UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(DS437)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE MEETING OF THE PANEL AND THE PARTIES

May 10, 2017

Mr. Chairperson, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on the Panel in this compliance proceeding. We also would like to thank the Secretariat staff for the hard work they are doing to support the Panel.

2. In response to the types of claims and arguments that China presented in the original dispute, the Dispute Settlement Body ("DSB") recommendations did not address the ultimate question of whether China was engaging in extensive subsidization across a range of key industries, thereby causing widespread harm to U.S. businesses and workers. Rather, the DSB found that the U.S. Department of Commerce ("Commerce") had not adequately explained its countervailing duty determinations in certain respects.

3. Accordingly, to bring the United States into compliance with the DSB's recommendations, Commerce conducted extensive proceedings pursuant to section 129 of the *Uruguay Round Agreements Act*. Based on its analysis of the evidence and arguments on the records of the section 129 proceedings, as well as information from the original proceedings, Commerce made and published revised determinations. These new determinations, in accordance with the DSB's recommendations, now contain the detailed analysis that the DSB found lacking in the original determinations. The United States would highlight that these revised determinations include decisions to reverse the finding of subsidization with respect to certain programs; China has not challenged those aspects of the determinations.

4. Under any fair reading of the Commerce determinations, the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and the DSB recommendations in this dispute, the United States has brought the challenged measures into compliance with WTO rules. That is why we are here; so that the Panel can determine whether the United States brought its measures into compliance. It is thus wholly inappropriate for China to make sweeping assertions, as it did in paragraph 53 of its opening statement today, regarding so-called "systemic non-implementation of the DSB recommendations" in this dispute. China is getting a bit ahead of the Panel when its makes such assertions. And China's use of highly charged rhetoric, like "systemic non-implementation in trade remedy cases" and "recidivism," does nothing to

contribute to the positive resolution of this dispute. China's arguments that the United States has not brought its measures into compliance are disconnected from the actual contents of the revised Commerce determinations, from the obligations set out in the text of the SCM Agreement, and from the DSB recommendations in this dispute. China attempts to make its case by mischaracterizing the determinations made by Commerce, by distorting the arguments made by the United States, and by misrepresenting the findings of the Appellate Body in prior reports. The U.S. written submissions address the host of specific instances in which China has not been fully candid with this Panel, and we demonstrate in those submissions that China's claims utterly lack merit.

5. To the extent that China has made any arguments that might be related to the actual determinations at issue, and the actual compliance obligations of the United States, the Panel first will need to sort through the accuracy of China's assertions and arguments before even beginning to evaluate their merits. This is particularly unfortunate given the number and scope of disputes that, at the present time, are putting serious stress on the WTO dispute settlement system.

6. The United States would also emphasize that China's attacks on Commerce's revised determinations are divorced from the fundamental trade issue that underlies this dispute – namely, the existence of massive Chinese subsidization and resulting market distortions that cause substantial harm to important industries in the United States and in other Members. To recall, Commerce found greater than *de minimis* levels of subsidization in all of the investigations that China has challenged in this dispute, and the U.S. International Trade Commission found that the subsidies China granted were causing material injury to the U.S. domestic industries producing the like products at issue. China does not ultimately dispute the existence of these subsidies, nor has China disputed the harm to U.S. producers caused by subsidized imports from China.

7. Instead, China raises issues not with respect to what Commerce has determined, but rather how Commerce has explained what – from a real-world view – is widely recognized: China has industrial policies that promote export-oriented industries, which leads to overcapacity in China and distorts markets in the United States and around the world.

8. China is attempting to use the standard of review for WTO panels, which if anything is supposed to be more deferential in that it precludes *de novo* review by a panel,[1] as a tactical device to find non-substantive errors in an authority's trade remedy determinations. In particular, China's tactic essentially is to argue that there is always another question that one might ask, and, therefore, Commerce's determinations somehow are not sufficient. Arguably, no investigating authority's determination could ever be sufficient under China's suggested approach to reviewing trade remedy determinations. Thus, if China's tactic were successful, the SCM Agreement would become a useless tool for addressing the worldwide distortions caused by China's subsidies. But China's tactic was foreclosed by Members when they charged WTO

[1] *See, e.g., US – Countervailing Measures (China) (Panel)*, para. 7.10 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 186-188).

adjudicators with reviewing whether an investigating authority's evaluation was unbiased and objective, even if the adjudicator would have reached a different conclusion.

9. In this light, the United States recalls that, in the *EC – Hormones* dispute, the Appellate Body observed in a different context that "[i]t is essential to bear in mind that the risk that is to be evaluated … is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."[2]

10. Similarly, here, this is not an academic or theoretical exercise. The U.S. investigating authority and many other Members' investigating authorities as well are attempting to deal with the consequences of China's subsidies in the real world, where people live and work, and where companies and whole industries face the actual potential for adverse effects caused by subsidized imports from China. The SCM Agreement is meant to provide Members tools to discipline injurious subsidies. It is not meant to provide cover for, and render untouchable, one Member's policy of providing massive subsidies to its industries through a complex web of laws, regulations, policies, and industrial plans. If the SCM Agreement is not interpreted in a way that permits it to function, it would undermine the security and predictability of the multilateral trading system.

11. The U.S. first and second written submissions respond in detail to China's written submissions, and demonstrate that the United States has implemented the recommendations of the DSB and brought its measures into conformity with the SCM Agreement. Given the extensive discussion presented in those written submissions, the United States today would like to highlight certain points that are critical to the Panel's resolution of this dispute.

China's Claims Concerning Article 1.1(a)(1) of the SCM Agreement Lack Merit

12. The original Panel, after referring to prior Appellate Body findings concerning the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, emphasized that "an investigating authority must evaluate the core features of the entity in question and its relationship to government, in order to determine whether [the entity] has the authority to perform governmental functions."[3] The original Panel explained that "simple ownership or control by a government of an entity is not sufficient. A further inquiry is needed."[4]

13. The United States responded by having Commerce undertake precisely the kind of "further inquiry" contemplated by the original Panel's findings. As we have explained, Commerce reviewed more than 3,100 pages of evidence that it collected itself and placed on the administrative records of the section 129 proceedings, and Commerce also considered information and arguments submitted by the Government of China and other interested parties.

[2] *EC – Hormones (AB)*, para. 187 (discussing risk assessment under the *Agreement on Sanitary and Phytosanitary Measures*).
[3] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[4] *US – Countervailing Measures (China) (Panel)*, para. 7.72.

Commerce presented more than 90 pages of analysis and explanation setting forth the reasons for its public body determinations.

14. China contends that these efforts were insufficient. China claims that the revised determinations still are inconsistent with the SCM Agreement because, in China's view, the only "relevant governmental function" under Article 1.1(a)(1) of the SCM Agreement would be "[t]he particular conduct of supplying the inputs at issue in these investigations."[5]

15. China's proposed interpretation of the term "public body" simply finds no support in the text of the SCM Agreement or in prior reports. Nothing in the SCM Agreement suggests that engaging in the "conduct" described in Article 1 is determinative of whether an entity is a "public body." Indeed, an analysis that focused on such Article 1 "conduct" would be essentially meaningless. In the present dispute, the "conduct" is the provision of goods under Article 1.1(a)(1)(iii). Clearly, the government, as well as public bodies and private bodies, can provide goods. So, China's proposed focus on such "conduct" would tell one nothing about the entity. The relevant analysis, as the original Panel and the Appellate Body have found, focuses on the "core features of the entity concerned, and its relationship with the government."[6]

16. The U.S. written submissions set forth in great detail the many reasons why the legal interpretation China proposes is untenable.[7] China's arguments with respect to Commerce's "government function" analysis likewise are unsupportable. In particular, China's contention that Commerce somehow failed to examine a "relevant governmental function" simply is wrong. Commerce examined whether "the provision of the inputs by the producers at issue to the company respondents in the investigations constitutes a financial contribution."[8] The provision of goods plainly is conduct described in Article 1.1(a)(1)(iii) of the SCM Agreement. Whether this conduct constitutes a "financial contribution" depends on whether the entity undertaking the conduct is "a government or any public body."[9] The Appellate Body has explained – as did the original Panel – that this question, in turn, depends on the "core features of the entity concerned, and its relationship with the government."[10]

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[5] Response of the Ministry of Commerce of the People's Republic of China to the Department's Public Body Questionnaire (May 15, 2015), p. 9 (Exhibit CHI-2) (emphasis added).

[6] *US – Countervailing Measures (China) (Panel)*, para. 7.66; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317; *US – Carbon Steel (India) (AB)*, para. 4.24.

[7] *See* First Written Submission of the United States of America (February 6, 2017) ("U.S. First Written Submission"), paras. 19-57; Second Written Submission of the United States of America (March 27, 2017) ("U.S. Second Written Submission"), paras. 19-106.

[8] *Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Preliminary Determination of Public Bodies and Input Specificity*, February 25, 2016 ("Public Bodies Preliminary Determination"), p. 14 (p. 15 of the PDF version of Exhibit CHI-4).

[9] SCM Agreement, Art. 1.1(a)(1). Article 1.1(a)(1)(iv) of the SCM Agreement also provides that there may be a "financial contribution" where "a government … entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above…." Commerce did not analyze any entities as private bodies in the section 129 proceedings here.

[10] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

17. Accordingly, Commerce examined the core features of the entities concerned and their relationship with the government. As Commerce explained, "China's government has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the 'socialist market economy', which includes maintaining a leading role for the state sector in the economy."[11] Commerce further found that "relevant laws also grant the government the authority to use SIEs as the means or instruments by which to achieve this mandate," and "the government exercises meaningful control over certain categories of SIEs in China and this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy."[12]

18. In other words, Commerce found that the Chinese government meaningfully controls and uses the entities at issue – producers of inputs that provided those inputs to the company respondents in the investigations – as tools to effectuate a governmental function, maintaining the predominant role of the state sector in the economy and upholding the socialist market economy. There is a clear, logical connection between the governmental function that Commerce identified and the conduct under Article 1.1(a)(1) in which the entities were engaged, and Commerce established that connection on the basis of substantial record evidence.

19. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, when it reviewed a Commerce determination that state-owned commercial banks (SOCBs) in China are public bodies, provided a clear explanation of the kind of evidence and analysis that is sufficient to support an investigating authority's public body determination. As the United States has noted, the parallels between the evidence and analysis that the Appellate Body found supported the public body determinations in *US – Anti-Dumping and Countervailing Duties (China)* and the evidence and analysis underlying the public body determinations here are plain to see.[13] Both in that dispute and here, there is evidence of:

- government ownership and control of entities in China;
- laws, regulations, policies, and industrial plans requiring entities in China to support China's industrial policies;
- government-appointment of executives and board members of entities;
- government involvement in the management of entities; and
- information that is contemporaneous with the periods of investigation.

[11] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4).
[12] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4) (emphasis added).
[13] *See* U.S. First Written Submission, paras. 38-42; U.S. Second Written Submission, paras. 68-80.

China's attack on Commerce's public body determinations in the section 129 proceedings here is, in reality, an attack on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, as well as an attack on the findings of the original Panel.

20. Ultimately, as the United States has explained, China's position simply is not consistent with what the original Panel found; it does not accord with the findings in prior reports; it is not supported by the text of Article 1.1(a)(1) of the SCM Agreement; and it is not logical. Accordingly, China's "as applied" claims against Commerce's public body determinations in the section 129 proceedings should be rejected.

21. The United States also has demonstrated that China's "as such" claim related to the Public Bodies Memorandum fails.[14] China must establish that the text of the Public Bodies Memorandum itself[15] supports the conclusion that the memorandum is a measure that is susceptible to WTO dispute settlement, that it is a norm of general and prospective application, and that it necessarily results in an inconsistency with Article 1.1(a)(1) of the SCM Agreement. China has barely made any attempt at all to show that the text of the Public Bodies Memorandum supports such conclusions. The reason for that is plain: nothing in the text of the Public Bodies Memorandum offers any support for China's "as such" claim.

22. Further, even taking China's argument at face value, if the Public Bodies Memorandum somehow were a measure, it had that status immediately upon publication. Publication, however, took place prior to China's original request for consultations and panel request in this dispute. Accordingly, in no conceivable scenario could the Public Bodies Memorandum be a measure taken to comply with the DSB's recommendations in this dispute.

23. Finally, to the extent China attempts to challenge an unwritten measure that is evidenced by the Public Bodies Memorandum, such a claim involving an unwritten measure is not within the Panel's terms of reference. Rather, under the plain meaning of China's request for panel establishment,[16] China has attempted to challenge the Public Bodies Memorandum itself, and not some type of alleged, unwritten measure.

24. For these reasons, China simply cannot prevail in its "as such" claim against the Public Bodies Memorandum.

China's Claims Concerning Article 14(d) of the SCM Agreement Lack Merit

25. China likewise cannot prevail in its claims that Commerce's benchmark determinations in *Line Pipe*, *Pressure Pipe*, *OCTG*, and *Solar Products* do not bring the United States into

[14] *See* U.S. First Written Submission, paras. 155-198; U.S. Second Written Submission, paras. 125-161.
[15] *See Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Tim Hruby Re: Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379*, May 18, 2012 ("Public Bodies Memorandum") (Exhibit CHI-1).
[16] *See* China's Panel Request in this compliance proceeding, para. 10.

compliance with U.S. obligations under the SCM Agreement. China has failed to refute the comprehensive evidence that "systemic and pervasive government intervention . . . diminishes the impact of market signals,"[17] limits private enterprise to a "subordinate" role,[18] and results in a persistent imbalance between supply and demand. In the context of this evidence, prices for steel and polysilicon inputs are not properly described as market-determined. Accordingly, these domestic transfer prices cannot serve as a proper basis for measuring the adequacy of remuneration.

26. The Commerce determinations fully explain that prices in the domestic market for steel and polysilicon inputs are distorted by virtue of the Government of China's policy interventions and a number of other factors. We have summarized the relevant portions of the determinations at length in our written submissions. In particular, domestic prices for the inputs at issue were not reflective of market conditions resulting from the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market."[19] The determinations explain that, based on this analysis, the relevant input prices "are not based on market conditions within the meaning of Article 14(d) of the SCM Agreement and, as result, these input prices are inappropriate to use as benchmarks to determine the adequacy of remuneration."[20] Commerce reached this conclusion only after it had "properly examined whether the relevant in-country prices were market determined or were distorted by governmental intervention."[21] Thus, the United States stands firmly in compliance with the recommendations and rulings of the DSB.

27. We would also like to emphasize that Commerce's redeterminations relied upon extensive evidence from a variety of sources, including reports and research from independent multilateral institutions such as the OECD and the World Bank. This evidence includes, for example, that the CCP exercises effective control over the appointment of senior executives in SIEs.[22] This control ensures that SIE decision-making remains responsive to the state's policy goals irrespective of ordinary market considerations. Commerce also examined evidence suggesting that the decisional process of SIEs is further distorted by the receipt of significant direct government benefits and restrictions on private-sector competition.[23] Commerce also

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[17] *Memorandum to Brendan Quinn from Eric Greynolds Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Supporting Benchmark Memorandum"), p. 4 (Exhibit USA-84).
[18] Benchmark Memorandum, pp. 18-20 (Exhibit CHI-20) (citing Article 11, China Constitution).
[19] *Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Benchmark Memorandum"), p. 28 (Exhibit CHI-20).
[20] *Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 19, 2016 ("Final Benchmark Determination"), p. 21 (Exhibit CHI-21).
[21] *US – Countervailing Measures (China) (AB)*, para. 4.79.
[22] *Memorandum to Brendan Quinn from Eric Greynolds Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Supporting Benchmark Memorandum"), p. 4 (Exhibit USA-84).
[23] Benchmark Memorandum, pp. 17-21 (Exhibit CHI-20).

explained that this arrangement enables SIEs to operate in a "soft budget" environment, insulating SIEs from normal commercial pressures.[24] The examination and analysis of this evidence contained in the redeterminations provides a compelling and objective basis for the decision not to use domestic prices to measure the adequacy of remuneration.

28. Instead of engaging with the evidence, China argues that the investigating authority should have taken a different approach. In China's view, the phrase "prevailing . . . conditions" in Article 14(d) means those conditions – seemingly in every possible situation, and regardless of the level of distortion – must be the conditions as affected by government policies and actions. This interpretation is untenable. If accepted, authorities would be required to ignore the existence of government-created distortions in the marketplace. The fundamental issue, however, in determining whether to rely upon an out-of-country benchmark under Article 14(d) is, in fact, the existence of price distortion. And, because price distortion can arise due to government intervention, Article 14(d) cannot be read to preclude an investigating authority from addressing situations in which government action has rendered prices not market-determined. Indeed, the Appellate Body in *US – Carbon Steel (India) (AB)* confirmed as much, stating that "in-country prices will not be reflective of prevailing market conditions . . . when they deviate from a market-determined price as a result of government intervention in the market."[25]

29. China also insists that Commerce should have limited its assessment to prices themselves and ignored other evidence. This argument is not supportable: nothing in the SCM Agreement dictates the specific mode of analysis that an authority must employ in conducting a benchmark analysis. Nor has the Appellate Body prescribed a certain approach. In fact, the Appellate Body in this dispute stated that the "specific type of analysis . . . will vary."[26] The Appellate Body even described a number of approaches that might be employed, stating, for example, that "investigating authorities may have to examine the structure of the relevant market" or the "nature" of the entities operating in that market.[27] The Appellate Body also made clear that what ultimately determines whether "recourse to an alternative benchmark is justified" depends not on the mode of analysis, but on "whether the proposed benchmark prices are market determined or distorted by governmental intervention."[28]

30. The United States observes further that, while nothing in the SCM Agreement supports China's insistence that a particular type of "market power" analysis is required, the "market power" approach that China advocates is fundamentally flawed. This approach presupposes that a government exercises market power exclusively through the economic behavior of state-owned suppliers. This, however, excludes from consideration the impact of legal and policy instruments that influence – and empower – state-invested enterprises. China's approach is also premised on the assumption that state-invested enterprises operate as profit-seeking commercial actors. Indeed, such an assumption is required if a market power analysis is to be informative. But this

[24] *Id.*
[25] *US – Carbon Steel (India) (AB)*, para. 4.155 (emphasis added).
[26] *US – Countervailing Measures (China) (AB)*, para. 4.62.
[27] *US – Countervailing Measures (China) (AB)*, para. 4.62.
[28] *US – Countervailing Measures (China) (AB)*, para. 4.77.

assumption is unfounded in a system where state-owned and politicized enterprises are used as tools of policy implementation and are insulated from competitive market pressures.

31. Likewise, China's reliance on a certain private investments in the steel industry is also misplaced. Indeed, Commerce's determinations were not premised on the lack of any private involvement in the sector. To the contrary, Commerce based its determination on a thorough, holistic analysis of the sector, and found extensive evidence that the sector as a whole was distorted.

32. I will now turn briefly to the *Solar Products* redetermination and the use of an external benchmark for polysilicon. Commerce's findings were fully explained in the redetermination. In particular, Commerce explained that China decided not to participate in the proceeding, and thereby refused to provide the requested information. In the absence of China's participation, Commerce relied on multiple sources of evidence on the record, and reasonably found that the Government of China intervened at various levels in the polysilicon market.[29] Other than complaining about the outcome, China has done nothing to question the adequacy of Commerce's explanation regarding the polysilicon market in China.

33. In sum, China essentially encourages the Panel to disregard Commerce's evidentiary findings. This is completely at odds with the appropriate standard of review. In the words of the original Panel in this dispute: "a panel reviewing a determination . . . based on the 'totality' of the evidence . . . must conduct its review on the same basis."[30] Where "an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination."[31] An analysis of the evidence in this dispute – when examined in light of the totality of the circumstances – demonstrates a probative and objective basis for the determination that the relevant prices in China are not market-determined. In each of the disputed proceedings this analysis comports with Article 14(d).

China's Claims Concerning Article 32.1 of the SCM Agreement Lack Merit

34. With respect to China's claim under Article 32.1 relating to Commerce's price distortion analysis, China has not articulated a cognizable claim nor has it identified the measure it seeks to challenge. Article 32.1 of the SCM Agreement provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." But to succeed in its challenge, China would first be required to identify a "measure" within the meaning of the DSU. It has not done so.

35. China's panel request asserts that the "benchmark determinations" in four of the section 129 proceedings are inconsistent with Article 32.1. Yet in the course of this dispute, China's presentation of this issue has appeared in a variety of inconsistent formulations. Each of these

[29] Supporting Benchmark Memorandum, p. 8-9 (Exhibit USA-84).
[30] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.
[31] *Id.*

fail to identify the specific measure that China challenges. Nor has China identified any specific action against subsidization apart from the countervailing duty determinations themselves. Given that the imposition of countervailing duties is a permissible response to subsidization, China has no basis for its Article 32.1 claim.

36. To the extent China attempts to re-characterize its claim before this Panel, the Appellate Body has made clear that a party cannot expand a WTO dispute to include measures that were not included within its panel request.[32]

China's Claims Concerning Article 2.1(c) of the SCM Agreement Lack Merit

37. With respect to Commerce's findings that the provision of material inputs for less than adequate remuneration was *de facto* specific, the United States has taken all steps necessary to bring its determinations into compliance with Article 2.1(c). Commerce identified the subsidies at issue and the systematic series of actions pursuant to which those subsidies were provided. In doing so, Commerce properly took account of the length of time the relevant programs have been in operation. Commerce sought information for each subsidy program under investigation. Commerce reviewed record evidence confirming how the subsidies were provided to a limited number of recipients over time. In each case, Commerce provided a reasonable and adequate explanation of its determination that the systematic provision of inputs was *de facto* specific.

38. China's objection to these findings is based on an incorrect reading of Appellate Body decisions – one that ignores the substance of Articles 1 and 2 of the SCM Agreement and offers no basis upon which to undermine Commerce's specificity findings. China cannot credibly claim that the subsidies at issue were provided to an unlimited number of users or were made widely available outside the identified industries.

39. As the United States has explained in its written submissions, China misunderstands where the "subsidy program" element fits into the overall subsidization analysis. The identification of a subsidy requires three separate elements: a finding of a (1) financial contribution that (2) confers a benefit and (3) that the subsidy is specific. As the Appellate Body stated, "the *existence* of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."[33] Here, the provision of inputs is *de facto* specific. The systematic provision of these inputs for nearly 50 years, as part of a regularized and well-planned series of actions, serves as evidence of a subsidy program for the purposes of Article 2.1(c). There is no basis in the text of the agreement to support China's contentions.

China's Claims Concerning Regional Specificity Lack Merit

40. With respect to the land specificity determination in *Thermal Paper* – one of the section 129 proceedings in which China declined to participate – Commerce had only limited evidence

[32] *US – Carbon Steel (AB)*, para. 171; *Dominican Republic – Cigarettes (AB)*, para. 120.
[33] *US – Countervailing Measures (China) (AB)*, para. 4.144.

regarding "preferential treatment" in land-use rights because China refused to provide that information when it was requested. Commerce properly relied on the available evidence: namely, a statement that the respondent received preferential treatment. Commerce found that statement probative and tending to support a determination that that respondent received preferential treatment within the zone. When the investigating authority sought to further examine the issue during the section 129 proceeding, China failed to provide the requested information. China repeatedly mischaracterizes the determination. As we have demonstrated in our written submissions, however, Commerce properly determined that the land at issue was provided pursuant to a "distinct land regime" and is therefore specific.

China's Claims Concerning Additional Proceedings and So-Called Ongoing Conduct Lack Merit

41. Turning finally to China's arguments that additional proceedings and so-called ongoing conduct should be adjudicated in this proceeding, China's attempt to expand the scope of implementation obligations has no basis in the DSU. China's claims that implementation should include what it considers "subsequent closely connected measures" in the form of additional periodic and sunset reviews, future proceedings, and so-called "ongoing conduct" are invalid for several reasons.

42. First, China has failed to make out its claims or a *prima facie* case with respect to the additional reviews, sunset reviews and so-called "ongoing conduct." China's "claims" consist of little more than a list of proceedings without the evidence or argument to satisfy its burden as the complaining party. As we have demonstrated in our written submissions, China has failed to meet its burden of argument with respect to any of these claims. These additional reviews and sunset determinations are not sufficiently closely connected because they do not, as China claims, consist of simply applying "the same" or "equally unlawful legal standards."[34] Rather they consist of fact-intensive determinations that in each case depend on the evidence and circumstances of the proceeding.

43. China has also not demonstrated that these subsequent proceedings are closely connected because it has not established the facts and circumstances of each of the additional proceedings. For example, did China participate in all of the proceedings and cooperate in responding to Commerce's requests for information in each case? In any of the cases? Although China refers the Panel to excerpts from each of the subsequent determinations, China neglects to provide the necessary analysis that would be required to make conclusions about the investigating authority's reasoning or evidence in each case. As the Appellate Body observed in *US – Gambling*, a claim necessarily must fail if the complaining Member does not make a *prima facie* case, and moreover, it would be legal error for a panel to make the *prima facie* case for a complaining Member.[35]

[34] China's First Written Submission, para. 389.
[35] *US – Gambling (AB)*, para. 140.

44. Second, the Panel should likewise reject China's attempt to expand the terms of reference to include these past proceedings given China's failure to put forth a *prima facie* case that the findings and analysis in subsequent proceedings are "closely connected" to the measures taken to comply.

45. Third, China's claims with respect to "future conduct" are also not within the Panel's terms of reference. Measures that are not yet in existence at the time of panel establishment – much less those which may never come into being – cannot be within a panel's terms of reference. China has likewise failed to establish that any so-called "ongoing conduct" exists that may be challenged as a rule or norm of general and prospective application.

Conclusion

46. For the reasons we have given in this statement and in the U.S. written submissions, the Panel should reject China's claims of non-compliance, and the Panel should not countenance China's effort to undermine the utility of the countervailing duty remedy to which Members agreed in the SCM Agreement.

47. Mr. Chairperson, members of the Panel, this concludes our opening statement. We would be pleased to respond to your questions.