

# **China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States: exporting US AD/CVD methodologies through WTO dispute settlement?**

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**Abstract:** In July 2009, Chinese steel producers of grain oriented electrical steel filed anti-dumping (AD) and countervailing duty (CVD) cases against US and Russian producers. The US challenged the duties for a variety of reasons, many of which involved deficiencies in the producers' application to China's investigating authority, the Ministry of Commerce of the People's Republic of China (MOFCOM). The US also challenged certain aspects of MOFCOM's injury analysis. The Panel and Appellate Body ruled in favor of the US on virtually every issue. Given the deficiencies in the application and China's handling of the case, the Panel and AB decisions were justified. In a larger sense, however, we believe China may well emerge as the 'winner' in this dispute as this case establishes important standards for allegations and evidence in applications, standards that other countries (including the US) likely have failed to meet when they have imposed AD and CVD orders on the largest target country, China.

## **1. Introduction**

On 11 February 2011, the United States (US) requested the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) to establish a Panel to examine China's measures imposing countervailing (CVD) and anti-dumping (AD) duties on grain oriented flat-rolled electrical steel (GOES) from the US, as set forth in the Ministry of Commerce of the People's Republic of China (MOFCOM) Notice No. 21 [2010], including its annexes, alleging that they were inconsistent

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with China's commitments and obligations under certain provisions of the General Agreement on Tariffs and Trade 1994 (GATT), the Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (Agreement).

Among the 12 claims brought by the US in *China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (China–GOES)*<sup>1</sup> one of the more important was whether China had acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement in *initiating* investigations into the 11 US federal and state programs that were allegedly providing countervailable subsidies to the US producers of GOES. As noted by the Panel, it was the first time for the issue of pre-initiation standard of evidence to be considered under Articles 11.2 and 11.3 of the SCM Agreement in the context of WTO dispute settlement.<sup>2</sup>

In the complaint, the US claimed that the initial and additional applications filed by the two Chinese steel producers, Wuhan Iron and Steel (Group) Corporation (WISCO) and Baosteel Group Corporation (Baosteel) did not provide 'sufficient evidence' of the existence of a subsidy as required by Article 11.2 of the SCM Agreement and that China acted inconsistently with Article 11.3 because MOFCOM failed to objectively examine the accuracy and adequacy of the evidence provided. China disputed the US claim and argued that the pre-initiation standard of evidence is substantively lower under Articles 11.2 and 11.3 than the one advanced by the US.

The Panel, interpreting the relationship between Articles 11.2 and 11.3 of the SCM Agreement and analyzing the application of the standard of evidence to each of the 11 programs, held that China acted inconsistently with 11.3 of the SCM Agreement in initiating countervailing duty investigations into all the programs challenged before it. While the Panel's decision may establish an important precedent, the impact on the immediate GOES order was limited as China had not based any of its subsidy margin on these 11 programs (i.e., in the course of its investigation MOFCOM had determined that these programs did not confer a countervailable subsidy). China was also found to have acted inconsistently with other relevant provisions of the ADA, the SCM Agreement, or both on most other claims brought by the US.

On 20 July 2012, China notified the DSB of its decision to appeal to the Appellate Body (AB) certain issues covered in the Panel report. Interestingly, China did not include the Panel's holding with regard to the initiation of the investigations and some other substantive issues that it had lost (perhaps because these issues did not change the margins imposed in the GOES case). China's appeal only focused

<sup>1</sup> *China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, Panel Report, WT/DS414/R (15 June 2012), modified by Appellate Body Report, WT/DS414/AB/R (18 October 2012) [hereinafter *China–GOES*].

<sup>2</sup> Panel Report, *China–GOES*, at para. 7.48.

on the Panel's findings relating to MOFCOM's price effects' analysis, the disclosure of the underlying essential facts to that analysis, and public notice requirements under various provisions of the ADA and the SCM Agreement. In the AB report issued on 18 October 2012, all findings of the Panel on these issues were upheld.

From either a legal or economic perspective, this dispute is relatively trivial. China lost most of the issues at the Panel level and later all of the issues appealed to the AB. Given China's lack of attention to process and procedure, the Panel and AB determinations may seem largely foregone conclusions. It should be noted that the GOES case was the first time China had used its countervailing duty statute. Some of the shortcomings might be attributable to China's inexperience with CVD. Nevertheless, inexperience does not justify the procedures, and the Panel and AB determinations were relatively uncontroversial.

At one level, the dispute must be viewed as a success for the US as it attempts to reign in what it sees as abuses of WTO trade rules. Yet, we cannot help but note how the US appears to have 'pulled its punches' in many respects, particularly on substantive issues. As one of the most active users of anti-dumping and countervailing duty protection, the US clearly carefully considered on what issues to base its WTO challenge, partly in an attempt to limit the implications of Panel and AB rulings on its own AD/CVD use. Its emphasis on challenging procedural issues seems to reflect a self-confidence that, in terms of transparency and due process, it stood on firm ground.

Ironically, some of the issues which China lost may quite possibly serve it well in the future, especially in cases where China is on the other side of the table (and of course China is a much more frequent subject of AD/CVD actions worldwide than a user of these instruments). Indeed, the pre-initiation standard of evidence as articulated by the Panel in *China–GOES* is likely to provide significant ammunition for China when it is the subject of countervailing investigations.

This report provides a detailed analysis of the key issues discussed in the Panel and AB reports in *China–GOES* and offers the authors' views on the legal and practical ramifications of the rulings.

## 2. Factual background to the dispute

The original anti-dumping and countervailing duty and injury investigations were initiated by MOFCOM on 1 June 2009 following an application filed by WISCO and Baosteel, alleging that the US GOES producers were receiving countervailable subsidies through 27 federal and state laws, and that US and Russian imports of GOES were being dumped in the Chinese market (with an estimated dumping margin of 25% for the imports from the US). The application also alleged that the imports caused and threatened material injury to the domestic industry.

Of the 27 federal and state laws alleged to constitute countervailable subsidies in the application, 22 of them were included by MOFCOM in the countervailing

duty initiation notice. An additional application was filed by the applicants that included ten more federal and state laws relating to subsidies, six of which were included in the investigation initiated by MOFCOM on 19 August 2009. The period of investigation for both anti-dumping and countervailing duty purposes was from 1 March 2008 to 28 February 2009.<sup>3</sup>

There are only two US producers of GOES, AK Steel Corporation (AK Steel) and Allegheny Ludlum Corporation (ATI), both registered and cooperated with the investigation at issue.<sup>4</sup> On 10 April 2010, MOFCOM issued its final determination for the AD and CVD investigations. The final anti-dumping duties were 7.8% for AK Steel and 19.9% for ATI, and the final countervailing duties were 11.7% for AK Steel and 12% for ATI.<sup>5</sup> The ‘all others’ final anti-dumping and countervailing duties were 44.6% and 64.8%, respectively. MOFCOM further found that the subsidized imports from the US and dumped imports from the US (and Russia) caused material injury to the domestic industry.

On 15 September 2010, the US requested consultations with China with respect to China’s countervailing and anti-dumping measures on GOES products from the US. After the consultations failed to resolve the dispute, the US requested the establishment of a Panel on 11 February 2011. The Panel report was circulated on 15 June 2012. Following China’s appeal on certain issues in the Panel report, the AB report was issued on 18 October 2012.

### 3. Key issues examined in the Panel and AB reports

#### 3.1 *Pre-initiation standard of evidence*

The Panel ruled in favor of the US on almost all the issues except for the three claims relating to the calculations and explanations in MOFCOM’s public notice/disclosure and the decision to apply ‘facts available’ in its calculation of the subsidy rates for the two respondents under certain programs.<sup>6</sup> With regard to the pre-initiation standard of evidence, the Panel found that China acted inconsistently with Article 11.3 of the SCM Agreement in initiating countervailing duty investigations into each of the 11 programs challenged by the US. China did not include this issue in its appeal to the AB.

<sup>3</sup> Panel Report, *China–GOES*, at para. 2.2.

<sup>4</sup> At least two Russian and one Swiss companies had registered and cooperated with the dumping investigation conducted by MOFCOM. They had no part in the case before the Panel.

<sup>5</sup> Panel Report, *China–GOES*, at para. 2.5; also Annex A-1 to the Panel Report, *China–GOES*, Executive Summary of the First Submission of the United States, at paras. 12–14.

<sup>6</sup> The Panel determined that it was not necessary to make a finding to the US claim that ‘China acted inconsistently with Article VI:2 of the GATT 1944 because the “all others” anti-dumping duty levied by China was greater in amount than appropriate margin of dumping’.

### 3.1.1 *The standard of evidence under Articles 11.2 and 11.3 of the SCM Agreement*

Given that Article 11 of the SCM Agreement contains the relevant procedural rules on the initiation of countervailing duty investigations, the Panel first examined the relationship between Articles 11.2 and 11.3. It found that while Article 11.2 establishes the kind of evidence that is required for an application/complaint to an investigating authority, namely ‘sufficient evidence’ of the existence of a subsidy, injury, and a causal link between the subsidized imports and the alleged injury,<sup>7</sup> Article 11.3 sets out the standard by which that authority is to review the evidence. The Panel noted in this context that the WTO covered agreements are international agreements between the WTO Members and that, therefore, the obligations embodied in them are binding only upon Members and not upon private actors. In the Panel’s view, the obligation upon Members in relation to the sufficiency of evidence in an application is found in Article 11.3 of the SCM Agreement.<sup>8</sup> According to Article 11.3, an investigating authority ‘shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation’. In the Panel’s view, the authority would be acting inconsistently with Article 11.3 if it were to initiate an investigation without ‘sufficient evidence’ as referenced in Article 11.2 before it. Therefore, with respect to the evaluation of the 11 programs in dispute, the Panel considered it only necessary to reach the conclusion regarding China’s compliance under Article 11.3.

In further interpreting the obligation under Article 11.3, the Panel squarely placed the duty of reviewing the evidence in the application on the investigating authority and stated that relevant evidence for the initiation decision submitted by parties such as an exporting Member should also be assessed by that investigating authority:

Under Article 11.3 of the SCM Agreement an investigating authority has an obligation to determine whether there is ‘sufficient evidence’ to justify initiation of an investigation. Part of this analysis must involve an assessment of the accuracy and adequacy of the evidence furnished. In the Panel’s view, when evidence not in the application but relevant to the decision to initiate is submitted to an investigating authority, for example by an exporting Member, an unbiased and objective investigating authority would weigh this evidence in its assessment.<sup>9</sup>

<sup>7</sup> Article 11.2 of the SCM Agreement provides: ‘An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.’

<sup>8</sup> Panel Report, *China–GOES*, at para. 7.50.

<sup>9</sup> Panel Report, *China–GOES*, at para. 7.52.

The center of the dispute between the US and China was on the standard of evidence that is required under Articles 11.2 and 11.3 to meet the threshold of sufficiency for the purpose of initiating a countervailing investigation. In this respect, the Panel noted that both parties agreed that the standard is different from the one that is required for a preliminary or final determination, as it was adopted by the panel in *US–Softwood Lumber V* in interpreting the analogous provision under the ADA.<sup>10</sup> However, the US argued for a standard under which the application must contain ‘a degree of actual evidence’ with regard to (1) the existence of a financial contribution, (2) a benefit, and (3) specificity.<sup>11</sup> It also claimed that the investigating authority cannot rely on the ‘broader context provided by the application in place for one or more of the necessary elements [of subsidy]’.<sup>12</sup> In contrast, China advocated that a much lower standard is required under the Articles, which only calls for information ‘reasonably available’ to the applicant. Although China agreed with the US that evidence of a financial contribution, benefit, and specificity are required for an application, it nevertheless considered the standard to be lower for the element of specificity due to the particular difficulty in obtaining evidence of *de facto* specificity.

Considering the need for investigating authorities to ‘filter those applications that are frivolous or unfounded’,<sup>13</sup> the Panel rejected the lower evidentiary standard propagated by China. Instead, the Panel held that the ‘same standard of “sufficient evidence” applies regardless of whether the evidence relates to the existence of a financial contribution, benefit or specificity’.<sup>14</sup> Specifically, adequate evidence that proves or is indicative of the existence of a subsidy is required in order to justify the initiation of an investigation. More significantly, the standard of evidence applies with respect to every element of every program that is alleged to be countervailable. Elaborating further, the Panel stated that:

Indeed, in considering the quality of the evidence that should be provided in an application before an investigation is justified, we note that Article 11.2 requires ‘sufficient evidence of the *existence* of a subsidy’, meaning that the evidence should provide an indication that a subsidy actually exists. It is also clear from the terms of Article 11.2 that ‘simple assertion, unsubstantiated by relevant evidence’ is not sufficient to justify the initiation of an investigation.<sup>15</sup>

[A]n investigation cannot be justified where, for example, there is no evidence of the existence of a subsidy before an investigating authority, even if such evidence is not ‘reasonably available’ to the applicant. Indeed, to justify initiation under

<sup>10</sup> *Ibid.*, at para. 7.54, citing to Panel Report, *United States–Final Dumping Determination on Softwood Lumber from Canada*, WT/DS/264/R [hereinafter *US–Softwood Lumber V*], para. 7.84.

<sup>11</sup> *Ibid.*, at paras. 7.12 and 7.13.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, at para. 7.55.

<sup>14</sup> *Ibid.*, at para. 7.62.

<sup>15</sup> *Ibid.*, at para. 7.55.

Article 11.3, an investigating authority must have ‘sufficient evidence’ (whether from the applicant, exporting member or arising out of its own enquiries) and not mere assertion before it.<sup>16</sup>

Additionally, in response to China’s argument that *de facto* specificity evidence may be difficult to obtain and thus should not be stringently required, the Panel made it explicitly clear that there was no basis for a lower evidentiary standard applying only to specificity evidence because any such leeway would detrimentally limit the effectiveness of precluding unwarranted allegations.

Having set forth the standard of evidence articulated above, the Panel proceeded to analyze each of the 11 programs challenged by the US in this case and held that China lacked the ‘sufficient evidence’ required by Articles 11.2 and 11.3 of the SCM Agreement in order to justify the initiation of a countervailing duty investigation as to all of them.

### 3.1.2 *The evaluation of the 11 programs at issue*

Before presenting the Panel’s analysis with regard to the 11 programs, the Panel reiterated its by now standard observation that its role was to consider the reasonableness of the conclusions reached by MOFCOM and not to conduct a *de novo* review of the accuracy and adequacy of the evidence in the application on its own.<sup>17</sup>

(1) Medicare Prescription Drug, Improvement and Modernization Act. With respect to the Medicare Prescription Drug, Improvement and Modernization Act, the point of contention between the parties was whether the application included any evidence of specificity. China pointed to AK Steel’s Annual Report for evidence, which was attached to the application and included a statement asserting that the subsidy was available to ‘sponsors of retiree healthcare benefit plans that include a qualified prescription drug benefit’. When combined with the fact that AK Steel was a sponsor of the kind of the benefit plans under the Act, it was China’s view that such evidence was sufficient for MOFCOM to find specificity.

The Panel found that the program’s availability to sponsors of particular healthcare plans did not indicate specificity. On the contrary, the evidence showed that the subsidy was not specific as the eligibility for the subsidy program was governed by ‘objective criteria or conditions’.<sup>18</sup> Also, the fact that AK Steel was a user of the program could not sufficiently indicate specificity unless there was more evidence to show that AK Steel was the ‘only user or one of a limited number of users of the programme’.<sup>19</sup>

<sup>16</sup> Ibid, at para. 7.56.

<sup>17</sup> Ibid., at para. 7.51.

<sup>18</sup> Ibid., at para. 7.65.

<sup>19</sup> Ibid.

Furthermore, the Panel held that it ‘requires evidence of the nature of each alleged subsidy programme’ to find specificity.<sup>20</sup> In the Panel’s view, ‘[g]eneral information about government policy, with no direct connection to the programme at issue, is not “sufficient evidence” of specificity’.<sup>21</sup> Though China argued that direct evidence of *de facto* specificity is not usually available to applicants, the Panel stated that a lack of access to ‘reasonably available’ evidence does not justify the initiation of an investigation. As such, the Panel held that China had acted inconsistently with Article 11.3 of the SCM Agreement in initiating an investigation into the program.

(2) Economic Recovery Tax Act of 1981. The issue regarding the Economic Recovery Tax Act of 1981 was whether there was sufficient evidence for the existence of a benefit during the period of investigation. The Act allowed unprofitable corporations to reduce their tax liabilities by selling certain tax credits to profitable corporations. The US claimed that the Act had not only ceased to operate 27 years prior to the period of investigation, but that the application also provided no evidence of benefit during the period of investigation.

Considering the actual validity period of the program, the Panel held that ‘present subsidization’ is required in order to impose a countervailing duty against a product.<sup>22</sup> On the basis of Article 19.1 and footnote 36 of the SCM Agreement, the Panel reasoned that ‘if the product were not currently subsidized, there would be no subsidy to offset and, therefore, no basis for the imposition of countervailing duties’.<sup>23</sup> It also pointed to the panel report *Japan–DRAMs (Korea)* for further support of the ‘present subsidization’ requirement, where it was stated that, ‘in the case of non-recurring or expired subsidies, “present subsidization” requires the benefit of the subsidy to be allocated to the period of investigation and indeed, to the period of imposition of countervailing duties’.<sup>24</sup> Because there was a significant lack of proof as to any present subsidy, the Panel concluded that ‘an unbiased and objectively investigating authority would not have found that the application included “sufficient evidence” to indicate the existence of a benefit during the period of investigation proposed by the applicants’.<sup>25</sup> Consequently, China was found to have acted inconsistently with Article 11.3 of the SCM Agreement with respect to the initiation of this program.

<sup>20</sup> *Ibid.*, at para. 7.66.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, at para. 7.71.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, citing to Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R (17 December 2007) [hereinafter *Japan–DRAMs (Korea)*].

<sup>25</sup> *Ibid.*



(3) Tax Reform Act of 1986. The issue in dispute between the US and China with respect to the Tax Reform Act of 1986 was the same as that with the Economic Recovery Tax Act of 1981, namely whether the application included ‘sufficient evidence’ of the existence of a benefit during the period of investigation. Similar to the Economic Recovery Tax Act of 1981, the Tax Reform Act of 1986 allowed the steel corporations to reduce their tax liabilities through a special transition rule. The US claimed that the program stopped providing the alleged subsidies 15 years prior to the period of the investigation. China reasoned that there was the possibility of the program being in operation during the period of the investigation since there was a lack of evidence to indicate otherwise.

The Panel found China’s argument unconvincing because the circumstances showed that the program had ceased providing benefits after 1990. Because there was insufficient information on the existence of a benefit during the period of the investigation, the Panel held that China had acted inconsistently with Article 11.3 of the SCM Agreement for the Tax Reform Act of 1986.

(4) Steel Import Stabilization Act of 1984. The contentious issue was whether there was ‘sufficient evidence’ in the application of the existence of a financial contribution under Article 1.1(a)(1) of the SCM Agreement, ‘any form of price support’ within the meaning of Article 1.1(a)(2), or both.<sup>26</sup> Under the Act, Voluntary Restraint Agreements (VRAs) restricted the imports of steel into the US by capping the total imports at 18.5% of the market share, which later increased to 20.26%.

In its evaluation of the evidence, the Panel determined that the application frequently referenced to the VRAs as a ‘government compulsory pricing support mechanism’ within the meaning of Article 1.1(a)(2) of the SCM Agreement.<sup>27</sup> Reading Article 1.1(a)(2) in the context of the SCM Agreement, the Panel stated that a narrow interpretation was appropriate and that the ‘focus [of the concept of “price support”] is on the nature of government action, rather than upon the effects of such action’.<sup>28</sup> Relying on the reasoning from a previous GATT panel, the Panel found that ‘price support’ involves 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’.<sup>29</sup> In consideration of this interpretation, the Panel held that while VRAs might have had incidental effects on market prices, they did not amount to any direct government intervention in the market, thus an unbiased and objective investigating authority would not have initiated an investigation on the basis of such evidence.

<sup>26</sup> Ibid., at para. 7.80.

<sup>27</sup> Ibid., at para. 7.82.

<sup>28</sup> Ibid., at para. 7.85.

<sup>29</sup> Ibid., at para. 7.86, citing the GATT panel on Subsidies and State Trading, Report on Subsidies, L/1160, 23 March 1960.

The Panel also analyzed whether the application contained sufficient evidence to fit under ‘financial contribution’ under Article 1.1(a)(1), since China argued that the VRAs constituted a financial contribution as they increased the market prices through their indirect effect on private parties by entrusting or directing the private producers to sell steel at higher prices. The Panel referred to the AB report *US–Countervailing Duty Investigation on DRAMS* in determining the definitions of ‘entrusting’ and ‘directing’,<sup>30</sup> and found that both involve a transfer of authority or responsibility, but with the latter assigning particular meaning to the exercise of authority being passed from the government to a private body.<sup>31</sup> Applying the interpretation to the case at hand, the Panel determined that, although the VRAs resulted in higher prices for the private customers and higher revenue for the US steel industry, this was not caused by entrustment or directed by the US government. Consequently, there was no evidence of a financial contribution. Therefore, the Panel found that China had acted inconsistently in initiating the investigation into the program based on either ‘financial contribution’ or ‘price support’ evidence.

(5) State of Indiana Steel Industry Advisory Service. The issue with regard to the State of Indiana Steel Industry Advisory Service was whether there was ‘sufficient evidence’ in the application to prove the existence of a financial contribution and a benefit. Under the program, the State of Indiana formed a service in 1987 to ‘examine state and federal laws affecting the steel industry and to consider industry problems such as foreign competition and economic decline’.<sup>32</sup> China claimed that the State of Indiana established the Service for the purpose of providing support to the steel industry, whereas the US argued that there was no evidence to show that the service was providing a financial contribution and benefit when the application did not even indicate what the benefit under the program would be, and could only estimate that a financial contribution was ‘quite plausibly’ provided.<sup>33</sup>

The Panel found that the application contained no evidence about any study ever being performed under the Service, let alone one that had been tailored to the steel industry. Because ‘simple assertion unsubstantiated by relevant evidence’ is not ‘sufficient evidence’,<sup>34</sup> the Panel determined that a financial contribution did not exist for the program and considered it not necessary to evaluate the sufficiency of the evidence of the existence of a benefit in addition to the financial contribution

30 Appellate Body Report, *US–Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, at paras. 110–111 and para. 114.

31 Panel Report, *China–GOES*, at paras. 7.91 and 7.92.

32 *Ibid.*, at paras 7.94 and 7.95.

33 *Ibid.*, at para. 7.96.

34 *Ibid.*,

determination.<sup>35</sup> Consequently, it held that China acted inconsistently with Article 11.3 of the SCM Agreement in initiating an investigation into the program.

(6) Grace period for Compliance with the Clean Air Act. Concerning the Grace period for Compliance with the Clean Air Act, China argued that the legislation had provided a subsidy to the steel industry by granting it a three-year extension of the original deadline of 31 December 1982 under the Clean Air Act. The US challenged China's assertion by stating that the applicants failed to indicate how a benefit was provided when the grace period ended more than 20 years prior to the period of investigation. In evaluating whether there was 'sufficient evidence' of the existence of a benefit during the period of investigation, the Panel referred to its analysis of the taxation subsidies and held that:

in circumstances where a long period of time has elapsed between the expiry of the alleged subsidy and the period of investigation, a 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 us 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.<sup>36</sup>

Accordingly, the Panel ruled that China acted inconsistently with Article 11.3 of the SCM Agreement regarding the initiation of this program. In light of this conclusion, the Panel considered it unnecessary to evaluate the issue of whether there was a financial contribution.<sup>37</sup>

(7) 2003 Economic Stimulus Plan of Pennsylvania. With respect to the 2003 Economic Stimulus Plan of Pennsylvania, the issue in contention was whether there was 'sufficient evidence' for specificity. In its defense, China mainly relied on two elements of the legislation for the sufficiency of the evidence of specificity. The first was the annexed material to the additional application, where the documents indicated that State legislation was aimed to create jobs, bolster business growth, and revitalize communities, joined with the fact that AK Steel and ATI were located and prominent in Pennsylvania; and the second element was that the legislation focused on traditional manufacturing industries in particular.

In the Panel's view, the evidence for the first element was not sufficient to sustain the assertion that the steel industry must have been one of a limited number of industries to receive the subsidy. As for the second element, the Panel identified that

<sup>35</sup> Panel Report, *China–GOES*, at para. 7.98.

<sup>36</sup> *Ibid.*, at para. 7.103.

<sup>37</sup> China contended that a financial contribution existed through the provision of income or price support to the industry. The US argued that the application included insufficient evidence of actual income or price support within the meaning of Article 1.1(a)(2) of the SCM Agreement. Panel Report, *China–GOES*, at paras. 7.20, 7.37, 7.101, and 7.104.

China and the US were taking very different conceptual approaches to the issue. Notably, the US argued that the legislation should have been viewed as a whole, and as it had included six other focal points in addition to the traditional manufacturing industries, the information was not sufficient to support a finding of specificity. China, on the other hand, argued that the individual pieces of the legislation should be considered separately so as to prevent a situation where an aggregated legislation or measure could be used to circumvent the standard of evidence by arguing that it is too diverse to find specificity. In the assessment of the two opposing views, the Panel determined that the subsidy program itself should define the scope of the analysis and not the legislation through which it was enacted. The inquiry, in turn, became centered on the question of what was the subsidy program being considered in the application. The Panel stated that the examination of the additional application showed that the applicants viewed the entire legislation as a single subsidy program even though China appeared to be arguing to the Panel that only one of the focal points listed in the legislation should be analyzed as an individual subsidy. As a result, the Panel found that the legislation included a diverse range of focal points and a number of enterprises that may have been eligible to receive the alleged subsidies under them. The Panel determined that the evidence did not demonstrate that the program was specific and therefore China acted inconsistently with Article 11.3 of the SCM Agreement in initiating the investigation into this program.

(8) Pennsylvania's Alternative Energy Funding Plan. The issue with respect to the Pennsylvania's Alternative Energy Funding plan was whether there was 'sufficient evidence' in the additional application of the existence of a benefit during the period of investigation and of specificity. China pointed to the annex to the additional application, which indicated that Pennsylvania had invested 650 million US Dollars with the goal of expanding the alternative fuel, clean energy, and efficiency sectors.<sup>38</sup> The Panel found the evidence unconvincing because the US had submitted evidence to MOFCOM that, in the Panel's view, effectively demonstrated that the plan had never provided a benefit to the industry concerned during the period of investigation. Specifically, the US had presented a document to MOFCOM which listed the companies that had projects approved for loans or grants under the plan, and none of them was producers of GOES, or part of the steel industry. The Panel held that

when evidence not in the application but relevant to the decision to initiate is submitted to an investigating authority, an unbiased and objective investigating authority should weigh this evidence in its consideration of whether initiation is justified.<sup>39</sup>

<sup>38</sup> Ibid., at para. 7.115.

<sup>39</sup> Ibid., at para. 7.118.

Accordingly, the Panel determined that the document prepared by the US for MOFCOM indicating that no subsidy was conferred to AK Steel and ATI should have been taken into account and that an unbiased and objective investigating authority would not have reached the conclusion that there was sufficient evidence of the existence of a benefit under the program during the period of investigation. It also followed that there was no need for the Panel to examine the issue of specificity when the answer for the benefit finding was in the negative. In conclusion, the Panel found that China acted inconsistently with Article 11.3 of the SCM Agreement in initiating an investigation into the program.

(9) The provision of natural gas. The issue in dispute with regard to the provision of natural gas was whether the additional application contained ‘sufficient evidence’ of the existence of a financial contribution, benefit, and specificity. China claimed that two types of subsidies of natural gas were being provided to the steel industry based on the evidence, consisting of one from the US government supplying natural gas at below market prices, and the other showing subsidies being ‘passed-through’ the natural gas industry to the steel industry. In support of these claims, China highlighted in the evidence provided the long history of US government regulation of the natural gas sector, the price difference between the prices paid by the steel industry in comparison to the average price paid in the economy, as well as the subsidies for the natural gas industry.

The Panel disagreed with China after examining the evidence in the additional application. With respect to the history of government regulation of the natural gas sector, the Panel stated that the evidence suggested that there was steady deregulation over the years and that the current prices were market-determined. The Panel found that there was insufficient evidence of a financial contribution or a benefit in the form of a government provision of goods or services at below market prices. With respect to the ‘pass-through’ subsidy alleged by China, the Panel noted that while it was not necessary to classify the type of subsidy being provided, it was important to focus on whether there was any evidence that the pass-through was specific to the steel industry. In that regard, the Panel determined that it was not. It cited *US–Softwood Lumber IV* where the panel stated that ‘where a subsidy is in the form of a natural resource, there is no implication that such a subsidy is necessarily specific, precisely because such goods may be used by an indefinite number of industries’.<sup>40</sup> Lastly, about the price differentiation evidence relied on by China to support the pass-through of the subsidy, the Panel simply stated that there was no evidence to indicate specificity. In light of the foregoing findings, the Panel held that the initiation was unjustified under Article 11.3 of the SCM Agreement.

<sup>40</sup>Ibid., at para. 7.128, citing to Panel Report, *United States–Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS/257/R [hereinafter *US–Softwood Lumber IV*], at para. 7.116.

(10) The provision of electricity. Similarly, the issue concerning the electricity provision was whether the additional application included ‘sufficient evidence’ for the existence of a benefit, financial contribution, and specificity. China contended that the US government was providing electricity to the steel industry at a below market price and that subsidies to the electricity industry were being passed-through to the steel industry. With respect to the direct subsidies, the Panel found that the additional application included insufficient evidence as to the price comparison between the benchmark prices (i.e., the national average electricity price in the US and the price paid by two selected industries, which were considered inappropriate by the Panel because they came from the market that was allegedly being manipulated by the government) and the price charged to the steel industry to reach a finding of a benefit in the form of the provision of goods or services at less than adequate remuneration (LTAR) by the government. Moreover, the Panel stated that, even assuming the steel industry received a financial contribution and a benefit, there was no evidence to show that it was limited to the steel industry alone or certain industries. With respect to the pass-through of subsidies, the Panel determined that ‘sufficient evidence’ for specificity was not found. Particularly, it considered that though specific subsidies to the electricity industry might have existed, no evidence was available to refute the assumption that the benefit passed-through to all purchasers of electricity and not only the steel industry. Based on the totality of the findings, the Panel held that the initiation was unjustified under Article 11.3 of the SCM Agreement.

(11) The provision of coal. With regard to the provision of coal, the issue and arguments were essentially identical to those of natural gas and electricity, except that China claimed that the pass-through subsidy to the steel industry was from the coal industry. In a similar manner as with the natural gas and electricity provisions, China relied on the evidence of the history of government support to the steel industry and the industry’s substantial use of coal in support of its specificity analysis. But the Panel found such evidence unpersuasive because none of it made direct connection between the subsidies granted by the government and the steel industry. Accordingly, the Panel found that China acted inconsistently regarding the initiation under Article 11.3 of the SCM Agreement.

### 3.2 *The non-confidential summary requirement*

The US claimed that MOFCOM had not required the applicants to provide adequate non-confidential summaries of confidential information in the application in violation of Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the ADA.

Disputing the US claim, China made three main arguments. First, it contended that the non-confidential summaries in the application were later supplemented by a non-confidential analysis provided by MOFCOM. Second, China argued that

the issue was not substantially challenged by the respondents during the investigation. Third, China reasoned that the exceptional circumstances' exemption applied in this case because there were only two Chinese producers (i.e., WISCO and Baosteel) whose confidential information would have been easily discernible by each other, so disaggregation of the data would disrupt the confidentiality afforded to the applicants.

Concerning the first argument, the Panel considered that the non-confidential summaries needed to be provided before the investigation authority reached its determinations as otherwise an interested party would not have an adequate opportunity to defend its interests. Regarding the second argument, the Panel held that the standard by which confidentiality is granted by an investigating authority cannot be changed irrespective of the sufficiency of the challenge from the respondents. Thus, the fact that the respondents in this case did not seriously contest the matter carried no weight with the Panel. Lastly, it was determined that the record did not establish that the exemption was invoked in this case, because the applicants failed to 'identify the exceptional circumstances and provide a statement explaining why summarization is not possible' as required by the Articles, as interpreted by AB and Panel reports.<sup>41</sup>

The Panel was then left with the question of whether the non-confidential summaries provided permitted 'a reasonable understanding of the information submitted in confidence'.<sup>42</sup> In evaluating Part II of the application where the non-confidential summaries could be found, the Panel determined that the summaries consisted of 'minimal descriptions of the nature, rather than the substance' of the confidential information,<sup>43</sup> thereby failing to meet the reasonable understanding standard required by Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the ADA. China also argued that non-confidential summaries were provided in Part I of the application since they could have been derived or inferred from the context therein. But the Panel found that at least some of the categories of non-confidential information, such as the output and consumption of GOES in China and the impact on the Chinese domestic industry of the dumping, were deficient even if the Panel agreed with China that the non-confidential summaries could be 'interspersed throughout the body of an application' as such practice was not clearly prohibited by the text of the Articles.<sup>44</sup> In addition, China argued that a non-confidential summary exists where an interested party is able 'to derive, or infer from the context, the possible nature of the confidential information'.<sup>45</sup> The Panel found the argument unconvincing and stated that the interested party providing

41 *Ibid.*, at para. 7.192.

42 *Ibid.*, at para. 7.193.

43 *Ibid.*, at para. 7.199.

44 *Ibid.*, at para. 7.201.

45 *Ibid.*, at para. 7.224.

the information has the explicit obligation to provide the summary under the Articles and that it is not for the others to derive their own summaries. Thus, the Panel concluded that China acted inconsistently with Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the ADA. This issue was not challenged on the appeal by China.

### 3.3 *The use and application of 'facts available'*

#### 3.3.1 *The countervailing duty rates for the respondents*

Apart from the pre-initiation standard of evidence and non-confidential summary issues, the US asserted that MOFCOM improperly resorted to 'facts available' to calculate the countervailing duty rates for AK Steel and ATI based on the finding of 'non-cooperation' and erroneously applied a 100% utilization rate under Article 12.7 of the SCM Agreement.

In order to resolve the issue of MOFCOM's decision to apply 'facts available', the Panel first reviewed the finding of 'non-cooperation' by examining the information requests and clarifications in the original questionnaire and deficiency letters, as well as the responses submitted by AK Steel and ATI. The Panel concluded that MOFCOM was entitled to treat the two respondents as non-cooperative respondents for the purpose of Article 12.7 of the SCM Agreement since they failed to submit the data as requested. Next, the Panel considered whether the information requested was 'necessary' within the meaning of Article 12.7 of the SCM Agreement. The US argued that the information was requested by MOFCOM for the preparation of the verification and therefore should not be treated as 'necessary' information (though China argued to the Panel that it might have also used the data to make determinations), but the Panel held that such information was considered 'necessary' and that MOFCOM was entitled to find 'non-cooperation' following the failure of the respondents to submit the information. The US repeatedly emphasized the 'burden' imposed by the broad information requests by MOFCOM on AK Steel and ATI (e.g., requesting data that cover a total of 15 years), which would have had substantive value in the view of the Panel if the US had explained how the argument connected to the claim under Article 12.7 of the SCM Agreement. The Panel articulated the inadequacies of the US argument in this regard as follows:

We agree that the United States has not explained how the alleged burden imposed on respondents might influence our evaluation of the United States' claim under Article 12.7 of the SCM Agreement. Nor has the United States explained how an overly burdensome request for transactional data, if any were made, would have prevented respondents from submitting any transaction data in a timely manner. Although the United States asserts that '[b]ecause of the volumes of information requested, neither AK Steel nor ATI could fulfill all of the requests made in the CVD proceeding', there is no evidence that either respondent stated that they were unable to provide the relevant transactional data within



the deadline imposed by MOFCOM. Rather, respondents complained that the requested data, concerning alleged indirect subsidization, was not relevant.<sup>46</sup>

Finally, the Panel evaluated whether the 100% utilization rate was properly applied when determining the extent to which the respondents' sales of products were subsidized. It found that MOFCOM had failed to provide any justification or any indication of the factual foundation in its Final Determination, which was also flawed considering that it drew adverse inferences based on information that was in fact 'at odds with information on the record suggesting that a lesser rate of utilization should be applied'.<sup>47</sup> While the Panel held that China's decision to resort to 'facts available' was consistent with Article 12.7 of the SCM Agreement, it ruled in favor of the US on the claim that the determination of a 100% utilization rate was inconsistent with that Article.

### 3.3.2 *The 'all others' anti-dumping and countervailing duty rates*

With respect to the 'all others' anti-dumping and countervailing duty rates' calculations, the US argued in separate claims that MOFCOM resorted to 'facts available' without meeting the conditions required under Article 6.8 and paragraph 1 of Annex II of the ADA and Article 12.7 of the SCM Agreement.<sup>48</sup> In evaluating the preconditions for the application of 'facts available', the Panel found that MOFCOM's notice of initiation did not contain all the detailed information (i.e., missing 'notice of the precise information required of exporters and of the consequences of failure to provide the information')<sup>49</sup> that was necessary for the unknown exporters to fully participate. Further, it was noted by the Panel that no other US GOES exporter/producer registered with MOFCOM besides AK Steel and ATI. Given the fact that the required information was not notified to the unknown exporters, the Panel relied on *Mexico–Rice* and held that the unknown producers could not be considered to have refused to provide necessary information or to have impeded the investigations under the Article 6.8 and paragraph 1 of Annex II of the ADA and Article 12.7 of the SCM Agreement when they had not been informed of the investigation.<sup>50</sup> Accordingly, the Panel held that China acted

<sup>46</sup> Ibid., at para. 7.293.

<sup>47</sup> Ibid., at para. 7.303.

<sup>48</sup> The claims relating to 'all others' rates were raised by the US in separate claims. The US challenged the anti-dumping duties based on the decision to apply 'facts available' to 'all other' producers under Article 6.8 of the ADA and the countervailing duties for the same reason under Article 12.7 of the SCM Agreement.

<sup>49</sup> Panel Report, *China–GOES*, at para. 7.385.

<sup>50</sup> Ibid., at paras. 7.388 to 7.392, citing to Appellate Body Report, *Mexico–Anti-dumping Measures on Rice* (WT/DS295/AB/R), at paras. 259–260. In *Mexico–Anti-dumping Measures on Rice* the AB held that paragraph 1 of Annex II of the ADA conditioned the use of 'facts available' on making the interested parties aware that the failure to provide necessary information requested within reasonable time could lead to the application of 'facts available' by the investigating authority. When an unknown exporter was not

inconsistently with the Articles in applying ‘facts available’ to the unknown exporters.

### 3.4 *The price effects analysis*

In challenging MOFCOM’s price effects findings in the injury determination, the US claimed that China failed to meet the two requirements set out for the investigating authority under Articles 3.1 and 3.2 of the ADA and Articles 15.1 and 15.2 of the SCM Agreement in conducting the price effects analysis, which were to base the findings on positive evidence and engage in an objective examination of the evidence provided. More specifically, the US argued that MOFCOM failed to demonstrate that the evidence supported the conclusion that any price depression and suppression during the period of investigation was an effect of imports.

With respect to the price depression findings, the Panel first considered the question of whether there was an obligation for the investigating authority to show that the relevant price depression was an effect of subject imports according to Article 3.2 of the ADA and Article 15.2 of the SCM Agreement. The Panel agreed with the US in finding that the authority must establish that there was a causal link between the imports concerned and the price depression. The Panel then evaluated whether MOFCOM’s finding that price depression was an effect of such imports was based on positive evidence and involved an objective examination. In its defense, China primarily relied on the evidence in the application and collected by MOFCOM during the investigation, the latter mainly consisting of price comparisons between the average import prices and domestic sales prices. Regarding the evidence in the application, the Panel found that it could not be considered as positive evidence because it was not incorporated into MOFCOM’s Final Determination and even contradictory to MOFCOM’s own finding. As for the price comparisons, the Panel noted that MOFCOM’s neglect in making any price adjustments to ensure price comparability made the analysis ‘neither objective, nor based on positive evidence’.<sup>51</sup> Additionally, China argued that the price depression finding could have been supported by the increase in the volume of imports alone. The Panel rejected this argument and stated that MOFCOM seemed to have shown equal consideration to both volume and price effects in its analysis and therefore the volume effect alone could not be considered sufficient as the primary basis of the finding as contended by China. Based on the evaluation, the Panel concluded that MOFCOM’s price depression findings were neither based on positive evidence nor reached through an objective examination. Therefore, they were inconsistent with the relevant Articles.

notified of the information required, it was denied the opportunity to provide the information. The AB concluded that the investigating authority could not apply ‘facts available’ to such exporters.

<sup>51</sup> *Ibid.*, at para. 7.530.

The Panel also upheld the US claims regarding the price suppression findings, because the same arguments were put forth by the US and China, with the additional claim from the US that MOFCOM overly relied on the changes in the price–cost ratio in its analysis when these ‘merely reflected changes in the underlying cost structure of the domestic industry’.<sup>52</sup> Scrutinizing the factual circumstances surrounding the Chinese producers (WISCO and Baosteel), the Panel determined that MOFCOM should have considered the underlying changes in the domestic industry in its analysis. However, it was not for the Panel to conduct a *de novo* review on this complex issue. In any event, the deficiencies found in MOFCOM’s price depression findings existed with price suppression as well. Additionally, the Panel agreed with the US that MOFCOM failed to provide an express finding of significant price undercutting by subject imports. Based on these reasons, the Panel held that China acted inconsistently with Articles 3.1 and 3.2 of the ADA and Articles 15.1 and 15.2 of the SCM Agreement.

On appeal, China challenged the Panel’s holdings with respect to the price depression and suppression findings, arguing that the investigating authority is not obligated to establish the causal link between the imports concerned and the price depression and suppression. The AB upheld the Panel’s findings, noting that the obligation for the investigating authority under Article 3.2 of the ADA and Article 15.2 of the SCM Agreement was to consider the relationship between the imports and domestic prices ‘so as to understand whether subject imports provide explanatory force for the occurrence of significant depression or suppression of domestic prices’.<sup>53</sup> In focusing on that relationship, the AB further explained that, even though the investigating authority is not required to examine all possible factors causing injury to the domestic industry, it may not disregard evidence which disputes the causal link between the subject imports and the significant depression or suppression of domestic prices.<sup>54</sup>

With regard to the interpretation of Articles 3.2 and 15.2, China also alleged that the Panel erred in distinguishing the panel report of *EC–Countervailing Measures on DRAM Chips*<sup>55</sup> in considering the relevant obligations under the Articles and wrongly interpreted the legal standard through its examination of the MOFCOM’s finding of significant price suppression. According to China, the panel report in the *EC–Countervailing Measures on DRAM Chips* dispute provides that the investigating authority is not required to find the causal link between the subject imports and price effects under Article 15.2 of the SCM Agreement, which the Panel in this dispute failed to recognize. In response, the AB stated that the *EC–Countervailing Measures on DRAM Chips* dispute was concerned with

<sup>52</sup> Ibid., at para. 7.547.

<sup>53</sup> AB report of *China–GOES*, at para. 154.

<sup>54</sup> Ibid.,

<sup>55</sup> Panel Report, *European Communities–Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R (3 August 2005), at para. 7.338.

the effects of *price undercutting* rather than *price depression or suppression* caused by subject import and therefore cannot be used to support the proposition put forth by China.

As for the Panel's examination of MOFCOM's finding, China considered that the Panel incorrectly imposed a requirement of determining subject imports as the 'only reason' for the price suppression under Articles 3.2 and 15.2 by concluding that 'MOFCOM's finding was not based on positive evidence and did not involve an objective examination' because it could not have determined that subject imports were 'the only reason' for the price suppression.<sup>56</sup> It was noted by the AB that this argument advanced by China was not directed at the Panel's articulation of the legal standard under the Articles but at the actual practice adopted by the Panel in its examination. The AB then reviewed the Panel's analysis and found that China misconstrued the statement about 'the only reason prices were not able to rise with costs' as a standard imposed by the Panel, when it was discussed in reference to the assumption made by MOFCOM in considering the changes in the price–cost ratio of like domestic products.<sup>57</sup> Moreover, the AB reached the conclusion that the Panel had properly focused on the lack of supporting evidence underlying MOFCOM's finding in the analysis.

Having resolved the issues regarding the interpretation of Articles 3.2 and 15.2, the AB considered China's claim with respect to the Panel's assessment of the price effects findings, namely that the Panel had misunderstood MOFCOM's analysis by focusing on the single factor of 'low price' in the examination of the Final Determination and failed to properly consider the other factors involved in the analysis, which were a pricing policy aiming at price undercutting, parallel price trends between subject import and domestic prices, and increases in subject import volume. Before turning to the examinations of the factors abovementioned, the AB stated that the Panel appropriately identified the issue as being whether MOFCOM met the standard for price effects analysis conducted on the basis of positive evidence and involving an objective examination.

Additionally, China contended that the Panel had violated its obligations under Article 11 of the Dispute Settlement Understanding (DSU) through 'misreading of MOFCOM's findings of fact and its misapplication of these findings to the legal standard "so exceeded the proper bounds of review"',<sup>58</sup> particularly with respect to the 'low price' reference in the Final Determination.

Regarding China's key argument of the over-emphasis placed by the Panel on the 'low price' factor, the AB determined that the Panel properly relied on the price evidence in its assessment because it formed a significant part of the basis for

<sup>56</sup> AB Report of *China–GOES*, at para. 165.

<sup>57</sup> *Ibid.*, at paras. 166–167. The Panel stated that 'MOFCOM simply assumed that (i) prices should have been able to rise with costs, and (ii) the only reason prices were not able to rise with costs was because of the effect of subject imports'. Panel Report, *China–GOES*, at para. 7.550.

<sup>58</sup> AB Report of *China–GOES*, at para. 32.

MOFCOM's price effects findings. Though China sought to explain that MOFCOM's reference to 'low price' was not the same as the existence of price undercutting, and price comparability was not depended upon in reaching the finding of significant price depression and suppression, China's responses to the Panel demonstrated to the contrary in the view of the AB. In detail, the AB pointed, among others, to China's second response to the Panel's request of 18 November 2011 and the response to Panel Question 69 following the second Panel meeting to show that, even though China did not make a finding of price undercutting, it nevertheless relied on the 'low price' of subject imports to find significant price depression and suppression in the Final Determination.<sup>59</sup> In addition, the AB also agreed with the Panel's position that price adjustments were not out of line under Articles 3.2 and 15.2 because, 'if subject import and domestic prices were not comparable, [it] would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic like products'.<sup>60</sup>

However, the AB did find that it was improper for the Panel to dismiss MOFCOM's reliance on the pricing policy because the Panel failed to examine whether, in the absence of price undercutting, the evidence could support a finding of significant price depression and suppression.<sup>61</sup> In the AB's view, the relevance of the policy to price depression and suppression should have been examined by the Panel since 'a policy aimed at price undercutting may very well depress and suppress domestic prices in instances where, as China asserts, "domestic producers were reacting to subject import competition and were lowering domestic prices so as to compete more effectively and minimize any further loss of market share"'.<sup>62</sup> The Panel rejected the pricing policy based on the fact that subject import prices were higher than the prices of domestic like products, but according to the AB the information 'does not necessarily negate the significance of a policy aimed at price undercutting for findings of price depression and suppression'.<sup>63</sup> Nonetheless, the AB's disagreement with the Panel's treatment of the pricing policy was not sufficient to reverse the Panel's overall finding of inconsistency under Articles 3.1 and 3.2 of the ADA and Articles 15.1 and 15.2 of the SCM Agreement because there was no 'foundation to conclude that MOFCOM's analysis of the effects of subject import prices could have been sustained on the basis of the pricing policy alone'.<sup>64</sup>

Regarding China's claim of the Panel's failure to consider the parallel trends of subject imports and domestic prices, the AB acknowledged that the existence of parallel trends might signal competition between the subject imports and domestic

59 *Ibid.*, at paras. 190–193.

60 *Ibid.*, at para. 200.

61 *Ibid.*, at para. 207.

62 *Ibid.*, at para. 206.

63 *Ibid.*

64 *Ibid.*, at para. 224.

products, which could help explain the effects of the former on the prices of the latter to some extent. However, there was a lack of sufficient evidence in the Final Determination to draw a conclusion since MOFCOM referred to the price trends as being ‘basically the same’ without providing any further description or explanation.<sup>65</sup> Indeed, the AB noted that it would have expected MOFCOM to provide some reasoning or explanation in the Final Determination as to the analysis of the movements in price trends if it had actually considered the parallel price trends significant for the price effects findings. Therefore, there was no basis to fault the Panel for failing to recognize and discuss the significance of those trends for the analysis.

Lastly, China claimed that the increases in subject import volume were the primary basis for MOFCOM’s finding of significant price depression and suppression and the Panel erred in not finding them as such. In evaluating the analysis of the Panel on the issue, the AB held that the focus of the Panel was not whether subject import volume or price was the primary basis for MOFCOM’s finding but how the two factors might have interacted and what effects they could have supported with respect to the findings of significant price depression and suppression. In that respect, the AB agreed with the Panel that it was not possible to ‘d disentangle the relative contribution of [the volume and price] effects in MOFCOM’s Final Determination without substituting its judgment for that of the authority’.<sup>66</sup> According to the AB, the Panel appropriately refrained from conducting the analysis and avoided the risk of engaging in a *de novo* review in assessing MOFCOM’s findings.

In conclusion, the AB held that the Panel did not err in its application of Article 3.2 of the ADA and Article 15.2 of the SCM Agreement.<sup>67</sup> It also determined that the Panel did not act inconsistently with its obligation to make an objective assessment of MOFCOM’s Final Determination under Article 11 of the DSU.

### 3.5 *The disclosure of ‘essential facts’*

In relation to the claims on the use of ‘facts available’, the US challenged that China failed to disclose the ‘essential facts’ forming the basis for applying the ‘facts available’ to ‘unknown’ US exporters under Articles 6.9, 12.2, and 12.2.2 of the ADA and Articles 12.8, 22.3, and 22.5 of the SCM Agreement. Similarly, with

<sup>65</sup> *Ibid.*, at para. 210 and footnote 350.

<sup>66</sup> *Ibid.*, at para. 219.

<sup>67</sup> It was noted by the AB that Article 3.2 of the ADA and Article 15.2 of the SCM Agreement were to be read together with Article 3.1 of the ADA and Article 15.1 of the SCM Agreement because the findings of inconsistency under the first two Articles would be based on an integrated analysis of both sets of provisions. See the AB Report, at paras. 112 and 113. The Panel had also found that the causation analysis by MOFCOM was inconsistent with Articles 3.1 and 3.5 of the ADA and Articles 15.1 and 15.5 of the SCM Agreement. However, the issue was not appealed by China. The AB noted that, despite the fact that the price effects analysis formed part of the causation analysis, the Panel’s finding with respect to causation would stand irrespective of its conclusion on the price effects findings.

respect to the price effects and causation findings, the US claimed that China acted inconsistently with Articles 6.9 and 12.2.2 of the ADA and Articles 12.8 and 22.5 of the SCM Agreement by reason of the deficiencies in the related ‘essential facts’ disclosure and public notice and explanation.

The Panel upheld US claims regarding the disclosure obligations. Concerning the application of ‘facts available’, the Panel found that the disclosure of the ‘essential facts’ leading to the conclusion to apply ‘facts available’ was warranted because such information was necessary for the US to defend its interests. With regard to the price effects findings, it was considered by the Panel that the ‘essential facts’ supporting the finding of ‘low’ subject import prices were significant to the application of the definitive measures and should have been disclosed by MOFCOM. For the causation analysis, the Panel held that China failed to disclose the data on the non-subject imports as it was one of the ‘essential facts’ and part of the ‘relevant information on the matters of fact and law and reason’ which have led to the imposition of final measures.

On appeal, China’s issues were limited to the price effects findings and the disclosure of underlying facts. More specifically, China brought two claims regarding the latter. First, China considered that it adequately disclosed the ‘essential facts’ in the investigation as Article 6.9 of the ADA and Article 12.8 of the SCM Agreement did not require the disclosure of the ‘essential facts’ regarding the ‘low price’ finding in support of its conclusion of significant price suppression and suppression from the subject imports. Second, China argued that the Panel incorrectly focused on the existence of price undercutting in finding that China failed to disclose ‘all relevant information on the matters of fact’ under Article 12.2.2 of the ADA and Article 22.5 of the SCM Agreement.

In examining the first issue raised by China, the AB stated that the terms of ‘essential facts’ under Articles 6.9 and 12.8 ‘refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures’.<sup>68</sup> In the AB’s view, the purpose of the disclosure is to ensure the ability of the interested parties to defend their interests by allowing them to sufficiently understand the basis leading to the decision whether to apply definitive measures under the ADA and SCM Agreement. As discussed above, the AB found that MOFCOM relied on the findings as to the ‘low price’ of subject imports in reaching its conclusions of significant price depression and suppression. Therefore, the AB determined that MOFCOM was required to disclose the ‘essential facts’ relating to the ‘low price’ finding and it failed to do so because no such fact was included in MOFCOM’s Preliminary Determination and the Final Injury Determination.<sup>69</sup>

<sup>68</sup> AB Report of *China–GOES*, at para. 240.

<sup>69</sup> The Preliminary Determination refers to MOFCOM Announcement No. 99 of 10 December 2009 [2009] (English translation in Panel Exhibit CHN-17) and the Final Injury Determination refers to the Essential Facts Under Consideration Which Form the Basis of the Determination on Industry Injury Investigation of the Anti-dumping Investigation of GOES from the US and Russia and the Anti-subsidy

Consequently, the AB upheld the Panel's finding that China acted inconsistently with Article 6.9 of the ADA and Article 12.8 of the SCM Agreement.

Regarding the second issue challenged by China, the AB found that the obligations to give public notice of the conclusion (or suspension) of the investigation under Article 12.2.2 of the ADA and Article 22.5 of the SCM Agreement come later in the process than the requirement to disclose the 'essential facts' pursuant to Articles 6.9 and 12.8, as the disclosure obligations under Article 12.2.2 and Article 22.5 are only triggered after an affirmative determination has been made for the imposition of definitive duties. The AB also held that what constitutes 'relevant information on matters of fact' has 'to be understood in light of the content of the findings needed to satisfy the substantive requirements with respect to the imposition of final measures under the Anti-Dumping Agreement and the SCM Agreement, as well as the factual circumstances of each case'.<sup>70</sup> On that basis, it was reasoned that the evidence of price undercutting was relevant to the understanding of the 'low price' finding and therefore it should have been disclosed by MOFCOM in the Final Determination. Responding to China's argument that it considered those facts immaterial because MOFCOM did not make any findings of significant price undercutting, or that the pricing policy of the producers disclosed by China was sufficient to constitute 'all relevant information on the matters of fact' with regard to the 'low price' subject imports, the AB stated that it disagreed with China because the arguments were based on the premises that the price undercutting finding was not relied on by MOFCOM for its conclusions of significant price depression and suppression. As a result, the AB upheld the Panel's finding that China failed to disclose the 'relevant information on the matters of fact' within the meaning of Article 12.2.2 of the ADA and Article 22.5 of the SCM Agreement.

#### 4. Legal and economic analysis

Thanks to the US careful choice regarding what issues to include in its application, most of the issues in this dispute are fairly uncontroversial. The US limited the items it challenged to clear shortcomings in the application and/or MOFCOM's analysis. While the US might argue that this reflects a philosophy of judicial restraint, it just as likely reflects the thin ice the US treads on with respect to WTO dispute settlement in the trade remedies' area and its own use of AD and CVD. US AD and CVD procedures are frequently challenged in the WTO and the US track record is dismal. Consequently, we believe the US hoped to shape its challenge in such

Investigation of GOES from the US, Shang Diao Chan Han No. 67 of 5 March 2010 [2010] (English translation in Panel Exhibit CHN-27).

<sup>70</sup> AB Report of *China-GOES*, at para. 257.



a way as to force China to change its practices (i.e., ‘score’ a victory against China) but also to limit the applicability of AB rulings on US own procedures. For instance, the US challenge included an extended and broad condemnation of 11 programs that the Chinese firms’ alleged subsidized US industry. As tenuous as the firms’ application regarding these programs was, the reality is that in the course of its investigation MOFCOM had determined that none of these programs did in fact convey a countervailable subsidy. Consequently, even with the Panel’s affirmative ruling, there was no impact on the margins in this case. Ironically, the Panel’s clarification of the standard of evidence required in an application is likely to benefit China because it is so often the target of AD and CVD investigations.

#### 4.1 *Pre-initiation standard of evidence*

The Panel agreed with the United States that a CVD application must contain, on a program-by-program basis, evidence of (1) a financial contribution by the government, (2) a benefit to the recipient, and (3) specificity in the case of domestic subsidies. This may seem obvious in light of the legal requirements of the SCM Agreement, but it is often easier said than done. As shown in [Table 1](#), in the GOES case the panel found with regard to the 11 challenged programs that in three instances the application did not contain evidence of a financial contribution, in six instances no evidence of a benefit, and in six instances no evidence of specificity.

We agree with the Panel’s view that while the application need not contain sufficient evidence to allow the investigating authority to draw definitive conclusions regarding the existence of a subsidy, injury, or a causal link between the two, it must have some evidence and not simply contain mere assertions. One possible interpretation is that the Chinese firms were mimicking what they perceive to be the practice of US firms when they file AD/CVD complaints against China. US CVD applications often refer to five-year plans of the Communist Party of China as evidence of illegal government support for the Chinese steel industry. Perhaps the Chinese, frustrated by similar accusations, felt that vague references to long defunct government programs were an acceptable basis for an application.

Ironically, the Panel findings, while going against China in GOES, may help China overall as it is now the main target of CVD investigations by other WTO members. As shown in [Table 2](#), since 2006 China has been the subject of almost half of all CVD cases worldwide and almost three-quarters of all US cases. Many of the underlying applications (in which China is the target) tend to be ‘cut and paste’ jobs of previous applications which means that detailed evidence with regard to one or more of the three elements is often lacking. Thus, it seems only a question of time before China will challenge on similar grounds imposition of CVD measures against it by countries such as the US and the EU.

Table 1. The 11 subsidy programs evaluated by the Panel in *China-GOES*

Program name	Evidence		
	Financial contrib.	Benefit	Specificity
1 Medicare Prescription Drug, Improvement and Modernization Act	Not contested	Not contested	No
2 Economic Recovery Tax Act of 1981	Not contested	No	Not contested
3 Tax Reform Act of 1986	Not contested	No	Not contested
4 Steel Import Stabilization Act of 1984	No	Not contested	Not contested
5 State of Indiana Steel Industry Advisory Service	No	Not determined*	Not contested
6 Grace Period for Compliance with the Clean Air Act	Not determined*	No	Not contested
7 2003 Economic Stimulus Plan of Pennsylvania	Not contested	Not contested	No
8 Pennsylvania's Alternative Energy Funding Plan	Not contested	No	Not determined*
9 The Provision of Natural Gas: (a) government provision of natural gas at below market prices and (b) 'pass-through' subsidy from the natural gas industry to the steel industry	(a) No (b) Not determined*	(a) No (b) Not determined*	(a) Not determined* (b) No
10 The Provisions of Electricity: (a) government provision of electricity at below market prices and (b) 'pass-through' subsidy from the electricity industry to the steel industry	(a) Not determined* (b) Not determined*	(a) No (b) Not determined*	(a) No (b) No
11 The Provision of Coal: (a) government provision of coal at below market prices and (b) 'pass-through' subsidy from the coal industry to the steel industry	(a) Not determined* (b) Not determined*	(a) Not determined* (b) Not determined*	(a) No (b) No

*Notes:* \* For certain programs listed above, the Panel considered it not necessary to evaluate the other evidence of the existence of evidentiary requirements after the evidence for one requirement has been found insufficient, see State of Indiana Steel Industry Advisory Service, Panel Report, at para. 7.98; the Grace Period for Compliance with the Clean Air Act, at para. 7.104; Pennsylvania's Alternative Energy Funding Plan, at para. 7.119; the Provision of Natural Gas, at paras. 7.125, 7.127–7.128; the Provision of Electricity, at paras. 7.135, 7.137–7.138; the Provision of Coal, at paras. 7.141–7.146.

## 4.2 Facts available

Article 12.7 of the SCM Agreement provides that:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

Table 2. Worldwide CVD activity, 2006–2011<sup>71</sup>

		Cases filed against				Total
		USA	China	EU	All Others	
Cases filed by	USA	–	32	–	14	46
	China	3	–	1	–	4
	EU	3	4	–	11	18
	All others	6	13	6	13	38
	Total	12	49	7	38	106

This article is frequently invoked by administering authorities in CVD cases, among others, because the massive amount of information requested by them often does not make it possible for respondents, whether governmental or non-governmental, to fully respond to the questionnaire. To some extent, broad data requests are unavoidable in CVD cases, especially as regards non-recurring subsidies. This is because non-recurring subsidies are normally allocated over time, depending on the useful life of the assets to which they relate. Suppose, for example, that in 1980a government provides a plot of land for free. Suppose further the useful life of the land is 50 years, the company that received the land for free will enjoy the benefit of that land for 50 years, in other words until 2030. Therefore, in the course of a CVD investigation, administering authorities may decide to request information relating to events that occurred many years ago in order to capture such benefits.

The other side of the coin, of course, is that overly broad information requests may make it *de facto* impossible for interested parties to provide all the information requested which will then lead the administering authorities to use facts available. A good example of this is the practice of some administering authorities to request the exporting country government to provide transaction-by-transaction information relating to all transactions during the investigation period between input suppliers and producers of the product under investigation. From a legal perspective, the issue would seem to be whether such information is ‘necessary’ within the meaning of Article 12.7 SCM Agreement. This issue was raised by the US, but rejected by the Panel. The US did not appeal this Panel finding likely because the US did not wish to tie its hands in its own CVD practice. Nevertheless, a good argument can be made that Panels should more rigorously examine whether information requests by administering authorities in CVD cases are ‘necessary’ within the meaning of Article 12.7 SCM, particularly as the failure to provide requested information is so often used in CVD practice as ‘the stick to beat the dog’.<sup>72</sup>

<sup>72</sup> Within the meaning of the proverb: If you wish to beat a dog, it is easy to find a stick.

There are typically two issues at stake then. First, whether resort to facts available is justified or, in other words, whether the conditions of Article 12.7 SCM Agreement are satisfied. Second, if the first question is answered in the affirmative, authorities must determine which facts are available to use. As regards the two respondents AK Steel and ATI, the facts available issue came up because the two respondents had not provided transaction data on domestic sales which supposedly would have enabled MOFCOM to determine whether they had benefitted – directly or indirectly – from government procurement at more than adequate remuneration.

Regarding the first question, the Panel considered that MOFCOM properly found that the respondents failed to cooperate with MOFCOM's requests (notably in the deficiency letter) to provide transaction data for domestic sales of GOES and non-GOES products during the period of investigation (POI). As a result, MOFCOM had by way of facts available assumed that AK Steel and ATI had sold *all* of their output to the government under programs requiring the payment of a 25% price premium (referred to in the panel report as a 100% utilization rate). The Panel referred to the AB report in *Mexico–Rice*<sup>73</sup> for the propositions that facts available means 'best' facts and that any resulting findings must be based on *facts*. The Panel considered that MOFCOM's finding was not based on facts and rejected MOFCOM's argument that it could draw *adverse inferences* from the respondents' failure to cooperate.

In our 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 states 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', we see no basis in Annex II for the drawing of adverse inferences. In our view, the purpose of the facts available mechanism is not to punish non-cooperation by interested parties. As explained by the Appellate Body, the purpose of Article 12.7 of the SCM Agreement is rather to 'ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation', in the sense that 'the provision permits the use of facts on record solely for the purpose of replacing information that may be missing'. While non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences.<sup>74</sup>

The Panel could have left it at that, but went on in great detail to explain why MOFCOM's finding in fact was illogical and contradicted by information provided in the case.<sup>75</sup>

<sup>73</sup> Panel report *China–GOES*, para. 7.296, AB report *Mexico–Rice*, para. 289.

<sup>74</sup> Panel report *China–GOES*, para. 7.302.

<sup>75</sup> Panel report *China–GOES*, para. 7.303–7.310.

The US also challenged China's use of facts available to calculate a dumping margin of 64.8% for unknown exporters as being inconsistent with Article 6.8 and paragraph 1 of Annex II of the ADA.

Paragraph 1 of Annex II of the ADA provides that:

As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

When initiating the GOES anti-dumping and countervailing duty investigations, MOFCOM had issued public notices of initiation in which it had indicated that any interested party should register for investigation and that failure to register would result in the application of best information available. MOFCOM provided the initiation notices to AK Steel and ATI, the two known US GOES exporters/producers, and placed the notices on its website and in its public reading room. MOFCOM had also notified the United States Embassy in Beijing of the initiations and requested that the Embassy notify the relevant exporters and producers. However, apart from AK Steel and ATI, no US GOES producers/exporters registered for the investigation. Therefore, MOFCOM eventually applied facts available for the 'all others' rate.

The Panel found that MOFCOM had violated this paragraph because the notice of initiation, relied upon by China as providing the requisite notification, did not specify in detail the information required of the interested parties for the purposes of the anti-dumping investigation.<sup>76</sup> The Panel found support for its finding in the rulings of the AB in *Mexico–Rice* and *Argentina–Ceramic Tiles*.<sup>77</sup>

The finding of the Panel seems legally correct, but it raises difficult operational issues for administering authorities. To the best of our knowledge the steps taken by China are the ones that most authorities would undertake to deal with the problem of unknown exporters. The initial information in a trade case comes from the application in which the domestic industry will normally provide a list of known exporters. Once the case is initiated, the authorities will then send the exporters' questionnaire to such known exporters.

It is basically this questionnaire that specifies 'in detail the information required from any interested party, and the manner in which that information should be

<sup>76</sup> Panel report *China–GOES*, at para. 7.386.

<sup>77</sup> Panel report *China–GOES*, at para. 7.388 citing Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001.

structured by the interested party in its response' within the meaning of paragraph 1 of annex II. Of course the questionnaire cannot be sent to unknown exporters as their identities, let alone their mailing coordinates, are not known. Therefore, the published notice of initiation will typically specify a time period during which unknown exporters can come forward, make themselves known, and request a copy of the questionnaire.

At the end of the investigation, sampled cooperating producers will normally receive individual duties, based on company-specific findings (as was the case for AK Steel and ATI), non-sampled cooperating producers will receive a weighted-average duty based on the duties imposed with respect to the cooperating sampled producers (excluding duties based on facts available and/or *de minimis* margins) and the authorities will then normally impose a residual or 'all others' duty applicable to non-cooperating producers. The 'all others' rate will typically be at least as high as the duty imposed with respect to any cooperating sampled producer to avoid that non-cooperating producers get a bonus for non-cooperation. The 'all others' rate will apply to all parties that did not cooperate in the investigation, no matter the reason for their non-cooperation. This rate will therefore be applicable to unknown exporters and even to parties that did not export (or produce!) during the original POI. The latter (but not the unknown exporters that did export during the period off investigation and therefore could have cooperated) can then have recourse to the special 'newcomer review' possibility laid down in Article 9.5 of the ADA.

As far as we know, this system functions well in practice, not in the least because news about a trade case normally travels fast in the industry concerned, thanks to trade associations and other parties with an interest in the case. Therefore, while there may often be producers/exporters 'unknown' to the authorities, there will rarely be producers/exporters that do not 'know' about the case. Any decision not to come forward and make themselves known to the authorities in accordance with the instructions in the notice of initiation will then often be based on a conscious decision not to cooperate, typically on the basis of a cost-benefit analysis.

It is therefore mysterious why the US decided to challenge this issue, particularly as it seemed relatively clear that there were in fact no other exporters during the POI.<sup>78</sup>

### 4.3 *Non-confidential summaries*

A typical application will contain a mix of both confidential business information (such as the domestic firms' pricing, production, and profits, evidence of lost sales,

<sup>78</sup> It is noted that on the basis of a different claim the panel found that China acted inconsistently with Article 6.9 of the ADA 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%. See Panel report *China-GOES*, paras 7.395-7.412. The panel further found a violation of Articles 12.2 and 12.2.2 of the ADA.

and often proprietary industry information) and non-confidential discussions of the industry and trends. Petitioners must be careful when preparing the non-confidential summaries so that they do not inadvertently reveal confidential information about any individual producer/exporter. The issue is most clear-cut when there are only two firms because then even an aggregate summary will convey important information.

Suppose, for example, an application were to report that domestic output fell from 100 to 90 tons. Suppose further that there are two producers (A and B) and that one of the firms (Firm A) produced 50 tons both years. Without a non-confidential public summary, Firm A could immediately deduce proprietary information about its domestic competitor (Firm B); namely that B's production fell from 50 to 40 tons.<sup>79</sup> Firm B could also deduce A's production levels.

The agreements allow an 'exceptional circumstances' exemption under Article 12.4.1 of the SCM Agreement and Article 6.5.1 of the ADA to be claimed in such situations. While these provisions do not provide further detail on what circumstances may qualify as 'exceptional', supposedly a situation in which only two petitioners bring a case might qualify as an exceptional circumstance allowing for extra leeway. However, China did not explicitly make the claim; nor did the application report even general summaries of the data (e.g., unlabeled trend lines, year-over-year percentage changes without any reported absolute levels). In China's view, the fact that there were only two domestic producers meant that the 'exceptional circumstances' exemption was understood to be invoked.

While there is some validity to China's view, we feel the Panel was correct in rejecting China's position. First of all, claiming the exemption and providing a statement explaining why summarization is not possible is not an onerous burden on either the petitioner or the investigating authorities. Second, China's position would create a vast opening for investigating authorities to limit what they include in their reports. Effectively China seems to be saying 'you should have known what I meant'. Had the Panel accepted China's position, respondents' ability to mount an adequate defense would require advanced degrees not just in law and economics but also in mind-reading. The requirement that the non-confidential summaries 'permit a reasonable understanding of the substance of the information submitted in confidence'<sup>80</sup> unless the exemption is explicitly made is reasonable.

#### 4.4 Price effects analysis of evidence

The Panel also found serious shortcomings with China's price effects' analysis. To a large extent, the core issue was that China did very little to document its basis for determining that subject imports had caused price depression and/or price suppression. Said differently, one wonders how much analysis was actually

<sup>79</sup> The analogous argument can be made if there are two exporters instead of two domestic producers.

<sup>80</sup> Panel Report, *China-GOES*, at para. 7.193.

involved in its price effects ‘analysis’. The Panel’s report makes it clear that reporting conclusions without any analysis and justification is insufficient.

The one piece of price effects analysis that is commonly done by investigative authorities (price–cost margin) was criticized by the Panel as being insufficient because it ‘merely reflected changes in the underlying cost structure of the domestic industry’.<sup>81</sup> This conclusion potentially poses a complication for the US International Trade Commission (USITC) as it often cites a declining price–cost margin as an indicator of injury. The notion is that import competition limits the ability of the domestic industry to raise its sales price as input costs rise. Consequently, its profits will fall. The Panel is correct that the price–cost margin metric is only informative if the investigating authority simultaneously controls for the impact of changes in the domestic market (e.g., new domestic competitors can also reduce the price–cost margin). It seems inevitable that the US will eventually find its injury analysis challenged on this exact point because the USITC generally does not distinguish domestic and foreign influences.

A deeper question that the Panel did not address – and certainly one question the US did not want specifically addressed – is what constitutes a proper price effects analysis. What does China (or, for that matter, the US) need to do in future cases in order to produce a satisfactory price analysis? On the one hand, China can look to EU and US AD/CVD proceedings and mimic the approaches proffered by their agencies. EU and US authorities present a mix of data reporting (e.g., charts of prices), trends analysis, and simple summary statistics (e.g., counting the number of quarters during the POI where the subject product undersold the comparable domestic product). Their facility with public reporting largely obscures the fact that neither the US nor the EU rigorously assess the impact that alternative factors might have played in the evolving pricing dynamics. The term ‘rigorous’ is defined as ‘extremely thorough, exhaustive, or accurate’ and must be interpreted in the context of modern econometric methods.

How big of a role have non-subject imports played in the domestic industry’s deteriorating performance? How have changes in domestic competition (via either entry or exit) or changes in input supply conditions affected the market? Both EU and US authorities seem to consider that it is usually sufficient to simply refer to these other possible causes of injury in their reports; there is no requirement that they explicitly quantify the impact of the alternative factors. If a determination were ever appealed, such references provide evidence that the investigating authorities did consider the alternative factors and ultimately concluded that subject imports were nevertheless a cause of material injury.

Presentation of data, if not explicit quantitative analysis, is what investigative authorities need to do under the EU/US approach. For instance, neither the US nor the EU have ever offered any standard for how many quarters of underselling are

81 *Ibid.*, at para. 7.547.



necessary to conclude price suppression or depression. Their reasoning, of course, is that depending on the case (the product, the subject country) the authorities want flexibility to come to different conclusions. There are instances where underselling is never present and yet the authorities find price effects and – much more rare of course – other cases where underselling is present every quarter and yet the authorities find no price effects. It is fair to question the value of the underselling analysis when the authorities have such discretion to interpret the results in any way they like.

On the other hand, China could look to the large body of statistical and econometric literature for guidance. Is determining the extent to which subject imports affect domestic prices that different from a myriad of policy questions where econometrics has helped provide an answer? To what extent is a worker's lower pay due to the fact she is a female versus other measurable qualities? To what extent is a person's diabetes caused by cigarette smoking versus other factors such as weight or diet? These are questions that econometric techniques are well suited to answering and are widely accepted by courts and administrative bodies. Yet, to our knowledge, no investigating authority does price effects analysis using any methods resembling those found in econometric books. For instance, neither the US nor the EU determine the extent to which prices are lower due to subject imports rather than, say, lower iron ore costs, weak demand, or any number of other alternative causes.

It is clear that this latter approach goes beyond what Panels have determined in prior disputes regarding whether Article 3.2 requires an investigating authority to consider an explicit quantitative determination must be made in this regard.<sup>82</sup> Thus, to a large extent the deficiency with China's approach in this case was that it failed to 'paper' its price effects analysis as well as the US does. The Panel and AB generally defer to the investigating authority when it is clear that the agency has considered the alternative effects and provided some basic quantitative discussion. However, because China failed to document its consideration of these other factors, the Panel concluded that it did not fulfill its obligations.

#### 4.5 *Disclosure of essential facts*

The Panel found that China failed to fulfill its disclosure obligations under Articles 6.9, 12.2., and 12.2.2 of the ADA and Articles 12.8, 22.3, and 22.5 of the SCM Agreement regarding the application of 'facts available', and also under Articles 6.9 and 12.2.2 of the ADA and Articles 12.8 and 22.5 of the SCM Agreement with

<sup>82</sup> China's appellant's submission, paras. 53 and 54 (referring to Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 28 September 2000 at para. 7.161; and Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, at para. 7.242).

respect to the price effects and causation findings. China chose to appeal only the issues with respect to the price effects findings to the AB.

China's arguments on appeal mainly focused on the question of what evidence falls within the meaning of 'essential facts' and 'relevant information on the matters of fact' under Articles 6.9 and 12.2.2 of the ADA and Articles 12.8 and 22.5 of the SCM Agreement. In China's view, it was not obligated to disclose the evidence in support of the 'low price' subject imports finding because it was only required to consider the existence of adverse price effects, which did not include any facts about the 'comparison' between the subject import prices and domestic prices, or the causal relationship between the two variables. In other words, China understood the obligations to be that it was solely required to disclose the information which it considered 'essential' to the price effects analysis. The AB disagreed with China by holding that the disclosure obligations have to be appreciated in the context of the application of definitive measures under the ADA and SCM Agreement, rather than from the mindset of the investigating authority. Given that the evidence of 'low price' subject imports in relation to the significant price depression and suppression was relied on by MOFCOM in reaching the decision to apply definitive measures, the AB found it necessary for the disclosure and subsequently upheld the Panel's findings.

While we think it is correct for the AB to safeguard the interested parties' rights to defend themselves by requiring the investigating authority to disclose the 'essential facts' and 'all relevant information on the matters of fact and law and reasons' regarding the imposition of definitive measures, and to interpret that understanding with respect to the ADA and the SCM Agreement and factual circumstances of each case, we consider that the AB in this dispute did not offer any further clarification on the disclosure obligations under Articles 6.9 and 12.2.2 of the ADA and Articles 12.8 and 22.5 of the SCM Agreement. What the AB essentially did was to adopt a case-by-case analysis approach when it comes to finding the institutional balance between guaranteeing due process through adequate disclosure and permitted discretion for the investigating authority. It was no surprise in this investigation that the AB agreed with the Panel in concluding that the 'low price' subject imports was 'essential' and must be disclosed due to MOFCOM's reliance on that factor to support the finding of significant price depression and suppression, but that was a relatively easy call. The explanation offered in the AB report, however, does not help much with the more muddled situations where it is less clear whether the facts have been relied on by the investigating authority or necessary for the interested parties to understand the imposition of definitive measures.

## 5. Concluding comments

We would like to conclude with two pieces of commentary. First, we speculate on some of China's motivation for initiating an AD/CVD investigation on GOES. Second, we discuss why even though the US prevailed, China might nevertheless ultimately benefit from some of the Panel's rulings.

### 5.1 Why GOES?

With respect to the first issue, given how China handled its investigation, we cannot help but speculate why it pursued GOES in the way it did. One hypothesis is that China is learning how to conduct an AD/CVD case. After all, China is a relatively new AD/CVD user, having WTO-consistent regulations for only about ten years. While there is likely some truth to this interpretation, we find it difficult to believe the issues in this case were solely, or even primarily, due to China's inexperience. According to the Global Anti-dumping Database<sup>83</sup> the GOES investigation was the 57th investigation conducted by MOFCOM.<sup>84</sup> It seems unlikely that MOFCOM had not considered most of the issues in this dispute in previous investigations; issues such as non-confidential summaries, facts available, and price effects are present in every case.

We think there are at least two other possible explanations for China's actions in this dispute. First, China may well have wanted to send the US a message about its unhappiness about the way the US has treated China in its AD/CVD proceedings. Since the US changed its policy allowing simultaneous AD and CVD cases against NME countries in 2007,<sup>85</sup> China is easily the leading target for US CVD allegations, having been subject to over 30 CVD investigations (Table 2).<sup>86</sup> Many of these CVD cases include subsidy allegations based on long-passed five-year plans of the Communist Party of China. Further, US applications have referred to historical Central Planning documents pertaining to the Chinese steel industry. Much to the frustration of the Chinese firms, the US Department of Commerce has accepted these claims as sufficient evidence to begin its own investigation. From this perspective, China may have felt the 11 challenged programs were not dissimilar from the type of programs the US has invoked in its CVD proceedings. It strikes us as quite probable that the Chinese wanted to do a case so it could obtain Panel and AB rulings on what constitutes sufficient evidence in the application.

A second motivation may well be related to China's willingness to use its administered protection in response to other countries' use of administered protection. Said differently, China decision to initiate this case may have partially been driven by retaliatory motives.<sup>87</sup> The US steel industry has long been the heaviest user of AD and CVD. Over the past decade two-thirds of US AD investigations have involved China and almost half of these involve steel or steel

83 Chad P. Bown, (2012) 'Global Anti-dumping Database', available at <http://econ.worldbank.org/ttbd/gad/>.

84 The GOES cases against the US and Russia were the 172nd and 173rd cases since 1997; most of the cases involved more than one country which explains why the number of investigations totals only 57.

85 Thomas J. Prusa and Edwin Vermulst, 'United States – Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through', *World Trade Review* (2013), 197–234.

86 As we discuss below, China is also the leading target for US AD allegations.

87 See Cyndee Todgham Cherniak, 'China is Learning to Play the Anti-Dumping Retaliation Game', *Trade Policy Blog*, 4 June 2009 at <http://tinyurl.com/q6jy7mf>.

Table 3. Flat-rolled imports by China, 2008 (metric tons)<sup>88</sup>

	All sources	US	US share of China's import market
Plate (coil & CTL)	1,893,772	18,698	1.0%
Hot-rolled	1,704,653	11,404	0.7%
Cold-rolled	526,730	4,969	0.9%
GOES	1,043,460	61,142	5.9%
Galvanized	3,579,576	1,332	0.0%
Total	8,748,191	97,545	1.1%

products. In fact, just two weeks before China initiated the GOES case the US imposed AD duties and CVD duties on Chinese line pipe producers of 74% and 31–40%, respectively.<sup>89</sup> Despite all of the US steel industry's activity aimed toward China, the GOES case was the first time China filed an AD or CVD case against steel imports from the US.

The fact that GOES is a niche product may have made it a more attractive product to target. By flat-rolled standards GOES is a small volume product and its production requires sophisticated chemistry and production techniques. GOES is an unusual product.<sup>90</sup> Consequently, it is a product produced by just a handful of steel mills. Despite the modest volume, GOES is generally considered a high profit margin product and is therefore quite important to the firms who do produce it. Further, given the combination and production complexity and small volume, GOES happens to be a product that China must import to meet domestic demand.

As shown in Table 3, despite the fact that GOES is a niche steel product, it accounts for over 10% of all of China's steel imports and over 60% of China's steel imports from the US. Given that effective economic retaliation requires the target

<sup>88</sup> UN Comtrade Statistics available at <http://comtrade.un.org/db>. HS codes used to define products are as follows: Plates Cut-to-Length (720840, 720851, 720852, 721090, 721113, 721114, 721921, 721922, 721931, 722011, 722540, 722550, 722691); Plates in Coils (720810, 720825, 720836, 720837, 721114, 721911, 721912, 721931, 722530); Hot Rolled Sheets (720826, 720827, 720838, 720839, 720840, 720853, 720854, 720890, 721913, 721914, 721923, 721924, 722540); Cold Rolled Sheets (721932, 721933, 721934, 721935, 721990, 722550, 722599); GOES (722511, 722519, 722611, 722619); Galvanized Sheets & Strip (721030, 721041, 721049, 721070, 721220, 721230, 722591, 722592, 722699).

<sup>89</sup> See, *Circular Welded Carbon Quality Steel Line Pipe from China*, USITC Investigation Nos. 701-TA-455 and 731-TA-1149.

<sup>90</sup> USITC reports indicate that GOES represents less than 1% of all flat-rolled steel produced in the US. See United States International Trade Commission, *Steel*, Investigation No. TA-201-73, Publication 3479, December 2001 and United States International Trade Commission, *Grain-Oriented Silicon Electrical Steel from Italy and Japan*, Investigation Nos. 701-TA-355 and 731-TA-659–660 (Review), USITC Publication 3396 (February 2001).

Table 4. Import supply, GOES, 2008 vs. 2011 (metric tons)<sup>91</sup>

Source country	2008	2011	% Change
United States	61,142	3,889	-94%
Russia	80,687	15,782	-80%
South Korea	179,054	158,513	-11%
Japan	444,138	518,779	17%
All others	278,438	251,640	-10%
World total	1,043,460	948,603	-9%

Table 5. Anti-dumping cases initiated against China, 2000–2011<sup>92</sup>

	Cases			Investigations		
	Against China	Total	% against China	Involving China	Total	% against China
New users	446	1,661	26.9%	446	877	50.9%
Traditional users	220	801	27.5%	220	388	56.7%
All users	666	2,462	27.1%	666	1,265	52.7%

Table 6. Anti-dumping cases initiated by China, 2000–2011<sup>93</sup>

Region/Country	No. of AD cases
Asia	100
USA	32
EU	32
Other	20
Total	184

to feel a serious economic impact, GOES was a good steel product for the Chinese to target in order to effectively retaliate against the US steel industry's aggressive use of AD/CVD against China. Moreover, despite the fact that GOES is a large export product for US steel producers, the US is not a major supplier of GOES to China. In fact, as shown in Table 4 despite the large reduction in shipments from

<sup>91</sup> Ibid.

<sup>92</sup> Compiled from data provided in Chad P. Bown, (2012) 'Global Anti-dumping Database', available at <http://econ.worldbank.org/ttbd/gad/>.

<sup>93</sup> Ibid.

the two subject countries following the orders (from over 140,000 MT to less than 20,000 MT), China was able to turn to alternative suppliers, most notably Japan, to offset the decrease from the US and Russia.

Taking all of these factors together suggests credible motivation for China to target US GOES producers, both to draw attention to some of the questionable allegations it has faced and also to raise the US industry's awareness of the potential trade losses due to AD/CVD actions.

## 5.2 *Why China might ultimately benefit from losing*

China is easily the world's largest target of AD and CVD actions, not just in the US but around the world. As shown in [Table 2](#), since 2006 China has been the subject of almost half of all CVD cases worldwide. The same story is true for AD – China is easily the leading target of AD cases worldwide.

In [Table 5](#), we report AD cases targeting China. In the left-half of the table, we report the number of cases targeting China by new and traditional AD users.<sup>94</sup> As shown, China accounts for about one-quarter of all AD cases by both new and traditional users.

In the right-half of the table, we follow Chad Bown's approach and report the number of investigations involving China.<sup>95</sup> The difference between the two is that many applications allege dumping by multiple countries. The Global Anti-dumping Database records each country as a case but considers the set of countries a single investigation. Using the investigation metric, we see that China is even a larger target. For both new and traditional users, China is a subject country in over half the AD investigations since 2000.

In [Table 6](#), we contrast these numbers with the number of AD cases initiated by China since 2000. Whereas Chinese producers have been subject to 666 AD cases, China has initiated only 184 cases and relatively evenly spread geographically.

Consequently, China has much to gain by having the WTO DSU clarify the rules for applications and investigations. This is all the more so in the CVD area where many countries are following the US lead in aggressively pursuing perceived Chinese subsidization, often heavily based on facts available.

Time will tell whether the US will succeed in exporting its AD/CVD methodologies to other WTO members or whether the GOES case will come back to haunt the US in the future. After all, in the trade remedies' area, no country has clean hands and, if the number of WTO disputes filed against it is an indicator, US hands are dirtier than most.

<sup>94</sup> Traditional AD users are the US, EU, Canada, and Australia.

<sup>95</sup> Chad P. Bown 'China's WTO Entry: Anti-dumping, Safeguards, and Dispute Settlement', in Robert C. Feenstra and Shang-Jin Wei (eds.), *China's Growing Role in World Trade*, University of Chicago Press for the NBER, 2010, pp. 281–337.