

Report of the Panel

Abbreviation	Description
Saudi Arabia.	Kingdom of Saudi Arabia
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USTR	Office of the United States Trade Representative
United States	United States of America
US	United States/United States'
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization

1. INTRODUCTION

1.1 *Complaint by the United States*

1.1 On 5 July 2012, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") (to the extent that Article 30 incorporates Article XXIII of the GATT 1994), and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") with respect to the measures and claims set out below.¹

1.2 Consultations were held on 23 August 2012. No mutually agreed solution was reached.

1.2 *Panel Establishment and Composition*

1.3 On 17 September 2012, the United States requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.² At its meeting on 23 October 2012, the Dispute Settlement Body ("DSB") established

¹ WT/DS440/1.
² WT/DS440/2.

a panel pursuant to the request of the United States in document WT/DS440/2, in accordance with Article 6 of the DSU.³

1.4 The Panel's terms of reference are the following:

[t]o examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS440/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁴

1.5 On 1 February 2013, the United States requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 11 February 2013, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Pierre Pettigrew
 Members: Ms Andrea Marie Brown
 Ms Enie Neri De Ross⁵

1.6 Colombia, the European Union ("EU"), India, Japan, Korea, Oman, the Kingdom of Saudi Arabia ("Saudi Arabia"), and Turkey notified their interest in participating in the Panel proceedings as third parties.

1.3 *Panel Proceedings*
 1.3.1 *General*

1.7 After consultation with the parties, the Panel adopted its working procedures⁶ on 28 February 2013 (amended on 16 April 2013) and timetable on 28 February 2013 (finalized on 10 March 2014).

1.8 The Panel held a first substantive meeting with the parties on 25 June 2013. A session with the third parties took place on 26 June 2013. The Panel held a second substantive meeting with the parties on 15 October 2013. On 15 November 2013, the Panel issued the descriptive part of its report to the parties.

³ WT/DSB/M/323.
⁴ WT/DS440/3.
⁵ *Ibid.*
⁶ See the Panel's Working Procedures in Annex A-1.

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The Panel issued its interim report to the parties on 21 February 2014. The Panel issued its final report to the parties on 24 March 2014.

1.3.2 Working procedures concerning Business Confidential Information ("BCI")

1.9 On 28 February 2013, the Panel adopted additional working procedures concerning BCI.⁷

1.3.3 Additional comments of the United States following the second Panel meeting

1.10 On 15 November 2013, the United States requested the Panel's leave to submit additional comments on China's reaction to the US opening statement at the second Panel meeting, which the United States attached to its request letter. On 19 November 2013, China requested the Panel to reject the US request for leave, citing the requirement in Article 12 of the DSU that disputing parties respect the various deadlines for written submissions set by the panel to a dispute. In the alternative, China requested the Panel to grant it a reasonable period of time to provide comments on the US additional comments.

1.11 On 20 November 2013, the Panel notified the parties that it would admit the US additional comments into the record, and gave China until close of business on 27 November 2013 to react to these additional comments. The Panel also adjusted the deadline for the parties' comments on the draft descriptive part of the Panel report to accommodate this additional comment period. On 27 November 2013, China submitted its comments on the US additional comments.

2. FACTUAL ASPECTS

2.1 The US claims concern various aspects of the anti-dumping ("AD") and countervailing duty ("CVD") measures imposed by China on certain automobiles from the United States with engine displacements equal to or greater than 2500 cubic centimetres ("cc"), set forth in MOFCOM Notices Nos. 20 and 84 of 2011, and accompanying annexes, as well as various aspects of the investigations

⁷ Additional Working Procedures of the Panel Concerning Business Confidential Information, Annex A-2.

leading to the imposition of these measures.⁸ Notice No. 20 of 2011 contains MOFCOM's final determinations in the AD and CVD investigations of certain imports of automobiles from the United States. In that Notice, MOFCOM found that the dumped and subsidized imports from the United States had caused material injury to the domestic industry. MOFCOM determined individual dumping margins for five of the six respondent companies in the AD investigation. The sixth respondent company (Ford Motor Company) did not export during the periods of investigation ("POI"), and therefore MOFCOM did not calculate an individual dumping margin rate for it. Furthermore, MOFCOM determined individual CVD rates for all six respondent companies in the CVD investigation. Despite finding dumping, subsidization, and injury, MOFCOM provisionally determined not to levy AD or CVD rates on US automobiles as of the date of its final determination.⁹ Subsequently, MOFCOM issued Notice No. 84 of 2011, which authorized the levying of AD and CVD rates on certain US automobiles effective 15 December 2011, at the rates established in the final determination.

2.2 On 9 September 2009, the China Association of Automobile Manufacturers ("CAAM"), an association of Chinese domestic automobile manufacturers, filed a petition seeking the imposition of anti-dumping and countervailing duties on imports of certain automobiles with an engine capacity equal to or greater than 2000cc from the United States.¹⁰ On 19 October 2009, the CAAM filed an amended petition containing more industry data.¹¹ The original petition identified General Motors LLC ("GM USA"), Ford Motor Company ("Ford USA") and Chrysler Group LLC ("Chrysler USA") as known exporters of the subject product.¹² MOFCOM initiated AD and CVD investigations on 6 November 2009.¹³

⁸ *Announcement No. 20, 2011, of the Ministry of Commerce of the People's Republic of China* (Exhibit USA-01) and *Appendix, "Final Determination of the People's Republic of China concerning the Anti-dumping and Countervailing Investigation on Imports of Certain Automobiles Originating in the United States"*, 5 May 2011 ("final determination") (Exhibit USA-02); *Announcement No. 84, 2011, of the Ministry of Commerce of the People's Republic of China*, 14 December 2011 (Exhibit USA-03). In connection with its first written submission, China submitted its own English translation of the Appendix (as Exhibit CHN-07) earlier submitted as Exhibit USA-02. The United States has not objected to the accuracy of the translation presented in Exhibit CHN-07 (US response to Panel question No. 24). Therefore, we base our analysis on this version of the Appendix.

⁹ Notice No. 20, Exhibit USA-01, p. 2.

¹⁰ *Anti-Dumping and Anti-Subsidy Investigation Application*, 9 September 2009 ("original petition") (Exhibit USA-04).

¹¹ *Petition for Antidumping and Countervailing Duty Investigation*, 19 October 2009 ("amended petition") (Exhibit CHN-01), p. 1.

¹² Original petition, Exhibit USA-04, p. 15.

¹³ *Initiation of Antidumping Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity \geq 2000cc) Originating from the United States*, MOFCOM Public Notice [2009] No. 83,

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2.3 In its notices of initiation, MOFCOM set the POI for the AD and CVD investigations as 1 September 2008 to 31 August 2009, and for the injury aspect of the investigations as 1 January 2006 to 30 September 2009.¹⁴ Also in its notices of initiation, MOFCOM set a 20-day deadline for interested parties to register to participate in the AD and CVD investigations.¹⁵ GM USA, Ford USA, Chrysler USA, Mercedes-Benz USA International Inc. and Daimler AG (collectively, "Mercedes-Benz USA"), BMW Manufacturing LLC ("BMW USA"), Honda of America Mfg. Inc. and American Honda Motor Co., Inc. (collectively, "Honda USA"), and Mitsubishi North America Inc. ("Mitsubishi USA") registered as respondent companies in both investigations prior to the closing date of 26 November 2009. The Office of the United States Trade Representative ("USTR") registered to participate on behalf of the United States as a CVD respondent within the period for registration.¹⁶ MOFCOM sent these respondents AD and/or CVD questionnaires on 9 December 2009. The deadline for responses to these questionnaires was extended upon request to 29 January 2010. All respondents except Mitsubishi USA submitted responses to MOFCOM's questionnaires by this date.¹⁷

2.4 MOFCOM issued separate notices, also on 6 November 2009, inviting interested parties to register to participate in its AD and CVD injury investigations.¹⁸ The CAAM registered to participate in these investigations.¹⁹ No other interested parties registered as domestic producers. Concurrently with their responses to the notices of initiation, GM USA, Ford USA, Chrysler USA, Mercedes-Benz USA, BMW USA, Honda USA, and Mitsubishi USA registered to participate as foreign producers and exporters in MOFCOM's injury investigations prior to the closing date of 26 November 2009 specified in the injury registration notices.²⁰ Mitsubishi USA subsequently withdrew from the investigations, on 28 December 2009.²¹

6 November 2009 ("AD notice of initiation")(Exhibit USA-06); *Initiation of Countervailing Duty Investigation into Saloon Cars and Cross-country Cars (of a Cylinder Capacity \geq 2000cc) Originating from the United States*, MOFCOM Public Notice [2009] No. 84, 6 November 2009 ("CVD notice of initiation")(Exhibit USA-07).

¹⁴ AD notice of initiation, Exhibit USA-06, p. 1; CVD notice of initiation, Exhibit USA-07, p. 2.

¹⁵ AD notice of initiation, Exhibit USA-06, p. 2; CVD notice of initiation, Exhibit USA-07, p. 4.

¹⁶ Final determination, Exhibit CHN-07, pp. 7-8, 10.

¹⁷ Final determination, Exhibit CHN-07, pp. 8-9, 11-12. As noted below, Mitsubishi USA withdrew from the investigations. See para. 2.4 of this Report.

¹⁸ Final determination, Exhibit CHN-07, pp. 18-20. See AD injury registration notice, Exhibit CHN-02 and CVD injury registration notice, Exhibit CHN-11.

¹⁹ Final determination, Exhibit CHN-07, pp. 18-20.

²⁰ AD injury registration notice, Exhibit CHN-02, p. 1.

²¹ *Mitsubishi Motors North America Inc. letter for quitting the anti-dumping investigation against saloon cars and cross-country cars of a cylinder capacity \geq 2000cc*, 28 December 2009 ("Mitsubishi

2.5 MOFCOM issued notices of extension in both investigations on 6 November 2010.²² On 10 March 2011, MOFCOM sent supplemental injury questionnaires to the remaining respondents. All remaining respondents submitted their responses on time.²³ On 8 March 2011, the petitioner applied to have the scope of the investigations amended to include only imports of certain US automobiles of a cylinder capacity equal to or greater than 2500cc.²⁴ The petitioner submitted supplementary domestic industry data on such automobiles on 21 March 2011.²⁵ MOFCOM accepted the petitioner's application, and adjusted the scope of the product under investigation to include only saloon cars and cross-country cars of a cylinder capacity equal to or greater than 2500cc.²⁶

2.6 MOFCOM issued its preliminary determinations on 2 April 2011. It found that the subject product was dumped and subsidized, and that the dumped and subsidized imports caused material injury to the domestic industry.²⁷ MOFCOM established the following AD and CVD rates in its preliminary determinations:

Table 1: Preliminary Duty Rates

Respondent	AD Rate (%)	CVD Rate (%)
GM USA	9.9	12.9
Chrysler USA	8.8	6.2
Mercedes-Benz USA	2.7	0
BMW USA	2.0	0
Honda USA	4.4	0
"All others"	21.5	12.9

2.7 MOFCOM issued its final determinations on 5 May 2011. It found that the subject product was dumped and subsidized, and that the dumped and

withdrawal letter (AD)")(Exhibit CHN-03); *Mitsubishi Motors North America Inc. letter for quitting the countervailing investigation against saloon cars and cross-country cars of a cylinder capacity ≥ 2000cc*, 28 December 2009 ("Mitsubishi withdrawal letter (CVD)")(Exhibit CHN-04).

²² Final determination, Exhibit CHN-07, p. 27.

²³ Final determination, Exhibit CHN-07, pp. 23-24.

²⁴ Final determination, Exhibit CHN-07, p. 48.

²⁵ Final determination, Exhibit CHN-07, p. 27.

²⁶ *Preliminary Determination of the People's Republic of China concerning the Anti-dumping and Countervailing Investigation on Imports of Certain Automobiles Originating in the United States*, 2 April 2011 ("preliminary determination")(Exhibit CHN-05), p. 31.

²⁷ Preliminary determination, Exhibit CHN-05, p. 107.

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subsidized imports caused injury to the domestic industry.²⁸ MOFCOM established the following AD and CVD rates in its final determinations:

Table 2: Final Duty Rates

Respondent	AD Rate (%)	CVD Rate (%)
GM USA	8.9	12.9
Chrysler USA	8.8	6.2
Mercedes-Benz USA	2.7	0
BMW USA	2.0	0
Honda USA	4.1	0
Ford USA	-	0
"All others"	21.5	12.9

3. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 United States

3.1 The United States requests that the Panel find as follows²⁹:

- a. With respect to the alleged procedural violations, that:
 - i. MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement and Article 12.4.1 of the SCM Agreement by failing to require the petitioner to provide adequate non-confidential summaries of allegedly confidential information.
 - ii. MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose essential facts to US respondents, particularly the data and calculations underlying their respective dumping margins.

²⁸ Final determination, Exhibit CHN-07, p. 170.
²⁹ US first written submission, paras. 2-5, 176-177. The United States dropped its consequential claim under Article VI of the GATT 1994 in its second written submission. See US second written submission, fn. 153.

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- b. With respect to MOFCOM's reasoning and conclusions for its AD determinations, that:
- i. MOFCOM acted inconsistently with Articles 6.8, 6.9, 12.2, 12.2.2, and paragraph 1 of Annex II of the Anti-Dumping Agreement by: (i) imposing an "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the dumping investigation; (ii) failing to inform the United States and other interested parties of the essential facts under consideration that formed the basis for the application of facts available or the margin calculation; and (iii) failing to disclose in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which led to the imposition of final measures.
- c. With respect to MOFCOM's reasoning and conclusions for its CVD determinations, that:
- i. MOFCOM acted inconsistently with Articles 12.7, 12.8, 22.3, and 22.5 of the SCM Agreement by: (i) imposing an "all others" rate based on facts available to producers that MOFCOM did not notify of the information required of them, and that did not refuse to provide necessary information or otherwise impede the CVD investigation; (ii) failing to inform the United States and other interested parties of the essential facts under consideration that formed the basis for this calculation; and (iii) failing to disclose in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by MOFCOM, or all relevant information on matters of fact and law and reasons which have led to the imposition of final measures.
- d. With respect to MOFCOM's reasoning and conclusions for its injury determinations, that:
- i. MOFCOM acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement and Articles 15.1 and 16.1 of the SCM Agreement by defining the domestic industry to include only those firms that supported the AD and CVD investigations and by failing to ensure that the domestic

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industry, as MOFCOM defined it, was capable of providing ample data that would ensure an accurate injury analysis.

- ii. MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement and Articles 15.1 and 15.2 of the SCM Agreement because its price effects finding was not based on positive evidence and did not involve an objective examination, as: (i) MOFCOM's finding of parallel pricing was contradicted by record evidence and, in any event, MOFCOM failed to explain the relevance of parallel pricing; (ii) MOFCOM failed to address evidence that subject imports oversold the domestic like product during the period in which MOFCOM identified price depression; (iii) MOFCOM failed to make needed adjustments to average unit values that it used in its price effects analysis; (iv) MOFCOM failed to consider or address evidence that the market share of domestic products increased along with that of subject imports; and (v) MOFCOM's price effects analysis was compromised by its flawed domestic industry definition.
- iii. MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement and Articles 15.1 and 15.5 of the SCM Agreement because its causation analysis was neither objective nor based on positive evidence, as: (i) MOFCOM's causation analysis was premised on its flawed domestic industry definition and its flawed price effects analysis; (ii) MOFCOM failed to examine evidence indicating that subject imports took market share from non-subject imports and not from domestic like products; (iii) MOFCOM failed to examine evidence regarding the Chinese industry's sharp decline in productivity throughout the period of investigation; (iv) MOFCOM failed to examine the lack of competition between subject imports and the domestic like products; (v) MOFCOM failed to examine the sharp drop in demand during the period in which it found material injury; (vi) MOFCOM failed to examine the effect of an increase in sales tax on larger engine vehicles during the period in which it found material injury; and (vii) MOFCOM failed to examine the effect of increases in average wages and employment over the period of investigation on the domestic industry's pre-tax profits.
- e. And, as a consequence of these violations, that:

- i. MOFCOM's conduct in the AD investigation violated Article 1 of the Anti-Dumping Agreement.
- ii. MOFCOM's conduct in the CVD investigation violated Article 10 of the SCM Agreement.

3.2 The United States further requests that, pursuant to Article 19.1 of the DSU, the Panel recommend that China bring its measures into conformity with the Anti-Dumping and SCM Agreements.³⁰

3.2 *China*

3.3 China requests that the Panel reject the US claims, finding instead that MOFCOM's determinations in the underlying investigations were fully consistent with China's WTO rights and obligations.³¹

4. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 18 of the working procedures adopted by the Panel (see Annexes B and C).

5. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, other than in their answers to questions, are reflected in their written submissions, oral statements or executive summaries thereof, provided to the Panel in accordance with paragraph 18 of the working procedures adopted by the Panel (see Annex D). Colombia, India and Oman did not submit written or oral arguments to the Panel.

³⁰ US first written submission, para. 178 (as modified by US second written submission, fn. 153).
³¹ China's first written submission, para. 272.