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 Second Substantive Meeting of the Panel

November 23, 2009

1. China has largely failed to articulate how the U.S. actions it challenges are inconsistent with any express obligations contained in the covered agreements. China has not provided a proper interpretive analysis of the provisions it has referenced. China's arguments do not provide a basis on which the Panel can sustain China's allegations that the United States has acted inconsistently with its WTO obligations, and China's claims must be rejected.

2. **Financial Contribution:** An analysis of the ordinary meaning of the term "any public body," in its context and in light of the object and purpose of the SCM Agreement, demonstrates that Commerce's financial contribution determinations were consistent with the SCM Agreement. The ordinary meaning of the term "public" includes the notion of belonging to the government or the nation. In addition, the term "public body" is modified by the term "any." Thus, there might be different *kinds* of public bodies. To interpret the term "public body" to refer to entities that "possess characteristics similar to those that define a government," as China does, would be to reduce the term "public body" to redundancy or inutility.

3. The use of the term "government" in place of "a government or any public body" in the SCM Agreement is merely a shorthand drafting technique used for convenience. China erroneously finds significance in the use of this technique and attempts to impart a meaning that is simply not supported by the text.

4. Contrary to China's argument an entrustment or direction analysis involves the *actions* of a government or public body and the *actions* of a private body or bodies. A public body analysis, on the other hand, involves an analysis of the *nature* of the entity or entities at issue.

5. The *Korea – Commercial Vessels* panel rejected the arguments China makes here with respect to the ILC Draft Articles and the GATS Annex on Financial Services. As that panel reasoned, "[i]n all cases, ... public body status can be determined on the basis of government (or other public body) control."[1] This Panel should follow a similar approach.

6. China's arguments related to the Spanish and French texts of the Agreement on Agriculture are unavailing. The issue here is the interpretation of the SCM Agreement. There is no discrepancy between the English, Spanish, and French texts of the SCM Agreement, and there is no need to look to the Agreement on Agriculture to determine the meaning of the term "public body." Additionally, the text of the Agriculture Agreement does not support China's arguments as the relevant text in the Agriculture Agreement is different than in the SCM Agreement.

7. An interpretation of Article 1 of the SCM Agreement that treats the government-owned entity as a public body ensures that governments will not be able to hide behind their ownership

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[1] *Korea – Commercial Vessels*, para. 7.55.

interests to escape the disciplines of the SCM Agreement, which is consistent with the object and purpose of the SCM Agreement.

8. Whether or not China now concedes that it made a commitment in paragraph 172 of the Working Party Report that allows Members to treat China's state-owned enterprises and banks as government actors for purposes of Article 1.1(a) of the SCM Agreement, at the very least, China indicated in that paragraph its own recognition that its SOEs and SOCBs are "public bodies."

9. China incorrectly argues that the ILC Draft Articles are relevant rules of international law that should be used to interpret the term "public body." The Draft Articles are *not* relevant and *not* applicable within the meaning of Article 31(3)(c) of the Vienna Convention, and the Panel is *not* permitted to take them into account in interpreting the relevant SCM Agreement text. The scope of the Draft Articles is limited to secondary rules of international law and explicitly excludes primary rules of international law. Moreover, the detailed distinctions in those articles are not "applicable in the relations between the parties," as there is no consensus that the ILC provisions have attained the status of customary international law.

10. With respect to sales through trading companies, Commerce properly applied the SCM Agreement. No entrustment or direction analysis was required, and China has not substantiated its claim that Commerce's analysis was improper.

11. **Benchmarks:** Commerce based its determinations to use benchmarks other than prices or interest rates available in China on findings that the predominant role of the Chinese government in various markets distorted prices and interest rates in China. Commerce made each benchmark determination on a case-by-case basis, based on the facts of each investigation. Commerce's determinations were consistent with Article 14 of the SCM Agreement, as interpreted by the Appellate Body in *US – Softwood Lumber CVD Final*.

12. Contrary to China's argument, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber CVD Final* requires a separate price distortion analysis before a Member may rely upon an out-of-country benchmark. The Appellate Body's analysis reflects the economic theory commonly referred to as the "Dominant Firm Model." The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.

13. In the investigations China challenges, Commerce applied the Appellate Body's reasoning in *US – Softwood Lumber CVD Final* to the facts before it. In the case of the markets for hot-rolled steel and BOPP, Commerce determined that, based on record evidence, "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's distortions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration." Likewise, for lending and for land-use rights, based on the evidence on the administrative record, Commerce determined that, due to the government's predominant role, it was necessary to use out-of-country benchmarks to measure the benefit.

14. In the markets for lending and land-use rights, in addition to the market distortion inherent in the fact that the government was the predominant supplier of loans and land, Commerce also found evidence of direct government intervention in those markets that would further impact prices, rendering those prices inappropriate for determining the amount of the benefit. Contrary to China's argument, the Appellate Body in *US – Softwood Lumber CVD Final* did not address and, consequently, did not exclude the possibility that other types of government intervention would also distort the market and render prices unreliable.

15. **Providing Credits in Benefit Calculations:** China has not shown that Commerce was required to provide a credit in the subsidy calculation for non-subsidized transactions. China has entirely changed its argument and now asks this Panel to find that the use of the term "good" in Article 14(d) establishes several obligations on WTO Members and limits the application of those obligations to situations under Article 14(d). China's argument is not credible.

16. The context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. Article 1 of the SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction by transaction basis. When a Member analyzes multiple subsidies, there is no obligation to provide a credit in that analysis for non-subsidized transactions.

17. The Appellate Body's zeroing reports examine the calculation of margins of dumping under the AD Agreement and certain provisions of the GATT 1994 that relate solely to AD proceedings, and there is simply no analytical connection between the calculation of margins of dumping and the calculation of a subsidy benefit that would justify extending the Appellate Body's reasoning in the zeroing reports to this dispute.

18. Because China has failed to establish any violation of Article 14(d), it is not necessary for the Panel to address China's other consequential claims under Article VI:3 of the GATT 1994, and Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement.

19. **Specificity:** Commerce's specificity determinations for the policy lending subsidy and land-use rights subsidy were substantiated by positive evidence and otherwise in accordance with the covered agreements. Contrary to China's arguments, neither Article 2.1(a) nor Article 2.2 requires an investigating authority to revisit the benefit determination to determine specificity.

20. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether legislation explicitly limits access to the subsidy to certain enterprises. Here, national, provincial, and municipal legislation and policy documents, viewed as a whole, explicitly limited access to the policy lending subsidy to a group of industries, including the tire industry.

21. China's interpretation of Article 2.2 of the SCM Agreement would require that, in order for a subsidy to be specific under Article 2.2, it would also have to be specific under Article 2.1, that is, it would have to be limited to certain enterprises. China's interpretation renders Article 2.2 redundant with Article 2.1, contrary to customary rules of treaty interpretation.

22. **Concurrent Application of CVD and AD Measures:** The import of China's argument before this panel, although China denies it, is that Members may not apply CVDs and NME AD

duties concurrently to the same merchandise, under any circumstances, because doing so automatically results in a so-called double remedy. Indeed, China is unable to identify any concrete circumstances, under China's theory, when the concurrent application of AD duties and CVDs would be permitted. In this respect, China's reliance on the court's opinion in *GPX v. United States* is unavailing.

23. The covered agreements fully reflect Members' consideration of what limits, if any, should be placed on concurrent application of AD duties and CVDs. GATT Contracting Parties identified *one instance* in which the AD and CVD regimes intersect – in the limited circumstance of export subsidization set out in GATT Article VI:5. Furthermore, China's Protocol explicitly reflects the right of Members to apply the NME AD methodology as well as the right to apply CVDs, with no conditions placed on concurrent application. Finally, China cannot avoid the significance of the fact that, during the Uruguay Round, Members decided *not* to carry Article 15 of the Tokyo Round Subsidies Code forward into the SCM Agreement. The agreements, therefore, are not silent, or, in other words, contain no gap that can be filled by reading a prohibition on concurrent application into WTO provisions addressing other specific issues.

24. Turning to China's claims under Article 19.3 and 19.4 of the SCM Agreement, the United States notes, first, that both provisions impose obligations in respect of the *levying* of CVDs, yet it is undisputed that the CVDs in the investigations at issue were not levied at the time of panel establishment. In respect of Article 19.3, China does not allege, much less demonstrate, that the CVDs levied exceed the subsidization rate calculated for each "source[] found to be subsidized and causing injury." Similarly, in respect of Article 19.4, China does not allege, much less demonstrate, that the CVDs levied exceed the amounts of the subsidies actually found by Commerce. Therefore, China has not established any inconsistency with Article 19.3 or 19.4.

25. Turning to China's claims under Article 12.1 and 12.8 of the SCM Agreement, the United States notes that, even if a double remedy could be shown to exist (a premise the United States strongly contests), Commerce's actions were not inconsistent with either provision. First, contrary to China's suggestion, at no point has Commerce ever agreed that a double remedy would likely arise from the concurrent application of CVDs and NME AD duties. Rather, Commerce signaled that it would keep an open mind to allow parties with a concrete interest to present their views supported by facts from particular investigations. Commerce itself saw no basis *ex ante* to believe that double remedies would be a problem. Under these circumstances, it was for interested parties who sought an adjustment from the normal application of CVDs and AD duties to explain, *with supporting evidence*, why their proposed course of action was appropriate. Neither Chinese respondents nor the Government of China did so.

26. China has failed to demonstrate the existence of a "double remedy," much less where that "double remedy" is found in Commerce's separate calculations of dumping margins and subsidy rates. First, China advances its argument as to the existence of a double remedy solely by reference to the *normal value* obtained under the NME methodology and its alleged relationship to subsidization. However, examination of only *one* of the elements of the AD remedy without the other (i.e., export price) does not inform the inquiry as to the existence of a double remedy.

27. Second, China's theory – premised on the extraordinary proposition that an NME *anti-dumping* methodology, by its very nature, offsets *subsidization* – reflects an understanding of the

NME methodology that has no basis in, and is contradicted by, the text of the covered agreements and the operation of the NME methodology under U.S. law. China has not cited, and indeed cannot cite, any provision of the GATT 1994, Anti-Dumping Agreement or SCM Agreement that would support its proposition. Furthermore, accepting the view that the NME methodology is designed to offset subsidization would render any AD duty calculated under that methodology a CVD within the meaning of footnote 36 to the SCM Agreement. As a result, that AD duty, as required by Article 10 of the SCM Agreement, could "only be imposed pursuant to [an] investigation[] initiated and conducted in accordance with [the SCM Agreement]." In the absence of such an investigation, any NME AD duty, under China's theory, would appear to be inconsistent with Article 10 of the SCM Agreement.

28. China's view that the NME methodology counteracts subsidization also finds no support in the text of the U.S. law governing the NME methodology. U.S. law identifies an exporting country as an "NME" based on an examination of multiple statutory factors, none of which references subsidization. U.S. legislative history also confirms the exclusive focus of the NME methodology on making a price comparison for the purpose of calculating the *dumping* margin. There is thus no basis to contend, as China does, that subsidization is one of the "'distortions' in the market that the NME construct was designed to address" when it is not even a factor examined when considering whether a country constitutes an NME.

29. With respect to China's challenge based on a so-called "absence of legal authority," the United States recalls that Commerce has not been presented with the concrete factual circumstances in which it was *required* to make a determination as to the scope of its legal authority. This follows directly from the failure of Chinese respondents and the Government of China to adduce any evidence relating to double remedy in the investigations at issue. China's statement this morning about the relevance of the *GPX* opinion to the issue of Commerce's legal authority reflects China's misunderstanding of the implications under U.S. law of that decision.

30. Finally, the United States submits that the *GPX* opinion should have no bearing on the Panel's consideration of this dispute for four reasons: (1) the *GPX* opinion is not instructive for this dispute because it is an opinion of a U.S. court interpreting U.S. law, whereas this dispute concerns the interpretation of the WTO agreements; (2) the *GPX* opinion is not the final judgment of the U.S. courts; (3) the *GPX* opinion is in error; and (4) even on its own terms, the decision does not support the position taken by China here – that, where a WTO Member is applying AD duties determined under a NME methodology to Chinese goods, it may not apply any CVDs to those same imports.

31. **Requests for Information Following the Original Questionnaire:** With respect to China's claim under Article 12.1.1 of the SCM Agreement, the United States notes that China now appears to agree with the proper interpretation of that provision as set out by the United States in these proceedings. In the context of an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, China has issued one new subsidy allegation questionnaire and five supplemental questionnaires for the U.S. Government. For *none* of these six questionnaires did China provide an initial period of 30 days to respond, as it would have done if acting consistently with the understanding of Article 12.1.1 it urges upon this Panel.