ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL REGARDING THE U.S. PRELIMINARY RULING REQUEST

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

JULY 7, 2009

1. We begin this morning with an examination of China's "as such" challenge. The purpose of the WTO dispute settlement system, in the words of the DSU, is "to secure a positive solution to a dispute." To this end, the DSU contemplates a series of events that generally must occur for a dispute to be properly brought to a WTO panel. This includes a Member (i) ascertaining what measure taken by another Member is impairing its benefits under the WTO agreements;[1] (ii) consulting on that measure with the responding Member, with a view to reaching an agreed solution; and (iii) absent such a solution, then requesting a panel to examine the complaint on that measure.

2. Rather than follow the proper path leading to the establishment of a panel, China has decided that it can chart its own course by neglecting the general requirement to consult on a measure before it can become the subject of a panel request and presenting for the first time in its panel request an "as such" challenge that identifies something that is not even a "measure" for purposes of WTO dispute settlement.

A. Alleged "failure ... to provide legal authority" is not a "measure"

3. The DSU recognizes the importance of the "prompt settlement of situations" in which a Member considers that its benefits under the covered agreements "are being impaired by *measures taken* by another Member."[2] China submits that the "failure of the United States to provide legal authority" is a "measure" for purposes of WTO dispute settlement by virtue of being an "omission."[3] China characterizes the "omission" in this dispute as "[t]he failure of a Member to enact legislation that would permit its investigating authority to avoid acting inconsistently with the covered agreements."[4]

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[1] *See, e.g.,* DSU Article 3.3.

[2] Article 3.3 of the DSU. (Emphasis added)

[3] See Panel Request, WT/DS379/2, p. 3; China's Response to Request for Preliminary Rulings, para. 20.

[4] China's Response to Request for Preliminary Rulings, para. 20.

4. Not every "failure ... to enact legislation," however, is subject to challenge as an "omission." Unlike a measure "taken" by a Member,[5] an "omission" or "failure" presents a special case for purposes of WTO dispute settlement. An "omission" in its ordinary meaning would not be a "measure taken." Rather, an omission can only be considered a "measure taken" if there is an affirmative obligation on a Member to take the action that the Member is accused of not having taken. In order for an "omission" to be a "measure" subject to WTO dispute settlement proceedings, a complaining party must connect such "omission" to the relevant legal obligation that requires the particular action that the responding party is alleged to have failed to take.

5. In this light, China has not established that the "failure ... to provide legal authority" is an "omission" that constitutes a "measure." At no point in its consultations request, panel request, or even its First Written Submission, has China pointed to any WTO rule requiring the enactment of legislation to provide Commerce with particular authority. Indeed, it cannot do so because no such rule exists. None of the provisions cited by China as the legal basis of its claims provide support for the existence of the separate and distinct obligation that the United States was required to enact particular legislation. In the absence of such provisions, the assertion that the United States did not enact that legislation, even if true, does not constitute an "omission" subject to challenge in WTO dispute settlement proceedings.

B. Lack of consultations on the alleged "failure ... to provide legal authority"

6. In the U.S. First Written Submission, the United States noted that China had identified the alleged "failure...to provide legal authority" as an entirely new measure in its panel request, notwithstanding its failure to do so in its consultations request. China does not dispute this fact. Rather, China seeks to excuse its actions on the ground that the new "measure" in the panel request "relate[s] to essentially the same dispute," seeking to find support in the Appellate Body report in *US - Continued Zeroing*.[6]

7. Unfortunately for China, that Appellate Body report does not take China where it would like to go. The Appellate Body noted several specific features of the additional measures in the *US - Continued Zeroing* dispute that led it to conclude that the additional measures did not expand the scope of the dispute. First, the Appellate Body relied on the fact that the periodic reviews and sunset reviews added by the EC in its panel request in that dispute concerned the same antidumping duties at issue in the proceedings identified in the consultations request. The Appellate Body further relied on the fact that the proceedings listed in the panel request were "successive stages subsequent to the issuance of the same anti-dumping duty orders" as the

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[5] *See e.g.,* DSU Article 3.3 and 4.2.

[6] China's Response to Request for Preliminary Rulings, para. 30 (quoting Appellate Body Report, *US - Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing*"), WT/DS350/AB/R, adopted 19 February 2009, para. 235).

proceedings listed in the consultations request.[7] Furthermore, the Appellate Body stated that all of the measures in *US - Continued Zeroing* "derive from the same underlying legal basis," namely the anti-dumping duty order established following the respective original investigation.[8]

8. In contrast, the measures listed in the consultations request and the new "measure" alleged by China are distinct and have fundamentally different legal bases. The first is a group of affirmative determinations by the Department of Commerce, an agency of the executive branch, in furtherance of its delegated regulatory authority. The second, however, is styled as an "omission," that is, an alleged failure of the Congress to exercise its legislative function to enact a statute. The latter is clearly not a "successive stage" of the former.

9. Moreover, the measures in *US - Continued Zeroing* all involved "as applied" challenges based on the same legal claims. China suggests that the fact that it is introducing an "as such" challenge for the first time in its panel request is "not relevant."[9] This ignores the plain effect of such a challenge on a dispute that, until that moment, was based purely on "as applied" claims. As the United States observed in its First Written Submission, the Appellate Body has clearly recognized the effect of "as such" challenges, noting that "the implications of such challenges are *obviously more far-reaching* than 'as applied' claims."[10] Given these "far-reaching" implications – which, in all likelihood, are precisely what motivated China to add its "as such" challenge in the panel request in the first place – China's attempts to downplay this sudden addition lack credibility.

10. Finally, and perhaps most significantly, China in this dispute completely ignores the importance of consultations. As discussed in the U.S. First Written Submission,[11] consultations serve a critical role not only in providing the responding party with notice of the scope of the dispute, but also in allowing for the exchange of views on areas of disagreement or misunderstanding with a view to resolving the dispute, which is, after all, the objective of the dispute settlement system.

11. China has alleged that the "failure...to provide legal authority" was "evident on the face of the determinations" it identified in the consultations request.[12] We disagree. As is evident

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[7] *US – Continued Zeroing*, para. 228.

[8] *US – Continued Zeroing*, para. 231.

[9] China's Response to Request for Preliminary Rulings, para. 36.

[10] U.S. First Submission, para. 85 (quoting Appellate Body Report, *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US - OCTG from Argentina*"), WT/DS268/AB/R, adopted 17 December 2004, para. 172). (Emphasis added)

[11] U.S. First Submission, paras. 82-83.

[12] China's Response to Request for Preliminary Rulings, footnote 28.

from a closer reading of these determinations, Commerce did not make any broad pronouncement as to whether it had legal authority to adjust anti-dumping duties to avoid any so-called double remedy. Indeed, it is precisely because the Government of China and Chinese respondents made absolutely no attempt to offer any evidence of how a double remedy might occur in any of the investigations at issue that the Department has not yet been presented with a situation in which it must determine whether such legal authority exists.

12. In any event, if China finds this "failure...to provide legal authority" to be "evident on the face of the determinations," it follows that the alleged existence of this "measure" was as evident to China at the time it read those determinations as China claims it should be to the Panel today. In other words, China appears to acknowledge that it was well aware of such a "failure ... to provide legal authority," and any consequent impairment of benefits, long before it requested consultations in this dispute. China neglected to include this "measure" in its consultations request but appears to have realized at some point that it wanted to include the "measure" within the scope of this dispute.

13. Under these circumstances, rather than simply add the new measure to its *panel* request, the correct response would have been for China to have filed a new or supplemental *consultations* request. Filing a new or supplemental consultations request is something with which China has first-hand knowledge. The United States has previously filed supplemental consultations requests in disputes with China.[13] In refusing to do so, notwithstanding these very concerns raised by the United States during two DSB meetings,[14] China appears to have concluded that it would not devote time to consulting on the measure to seek a solution, but rather preferred to skip the consultations phase. China, however, is not free to choose the course it deems most convenient – the DSU *requires* Members to consult first before proceeding to a panel.

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[13] See *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1/Add.1; *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1/Add.1.

[14] WT/DSB/M/261, p. 11 (minutes of 22 December 2008 DSB meeting); WT/DSB/M/263, p. 15 (minutes of 20 January 2009 DSB meeting).