UNITED STATES – DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA
(DS379)

Executive Summary of the Opening Statement of the United States of America at the First Substantive Meeting of the Panel

July 20, 2009

1. Instead of addressing all of the issues raised by China in its First Written Submission, we will focus this morning on China's arguments relating to Commerce's subsidy determinations and conclude with China's challenge to a Member's right to make full use of both the anti-dumping and countervailing duty remedies available under WTO rules.

2. At the outset, it is important to have a clear understanding of exactly what China is asking the Panel to do in this dispute. Unhappy with the rules it accepted when it acceded to the WTO in 2001, China now advances interpretations of those rules that have little connection with how those rules are properly understood in light of the customary rules of interpretation of public international law. The only solution for China's complaint, if it wants to avoid anti-dumping and countervailing duties, is to cease the dumping and subsidization that gave rise to the duties in the first place.

3. **Financial Contribution:** Commerce based its "public body" determinations in the challenged CVD investigations on a proper interpretation of the SCM Agreement. Instead of properly applying the rules of interpretation reflected in the Vienna Convention to interpret the term "public body," China seeks to graft onto the SCM Agreement certain provisions of the ILC Draft Articles, which are not covered agreements, not context, nor otherwise relevant to the interpretation of the term "public body." China ignores commitments it made in the Working Party Report on its accession to the WTO that confirm that Chinese state-owned enterprises, including banks, are public bodies. The Panel should reject China's effort to avoid the ordinary meaning of the term "public body," import provisions of the ILC Draft Articles into the SCM Agreement, and evade commitments it made as part of its accession to the WTO.

4. The Panel should find that the ordinary meaning of the term "public body," read in its context and in light of the object and purpose of the SCM Agreement, indicates that a public body is an entity that is owned or otherwise controlled by the government, but not necessarily one that is authorized to exercise, or is in fact exercising, government functions. There is no need to look to the Spanish version of the Agriculture Agreement to determine the meaning of the term "public body" in the SCM Agreement.

5. The adopted panel report in the *Korea – Commercial Vessels* dispute supports the U.S. interpretation and weighs against China's interpretation. The panel there concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)." Majority government ownership can demonstrate control.

6. No entrustment or direction analysis, which is relevant only when an investigating authority seeks to determine if a financial contribution has been provided by a private body, was required, including for transactions involving trading companies.

7. **Benchmark:** With respect to benchmarks, Commerce determined that interest rates for loans and domestic prices in China were distorted because of the predominate role of the Chinese government in these markets, rendering these interest rates and domestic prices unsuitable as benchmarks. China nonetheless argues that only in-county benchmarks may be used. If this position were accepted, Members would never be able to measure the benefit of these financial contributions because, as the Appellate Body has previously explained, the government price for the loan or land would be compared to itself.[1] Such an outcome would be inconsistent with the flexible nature of Article 14 of the SCM Agreement, which China ignores.

8. China also ignores paragraph 15(b) of its Accession Protocol and paragraph 150 of the Working Party Report which confirm the permissibility of using out-of-country benchmarks to measure any benefit in CVD investigations concerning imports from China. Paragraph 15(b) expressly recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks." China argues that the United States may not make reference to its Accession Protocol and Working Party Report in this dispute, claiming that doing so constitutes an *ex post* rationalization. This contention is utterly without support.

9. In determining to use external benchmarks, Commerce did not apply a "*per se* rule" that only considered the degree of state ownership of the industries. Where the facts demonstrated that Chinese prices and interest rates were distorted by the government's predominant role in a market and unsuitable as commercial benchmarks, Commerce used market-derived prices from outside China. Commerce relied on benchmarks for inputs and land-use rights that reasonably reflected "prevailing market conditions" in China, and benchmarks for loans tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market." China's assertion that Commerce did not "make any effort whatsoever to ensure that these benchmarks related to prevailing market conditions in China" is simply without foundation.

10. **Providing Credits in Benefit Calculations:** Commerce was not required to provide a credit in the subsidy benefit calculation for those instances in which China provided rubber to tire producers for adequate remuneration, that is, when China did not provide a subsidy. China does not suggest that its invented obligation to provide a credit can be located in Article 14, but instead argues that the use of the term "product" in other provisions of the SCM Agreement and the GATT 1994 requires a credit. Accepting China's argument would mean that the mere use of the term "product" in these other provisions overrides the "latitude" and "leeway" that panels and the Appellate Body have found in the guidelines set forth in Article 14 of the SCM Agreement, and would elevate context above the text.

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[1] *US – Softwood Lumber CVD Final (AB)*, para. 93.

11. China's argument cannot be reconciled with the definition of a subsidy in Article 1 of the SCM Agreement. Any time a government provides a financial contribution and a benefit is thereby conferred, a subsidy is "deemed to exist." Instances of "non-subsidies" cannot eliminate or diminish the benefits conferred when a government provides a financial contribution that confers a benefit.

12. The calculation of a subsidy benefit under Article 14 of the SCM Agreement is in no way related to "zeroing", and the invocation of the term "zeroing" in this dispute is merely a distraction. The Appellate Body's findings in the "zeroing" disputes are of no assistance to this Panel, as they concern a different type of calculation under a different agreement. There is no analytical connection between the calculation of a subsidy benefit and the calculation of margins of dumping that would justify extending the Appellate Body's reasoning.

13. If China's interpretation were accepted, it would necessarily apply to all of Article 14 and would require that credit be provided whenever an investigating authority found that a financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even different types of subsidies. China's interpretation would result in a benefit calculation that is artificially low, or even zero, preventing the United States from fully offsetting the effect of subsidies found to exist. It therefore fails to read Article 14 in light of the object and purpose of the SCM Agreement.

14. **Benefit Where Inputs Purchased from Trading Companies:** With respect to China's argument that, where production inputs were purchased from trading companies, Commerce was required to measure the benefit conferred upon trading companies in addition to the benefit conferred upon respondent producers, China has not identified any provision of the SCM Agreement or the GATT 1994 with which Commerce's benefit determinations are purportedly inconsistent. It was not necessary to measure any benefit that may have been received by the trading companies. The amount or portion of any benefit received by the trading companies is irrelevant for the purpose of determining the benefit conferred upon the subject merchandise producers.

15. **Specificity:** Contrary to China's claims, Commerce's specificity determinations were consistent with the SCM Agreement. China misreads the agreement. With respect to the specificity of policy lending, China asks the Panel to apply an approach not set forth in Article 2.1(a) of the SCM Agreement. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether: (i) the granting authority explicitly limits access to a subsidy to "certain enterprises;" or (ii) the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to "certain enterprises." Nothing in Article 2.1(a) requires Members to identify legislation that defines the "elements of a subsidy." The elements of a subsidy are the financial contribution and benefit, which are analyzed separately from specificity.

16. Central, provincial, and municipal policy documents clearly substantiate that the various levels of government in China guided lending to a *group* of industries, which included the OTR

tire industry. Article 2.1 of the SCM Agreement defines "certain enterprises" to include a group of industries.

17. China's challenge of Commerce's land-use rights specificity determination relies on a misreading of Article 2.2 of the SCM Agreement. Pursuant to Article 2.2, a subsidy is specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. China argues that if a subsidy is available to *all* enterprises within a designated geographical region, it is not specific pursuant to Article 2.2 of the SCM Agreement. China's interpretation would render Article 2.2 redundant, contrary to the rules of treaty interpretation. China's interpretation of Article 2.2 is also contrary to Articles 8.1(b) and 8.2(b) of the SCM Agreement. China's argument cannot be accepted.

18. Commerce properly determined in the *LWS* CVD investigation that New Century Industry Park fits the ordinary meaning of a designated geographical region. As demonstrated in the record, the land-use rights subsidy at issue was used as an incentive to relocate producers to the industrial park and was tied to the level of investment within the park. Therefore, the subsidy is unique and only available to enterprises investing within the industrial park. The fact that Huantai County may have granted other types of land-use rights to other leaseholders outside of the industrial park is irrelevant. Article 2.2 does not require an investigating authority to determine that a benefit was unavailable to all enterprises outside of the designated geographical region before finding a subsidy geographically specific. China's interpretation could lead to circumvention of the subsidy disciplines, which is both illogical and inconsistent with the object and purpose of the SCM Agreement.

19. **Concurrent Application of CVD and AD Measures:** We turn now to China's claim that a Member is not permitted to avail itself of both anti-dumping and countervailing duty remedies in respect of imports from China when the anti-dumping duty is calculated on the basis of a non-market economy methodology.

20. In its Oral Statement, China said that it "does not contend that the United States must 'choose' between the use of countervailing duties and the use of an NME methodology," only that when applying both, "it must do so in a manner that takes into account the fact that it offsets the same alleged subsidies through the manner in which it calculates antidumping duties."[2] This is simply a distinction without a difference. The logic of China's theory, under which the so-called double remedy inheres in the concurrent application of NME anti-dumping duties and countervailing duties, necessarily suggests that the United States must *choose* between the use of countervailing duties and the use of an NME methodology.

21. That Members have long recognized the right to apply anti-dumping duties and countervailing duties concurrently to imports that are both dumped and subsidized is reflected in GATT Article VI:5, which provides the only limitation on that right, solely in the context of

[2] Opening Statement of China, para. 75.

export subsidies. This right is confirmed by the fact that the Tokyo Round Subsidies Code required an express provision in order to impose a choice upon Code signatories between the anti-dumping and countervailing duty remedy in respect of imports from non-market economies. When drafting the SCM Agreement, however, Members chose not to maintain this limitation.

22. China's Accession Protocol was negotiated against this backdrop of the well-established right to apply both anti-dumping and countervailing duties concurrently. The Protocol affirms Members' right to apply NME anti-dumping duties to imports from China, and their right to apply countervailing duties to imports from China. Nowhere in the Protocol is there any limitation on the resort to either of these remedies.

23. Without textual support for its view that Members do not have this right, China resorts to quasi-economic theories, unsubstantiated by any facts, arguing that an NME anti-dumping margin captures domestic subsidies in their entirety, rendering any application of a countervailing duty a so-called "double remedy." Whatever the merits of China's quasi-economic theories – with which we have strong disagreements, as explained in the U.S. First Written Submission[3] – the text of the covered agreements, which is the only legally binding evidence of Members' intent, does not reflect those theories.

24. Even a cursory examination of China's three narrow claims reveals that China has failed to establish any violation. China's claims under Articles 19.3 and 19.4 of the SCM Agreement – provisions that limit the amount of *countervailing duties* that may be imposed – are premised on the most fundamental of errors, namely, that a portion of the NME anti-dumping duty should be understood to be a "countervailing duty" under the SCM Agreement. An NME anti-dumping duty, however, is not imposed "for the purpose of offsetting any subsidy."[4] In addition, the alleged discrimination underlying China's MFN claim stems from the fact that imports from China, unlike those form market economies, are subject to an NME methodology. This differential treatment, however, is necessitated by the nature of China's economy itself, as recognized in the explicit authority given under China's Protocol to employ such a methodology.

25. We continue to wonder exactly what China proposes that a Member do when faced with dumped and subsidized imports from China. Is a Member expected to forego the countervailing duty remedy, specifically provided for in China's Protocol, in favor of the exclusive application of an *anti-dumping duty* calculated under the non-market economy methodology? Or is a Member expected to forego the non-market economy methodology, also specifically provided for in China's Protocol, in favor of the exclusive application of a *countervailing duty*? These questions go to the heart of what rights, under China's argument, Members retain in respect of their trade remedy disciplines.

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[3] U.S. First Submission, paras. 445-462.

[4] Footnote 36 of the SCM Agreement.