Before the World Trade Organization

Panel Proceedings

CHINA – ANTI-DUMPING MEASURES ON STAINLESS STEEL PRODUCTS FROM JAPAN

(DS601)

THIRD PARTY ORAL STATEMENT OF AUSTRALIA AS DELIVERED

30 June 2022

I STATEMENT CONCERNING RUSSIA'S INVASION OF UKRAINE

1. My name is Jonathan Kenna and I am the Chief Trade Law Officer for the Department of Foreign Affairs and Trade.

2. Before proceeding to set out Australia's views on the legal issues in this dispute, I would like to provide Australia's statement concerning Russia's invasion of Ukraine. Australia affirms its ongoing support for Ukraine and again condemns Russia's unilateral, illegal and immoral aggression against the people of Ukraine. Russia's invasion is a gross violation of international law, including the Charter of the United Nations, and is inconsistent with the global rules and norms that underpin multilateral organisations such as the WTO. There is no other place within the WTO system where the rules-based nature of the organisation is more important than in the dispute settlement system. It is appropriate that in this context, Australia takes this opportunity to reiterate its strong condemnation of Russia's gross violation of international law.

II INTRODUCTION

3. Turning now to legal issues in this dispute, I would firstly like to thank Members of the Panel for the opportunity to present Australia's views.

4. Australia has a systemic interest in ensuring there is a proper legal interpretation and application of the Anti-Dumping Agreement. Anti-dumping measures applied inconsistently with the Anti-Dumping Agreement have the potential to be highly disruptive to trade. It is, therefore, important that anti-dumping investigations are conducted and measures are applied consistently with the rules agreed by WTO Members in the Anti-Dumping Agreement. This provides Members with certainty and confidence in the process, and supports the rules-based trading system.

5. Australia has systemic concerns about the way China's investigating authority, the Ministry of Commerce of China (which we will refer to as MOFCOM), conducts its anti-dumping investigations. As Members would be aware, Australia has raised these concerns in the context of the two WTO disputes that Australia has brought against China regarding Australian barley (DS598) and Australian wine (DS602). We would like to use this statement

today to highlight two aspects of MOFCOM's injury determination in this case, which we find particularly concerning:

6. First, the question of whether there was an absence of price comparability, such that MOFCOM's price effects analysis was not consistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

7. Second, the question of whether MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, in failing to provide a reasoned explanation as to why there was no need to conduct a non-attribution analysis. MOFCOM's decision in this regard should be carefully examined, especially in circumstances where it had been placed on notice as to the existence of other factors that had been raised by interested parties as potentially causing injury to the domestic industry.

8. In addition, Australia is concerned that this dispute raises questions about MOFCOM's compliance with the important due process obligations set out in Articles 6 and 12 of the Anti-Dumping Agreement. Australia also has a strong systemic interest in these due process obligations.

9. I will now hand over to my colleague, Sarah Toh, who will outline Australia's views on these issues.

II PRICE COMPARABILITY

10. Australia notes that Article 3.2 of the Anti-Dumping Agreement does not make specific reference to price comparability or mandate any specific methodology that must be used to ensure price comparability in the determination of injury. However, price comparability underpins the obligation in Article 3.1 to conduct an injury analysis in an objective manner and based on positive evidence.

11. In response to one of the themes the Panel has identified for particular consideration by third parties, Australia's view is that China's interpretation of when the obligation to ensure price comparability is triggered does not reflect the totality of circumstances in which price comparability must be considered.

12. Australia recalls the jurisprudence establishing that the Anti-Dumping Agreement requires an investigating authority to ensure that it is comparing "like with like" for the purposes of its price effects analysis.[1] To do otherwise risks producing a price effects analysis with a fundamentally distorting effect on the determination of injury and the outcome of the investigation. As the Appellate Body explained in *China – GOES*, if subject import and domestic prices are not comparable, this defeats the explanatory force that subject import prices might have for the depression or suppression of domestic prices.[2]

13. The panel in *China – X-Ray Equipment* made the point that price comparability needs to be considered in all price effects analyses.[3] This would include an investigating authority's assessment on whether the subject imports had an undercutting, depressing or suppressing effect on prices of the domestic like products.

14. Where an investigating authority is comparing a 'basket' of subject imports with a 'basket' of domestic like products, there needs to be price comparability between these two baskets.[4] The panel in *China – Broiler Products* confirmed that, in such circumstances, an investigating authority "must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar."[5] This is "so that any price differential… [is] not merely from differences in the composition of the two baskets being compared."[6] This "may well require the investigating authority to perform its price comparison at the level of product models" to ensure price comparability.[7]

15. Australia considers that the obligation to ensure price comparability is triggered where there are significant differences in the physical characteristics or uses of product types within a basket of goods. In this case, the product under investigation comprised three distinct product types – stainless steel slabs, hot-rolled stainless steel coils and hot-rolled stainless steel plates – each with different steel grades. Australia considers that with a broadly defined

[1] Panel report, *China – Autos (US)*, para 7.277. See also Appellate Body report, *China – GOES*, para. 200, Panel report, *China – X-Ray Equipment*, para. 7.65 and Panel report, *China – Broiler Products*, para 7.483.
[2] Appellate Body Report, *China – GOES*, para. 200.
[3] Panel Report, *China – X-Ray Equipment*, para. 7.68.
[4] Panel report, *China – Broiler Products*, para. 7.483.
[5] Panel report, *China – Broiler Products*, para. 7.483.
[6] Panel report, *China – Broiler Products*, para. 7.483.
[7] Panel report, *China – Broiler Products*, para. 7.483.

product under investigation, an investigating authority must take care to ensure that it is comparing "like with like" for the purposes of its price effects analysis. If an investigating authority does not take into account the differences identified (including by interested parties), such as physical differences and uses, in order to ensure price comparability, an investigating authority's price effects analysis would necessarily be skewed.

16. Australia considers that an investigating authority could not have undertaken its price effects analysis in an objective manner and based on positive evidence if the prices being compared – that is, of the subject imports and domestic like products – were not, in fact, comparable. Given the significance of price comparability in the context of an investigating authority's price effects analysis, Australia respectfully submits that the Panel should carefully examine whether MOFCOM gave appropriate consideration to this issue, based on the evidence it had.

III NON-ATTRIBUTION

17. Another issue in this dispute is non-attribution. Article 3.5 of the Anti-Dumping Agreement requires "demonstration of a causal relationship between the dumped imports and the injury to the domestic industry". Australia notes that in determining whether a "causal relationship" exists between dumped imports and injury to the relevant domestic industry, an investigating authority must also examine any "known factors", other than the dumped imports, which may be injuring the domestic industry at the same time.

18. Australia's view, which is supported by the jurisprudence, is that where interested parties have made the investigating authority aware of factors that may be causing injury to the domestic industry, those factors are "known factors".[8] In this case, the "known factors" included fluctuations in nickel prices, and the effects of stricter environmental standards.[9] Once these "known factors" have been identified, an investigating authority is required to separate and distinguish the injurious effects of those known factors from the injurious effects of the dumped imports.[10] Australia also recalls that an investigating authority has an obligation

[8] Panel report, *EU – Footwear (China)*, para. 7.484. See also Panel report, *Thailand – H-Beams*, para. 7.273.
[9] Japan's first written submission, para. 419.
[10] Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 223.

to provide a satisfactory explanation of the nature and extent of the injurious effects of those known factors, as distinguished from the injurious effects of the alleged dumping.[11]

19. As outlined in Australia's submission, we consider that mere assertions that known factors "could not refute the causal link" between the dumped imports and injury, without further investigation and explanation, would not satisfy the requirement for an investigating authority to conduct its injury determination in an objective manner and based on positive evidence. Accordingly, Australia respectfully submits that the Panel should carefully consider whether these assertions are sufficient to meet the legal standard required under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

20. Australia also wishes to reiterate, consistent with well-established jurisprudence, that investigating authorities cannot "conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[12]

IV DUE PROCESS

21. Finally, Australia would like to emphasise the importance of an investigating authority's compliance with due process requirements, as set out in Articles 6 and 12 of the Anti-Dumping Agreement. As outlined in Australia's submission, these obligations operate together to ensure that interested parties can meaningfully engage in the investigative process and have an opportunity to defend their interests during an anti-dumping investigation. These are fundamental obligations which ensure that WTO Members have the relevant information to allow them to assess the consistency of a measure against domestic laws and/or the Anti-Dumping Agreement and, where appropriate to seek review of an anti-dumping measure.

22. Australia shares Japan's concerns in relation to procedural deficiencies by MOFCOM, which undermined interested parties' rights under the Anti-Dumping Agreement. Australia considers that the due process obligations in the Anti-Dumping Agreement, including the

[11] Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 226.
[12] Appellate Body Report, *US – Hot-Rolled Steel (2001)*, para. 196.

notice requirements, must be strictly upheld in order to ensure the integrity of the WTO anti-dumping framework.

23. Australia thanks the Panel for the opportunity to submit its views on the important issues raised in this dispute.