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UNITED STATES – COUNTERVAILING DUTIES MEASURES ON CERTAIN PRODUCTS FROM CHINA
(DS437)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

April 30, 2013

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 this Panel. This dispute raises the question whether WTO rules are adequate to counter subsidization taking place in one of the world's most important economies, causing profound distortions not only in that economy but throughout the world trading system generally. While it is every WTO Member's right to decide the degree of intervention in its own economy, it is equally the case that every WTO Member has agreed that subsidies that cause injury are subject to WTO rules. These WTO rules create effective disciplines and permit Members to counter injurious subsidization. The claims brought by China, however, seek to convert the WTO rules into a means to shield China's subsidization from scrutiny. China's reading of the WTO rules would make it more difficult, if not impossible, to ensure that firms in other Members do not have to compete against the financial resources of the Chinese government. The choice China has made about the structure of its economy does not excuse China from the rules that apply to all WTO Members.

2. This dispute is also one of the largest in the history of the WTO. China has advanced claims with respect to 97 individual alleged breaches of the SCM Agreement, concerning 17 different CVD investigations, and involving 31 initiations of investigations, preliminary or final determinations. Yet, at each step in this case – first the consultations request, then the panel request, and, most importantly, in its first written submission – China has taken shortcuts in its claims, discussion of the facts, and arguments. China relies on sweeping factual generalizations instead of presenting the facts and legal arguments for each challenged investigation necessary to sustain China's burden of proof. China must make its own case, and it has failed to do so.

3. China attempts a shortcut when it asserts that its claims "largely entail the application of the findings in DS379, as well as other well-settled jurisprudence." In fact, this dispute involves several novel interpretations of the SCM Agreement that were not addressed in *US – Anti-Dumping and Countervailing Duties (China)* (DS379), or any other dispute. It is important to recall that in DS379 neither the panel nor the Appellate Body found any general regulations or other measures of the United States WTO-inconsistent "as such", but rather, evaluated certain determinations by the U.S. Department of Commerce ("Commerce") on an as applied basis in four CVD investigations. China inappropriately relied on the findings of *US – Anti-Dumping and Countervailing Duties (China),* declining to include in its first written submission virtually

any discussion of the facts at issue in the determinations it challenges here. Accordingly, for each of China's claims, China has failed to establish a *prima facie* case.

4. China must demonstrate, with specific evidence from the investigations challenged, how Commerce's determinations in each investigation were inconsistent with the requirements of the SCM Agreement. China must link its legal arguments to the facts and evidence of each of the investigations it challenges. However, despite advancing dozens of individual claims that Commerce's findings were inconsistent with the SCM Agreement, China barely discusses Commerce's determinations at all, simply providing a few cursory descriptions as examples. In doing so, China has attempted another shortcut. China seems to ask the Panel to fill in the blanks and answer the questions China has not addressed. Of course, it is not proper for China to ask this of a panel, and China should be mindful of the Appellate Body's caution that asking a panel to make findings "in the absence of evidence and supporting arguments," is to ask a panel to act inconsistently with its obligations under Article 11 of the DSU."[1] China must make its own case, and it has failed to do so.

5. In the remainder of our opening statement – without repeating in full the arguments we have made in the U.S. first written submission – we would like to touch on each of the issues in this dispute to highlight China's failure to make its case, both as a matter of evidence and as a matter of law.

I. CHINA'S PUBLIC BODY CLAIMS ARE FOUNDED ON AN ERRONEOUS INTERPRETATION OF THE SCM AGREEMENT

6. First, with respect to the interpretation of the term public body, China's claims are without merit. China has offered the Panel an erroneous interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, and has failed to demonstrate that Commerce's public body determinations are inconsistent with the requirements of the SCM Agreement, when its terms are properly interpreted.

7. With respect to the definition of the term "public body," the Panel must undertake its own interpretations of that term by applying the customary rules of interpretation of public international law, taking due account of previous interpretations of that term. As explained in the U.S. first written submission, the proper conclusion that flows from such an analysis is that a public body is an entity controlled by the government such that the government can use the entity's resources as its own. We note that the interpretation we have set forth in the U.S first written submission accords with the ordinary meaning of the terms of the SCM Agreement, read in their context, in light of the object and purpose of the agreement.

8. Three WTO dispute settlement panels – in *Korea – Commercial Vessels, EC and certain member States – Large Civil Aircraft*, and *US – Anti-Dumping and Countervailing Duties*

[1] *US – Gambling (AB)*, para. 281.

(China)[2] – have agreed that a "public body" is an entity controlled by the government. The Appellate Body, in one report, arrived at a different conclusion. However, as explained in the U.S. first written submission, the Appellate Body's interpretation leaves open questions that, when resolved, support the conclusion that a public body is an entity controlled by the government such that the government can use the entity's resources as its own.

9. Contrary to China's suggestion in its first written submission, it simply is not necessary for an entity to be vested with, possess, or exercise "governmental authority" to "'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority" for that entity to provide a financial contribution that confers a benefit; that is, for that entity to provide a subsidy.

10. Indeed, of the activities described as financial contributions in Article 1.1(a)(1), only the indirect reference to taxation in Article 1.1(a)(1)(ii) appears to even have a remote connection to what the Appellate Body described in *Canada – Dairy* as the "essence" of government. When the term "government" in Article 1.1(a)(1)(ii) is read in the collective sense, as it must be, that provision actually refers to "government [or any public body] revenue . . . foregone or not collected," and so is not limited to taxation at all. Hence, as the Appellate Body suggested in *US – Anti-Dumping and Countervailing Duties (China)*, the types of conduct listed in all of the subparagraphs of Article 1.1(a)(1) could be carried out by governmental as well as nongovernmental entities, and "governmental authority" – in the sense of controlling or supervising individuals, or otherwise restraining their conduct – is not necessary to undertake any of them.

11. China is asking the Panel to go beyond the Appellate Body's findings in *United States – Anti-Dumping and Countervailing Duties (China)*. China seeks a finding from the Panel that all public bodies must have the power to regulate, control, supervise, and restrain individuals. Such power simply is unrelated to and unnecessary for the purpose of providing a subsidy, and there is no textual support in the SCM Agreement for the conclusion that all public bodies must possess such power.

12. What is necessary, in order for a subsidy to be attributable to a Member, is that the Member's government can control the entity providing the financial contribution such that the government can use the entity's resources as its own. When the government has that kind of control over an entity, there is no logical distinction between a financial contribution that flows directly from the government and a financial contribution that flows from the entity – the public body – over which the government has control.

13. The SCM Agreement is intended to discipline the use of subsidies by governments so as to permit economic actors to compete in the international marketplace without the effects of subsidies distorting the outcome of that competition. An understanding of "public body" as reaching financial contributions flowing from an entity that is controlled by the government such

[2] *See Korea – Commercial Vessels*, para. 7.50. *See also id.*, paras. 7.172, 7.353, and 7.356; *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.1359; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.94.

that the government can use that entity's resources as its own supports that goal. To find otherwise would permit a government to provide the same financial contribution with the same economic effects and escape the definition of a "financial contribution" merely by changing the legal form of the grantor from a government agency to, for example, a wholly government-owned corporation. A correct interpretation of the "public body" avoids such an outcome.

II. CHINA'S CLAIM REGARDING THE *KITCHEN SHELVING* DISCUSSION HAS NO MERIT

14. Next we move on to the issue of China's "as such" challenge to Commerce's discussion of the public body issue in the final determination in the *Kitchen Shelving* investigation. China claims that Commerce established a policy of a "rebuttable presumption" that majority government-owned entities are public bodies. This argument fails for two reasons: First, the *Kitchen Shelving* discussion is simply a discussion of the past practice and is not a "measure." Second, even if that discussion somehow could be construed a measure, it would not result in a breach of a WTO obligation.

15. Even aside from the proper interpretation of the term "public body," the *Kitchen Shelving* discussion is not a "measure." WTO panels have consistently found that administrative practice does not have independent operational status such that it gives rise to a breach of WTO obligations. A repeated practice does not create a breach of WTO obligations, as the practice can be departed from. In light of these findings, a discussion of past practice likewise cannot amount to a "measure" for the purposes of dispute settlement proceedings.

16. Further, in order for China's "as such" claim to be successful, China must show that the *Kitchen Shelving* discussion – if somehow construed as a "measure" – will necessarily result in a determination that is inconsistent with the U.S.' WTO obligations. Such an assertion, however, is not supportable. In *Kitchen Shelving*, Commerce merely discussed its historic approach to public body issues and explained how it viewed the issues at the time. The discussion is simply that – a discussion of the factors and relevant information that Commerce takes into account when determining whether a firm is an authority. It does not commit Commerce to any future course of action. Moreover, it is well-established that as a matter of U.S. domestic law that Commerce must evaluate each case on its own merits, and is not bound by past practice. Accordingly, a discussion of past practice does not dictate the outcome in any future proceeding.

III. COMMERCE'S USE OF OUT-OF-COUNTRY BENCHMARKS TO MEASURE THE BENEFIT WHEN INPUTS WERE PROVIDED FOR LESS THAN ADEQUATE REMUNERATION WAS NOT INCONSISTENT WITH THE SCM AGREEMENT

17. Next we will address China's claims regarding out-of-country benchmarks. First, China has failed to make a *prima facie* case for its out-of-country benchmark claims because it has failed to conduct the case-by-case analysis necessary to show why a reasonable and objective investigating authority could not reach the conclusion that in-country private prices were unreliable benchmarks.

18. There can be no question that an investigating authority may rely on out-of-country benchmarks in certain circumstances. As a matter of law, depending on the information obtained in a given countervailing duty investigation, a government's role as provider in a marketplace can be sufficient on its own to explain price distortion and, as a result, support a decision to rely on out-of-country benchmark prices for the benefit analysis. China's generalization that Commerce relies exclusively on the share of government-produced goods in the market in each investigation to determine that distortion exists is incorrect, as Commerce relies on other factors as well. So even if, *arguendo*, Commerce could not rely on government market share *alone* to find distortion in the in-country market, China's arguments fail.

IV. COMMERCE'S DETERMINATIONS THAT INPUT SUBSIDIES WERE SPECIFIC WERE FULLY CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

19. Next, China's claims that Commerce's specificity determinations are inconsistent with the SCM Agreement are without merit. China appears to challenge 17 different specificity determinations in 15 investigations. As an initial matter, China has failed to make a *prima facie* case with respect to its claims under Article 2. Each determination was based on the specific facts and circumstances of the relevant proceeding, and China must address those facts and circumstances. China has failed to do so, instead relying on broad, inaccurate characterizations of the measures at issue. The claims should be rejected for that reason alone.

20. With respect to its legal arguments, China advances novel interpretations of Article 2 which would impose formalistic requirements on investigating authorities that lack any basis in the agreement. Article 2 is, essentially, about determining whether a subsidy is specific. China's interpretations would substantially impede an investigating authority's ability to find the *de facto* provision of goods for less than adequate remuneration, a type of subsidy explicitly contemplated by Articles 1.1(a)(1)(iii) and Article 14(d), to be specific. China's approach frustrates the operation of the SCM Agreement.

21. First, there is nothing in the text of Article 2.1(c) that requires an investigating authority to identify a "subsidy program," that is formally set out in a plan or outline. Article 2.1(c) provides that one of the "factors" that "may be considered" as part of the *de facto* specificity analysis is "use of a subsidy programme by a limited number of certain enterprises." As China points out, in the challenged investigations Commerce generally identified the "program" at issue in its analysis. China argues that Commerce's identification of such programs was not in accordance with Article 2.1(c) because there was no "'legislation' or other type of official" government measures that provide for these subsidies. China is incorrect in its interpretation of Article 2, because neither the text of Article 2 nor any other provision of the SCM Agreement requires a subsidy or "subsidy program" to be implemented pursuant to a formally instituted "plan or outline." Accordingly, China's argument has no textual support in Article 2.1(c).

22. China's interpretation, inserting the requirement that a formal "subsidy program" must be identified, runs counter to the text of Article 2 and the SCM Agreement. In particular, this interpretation would negate the distinction between Article 2.1(c), relating to subsidies that are

de facto specific, and Article 2.1(a), relating to subsidies that are *de jure* specific because of a limitation on access is explicitly laid out in legislation or elsewhere. China's interpretation of Article 2.1(c) would incorrectly focus a *de facto* specificity inquiry on the existence of a formal plan or outline, and not on whether or not there are limited numbers of users, the inquiry which is the subject of Article 2.1(c). This interpretation is not only unsupported by the text of the Agreement, but would also allow Members to circumvent the disciplines of the Agreement by avoiding the creation of an identifiable plan or outline, thereby frustrating the ability of investigating authorities to countervail otherwise actionable subsidies.

23. Second, China's assertion that an investigating authority must examine a subsidy under Articles 2.1(a) and 2.1(b) before examining Article 2.1(c) in every case has no basis in the text of the SCM Agreement. The ordinary meaning of Article 2.1 makes clear, and the Appellate Body has confirmed, that paragraphs in Article 2.1 should be applied "concurrent[ly]" and that, although Article 2.1 "suggests" that the specificity analysis will "ordinarily" proceed sequentially, this is not a mandatory prescription.[3] As a result, China's arguments are inconsistent with the ordinary meaning and context of the provisions of the SCM Agreement.

24. Third, China is incorrect to assert that the SCM Agreement requires investigating authorities to conduct a separate analysis identifying the granting authority as part of its *de facto* specificity analysis. China points to no language within Article 2.1(c) or the SCM Agreement as a whole which would support such an argument. As the Appellate Body has explained, "the analysis under 2.1 focuses on ascertaining whether…the subsidy in question is limited to a particular class of eligible recipients.[4] Accordingly, China's argument that Commerce was required in every specificity determination to analyze and identify the "granting authority" is without merit.

25. Fourth, China argues that Commerce was required to address expressly the diversification of China's economy and the length of time inputs had been provided for less than adequate remuneration in each challenged determination. A specificity determination involves a fact-based analysis, made on a case-by-case basis. Thus, the relevance of either (1) the length of time a subsidy has been in place or (2) the economic diversification in the Member would also be determined on a case-by-case basis. In particular, those factors would be relevant only if the period of time examined could directly impact the specificity determination, or if the subject economy lacks diversification. These factors were not relevant to the investigations at issue, and China's submission does not allege that the factors would have impacted the analysis in the investigations at issue. Thus, China's argument is without merit, and Commerce's determinations that the provision of inputs was specific in the challenged investigations were fully consistent with U.S. obligations under Article 2.1.

[3] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 873.
[4] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 756.

V. CHINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE WITH RESPECT TO THE REGIONAL SPECIFICTY DETERMINATIONS IN THE CHALLENGED INVESTIGATIONS

26. China appears to challenge determinations made by Commerce in seven investigations that the provision of land-use rights in China was specific within the meaning of Article 2 of the SCM Agreement. Although China claims that in "each investigation" Commerce's determination of specificity with respect to land-use rights is inconsistent with Article 2.2 of the Agreement, China has failed to make a *prima facie* case of any of these alleged breaches. For that reason, China's claims with respect to regional specificity fail.

VI. COMMERCE'S INITIATIONS OF INVESTIGATIONS INTO WHETHER RESPONDENT COMPANIES RECEIVED GOODS FOR LESS THAN ADEQUATE REMUNERATION WERE CONSISTENT WITH ARTICLE 11 OF THE SCM AGREEMENT

27. China's claims that Commerce's initiations of CVD investigations are inconsistent with the SCM Agreement must fail because China has failed to establish a *prima facie* case with respect to these claims because it has failed to discuss the evidence presented in each application. Furthermore, in all cases, Commerce's decision to initiate the investigations with respect to the provision of goods for less than adequate remuneration were consistent with the standard set out in Article 11 of the SCM Agreement.

28. Article 11 of the SCM Agreement requires only that there be "sufficient evidence" of the existence of a subsidy in an application to justify initiation of an investigation. As the panel stated in *China – GOES*, all that is required is "adequate evidence, tending to prove or indicating the existence of" a subsidy, not "definitive proof" of the subsidy's existence and nature. Further, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant. As the panel in *China – GOES* stated: "[i]n the Panel's view, the fact that an applicant must provide such information as is 'reasonably available' to it confirms that the quantity and quality of the evidence required at the stage of initiating an investigation is not of the same standard as that required for a preliminary or final determination." China has failed to demonstrate that Commerce's determinations were inconsistent with this standard.

29. With respect to specificity, Commerce's initiations were justified because evidence pertaining to the subsidies themselves indicated that the provisions of the inputs in question for less than adequate remuneration were specific. Further, the applications provided additional evidence regarding specificity which was reasonably available to the applicants, including citations to past final determinations regarding the same or similar inputs. Under the standard for initiations under Article 11, this evidence was sufficient to initiate investigations into the alleged subsidies.

30. With respect to the sufficiency of evidence regarding the existence of public bodies, in many situations, much of the evidence of government control may not be available before the initiation of an investigation, particularly with respect to entities alleged to be state-owned.

Accordingly, the only reasonably available information to an applicant may be general evidence of government control over an industry or sector.

31. Even under China's proposed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, Article 11 would only require adequate evidence tending to prove or indicating that an entity possesses, exercises, or is vested with governmental authority, not definitive proof of such. The relevant question would therefore be what type of evidence is adequate, for initiation purposes, to tend to prove or indicating that an entity possesses, exercises or is vested with governmental authority. China argues that evidence of government ownership or control is insufficient for initiation purposes. China is mistaken.

32. If, as DS379 allows, evidence of government ownership or control is relevant to the question of whether an entity is a public body in a final determination, such evidence can be adequate to "tend to prove or indicate" or "support a statement or belief" that an entity is a public body at the initiation stage, as required by Article 11 of the SCM Agreement.

33. Further, when assessing the sufficiency of evidence, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant. If the precise identities of the entities that may be public bodies are not reasonably available, then their characteristics and features also are not reasonably available to an applicant. This means that certain evidence relevant to the question of whether an entity "possesses, exercises or is vested with governmental authority" generally may not reasonably be available to an applicant, and instead, this evidence must be gathered by the investigating authority through the investigatory process. Even if the identities of some of the entities that may be public bodies are available, much of the evidence regarding the nature of those entities is not in the public realm and thus not available to an applicant. At the same time, an investigation cannot be initiated on the basis of no evidence, or on the basis of simple assertion, unsubstantiated by relevant evidence. The question for the investigating authority is therefore: what evidence is reasonably available to an applicant, and does it tend to indicate that the government or public bodies are providing financial contributions? In general, evidence of government ownership or control is in certain circumstances the only evidence that is reasonably available. In fact, the issue of public bodies is an example of why the SCM Agreement includes the term "reasonably available."

VII. COMMERCE'S INITIATION OF INVESTIGATIONS INTO CERTAIN EXPORT RESTRAINT POLICIES IMPOSED BY CHINA AND DETERMINATIONS THAT THESE EXPORT RESTRAINTS CONSTITUTED COUNTERVAILABLE SUBSIDIES ARE CONSISTENT WITH THE SCM AGREEMENT

34. China challenges Commerce's decision in *Seamless Pipe* and *Magnesia Carbon Bricks* to initiate investigations into export restraints imposed by China, in addition to Commerce's determination to countervail those export restraints after China refused to provide information necessary to the analysis. China's objections to those initiation decisions – objections which are crucial to China's case given that it failed to cooperate once the investigations were underway – are unfounded because they rely on China's flawed belief that investigating authorities are prohibited from examining China's various export restraint schemes based on the *US – Export*

Restraints panel report. Commerce's initiation of investigations into export restraints in the challenged investigations was not inconsistent with Articles 11.2 and 11.3 of the SCM Agreement, in spite of the *Export Restraints* panel's analysis of whether hypothetical export restraints could constitute a financial contribution.

35. Examining whether an export restraint constitutes a financial contribution through the entrustment or direction of private entities is fully consistent with Article 1.1(a)(1). The U.S. decisions to countervail China's export restraints on coke and magnesia are not WTO-inconsistent where they were based upon the use of facts available pursuant to Article 12.7 of the SCM Agreement. The use of facts available was required after China declined to provide necessary information based on its erroneous position that, as a legal matter, an export restraint can never constitute a financial contribution encompassed by Article 1.1(a) of the SCM Agreement.

VIII. COMMERCE'S USES OF FACTS AVAILABLE WERE CONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

36. As an initial matter, the United States would point out that China, in its pursuit of its facts available claims, failed in its panel request to summarize the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2 of the Dispute Settlement Understanding. Its vaguely drafted panel request describing hundreds of facts available claims, which it apparently never intended to pursue. After incorrectly stating that it was pursuing all of those claims, China has advanced claims only with respect to 48 instances of the use of facts available. China's defective approach to its Article 12.7 claims made it impossible for the Panel to understand what matters fell into its terms of reference, and for the United States to begin to prepare its defense. The United States is disappointed by China's approach to the proceedings.

37. On the substance, China's first submission provides only a cursory description of its claims with respect to two investigations, merely listing the remaining instances in an exhibit. This approach is insufficient to establish a *prima facie* case with respect to these claims. In addition, China's Article 12.7 claims are based on incorrect interpretations of the SCM Agreement and mischaracterizations of Commerce's determinations.

38. Commerce's use of an adverse inference in selecting from among the available facts is fully consistent with the SCM Agreement, confirmed by the ordinary meaning of the provision, as well as the context provided by the SCM Agreement as a whole and the parallel provision in the AD Agreement. Further, China's interpretation of Article 12.7 would lead to a breakdown of the remedies provided in the SCM Agreement, as interested parties and Members would have no incentive to participate in an investigation if their refusal would mean that an investigating authority would have insufficient information to make a finding of a specific subsidy. Finally, China's reliance on the panel's findings in *China – GOES* to argue that Article 12.7 prohibits the reliance on adverse facts available is misplaced. The panel found that China's investigating authority had ignored substantiated facts on the record and that its determination "was actually at odds with information on the record." In contrast, Commerce's determinations are based on a factual foundation and were not contradicted by substantiated facts.

39. Finally, China has failed to demonstrate that any of the 48 challenged determinations are inadequately supported by the record evidence in each investigation. Commerce's facts available determinations are based on the factual information available on the record of each investigation. Thus, China's argument that the challenged adverse facts available determinations were devoid of a factual basis is simply incorrect.

IX. CONCLUSION

40. As we have demonstrated in our first written submission and again this morning, China has failed to make its case in this dispute, both as a matter of evidence and as a matter of law. Accordingly, the United States respectfully requests the Panel to reject China's claims.

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