

> "It is clear that at the stage of initiating an investigation, an investigating authority is not required to reach definitive conclusions regarding the existence of a subsidy, injury or a causal link between the two. Rather, as the panel noted in *Guatemala – Cement II*, an "investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward".[3] Indeed, both parties appeared to agree with the reasoning of the panel in *US – Softwood Lumber V,* in examining the analogous provisions under the *Anti-Dumping Agreement*, that "the quantity and the quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination." (Para 7.54)

According to China, the standard for 'sufficient evidence' must be interpreted in the light of the requirement in Article 11.2 that the application contained such information as was "reasonable available to the applicant". In the Panel's view, the fact that an applicant must provide such information as is "reasonable available" to it confirmed that the quantity and quality of the evidence required at the stage of initiating the investigation was not of the same standard as that required for a preliminary or final determination. Thus, the Panel considered that the standard advocated by China was at times overly permissive, as indicated in the Panel's consideration of the 11 programmes at issue. (Paras 7.55-7.56)

The required evidence

(***Key Question***: *Does Article 11.2 of the SCM Agreement prescribe a lower evidentiary standard of specificity compared to Article 2 of the SCM Agreement?)*
In relation to the categories of evidence referred to under Article 11.2 of the *SCM Agreement*, while China accepted that the reference in Article 11.2(iii) to evidence of the 'nature' of subsidy referred to whether the subsidy was specific under Article 2 of the *SCM Agreement*, however, it argued that the lack of any direct reference to 'specificity' under Article 11.2 suggested a different and lower evidentiary standard in relation to it. According to the Panel, while evidence referred to in Article 11.2 of the *SCM Agreement* included evidence of specificity, the Panel found no basis for China's argument that a lower evidentiary standard applied in relation to it. (Paras 7.58-7.62)

The 11 programmes at issue

(i) Medicare Prescription Drug, Improvement and Modernization Act

The issue in contention between the parties was whether the application included any evidence of specificity in relation to the Medicare Prescription Drug, Improvement and Modernization Act. China

[2] Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, Para 7.78
[3] Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, Para. 8.35.

argued that evidence that could represent the existence of either a *de jure* or *de facto* specific measure was submitted with the application. The purported evidence of specificity relied upon by China was a statement from AK Steel Annual Report that the subsidy was available to 'sponsors of retiree healthcare benefit plans that included a qualified prescription drug benefit' and that AK Steel was a sponsor of such a plan. In the Panel's view, the fact that the subsidy programme was available to sponsors of particular healthcare plans did not provide an indication of *de jure* specificity. To the contrary, the evidence indicated that eligibility for the subsidy was governed by "objective criteria or conditions" in the sense of Article 2.1(b) of the *SCM Agreement*, which provided that, subject to Article 2.1(c), "specificity shall not exist" under such circumstances. Further, the evidence that AK Steel sponsored the relevant type of healthcare plan merely indicated that AK Steel was a user of the programme. In the Panel's view, this was not sufficient for an unbiased and objective investigating authority to conclude there was any evidence to indicate that the programme was *de facto* specific. (Paras 7.63-7.68)

(ii) Economic Recovery Tax Act 1981

(***Key Question***: *Is 'present subsidization' a prerequisite for imposing countervailing duties?)*
According to the evidence annexed to the application, the Economic Recovery Tax Act 1981 allowed unprofitable corporations with certain unusable federal income tax credits and deductions effectively to sell them to profitable corporations that could use them to reduce their tax liabilities. The Act operated for a period of two years, expiring in 1983. The purported evidence relied upon by China was a "large benefit" to the steel industry when the subsidies were disbursed over a two year period concluding in 1983. In the view of the Panel, in order to impose a countervailing duty, it was necessary that the product against which it was imposed be presently subsidized. It found support for this in Article 19.1 of the *SCM Agreement*, which provided that a countervailing duty may be imposed where the "subsidized imports" were causing injury and footnote 36 of the *SCM Agreement* which stated that a countervailing duty was "levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise". If the product was not currently subsidized, there would be no subsidy to offset and therefore, no basis for the imposition of countervailing duties. The panel in *Japan – DRAMs (Korea)* had agreed that "present subsidization" was required before countervailing duties may be imposed. Given the absence in the application of even a reference to or an argument about allocation of the benefit of the subsidy to the proposed period of investigation, much less the inclusion of any evidence in this regard, the Panel found that China acted inconsistently with Article 11.3 of the *SCM Agreement* and an unbiased and objective investigating authority would not have concluded that initiation was justified. (Paras 7.69-7.74)

(iii) Tax Reform Act 1986
The Tax Reform Act 1986 granted the steel industry a special transition rule to mitigate the impact of the repeal of a federal investment tax credit. The application claimed that this resulted in a benefit of USD 574 million to the United States steel industry over the period 1986-1990. For the same reasons as expressed in relation to the Economic Recovery Tax Act, the Panel concluded that China had acted inconsistently with Article 11.3 of the *SCM Agreement*. In particular, the evidence in the application indicated that the benefit of the subsidy was received during the period 1986-1990, over 15 years prior to the expected period of investigation. (Paras 7.75-7.78)

(iv) Steel Import Stabilization Act 1984
The annex to the application indicated that under the Steel Import Stabilization Act, Voluntary Restraint Agreements (VRAs) restricting imports of steel into the United States were established. Total imports of steel were capped at 18.5% of market share, with this later increasing to 20.26%. The issue in contention between the parties appeared to be whether the application included sufficient evidence of the existence of a financial contribution under Article 1.1(a)(i) of the *SCM Agreement*, or of "any form of…price support" within the meaning of Article 1.1(a)(2).

(***Key Question***: *How broad is the scope of 'price support' under Article 1.1(a)(2) of the SCM Agreement?)* Starting with the analysis under Article 1.1(a)(2), the Panel noted that despite the potential for a broad interpretation of the term 'price support', reading it in the context of Article 1.1(a) of the *SCM Agreement* suggested that a more narrow interpretation was appropriate. Relying on *US-Export Restraints*[4], where the panel had noted the concept of 'financial contribution was included in the definition of subsidy in order to avoid an effects-based approach, the Panel concluded that the term "price support" in this context, did not include all government intervention that may have an effect on prices, such as tariffs and quantitative restrictions and had a more narrow meaning than suggested by the applicants, and included direct government intervention in the market with the design to fix the price of a good at a particular level, for example, through purchase of surplus production when price is set above equilibrium. The Panel found some support for this approach from the *GATT Panel on Subsides and State Trading, Report on Subsidies*[5], where the latter had envisaged 'price support' to involve the government setting and maintaining a fixed price, rather than a random change in price merely being a side-effect of any form of government measure. (Paras 7.84-7.86)

The Panel also noted that a concept of 'market price support' was included in the *Agreement on Agriculture*, from where it could be concluded that at least for the type of price support contemplated in Annex 3 of the *Agreement on Agriculture*, a direct form of government control over domestic prices was required, in the form of a fixed, administered price, rather than a movement in prices being an indirect effect of another form of government intervention. In the light of these considerations, in the Panel's view, "any form of…price support" was not broad enough to encompass VRAs, which may have an incidental side-effect, of random magnitude, on prices. (Paras 7.87-7.88)

Furthermore, according to China, the evidence that the VRAs led to a transfer of wealth from steel purchasers to the US steel industry "might be seen as evidence of a financial contribution under Article 1.1(a)(1)(iv) of the *SCM Agreement* given the effect of the measure on private parties, causing them to provide a transfer of funds in the form of higher prices". The Panel did not agree with this interpretation of Article 1.1(a)(1)(iv) of the *SCM Agreement*. In particular, the Panel did not consider that when a government policy, such as a border measure, had the indirect effect of increasing prices in a market, the government had entrusted or directed private consumers to provide direct transfers of funds to the industry selling the good in the affected market. In the light of the preceding reasons, the Panel concluded that China had acted inconsistently with Article 11.3 of the *SCM Agreement.* In the Panel's view, an unbiased and objective investigating authority would not have concluded that the application included sufficient evidence of the existence of price support or a financial contribution. (Paras 7.89-7.93)

(v) State of Indiana Steel Industry Advisory Service;

According to the information annexed to the application, in 1987 the State of Indiana formed a "Steel Advisory Commission to examine state and federal laws affecting the steel industry and to consider industry problems such as foreign competition and economic decline". The issues in contention between the parties were whether the application included sufficient evidence of the existence of a financial contribution and a benefit. In relation to whether the application included sufficient evidence of the existence of a financial contribution, the Panel noted that it was entirely possible that a programme under which a government studied the laws and problems affecting an industry could give rise to a financial contribution in the form of a provision of a good or service. However, the Panel was not satisfied that an unbiased and objective investigating authority could have concluded that the application included "sufficient evidence" to indicate that this was the case in relation to the Steel Industry Advisory Service.

[4] Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001
[5] L/1160, 23 March 1960

In the light of the Panel's finding that China acted inconsistently with Article 11.3 with respect to the evidence of a financial contribution, the Panel did not consider it necessary to proceed to consider the US's' arguments regarding the sufficiency of the evidence of the existence of a benefit. (Paras 7.94-7.98)

(vi) Grace Period for Compliance with Clean Air Act, 2003

The application explained that in 1981, legislation granting the steel industry a three-year extension on the deadline for complying with the Clean Air Act came into force and expired in 1985. According to the Panel, as indicated in its analysis of the taxation programmes, in circumstances where a long period of time has elapsed between the expiry of the alleged subsidy and the period of investigation, lack of any evidence, or indeed any argument or assertion, regarding whether allocation of the benefit to the period of investigation would be appropriate, leads to the conclusion that an unbiased and objective investigating authority would not have concluded that there was sufficient evidence of the existence of a benefit during the period of investigation to justify initiation. Consequently, the Panel concluded that China acted inconsistently with Article 11.3 of the *SCM Agreement*. (Paras 7.99-7.104)

(vii) 2003 Economic Stimulus Plan of Pennsylvania

The evidence annexed to the additional application indicated that Pennsylvania introduced an Economic Stimulus Plan aimed at creating jobs, bolstering business growth etc. The issue in contention between the parties was whether the additional application included sufficient evidence of *de facto* specificity. The purported evidence relied upon by China included documentation demonstrating that AK Steel and ATI were located and prominent in Pennsylvania. Further, China contended that the evidence in the additional application demonstrated that the programme was focused on "traditional industries, especially manufacturing". The Panel did not consider the information regarding the presence and prominence of GOES manufacturers in Pennsylvania to be evidence of *de facto* specificity. According to the Panel, this information demonstrated that AK Steel and ATI may be eligible to be users of the programme, but did not provide any evidence that the steel industry was one of a limited number of users or that it receives a disproportionately large amount of the subsidy. With respect to the second element of China's argument, the Panel noted that the Economic Stimulus Plan included a diverse range of "focal points", such as economic and community development projects; rural urban and suburban sites; resources for small cities and communities; real estate and business development; and high-growth firms. According to the Panel, the evidence suggested that the programme had a much wider application than suggested by China. (Paras 7.105-7.108)

Consequently, the Panel was not convinced that an unbiased and objective investigating authority would have found that the information regarding a focus on "traditional industries, especially manufacturing" was sufficient evidence of specificity to justify initiation under Article 11.3 of the *SCM Agreement*. (Para 7.112)

(viii)Pennsylvania's Alternative Energy Funding Plan

The evidence in the annex to the additional application indicated that the State of Pennsylvania invested USD 650 million towards "expanding the alternative fuel, clean energy and efficiency sectors". The issue in contention between the parties was whether the additional application included sufficient evidence of the existence of a benefit during the expected period of investigation and sufficient evidence of specificity. According to the Panel, on the of basis the totality of the evidence before the investigating authority, an unbiased and objective investigating authority could not have considered an investigation justified under Article 11.3. This was because the US had submitted evidence to MOFCOM, a document, listing eight companies that had had projects approved for loans and grants as of 14 July 2009 and none of the companies listed were producers of GOES, or indeed part of the steel industry. (Paras 7.115-7.119)

(ix) Natural Gas

The issue in dispute between the parties was whether the additional application included "sufficient

evidence" of the existence of a financial contribution, benefit and specificity under Articles 11.2 and 11.3 of the *SCM Agreement.* The additional application included allegations of two different types of subsidies. In particular, the additional application contended first, that the US Government regulated the price of natural gas and provided it to the steel industry at below market prices and second, that subsidies provided to the natural gas industry resulted in "pass-through" to the steel industry.

In relation to the first type of subsidy, the Panel noted that China's reference to government price regulation through lower-reach development companies was a reference to historical regulation and did not provide support for the allegation that the government *currently* provided natural gas to the steel industry at below market prices. In relation to the second type of subsidy, the Panel noted that there was no evidence that any pass-through that occurred was specific to the steel industry. In particular, if an allegation of pass-through was accepted for the purposes of the application, there was no reason to assume that the benefit did not pass-through to all purchasers of natural gas, rather than to the steel industry specifically. In this regard, the Panel noted the panel's statement in *US – Softwood Lumber IV* that where a subsidy was provided in the form of the provision of a good by the government, where the good was in the form of a natural resource, there was no implication that such a subsidy was necessarily specific, precisely because such goods may be used by an indefinite number of industries. Therefore, the Panel found China to have violated Article 11.3 of the *SCM Agreement* in relation to both kinds of subsidies. (Paras 7.121-7.131)

(x) Electricity

The issue in contention between the parties was whether the additional application included sufficient evidence of the existence of a financial contribution, benefit and specificity in accordance with Articles 11.2 and 11.3 of the *SCM Agreement.* The applicants alleged that the US electricity industry, including its pricing, was largely controlled by the US Government and that electricity was provided to the steel industry at a low price. The applicants also argued that subsidies provided to the electricity industry pass-through to the steel industry. According to the Panel, even assuming that the government intervened in the electricity market to provide it to the steel industry at below market prices, there was nothing to suggest that the steel industry alone benefitted from this intervention, or that access to this subsidy was otherwise limited to "certain enterprises". The Panel also noted that the additional application did not include evidence to indicate that the alleged subsidy was indeed only provided to the steel industry or to a limited group of beneficiaries. Therefore, the Panel found that the additional application included insufficient evidence for an unbiased and objective investigating authority to conclude that initiation was justified under Article 11.3 of the *SCM Agreement*. (Paras 7.132-7.139)

(xi) Coal

The issue in contention between the parties was whether the additional application included sufficient evidence of the existence of a financial contribution, benefit and specificity for the purposes of Articles 11.2 and 11.3 of the *SCM Agreement*. The additional application alleged that the US Government provided subsidies to the coal industry and that the subsidies "pass-through" to the steel industry, which was a major user of coal. In a manner similar to the reasoning in relation to the alleged pass-through of natural gas subsidies, the Panel did not consider it necessary to determine what evidence would be "sufficient" under Articles 11.2 and 11.3 for the purposes of tending to prove the "pass-through" of a benefit from an upstream to a downstream entity. (Para 7.140-7.147)

Conclusion

Thus, the Panel concludedthat China had acted inconsistently with Article 11.3 of the *SCM Agreement* in relation to each of the 11 programmes at issue. (Para 7.148)

B. Whether China acted inconsistently with Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement because MOFCOM failed to require adequate non-confidential summaries?

Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement

The issue in contention between the parties was whether the applicants provided non-confidential summaries of the confidential information redacted from the application, in accordance with the requirements of Article 12.4.1 of the *SCM Agreement* and 6.5.1 of the *Anti-Dumping Agreement*. Both the Articles obliged the investigating authorities to require interested parties and interested Members in the case of the *SCM Agreement*, to furnish non-confidential summaries of any confidential information provided. The Panel noted the following in this regard:

(***Key Question***: *Can the investigating authority provide the non-confidential information summary in the determination, instead of the interested parties?)*

a. On the issue of when the obligation to furnish a non-confidential summary arose, China argued that the non-confidential summaries provided in the application itself were later supplemented by non-confidential analysis by MOFCOM in its determination, and by the parties in their arguments to MOFCOM. However, the Panel was not convinced by China's argument in this regard and stated that in order to allow an interested party the opportunity to defend its interests, the summary of the confidential information is needed to be provided before the investigating authority has reached its determination. Furthermore, Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *Anti-Dumping Agreement* expressly provided that the authorities shall require "*interested parties*" providing confidential information to furnish non-confidential summaries thereof and it was difficult to read this obligation as being fulfilled when an *investigating authority* produced a summary of information submitted to it. (Para 7.190)

b. The parties also disagreed regarding the relevance of whether a respondent contested the issue of the subject of the summary. The Panel noted that whether or not a respondent made substantive challenge regarding the subject matter that had been treated confidentially did not affect the standard for an adequate non-confidential summary under Articles 12.4.1 of the *SCM Agreement* or 6.5.1 of the *Anti-Dumping Agreement*. Indeed, without an adequate non-confidential summary, the ability of an interested party to contest the relevant issue was compromised. (Para 7.191)

c. With respect to whether the "exceptional circumstances" exemption was at issue, the Panel noted that Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *Anti Dumping Agreement* explicitly established the standard sufficiency of non-confidential summaries was to be assessed, namely by reference to whether the summaries "permit a reasonable understanding of the substance of the information submitted in confidence". However, if this "exceptional circumstance" exemption was not invoked, as in this case, there was no basis to conclude that purported "exceptional circumstances" altered the standard that applied under Articles 12.4.1 and 6.5.1. Therefore, the Panel concluded that it would assess the adequacy of the non-confidential summaries by reference to whether they "permit a reasonable understanding of the information submitted in confidence". (Pars 7.192-7.193)

Part II of the application

Another issue of contention between the parties was where in the application the non confidential summaries could be found. While the US contended that the purported non-confidential summaries were the general statements found in Part-II of the application, China contended that non-confidential summaries could be found throughout Part-I of the application. The Panel found that a review of the

applications provided support for the US's view that the applicants intended Part II-2 of the application to provide the non-confidential summaries of the redacted information. This was due to the consistent instructions in the body of the application, following redacted sections, to consult Part II of the application for summaries of the non-confidential information and the title to Part II-2, which stated "non-confidential summary". However, according to the Panel, the summaries provided minimal descriptions of the nature, rather than the substance of the confidential information and hence were inadequate under Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *Anti-Dumping Agreement*. (Paras 7.194 – 7.200)

Part I of the application

Although the Panel concluded that Part II of the application was intended to provide the non confidential summaries, it noted China's argument that neither Article 12.4.1 of the *SCM Agreement* nor Article 6.5.1 of the *Anti-Dumping Agreement* required that non-confidential summaries must take a particular form or be labelled in a particular manner. Consequently, China had argued that non-confidential summaries could be interspersed throughout the body of an application and still provide a reasonable understanding of the substance of the confidential information. The Panel stated that even if it were to accept China's argument, it was not convinced that the purported summaries provided a reasonable understanding of the substance of the confidential information, based on the following analysis of a selection of the categories of confidential information redacted from the application. (Paras 7.201-7.202)

a. Output of the petitioner, total output of the GOES in China, proportion of the petitioners' output in China's total output

(***Key Question***: *Is it permissible to redact the numerical information on which the test of standing is based?)*
The Panel noted that Table 1 of the application included information about the output of each applicant, the total output of GOES in China and the proportion of total output of each of the two applicants over the period 2006 through the first quarter of 2009. All of the numerical information in the table was redacted. China argued that Table 1 was included in the application for the purpose of demonstrating that the applicants met the *standing* requirements under the *Anti-Dumping* and *SCM Agreements*. According to China, the assertion that the applicants met the standing requirements under WTO rules was an adequate summary of the confidential information redacted from Table 1 of the application. However, the Panel recalled that Article 6.5.1 of the *Anti-Dumping Agreement* accommodates the concerns of confidentiality, transparency and due process to conclude that. In the Panel's view, to accommodate the concern of due process, interested parties must have access to a summary of the confidential information that is relied upon to draw certain conclusions, so that those conclusions may be challenged. Thus, according to the Panel, even if it were to accept China's argument that the non-confidential summaries were to be found in Part I, the information relied upon by China as the summary of confidential information was inadequate under Article 12.4.1 of the *SCM Agreement*.(Paras 7.203-7.208)

b. Apparent consumption of GOES in China
Tables 23 and 24 of the application redacted data on the annual domestic apparent consumption of GOES over the period 2006 through the first quarter of 2009. However, in the Panel's view, there remained significant problems with the purported summaries of the confidential information relied upon by China. In particular, there was a mismatch between the redacted information and the alleged summaries. The Panel also noted that Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *Anti-Dumping Agreement* did not include any requirements regarding the form a non-confidential summary must take. However, given the lack of cross-referencing and the mismatch between the redacted information and the purported non-confidential summaries, a respondent may be confused regarding whether the summary information was based on the same data source as the redacted information and thus represented the "non-confidential" summary. In this sense, the due process objective of Articles 12.4.1 and 6.5.1 may be undermined, as an

interested party may not be aware that the redacted information had in fact been summarized and could be contested. (Paras 7.209-7.213)

c. Influence on the Chinese domestic industry

The section of the application describing the impact of the dumped imports on the domestic industry included 24 tables of data, from which either all or a significant portion of the data was redacted. China relied upon year-on-year percentage changes as the relevant non-confidential summaries, provided either within the relevant tables or in the accompanying commentary. In this case as well, the Panel noted that there remained certain gaps in the summaries provided in the section of the application examining the impact of the dumped imports on the domestic industry. (Para 7.215 – 7.218)

d. Dumping margin of GOES imports from the United States

China argued that the dumping margins for GOES were adequately summarized because the methodology for calculating the margins was outlined and the vast majority of numbers were provided in Part I of the application. Given the Panel's conclusions regarding the numerous problems with the purported non-confidential summaries in relation to the three preceding categories of confidential information, it did not consider it necessary to reach a definitive conclusion regarding whether, in this context, outlining the methodology for calculating the dumping margins was sufficient to permit a reasonable understanding of substance of the redacted information. (Paras 7.221-7.222)

Conclusion

The Panel concluded the purported non-confidential summaries in Part II were inadequate in permitting a reasonable understanding of the substance of the information submitted in confidence and hence China had acted inconsistently with Articles 12.4.1 of the *SCM Agreement* and 6.5.1 of the *Anti-Dumping Agreement*. (Paras 7.223-7.225)

C. Whether China acted inconsistently with Article 12.7 of the SCM Agreement in its use of facts available in calculating the subsidy rates (for the two known respondents) under certain procurement programmes?

MOFCOM had applied facts available to calculate the subsidy rates for the two known respondents, AK Steel and ATI. MOFCOM found that the respondents had not cooperated with its investigation, since they had failed to provide certain sales data. US contended that MOFCOM's reliance on facts available was improper, and therefore contrary to China's obligations under Article 12.7 of the *SCM Agreement*. The Panel noted that there were the following two main issues raised by the US's Article 12.7 claim:

Did MOFCOM properly find that the respondents failed to cooperate with MOFCOM's requests to provide transaction data for domestic sales of GOES and non-GOES products during the Period of Investigation (POI)?

In order to resolve this first issue, the Panel began by examining the relevant requests for information made by MOFCOM, and the respondents' responses to those requests. The Panel noted that although the questions in the initial questionnaire did not require submission of transaction data for all domestic sales of all products during the POI, the scope of the relevant questions was effectively revised by the deficiency letter issued to the respondents on 26 August 2009. (Paras 7.268 – 7.286)

Thereafter, the Panel examined MOFCOM's finding of non-cooperation, and considered whether that finding was justified by the facts. ATI had failed to provide any transaction data for any domestic sales of any products for any period. In the Panel's view, MOFCOM was consequently entitled to treat ATI as non-cooperative for the purpose of Article 12.7 of the *SCM Agreement*. AK Steel had provided transaction data for domestic sales of GOES during the period of investigation. However, AK Steel had

only submitted that data on 30 December 2009, in its comments on MOFCOM's preliminary determination. AK Steel did not submit this data in response to the requests set forth in MOFCOM's deficiency letter. Given AK Steel's failure to respond adequately to MOFCOM's deficiency letter, and given AK Steel's failure to include any non-GOES data when it did finally provide transaction data in its comments on MOFCOM's preliminary determination, the Panel considered that MOFCOM was also entitled to treat AK Steel as non-cooperative for the purpose of Article 12.7 of the *SCM Agreement*. (Paras 7.287-7.289)

(***Key Question***: *Can the data required for preparing verification strategy be termed as "necessary" for the purposes of Article 12.7 of the SCM Agreement?*)
Finally, the Panel considered US argument that data requested by MOFCOM was not "necessary" within the meaning of Article 12.7 of the *SCM Agreement* because MOFCOM was only going to use the data as a tool to inform its verification strategy and because this data had already been provided in the parallel anti-dumping proceeding. The Panel noted that the issue of whether or not the requested data was 'necessary' was important, as Article 12.7 of the *SCM Agreement* only concerned the provision of 'necessary' information. The Panel concluded that information that is only needed to prepare verification might still be treated as 'necessary' as verification forms an important part of the investigative process. The Panel was also not persuaded by the US's argument that transaction data was not 'necessary' for the countervail investigation because it was on record in the parallel anti-dumping proceedings since the anti-dumping record did not contain data for non-GOES transactions. Thus, the Panel concluded that MOFCOM had properly found that the respondents failed to cooperate with MOFCOM's requests to provide transactions data for domestic sales of GOES and non-GOES products during the period of investigation. (Paras 7.290-7.294)

Did MOFCOM properly apply a 100% utilization rate when determining the extent to which respondents' domestic sales of GOES and non-GOES products during the POI were subsidized?

The Panel recalled that the US claim was based on Article 12.7 of the *SCM Agreement*, which allowed investigating authorities to use information or facts to fill gaps in the record, resulting from non-cooperation on the part of interested parties. In other words, even when applying facts available, an investigating authority's determination must have a factual foundation. The Panel began its evaluation with the observation that there was no justification for the application of a 100% utilization rate, or any indication of the factual foundation for this rate, in MOFCOM's final determination. In its preliminary determination, MOFCOM had simply stated that "it was deduced that all the products of the responding companies sold in domestic sales were sold to the government, public bodies or project contractors thereof, at the highest premium, i.e., at a price 25% higher than that of foreign products." (Paras 7.295 – 7.299)

There was no additional explanation by MOFCOM on the basis of which "it was deduced" that all sales were made to government entities or government contractors. MOFCOM's reference to the respondents' failure to cooperate suggested that MOFCOM considered that the fact of non-cooperation by itself was sufficient to justify the application of a 100% utilization rate. In the Panel's view, the use of facts available should be distinguished from the application of adverse inferences. While paragraph 7 of Annex II of the *Anti-Dumping Agreement* stated that non-cooperation by an interested party "could lead to a result which is less favourable to the party than if the party did cooperate", there was no basis in Annex II for the drawing of adverse inferences. The purpose of the facts available mechanism was not to punish non-cooperation by interested parties. The Panel also observed that, not only did MOFCOM fail to establish any factual basis for a 100% utilization rate, but MOFCOM's application of this rate was actually at odds with information on the record suggesting that a lesser rate of utilization should be applied and the Panel found MOFCOM's determination to be particularly flawed in its treatment of AK Steel. For the above reasons, the Panel found that there was no factual basis for MOFCOM's

determination to apply a 100% utilization rate. (Paras 7.300-7.310)

D. Whether China acted inconsistently with Article 12.2.2 of the Anti-Dumping Agreement because it did not disclose the data and calculations used to establish the dumping margins?

US complained that MOFCOM did not disclose the data and calculations it used to arrive at the dumping margins for AK Steel and ATI and that this was inconsistent with Article 12.2.2 of the *Anti-Dumping Agreement.* Therefore, the issue for the Panel to determine was whether an investigating authority was required to include such calculations and data in the "public notice…or…separate report" under Article 12.2.2 of the *Anti-Dumping Agreement*. The Panel noted that although the requirement to give public notice of "all relevant information on matters of fact and law" may appear wide enough to encompass the data and calculations used to determine the dumping margins, this requirement must be read in the light of the more particular obligation spelt out in Article 12.2.1(iii), which was incorporated by reference into Article 12.2.2. In the Panel's view, it was significant that the text in Article 12.2.1(iii) set out in detail the information regarding dumping margins that must be included in a public notice or separate report, but omitted any reference to the calculations or data as the data underlying a dumping margin calculation was confidential to the respondent providing it. In the light of the text of Article 12.2.2, and the context in which it was found, there was no basis to conclude that it required inclusion of the data and calculations underlying the dumping margin in the public notice or separate report. Therefore, the Panel concluded that China had not acted inconsistently with Article 12.2.2 of the *Anti-Dumping Agreement*. (Para 7.311-7.339)

E. Whether China acted inconsistently with Article 22.3 of the SCM Agreement because it had failed to provide sufficient information on the findings and conclusions of law it considered material with respect to the benefit determination under the government procurement statutes?

US complained that MOFCOM did not adequately explain, in either the preliminary or final determinations, why the exclusion of foreign producers from the competitive bidding process under the United States Government procurement statutes led to the conclusion that the resulting prices were not market prices for the purposes of the benefit determination. According to the US, this was inconsistent with Article 22.3 of the *SCM Agreement*. In the Panel's view, and as the parties agreed, the obligation in Article 22.3 of the *SCM Agreement* was procedural in character, relating to the nature of the public notice an investigating authority must provide with respect to its substantive determinations. The text of Article 22.3 indicated that the disclosure required related to the findings and conclusions *actually* reached by an investigating authority, rather than the findings and conclusions that should reasonably have been reached under an objective standard and by reference to the substantive obligations at issue. (Paras 7.354-7.356)

The United States' claim related to the explanation provided by MOFCOM for its conclusion that the price paid by the Government, as a result of a competitive bidding process, did not reflect 'market competition in the usual sense', leading to the conclusion that a benefit was conferred through the purchase of GOES for more than adequate remuneration (i.e. for a price above the market). In the preliminary determination, MOFCOM had found that according to the *Buy American Act* and other regulations, although there was a competitive bidding process, using steel and finished products produced in the US was required, unless there was a waiver in place. Thus, it had concluded that scope of products allowed for bidding under the *Buy American Act* had actually been limited to some extent, and hence the bidding was not market competition in the usual sense. In addition to the public interest exception, the conditions for using foreign products included that, the quantity of US iron and steel products was not enough, or the purchase of US iron and steel products would cost 25% higher than foreign products. Thus, the according to the investigating authority, the competitive bidding restricted the scope of participating products. (Para 7.358)

In the final determination too, MOFCOM did not alter its conclusion and stated that the investigating authority had considered that the bidding price obtained within a bidding range that excluded potential low-priced bidders could not reflect real market prices, since the bidding had excluded foreign products of relatively lower price. (Para 7.359)

The US stated various claims that MOFCOM's explanation in relation to the benefit determination was deficient under Article 22.3 of the *SCM Agreement*. In the Panel's view, the US had not made out its claim under Article 22.3 of the *SCM Agreement* and thus China did not act inconsistently with Article 22.3 of the *SCM Agreement* in relation to the explanation of its benefit determination under the government procurement statutes. Moreover, the Panel noted that Article 22.3 did not discipline the substantive adequacy of an investigating authority's reasoning and unlike Article 22.5 of the *SCM Agreement*, Article 22.3 did not explicitly require the disclosure of the reasons for the acceptance or rejection of the relevant arguments or claims made by the Members or the exporters or importers. (Paras 7.360 – 7.367)

F. Whether China acted inconsistently with Articles 6.8, 6.9, 12.2, 12.2.2 and Annex II of the Anti-Dumping Agreement in relation to the "all others" rate for unknown exporters in the Anti-Dumping duty investigation?

Whether China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the Anti-Dumping Agreement in using facts available to calculate the dumping margins for unknown exporters?

The question before the Panel was whether the conditions for the application of "facts available" were met as in calculating the anti-dumping rates, MOFCOM had applied "facts available" to exporters/producers that were "unknown" to it, but did not apply "facts available" to the two investigated exporters, namely AK Steel and ATI. In the view of the Panel, MOFCOM did not notify the "all other" exporters of the necessary information required of them and so did not meet one of the preconditions for the application of facts available, as found in paragraph 1 of Annex II of the *Anti-Dumping Agreement*. Further, exporters that were unknown to MOFCOM, and indeed that were non-existent, could not reasonably be held to have refused to provide necessary information or to have impeded an investigation within the meaning of Article 6.8 of the *Anti-Dumping Agreement*. (Paras 7.383-7.387)

The Panel found support for its reasoning in the report of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, where it was held that the second sentence of paragraph 1 of Annex II of the *Anti-Dumping Agreement* conditioned the use of facts available on making the interested party aware that if necessary information was not supplied by it within a reasonable time, the investigating authority would be free to resort to facts available.[6] According to the Appellate Body, this indicated that an exporter must be given the opportunity to provide the information required by the investigating authority, before the latter resorted to the use of facts available. An exporter that is unknown to the investigating authority, and therefore not notified of the information required of it, is denied the opportunity to provide the information. Consequently, the Appellate Body had concluded that an investigating authority that applied facts available to such exporters acted inconsistently with paragraph 1 of Annex II of the *Anti-Dumping Agreement* and therefore, with Article 6.8 (Para 7.388)

According to the Panel, while there was no system of precedent under the DSU, China had not advanced a convincing reason for the Panel to depart from the reasoning of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. Therefore, the Panel found that China acted inconsistently with Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*.

[6] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, Paras 259-260

Whether China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform the interested parties of the essential facts under the consideration in calculating the "all others" dumping margin?

Following the preliminary determination, and prior to issuing its final determination, MOFCOM had issued a final disclosure document, including certain disclosures regarding the dumping margins and subsidy rates to be applied to the investigated companies and to the "unknown" exporters. In its final determination, MOFCOM applied the "all others" dumping rate of 64.8%, based upon "facts available and the information submitted by respondent companies". The US argued that MOFCOM did not disclose the "essential facts" forming the basis for applying an "all others" dumping rate of 64.8%.

In the Panel's view, the obligation under Article 6.9 of the *Anti-Dumping Agreement* required investigating authorities to disclose those facts underlying the final findings and conclusions in respect of the essential elements that must exist for the application of definitive anti-dumping duties. In an anti-dumping investigation, the essential elements include the existence of dumping, injury and causation. The Panel agreed with those panels that had noted that the disclosure obligation did not apply to the *reasoning* of the investigating authorities, but rather to the "essential facts" underlying the reasoning. In the Panel's view, China had acted inconsistently with its disclosure obligations under Article 6.9 of the *Anti-Dumping Agreement* in relation to the "all others" dumping rate. In particular, in reaching its conclusion on the existence of dumping by "all other" exporters, MOFCOM should have considered a number of facts leading to the conclusion that the use of "facts available" was warranted. Therefore, in order to allow the US, as an interested party, to defend its interests, it was vital that MOFCOM disclosed the factual basis for its use of best information available. (Paras 7.407- 7.408)

The Panel also noted that on the one hand, Article 6.5 of the *Anti-Dumping Agreement* required that confidential information be treated as such and not be disclosed without the permission of the party submitting it. On the other hand, Article 6.9 required that the essential facts be disclosed so that interested parties may defend their interests. Article 6.9 did not include a carve-out in relation to confidential information. Therefore, in the Panel's view, when information was both confidential but also part of the "essential facts under consideration", the obligation to disclose the information was nevertheless binding. However, where the party submitting the confidential information did not give permission for the information to be disclosed, the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the "essential" but confidential facts. Therefore, a non-confidential summary of the information from the respondents which formed the factual basis of the "all others" dumping rate should have been prepared and disclosed for the purposes of Article 6.9 of the *Anti-Dumping Agreement*. (Para 7.410)

Consequently, the Panel found that China had acted inconsistently with Article 6.9 of the *Anti-Dumping Agreement* in failing to disclose certain "essential facts" forming the basis of the conclusion that "all other" exporters were dumping at a rate of 64.8%. (Para 7.412)

Whether China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement in relation to the public notice and explanation of its determination of the "all others" dumping margin?

The US argued that China acted inconsistently with its obligations under Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* on the basis that MOFCOM did not provide the factual and legal basis underlying its resort to "facts available" for the purposes of calculating the "all others" dumping rate for unknown exporters. (Para 7.419)

The Panel noted that previously a number of other panels had exercised judicial economy in relation to

claims under Articles 12.2 or 12.2.2 of the *Anti-Dumping Agreement* in circumstances where a substantive inconsistency with another provision of the *Anti-Dumping Agreement* had been found. However, in the circumstances of this case, the Panel was of the view that findings under the public notice provisions may be relevant in the context of implementation. Consequently, it considered that such findings would be useful in reaching a positive solution to the dispute and therefore it proceeded to examine the US's claims in this regard. According to the Panel, the decision to resort to facts available to determine the existence and the margin of dumping in relation to "all other" exporters is one step in the process leading to the imposition of a final measure, within the meaning of Article 12.2.2 of the *Anti-Dumping Agreement*. In the Panel's view, the final determination did not set forth "all relevant information on matters of fact" or the "findings…reached on all issues of fact" supporting the conclusion that unknown, indeed non-existent, exporters refused to provide necessary information or otherwise impeded the investigation. (Paras 7.420-7.424)

Furthermore, there was no indication of this in the final determination and it still remained unclear exactly what factual findings MOFCOM made to support a dumping of margin of 64.8%, which differed markedly from the rate calculated for the two respondent companies. Consequently, the Panel concluded that MOFCOM did not disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact". Therefore, it found that China had acted inconsistently with Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement*. (Paras 7.425-7.426)

G. Whether China acted inconsistently with Article VI:2 of the GATT 1994?

The US claimed that China had acted inconsistently with Article VI:2 of the *GATT 1994* because the duties China levied on the "all other" companies that were unknown to the investigating authority were greater in amount than the appropriate margin of dumping. The Panel had previously concluded that the manner in which MOFCOM calculated the "all others" anti-dumping duty rate, and the way in which it disclosed the facts underlying this calculation, were inconsistent with both substantive and procedural provisions of the *Anti-Dumping Agreement*, namely Articles 6.8, 6.9 and 12.2.2. According to the Panel. given that it had upheld the US's claims under the *Anti-Dumping Agreement* with respect to the "all others" anti-dumping duty rate, it was not necessary also to make a finding with respect to this measure under Article VI:2 of the *GATT 1994*. Therefore, the Panel exercised judicial economy in relation to the US claim under Article VI:2 of the *GATT 1994*. (Para 7.431-7.432)

H. Whether China acted inconsistently with Articles 12.7, 12.8, 22.3 and 22.5 of the SCM Agreement in relation to the "all others" rate for unknown exporters in the countervailing duty investigation?

Whether China acted inconsistently with Article 12.7 of the SCM Agreement in using facts available to calculate the subsidy rate for unknown exporters?

The US's claim under Article 12.7 of the *SCM Agreement* raised two questions for the Panel to determine.

(i) Whether the conditions for the application of facts available were met

The Panel recalled that the investigating authority took the same steps to attempt to notify interested parties as it did in the context of the anti-dumping investigation. The US claim raised the question of whether, despite the absence in the *SCM Agreement* of an equivalent to Annex II of the *Anti-Dumping Agreement*, an investigating authority was required to notify interested parties of the "necessary information" before the investigating authority may resort to facts available. In this regard, the Panel considers that Article 12.1 provided relevant context for the interpretation of "necessary information" in

Article 12.7. Therefore, even in the absence of an equivalent to Annex II, the Panel considered that a similar conclusion to that reached under Article 6.8 of the *Anti-Dumping Agreement* is appropriate. The Panel noted that its conclusion found support in the reasoning used by other panels to have considered Article 12.7 of the *SCM Agreement.* In particular, the panel in *Mexico – Anti-Dumping Measures on Rice*[7] noted that exporters who were not given notice of the information required of them could not be considered to have failed to provide necessary information. (Para 7.446-7.447)

In sum, the Panel concluded that in applying "facts available" to exporters that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, China had acted inconsistently with Article 12.7 of the *SCM Agreement*. (Para 7.448)

(ii) The manner in which facts available were applied

In the Panel's view, the US had a strong claim that MOFCOM applied facts available in a manner inconsistent with Article 12.7 of the *SCM Agreement* by including programmes found by MOFCOM not to confer countervailable subsidies in the calculation of the "all others" subsidy rate. Indeed, China did not seriously contest this aspect of the United States' case, but merely confirmed that the calculation of the "all others" subsidy rate occurred in this manner. (Para 7.449 – 7.450)

The Panel recalled the Appellate Body's findings in *Mexico – Anti-Dumping Measures on Rice* regarding the way in which facts available may be applied under Article 12.7 of the *SCM Agreement.* The fact that resort to facts available was conditioned on refusal to supply necessary information suggested that it was to be used to replace only that information to which the refusal related. Further, the Panel accorded significance to the fact that China did not address the Appellate Body's findings or suggested any reasons for the Panel to depart from them, despite a specific Panel question to China asking it to comment on this aspect of the reasoning in *Mexico – Anti-Dumping Measures on Rice.* Therefore, the Panel concluded that by ignoring substantiated facts on the record, namely that certain programmes included in the application did not confer countervailable subsidies, China acted inconsistently with Article 12.7 of the *SCM Agreement*. (Para 7.451-7.452)

Whether China acted inconsistently with Article 12.8 of the SCM Agreement by failing to inform interested parties of the essential facts under consideration in calculating the "all others" subsidy rate?

In its preliminary determination, MOFCOM had established an "all others" subsidy rate of 12% for unknown exporters. In the final disclosure document, released prior to the final determination, MOFCOM indicated that the rate had increased to 44.6%. In the circumstances of this case, where China acknowledged that there were in fact no other exporters of GOES, apart from AK Steel and ATI, it was not clear how non-existent exporters failed to provide necessary information or otherwise impeded the investigation. According to the Panel, MOFCOM should have disclosed the facts leading to this conclusion in order to allow interested parties to defend their interests. Further, the "facts available" actually relied upon by MOFCOM, resulting in a subsidy rate of 44.6%, should have been disclosed in accordance with Article 12.8 of the *SCM Agreement.* Given the significant increase in the "all others" subsidy rate between the preliminary determination and the final disclosure, and the large disparity between the all others "facts available" subsidy rate and the rates calculated for the known exporters, a more detailed disclosure of the "essential facts" under consideration leading to an "all others" rate of 44.6% was required to allow the US to defend its interests. (Para 7.461-7.465)

Therefore, the Panel found that China had acted inconsistently with Article 12.8 of the *SCM Agreement* in

[7] Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R,

failing to disclose certain essential facts underlying its decision to apply an "all others" subsidy rate of 44.6%. (Para 7.466)

Whether China acted inconsistently with Articles 22.3 and 22.5 of the SCM Agreement in relation to the public notice and explanation of its determination of the "all others" subsidy rate?

The United States' claims under Articles 22.3 and 22.5 of the *SCM Agreement* related to the explanation in the final determination regarding the "all others" subsidy rate for unknown exporters. The final determination stated "[f]or other U.S. companies who did not submit questionnaire responses, the Investigating Authority made a determination on *Ad Valorem* subsidy rate according to the information submitted by the Petitioners pursue to Article 21 of the *Anti-Subsidy Regulations*" (where Article 21 relates to the use of facts available). (Para 7.472)

The final determination did not set forth the relevant matters of fact leading to the conclusion that 44.6% was the appropriate subsidy rate for "all other" exporters. Although the final determination stated that the "all others" subsidy rate was based upon information submitted by the applicants, it was now clear that this included information on programmes that MOFCOM had found not to constitute countervailable subsidies. However, there was no indication of this in the final determination and it was not clear from the determination what relevant facts led to an "all others" rate that was substantially higher than the subsidy rate calculated for the two known exporters. Consequently, the Panel concluded that MOFCOM did not disclose in "sufficient detail the findings and conclusions reached on all issues of fact" or "all relevant information on matters of fact". Therefore, China acted inconsistently with Articles 22.3 and 22.5 of the *SCM Agreement*. (Para 7.474)

I. Price Effect Analysis

Whether China acted inconsistently with Articles 15.1 and 15.2 of the SCM Agreement and Articles 3.1 and 3.2 of the Anti-Dumping Agreement in relation to MOFCOM's analysis of the price effects of subject imports?

The US claimed that MOFCOM's price effects analysis was not based on positive evidence and that, in conducting its price effects analysis, MOFCOM did not engage in an objective examination of the evidence. China on the other hand argued that MOFCOM had correctly analysed price effects and that the US's arguments to the contrary were without merit. In addressing this issue, the Panel recalled that it was well established that the role of the Panel was not to conduct a *de novo* review nor simply defer to the conclusions of the investigating authority. Rather, it was to determine whether the explanation for the conclusions reached by the investigating authority was reasoned and adequate in the light of other plausible alternative explanations. (Paras 7.511-7.513)

(i) Price depression

The US challenged both MOFCOM's finding of the existence of significant price depression *per se*, and MOFCOM's finding that such price depression was an effect of subject imports. The Panel addeessed each issue in turn:

<u>The existence of price depression *per se*</u>

The US's arguments regarding the existence of price depression *per se* were focused on the year 2008. The Panel did not consider it necessary to address the dispute between the parties regarding the existence of price depression in 2008. According to the Panel, even if prices did not fall in 2008, MOFCOM's final determination contains a finding that domestic prices did fall by 30.25% in the first quarter of 2009, the US had not challenged this finding. (Para 7.515-7.517)

Whether price depression was an effect of subject imports

Having upheld MOFCOM's finding of the existence of significant price depression *per se*, the Panel next considered the US's claim against MOFCOM's finding that such price depression was an effect of subject imports, by addressing the following issues:

a. Whether Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* require an investigating authority to demonstrate that the relevant price depression is an effect of subject imports?

The US's arguments were premised on the position that, as a matter of law, an investigating authority was required by Article 3.2 of the *Anti-Dumping Agreement* or Article 15.2 of the *SCM Agreement* to demonstrate that any price depression found to exist was an effect of subject imports. China denies that any such obligation was contained in these provisions and claimed that the need to establish a link between price effects and subject imports was part of the broader obligations in Article 15.5 of the *SCM Agreement* and Article 3.5 of the *Anti-Dumping Agreement* to establish a causal link between subject imports and material injury suffered by the domestic industry. In support of its argument, China relied on the statement by the panel in *EC – Countervailing Measures on DRAM Chips*[8] that Article 15.2 of the *SCM Agreement* did not, as such, require an investigating authority to establish a causal link between the subsidized imports and the domestic prices which would require it to examine all other factors affecting domestic prices at the same time. (Paras 7.519-7.521)

According to the Panel, the panel in *EC – Countervailing Measures on DRAM Chips* was dealing with a different issue than the one at hand and hence it did not accept that the report of the panel in *EC – Countervailing Measures on DRAM Chips* stood for the proposition that an authority was not required by Article 15.2 of the *SCM Agreement* to show that the relevant price depression was an effect of subject imports. As a result, the Panel considered that the US was entitled to pursue a claim under Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement* against MOFCOM's finding that the relevant price depression was an effect of subject imports. (Para 7.522)

b. Whether MOFCOM properly found that price depression was an effect of the low price of subject imports?

The US contended that MOFCOM's findings that subject import prices were "low" relative o domestic prices and that there was a "pricing policy" of setting subject import prices lower than domestic prices, were not based on an objective examination of positive evidence. The Panel agreed with the US argument and held that it did not consider that the evidence available to MOFCOM could have allowed an objective and impartial investigating authority to determine that subject imports were priced lower than domestic products. The Panel noted that

1. China had referred to two tables showing that the weighted average price of imports from the United States and Russia together, and from the United States separately, were lower than the average price charged by the applicants during the period of investigation and this evidence in the application was not expressly referenced, or incorporated into, MOFCOM's final determination. Furthermore, regarding the reliability of the evidence, the Panel noted that the evidence indicated that subject import prices were lower than domestic prices in both 2008 and the first quarter of 2009 which were at odds with MOFCOM's own finding that subject import prices were not less than domestic prices during the first quarter of 2009. According to the Panel, this undermined the reliability of the evidence and it did not consider that the applicants' evidence could properly be treated as "positive evidence" supporting MOFCOM's finding that price depression was an effect

[8] Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, Para 7.338

of subject imports. (Para 7.525)

2. The Panel also examined MOFCOM's reliance on comparison of the average units values ("AUVs") of the subject imports and domestic sales. The Panel stated that it had a number of misgivings regarding the AUV data relied on by MOFCOM, particularly concerning MOFCOM's failure to consider the need for adjustments to ensue price comparability. China did not deny that MOFCOM failed to make any form of adjustment to ensure price comparability, rather it argued that because MOFCOM did not make findings of price undercutting, price comparability did not arise as an issue. The Panel rejected China's argument and concluded that even though MOFCOM did not make a finding of significant price undercutting (i.e. price undercutting of a certain magnitude), MOFCOM did rely on a finding that subject import prices undercut domestic prices. In the Panel's view, a proper finding of the existence of price undercutting necessarily entailed a comparison of prices, and the authority should have ensured that the prices it was using for its comparison were properly comparable. (Paras 7.526 – 7.530)

c. Whether MOFCOM's finding that price depression was an effect of subject imports might nevertheless stand on the basis of MOFCOM's analysis of the effect of the increase in the volume of subject imports in depressing domestic prices?

China argued that the increase in the volume of subject imports was the primary basis for MOFCOM's finding that price depression was an effect of subject imports, and that this primary basis for MOFCOM's finding was sufficient in and of itself to uphold that finding, even if MOFCOM's analysis of the supporting basis, i.e. the price effects of subject imports, was flawed. The Panel stated that it did not consider that MOFCOM's final determination supported China's argument that volume effects were the primary basis for MOFCOM's finding that price effects was an effect of subject imports. Furthermore, the Panel recalled the Appellate Body's finding in *Japan – DRAMs (Korea)*[9] that a panel must exercise great caution in determining whether or not to engage in analyses not undertaken by the investigating authority itself. According to the Panel, there was nothing in MOFCOM's determination to indicate that MOFCOM relied more heavily on the volume effects of subject imports than it did on the price effects thereof for the purpose of establishing that price depression was an effect of subject imports. (Paras 7.537-7.542)

Conclusion

Thus, the Panel concluded that MOFCOM's determination that price depression was an effect of subject imports was neither made pursuant to an objective examination, nor based on positive evidence. (Pars 7.543)

(ii) *Price suppression*

MOFCOM had found that there was significant price suppression in 2008 and the first quarter if 2009. The Panel began its analysis by examining the US's challenge against MOFCOM's finding of the existence of price suppression *per se*.

The existence of price suppression *per se*

The Panel was not persuaded by the US's argument that MOFCOM was precluded from relying on changes in the price-cost ratio between 2007 and 2008, and between the first quarter of 2008 and the first quarter of 2009, to establish the existence of price suppression. It noted that neither Article 3.2 of the *Anti-Dumping Agreement* nor Article 15.2 of the *SCM Agreement* prescribed the manner in which an investigating authority must establish the existence of price suppression, nor did these provisions exclude an investigating authority's reliance on changes in per unit price-cost ratios. (Para 7.546)

[9] Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007,

Whether price suppression was an effect of subject imports

To challenge MOFCOM's finding that price suppression was an effect of subject imports, the US relied mainly on the same arguments as it did to challenge MOFCOM's finding that price depression was an effect of subject imports. The Panel noted that since MOFCOM relied on the same analysis of the price effects of subject imports to show that both price depression and price suppression was an effect of subject imports, the same flaws that undermined MOFCOM's finding that price depression was an effect of subject imports also undermined MOFCOM's finding that price suppression was an effect of subject imports. Thus, the Panel concluded that MOFCOM's determination that price suppression was an effect of subject imports was no made pursuant to an objective examination, based on positive evidence. (Pars7.547-7.551)

(iii) *Price undercutting*

The basic issue raised by the parties was whether or not MOFCOM made a finding of "significant price undercutting" within the meaning of Article 3.2 of the *Anti-Dumping Agreement* and Article 15.2 of the *SCM Agreement.* The United States acknowledged that MOFCOM did not make an express finding of significant price undercutting, but contended that an essential predicate of MOFCOM's price effects analysis was that prices for subject imports were lower than domestic prices. China denied that MOFCOM made any finding of significant price undercutting. In examining MOFCOM's final determination, the Panel was unable to find any express finding by MOFCOM that there was significant price undercutting by subject imports. The Panel thus concluded that there was no finding of 'significant price undercutting' for it to review. (Para 7.552-7.553)

(iv) *Conclusion*

Thus, the Panel concluded that MOFCOM's findings regarding the price effects were inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*, and Articles 15.1 and 15.2 of the *SCM Agreement.*

Whether China acted inconsistently with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement in failing to disclose the essential facts under consideration in relation to its price effects analysis?

According to the US, five principal areas of MOFCOM's price effects analysis were not accompanied by adequate disclosure of the "essential facts under consideration" in accordance with Articles 12.8 of the *SCM Agreement* and 6.9 of the *Anti-Dumping Agreement*. The Panel noted that Articles 12.8 of the *SCM Agreement* and 6.9 of the *Anti-Dumping Agreement* required the investigating authorities to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". The Panel noted that it was clear that MOFCOM considered a number of facts leading to the conclusion of "lower" subject import prices. While the Panel acknowledged China's argument that the price comparison data at issue was confidential, China's disclosures during the Panel proceedings demonstrated that the facts could be summarized in non-confidential format. Thus, the Panel concluded that the failure to disclose the "essential facts" underlying MOFCOM's finding of "low" subject import prices was inconsistent with Articles 12.8 of the *SCM Agreement* and 6.9 of the *Anti-Dumping Agreement*. The Panel did not consider it necessary to evaluate whether MOFCOM's disclosures on other matters, such as costs, were also inconsistent with Articles 12.8 of the *SCM Agreement* and 6.9 of the *Anti-Dumping Agreement*. (Paras 7.567-7.575)

Whether China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement in relation to the public notice and explanation of its price effects determination?

The US argued that China acted inconsistently with Articles 22.5 of the *SCM Agreement* and 12.2.2 of the *Anti-Dumping Agreement* on the basis that MOFCOM's final determination did not include facts supporting a finding that the US and Russia had a strategy of charging "lower prices" and supporting a finding that the prices of GOES from the United States and Russia were at any time "lower" than prices for the domestically produced product. The Panel recalled that Articles 22.5 of the *SCM Agreement* and 12.2.2 of the *Anti-Dumping Agreement* required that the public notice or separate report released at the conclusion of an investigation contain "all relevant information on matters of fact and law and reasons which have led to the imposition of final measures…due regard being paid to the protection of confidential information". According to the Panel, given the importance that the conclusion regarding the "lower" price of subject imports played in MOFCOM's reasoning, the Panel was of the view that further information on the matters of fact leading to this conclusion was required under Articles 22.5 of the *SCM Agreement* and 12.2.2 of the *Anti-Dumping Agreement*. Consequently, the Panel concluded that China acted inconsistently with Articles 22.5 of the *SCM Agreement* and 12.2.2 of the Anti-Dumping. (Paras 7.587-7.592)

J. Causation Analysis

Whether China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and 15.1 and 15.5 of the SCM Agreement with respect to MOFCOM's causation analysis?

The US's claim raised issues regarding MOFCOM's use of price effects findings, and MOFCOM's examination of the domestic industry's increase in capacity and production as an alternative cause of injury. At the outset, the Panel recalled that in *US - Hot Rolled Steel* the Appellate Body noted that investigating authorities were required, as a part of their causation analysis, to examine all "known factors" other than dumped imports which were causing injury to the domestic industry. Where such other known factors were causing injury, the investigating authority must ensure that the injurious effects of these factors are not "attributed" to the dumped imports.

(i) Use of price effects findings

The evaluation of MOFCOM's findings on price depression and price suppression had revealed a number of shortcomings in MOFCOM's analysis of the price effects of subject imports. Since MOFCOM relied on the price effects of subject imports in support of its finding that subject imports caused material injury to the domestic industry, the abovementioned shortcomings also undermine MOFCOM's conclusion on the causal link between subject imports and the material injury suffered by the domestic industry. (Para 7.620)

(ii) Other causes of injury: domestic capacity, production, demand and inventories

The Panel noted that Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement* require an investigating authority to "examine any known factors other than" subject imports "which at the same time are injuring the domestic industry". These provisions also stated that "the injuries caused by these other factors must not be attributed to" the subject imports. China argued that the US improperly re-characterized the "other factor" at issue, shifting its argument to "overproduction," and "production growing far more rapidly than demand." According to China, during the proceedings, the arguments focused on excess production capacity, and did not discuss excess production. The Panel was not persuaded by China's arguments, as US comment made during the course of MOFCOM's investigation, clearly referred to domestic industry's increase in production, in addition to the increase in capacity. (Paras 7.624-7.626)

Furthermore, on the subject of nature of MOFCOM's finding, the US argued that the only finding made by MOFCOM was that the domestic industry's increase in capacity and production did not cause injury to

the domestic industry. The US alleged that MOFCOM did not conduct and non-attribution analysis in respect of this factor. The Panel recalled that it was well established that a proper non-attribution analysis required the injury caused by "other factors" to be separated and distinguished from the injury caused by increased imports. In the present case, MOFCOM had found that there was no injury caused by the domestic industry's increase in capacity and production. Having made this finding, the Panel did not see how MOFCOM could then have identified the injury caused by that factor, and ensured that such injury - of which there was allegedly none - was not attributed to subject imports. Accordingly, the Panel rejected China's argument that MOFCOM undertook a non-attribution analysis in respect of the domestic industry's increase in capacity and production. (Paras 7.627-7.628)

Thus, the Panel concluded that its evaluation of the US arguments in the light of the limited information available to it, and its analysis of that information, indicated that the domestic industry's increase in capacity and production were at least partly responsible for the accumulation of inventory in 2008 and the first quarter of 2009. Accordingly, it found that the US had established a *prima facie* case that MOFCOM's determination that the domestic industry's increase in capacity and production was not a cause of injury was flawed. The Panel further found that China has failed to rebut that *prima facie* case. As a result, the Panel concluded that MOFCOM had failed properly to examine whether a known factor other than subject imports was at the same time injuring the domestic industry, contrary to the obligation set forth in the third sentences of Article 3.5 of the *Anti-Dumping Agreement* and Article 15.5 of the *SCM Agreement*. (Para 7.637)

Whether China acted inconsistently with Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement in failing to disclose the essential facts under consideration in relation to non-subject imports in its causation analysis?

The US claimed that MOFCOM's failure to disclose information concerning non-subject imports was inconsistent with Article 12.8 of the *SCM Agreement* and Article 6.9 of the *Anti-Dumping Agreement*. In particular, the US claimed that MOFCOM should have disclosed the volume and prices of imports from sources other than Russia and the United States. China argued that it did disclose the "essential facts under consideration" with respect to the role of non-subject imports in the causation analysis. The Panel concluded that in reaching its finding on the effect of non-subject imports, MOFCOM had before it and considered data on the volume of such imports, rather than merely the market shares. The Panel also concluded that data on the volume of non-subject imports was a part of the body of facts being considered by MOFCOM as a part of its causation analysis. The Panel concluded that China acted inconsistently with Articles 12.8 of the *SCM Agreement* and 6.9 of the *Anti-Dumping Agreement* in not disclosing the data on volume of non-subject imports. In the light of this conclusion, the Panel did not consider it necessary to proceed to consider whether MOFCOM also failed to disclose "essential facts under consideration" by not disclosing the prices of non-subject imports. (Paras 7.648-7.660)

Whether China acted inconsistently with Articles 22.5 of the SCM Agreement and 12.2.2 of the Anti-Dumping Agreement in relation to the public notice and explanation of its causation analysis with respect to non-subject imports?

The US argued that the final determination did not include "all relevant information on matters of fact and law" leading to the imposition of definitive measures. In particular, the United States argues that the final determination was "essentially devoid of information" relating to imports from sources other than Russia and the US. China argued that information on the market share of non-subject imports during 2008 could be derived from disclosures in other sections of the determination, namely that non-subject imports increased by 0.09% in 2008. However, according to the Panel, this disclosure was not explicit and its relevance to the analysis of the non-subject imports as a factor that could be injuring the domestic industry was not clear, particularly in the light of the fact that the information from which it could be

derived was in a different section of the determination. Even if the Panel was to accept that MOFCOM disclosed that non-subject imports increased by 0.09% in 2008, the it was not convinced that MOFCOM adequately disclosed all relevant information on the matters of fact and law and reasons underlying the conclusion that non-subject imports were not injuring the domestic industry. Consequently, in the light of this reasoning, the Panel concluded that China acted inconsistently with Articles 22.5 of the *SCM Agreement* and 12.2.2 of the *Anti-Dumping Agreement*. (Pars 7.669-7.675)

K. Whether China acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article 10 of the SCM Agreement?

The US's claims under Article 1 of the *Anti-Dumping Agreement* and Article 10 of the *SCM Agreement* were dependent on the other claims it had brought in this dispute. Therefore, the Panel concluded that to the extent it had upheld the US's claims under the *SCM* and *Anti-Dumping Agreement*s, it found that China had also acted inconsistently with Article 10 of the *SCM Agreement* and Article 1 of the *Anti-Dumping Agreement*. (Paras 7.680-7.681)

III. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law:
  The Panel in its analyses has mainly relied on treaty text (viz. the *SCM Agreement*, the *Anti-Dumping Agreement* and *GATT 1994*) and the previous relevant Panel/ Appellate Body Reports.

- 'Present subsidization' and imposition of countervailing duties:
  Reiterating the finding of the panel in *Japan-DRAMS (Korea)*, the Panel stated that 'present subsidization' was required for countervailing duties to be imposed. The Panel found China had acted inconsistently with Article 11.3 of the *SCM Agreement* for initiating action, given the absence in the application of even a reference to or an argument about allocation of benefit of the subsidy to the proposed period of investigation, much less the inclusion of evidence in this regard.

- 'Price Support' under Article 1.1(a)(2) of the *SCM Agreement*
  The Panel has provided some clarity on how the term 'price support' in Article 1.1(a)(2) of the *SCM Agreement* has to be interpreted, clearing the lacuna in the existing jurisprudence on the subject. The Panel ruled in favour of a narrower interpretation, stating that 'price support' did not include all government intervention that may have an effect on prices, such as tariffs and quantitative restrictions, but included direct government intervention in the market with the design to fix the price of a good a particular level, for example, through purchase of surplus production when price is set above equilibrium.

- *Buy American Act* and Article 22.3 of the *SCM Agreement*
  This dispute, for the first time, brought the *Buy American Act* before a WTO Panel. However, since the United States had raised only procedural issue under Article 22.3 of the *SCM Agreement*, the Panel did not examine the determination of China relating to the Act on substantial grounds. Even on the procedural issue, the Panel concluded that China had not acted inconsistently with Article 22.3, and rejected the United States' claim. China had concluded in its benefit determination that since under the *Buy American Act*, when purchases of US iron and steel products did not cost 25% more than foreign products, the competitive bidding was only competition among the US products, this did not reflect market competition in the usual sense. The conclusion that a buy national provision as under the *Buy American Act* leads to a benefit under the *SCM Agreement* may open doors for several disputes relating to this issue. It would be interesting to see how a WTO Panel/Appellate Body examines this issue in a future dispute.