UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN PRODUCTS FROM CHINA

(AB-2014-8 / DS437)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

October 16, 2014

Good morning, Presiding Member and members of the Division:

1. On behalf of the United States, I would like to thank you, as well as the Secretariat assisting you, for your work on this appeal.

2. What began as a dispute involving potentially thousands of individual claims, concerning 22 countervailing duty investigations, has been winnowed down on appeal to a handful of questions concerning the interpretation and application of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Contrasted with other appeals presented to the Appellate Body, this one may seem rather small in terms of the number of legal questions presented. However, the answers to these relatively few legal questions will have a profound impact on the ability of WTO Members to confront subsidies provided by other Members that distort trade, causing injury to their industries and ultimately their citizens.

3. China offers the Appellate Body narrow, rigid interpretations of the provisions of the SCM Agreement relating to benchmark issues, the specificity analysis, and the application of facts available. However, China's proposed interpretations simply are not supported by the text of the SCM Agreement, when it is examined in accordance with the customary rules of treaty interpretation, per Article 3.2 of the DSU.

4. If accepted, China's proposed interpretations would seriously undermine the ability of Members' investigating authorities, as well as WTO dispute settlement panels, to identify and measure the types of injurious subsidies disciplined by the SCM Agreement. Ultimately, this dispute raises the following question: under the WTO rules to which they have all agreed, can WTO Members actually confront and obtain relief from injurious subsidization by other Members? If the world trading system is to remain viable, it is imperative that they can.

5. We recognize, of course, that it is every WTO Member's right to decide the degree of government intervention in its own economy. However, every Member has also agreed that its subsidies are subject to WTO rules. These rules create effective disciplines and permit Members to counter injurious subsidization – through countervailing duties or through WTO dispute settlement proceedings.

6. China's reading of the WTO rules would make it more difficult, if not impossible, for other WTO Members to ensure that businesses and workers in their territories are not competing against the financial resources of the Government of China, or other governments. The choices China has made about the structure and operation of its economy do not excuse China from the rules to which it agreed when it joined the WTO. When China's decision to subsidize its industries causes injury to other WTO Members, WTO rules provide an effective response.

Selection of the Benchmark in the Benefit Analysis

7. Moving to the substantive issues on appeal, first, there is the question of the calculation of the benefit conferred by the "financial contribution." This is one of the foundational questions related to whether or not there is a subsidy at all. How are investigating authorities – and WTO panels – to perform such an analysis?

8. The question at issue in the benefit analysis, as the Appellate Body has explained, is whether the "'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution."[1] The Appellate Body has said that, to answer that question, "the marketplace provides an appropriate basis for comparison . . . because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has

[1] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 436 (citing *Canada – Aircraft (AB)*, para. 157).

received the 'financial contribution' on terms more favourable than those available to the recipient in the market."[2]

9. Logically, when looking to the marketplace, an investigating authority or a WTO panel must identify a benchmark that is appropriate and useful for determining whether a benefit has been conferred by a "financial contribution." Of particular importance, the benchmark used for comparison must be independent of the "financial contribution" to which it is compared. Otherwise, the comparison would be circular and would provide no information at all about whether the "financial contribution" conferred a benefit to the recipient. The Appellate Body previously has recognized the problem of such circularity in the benefit calculation, both in *US – Softwood Lumber IV* and again in *US – Anti-Dumping and Countervailing Duties (China)*.[3]

10. In a situation where the "financial contribution" is the sale of a good by a government-owned entity, it is self-evident that the benchmark should not be another sale of the good by the very same entity found to have provided the "financial contribution." That would entail, quite literally, comparing the "financial contribution" to itself, and that likely would provide no information at all about whether the "financial contribution" conferred a benefit.

11. It is also logical that the benchmark should not be a sale by another entity owned by the same owner as the entity found to have provided the "financial contribution" that is the subject of examination. That, too, would risk a circular comparison, due to the alignment of economic interests of entities that share a common owner. For example, in common financial terms, any company in which another company holds a controlling interest is a "subsidiary" of that other company. Logically, the alignment of interests of subsidiary entities would extend to pricing

[2] *Canada – Aircraft (AB)*, para. 157.
[3] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444; *US – Softwood Lumber IV (AB)*, para. 93.

strategy and, absent evidence to the contrary, an investigating authority – or a WTO panel – would be justified in concluding that it does.

12. An analogy can be drawn in this regard to Article 16.1 of the SCM Agreement, which concerns the definition of the domestic industry for the purpose of the injury determination. Article 16.1 permits the exclusion from the domestic industry of domestic producers that are "related" to exporters or importers. Footnote 48 of the SCM Agreement provides that producers are "deemed to be related" when, *inter alia*, both are "directly or indirectly controlled" by a common third party. The footnote further provides that, for the purpose of that paragraph, one party "shall be deemed" to control another where one party is "legally or operationally in a position to exercise restraint or direction over" another. It is uncontroversial, in that context, that ownership of an exporter and producer by a third party is sufficient evidence that the third party is legally in a position to exercise restraint or direction over both the producer and exporter. Thus, ownership by the third party means that those entities are "related" and justifies excluding a producer from the definition of the domestic industry.

13. The same is true when an investigating authority or a WTO panel seeks an appropriate benchmark to use to measure the benefit conferred by a "financial contribution" provided by a government-owned entity. Caution is warranted where, just like that entity, another entity that sells the same good "in the country of provision" also is owned by the government. Absent evidence contradicting what one would normally expect – as a matter of economic and commercial logic – about the alignment of interests of entities that share a common owner, a sale by an entity that is also owned by the government should not be used as a benchmark to measure the benefit of the "financial contribution" provided by another government-owned entity.

14. China misunderstands the logic underlying the selection of a benchmark when it argues that investigating authorities – and, by extension, WTO panels – must undertake a "public body" analysis of other government-owned entities participating in the domestic market before determining not to use a sale or sales by those entities as a benchmark or even before determining to rely on an out-of-country benchmark where government-owned entities play a predominant role in the market. Such a "public body" analysis of other government-owned entities would, for the reasons given above, be unnecessary and beside the point.

15. Those other entities are excluded as potential sources of a benchmark not because the entities themselves necessarily are the "government" within the meaning of Article 1.1 of the SCM Agreement, but rather because they are also owned by the "government," as that term is defined in Article 1.1, a fact that is not disputed in this case. Likewise, the "government" is viewed as playing a predominant role in the market not necessarily because each of the government-owned entities has been examined and determined to be a "public body" or "government" as defined in Article 1.1, but, again, because the "government" is the common owner of the entities.

16. China's proposed interpretation of Article 14(d) of the SCM Agreement, if accepted, would require investigating authorities and WTO panels to undertake a burdensome and entirely unnecessary "public body" analysis, even of entities not alleged to be providing subsidies, in the context of examining benefit. It would also impose a substantial burden on interested parties and Members, which would be required to provide substantial amounts of information so that investigating authorities and WTO panels can perform such analyses. Ultimately, China's proposed interpretation could prevent investigating authorities and WTO panels from finding that subsidies exist because they would be limited to making meaningless, circular comparisons,

using benchmarks that can provide no information about whether a "financial contribution" has conferred a benefit. Such an interpretation is untenable.

Specificity

17. China proposes similarly untenable interpretations of Article 2.1 of the SCM Agreement. If accepted, China's interpretations would prevent investigating authorities and WTO panels from finding subsidies specific, even where evidence establishes, without question, that the subsidy found to exist has, in fact, been limited to certain enterprises.

18. China argues that the principles set forth in Article 2.1 impose on investigating authorities and WTO panels rigid rules for examining whether a subsidy is specific. These rules purportedly govern the very order in which the analysis must be conducted, requiring that certain, particular steps be taken, in sequence, in every case. China's reading of Article 2.1 simply is not supported by the text of that provision, nor by the logic underlying the specificity analysis.

19. The Appellate Body has indicated that the "subparagraphs of Article 2.1 are 'principles', and . . . a proper understanding of specificity must allow for their concurrent application."[4] Applying subparagraphs (a), (b), and (c) concurrently, there may be situations where consideration or analysis of the specificity factors in subparagraphs (a) and (b) simply would not be warranted in light of the evidence before the investigating authority or WTO panel.

20. For example, where there is no evidence that a granting authority or legislation has explicitly limited access to the subsidy, the situation described under Article 2.1(a), there is no need to apply the principle in that subparagraph. Similarly, where there is no evidence that the

[4] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 796.

granting authority or legislation establishes objective criteria or conditions governing the eligibility for, and the amount of, the subsidy, the situation described under Article 2.1(b), there is no need to apply the principle in that subparagraph.

21. That was the case in the underlying investigations. Accordingly, the Department of Commerce ("Commerce") limited its examination to an analysis under Article 2.1(c), which was the only subparagraph relevant to the arguments and evidence presented by the parties.

22. When discussing Article 2.1(c), the Appellate Body has explained that, "[w]here the panel finds that the arguments and evidence submitted by the parties do not sufficiently demonstrate reasons to indicate specificity under Article 2.1(c), a more exhaustive analysis of the specificity factors set out in that provision may not be warranted."[5]

23. Logically, the same is true of subparagraphs (a) and (b). In the absence of arguments and evidence demonstrating reasons to indicate specificity or non-specificity under Articles 2.1(a) or 2.1(b), a more exhaustive analysis of the specificity factors set out in those provisions may not be warranted. Alternatively, the absence of arguments and evidence relating to the situation described in subparagraph (a) – that is, the absence of any evidence that the legislation or the granting authority explicitly limits access to the subsidy – may itself be an indication of non-specificity, as described in subparagraph (c). In any event, nothing in the text of Article 2.1 requires investigating authorities or WTO panels to expend time and resources engaging in unnecessary analyses.

24. China also argues that investigating authorities and WTO panels are required by Article 2.1 to identify the "granting authority," as well as *de jure* evidence of a "plan or outline" of a

[5] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 797.

"subsidy programme." Yet, Article 2.1 does not set up identification of these things as boxes to be checked in the specificity analysis.

25. With respect to "granting authority," nothing in the text of Article 2.1 requires an investigating authority or WTO panel to identify the "granting authority" as a prerequisite to ascertaining the appropriate "jurisdiction" that is relevant to the specificity analysis. As the Appellate Body has explained, "the analysis under Article 2.1 focuses on ascertaining whether access to the subsidy in question is limited to a particular class of eligible *recipients*."[6] The Appellate Body further explained that, "[w]hile the scope and operation of the granting authority is relevant to the question of whether such an access limitation with respect to a particular class of recipients exists, it is important to keep in mind that it is not the purpose of a specificity analysis to determine whether the authorities involved in granting the subsidies constitute a single subsidy *grantor* or several *grantors*."[7]

26. In each of the challenged investigations, Commerce identified the relevant jurisdiction for the purpose of the specificity analysis as all of China. China has never suggested that the relevant jurisdiction should be something other than China. Accordingly, the Panel was correct to conclude that, even though it did not identify the "granting authority," Commerce did not act inconsistently with Article 2.1.

27. As for "subsidy programme," China similarly misreads Article 2.1(c) as imposing a rigid, *de jure* requirement on an investigating authority's or WTO panel's *de facto* analysis of specificity. While the parties agree on the dictionary definition of the term "programme," they differ in their view of the purpose of examining a "subsidy programme" in the context of a *de*

[6] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 756 (emphasis in original).
[7] *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 756 (emphasis in original).

facto specificity analysis. The identification of a "subsidy programme" is not a general prerequisite to the finding of a subsidy or to the finding of specificity. Rather, an investigating authority or a WTO panel will look at a "subsidy programme" to help determine whether the number of recipients of the subsidy is limited, and therefore whether the subsidy is specific.

28. The parties also differ in their views of what evidence supports the conclusion that a "subsidy programme" exists. The implication of China's view is that a "subsidy programme" can be found to exist only where there is evidence of a *de jure* "plan." China's position, though, fails, in the Panel's words, to "reflect[] the diversity of facts and circumstances that investigating authorities [and WTO panels, we would add] may be confronted with when analysing subsidies covered by the SCM Agreement."[8] China's interpretation of Article 2.1(c), if accepted, could prove a serious impediment to investigating authorities and WTO panels when they undertake *de facto* specificity analyses. It could also have the troublesome effect of providing an incentive for Members simply to not notify or publish information about their subsidies and subsidy programs in a transparent manner.

29. In sum, the narrow, rigid interpretations proposed by China are not supported by the text of Article 2.1, read in context, and in light of the object and purpose of the SCM Agreement. China's proposed interpretation would make it more difficult for investigating authorities and WTO panels to find a subsidy specific, even when the evidence overwhelmingly demonstrates that, in fact, the subsidy is used by a limited number of certain enterprises. Such an interpretation cannot be accepted.

Application of Facts Available

[8] Panel Report, para. 7.240.

30. China's claims concerning Commerce's application of facts available, and China's appeal of the Panel's findings under Article 11 of the DSU, are, like China's claims related to benchmark and specificity, divorced from the text of the covered agreements.

31. Before the Panel, and again on appeal, China has argued that Commerce was required by Article 12.7 of the SCM Agreement to cite to the specific facts on which it relied when it applied facts available. However, nothing in the text of Article 12.7 imposes such a requirement on investigating authorities, and nothing in Article 11 of the DSU, read together with Article 12.7 of the SCM Agreement, establishes that such a requirement is a feature of the standard of review to be applied by a panel examining an investigating authority's use of facts available. There simply is no textual support for this aspect of China's underlying legal claim under Article 12.7.

32. Of greater concern, China's claim on appeal under Article 11 of the DSU is nothing more than a recasting of China's claim before the Panel under Article 12.7 of the SCM Agreement. This is a wholly inappropriate invocation of Article 11, as the Appellate Body has previously explained.[9]

33. China claimed before the Panel that each of Commerce's facts available determinations were not based on facts. The Panel examined China's various as applied claims, reviewing Commerce's final determinations, preliminary determinations, issues and decision memoranda, and other evidence put before the Panel by the parties, and concluded that China had failed to establish that each of Commerce's facts available determinations lacked a factual foundation. The Panel applied the correct standard of review, consistent with Article 11 of the DSU.

Section B.1.(d)(1) of China's Panel Request Did Not Satisfy Article 6.2 of the DSU

[9] *See EC – Fasteners (China) (AB)*, para. 442.

34. Of course, the Panel never should have made findings on China's claims under Article 12.7 of the SCM Agreement at all, because those claims were not within the Panel's terms of reference. As explained in the U.S. other appellant submission, section B.1.(d)(1) of China's panel request failed to provide a summary of the legal basis of China's claims under Article 12.7 sufficient to present the problem clearly, as required by Article 6.2 of the DSU.

35. China responds to the U.S. appeal with yet another attempt to interpret and apply the covered agreements so that the rules do not apply to China. Contrary to China's arguments, the Appellate Body is not bound to apply a rigid analytical framework wherein China's panel request escapes scrutiny unless the Appellate Body agrees with each and every aspect of the U.S. argument. Rather the Appellate Body should look at the text of China's panel request, China's first written submission, and the totality of facts and circumstances, and assess whether section B.1.(d)(1) of China's panel request meets the requirements of Article 6.2 of the DSU.

36. In this case, China failed to identify in its panel request the specific instances of "facts available" that were actually of concern to China, China's description of the alleged breach was circular, China used the term "manners" when it contemplated only one legal basis for its challenge, and China failed to identify which of the requirements under Article 12.7 the instances allegedly breached (and we have identified at least six such requirements under Article 12.7). When viewed together with the claims for which China ultimately presented arguments, the only conclusion to be drawn is that section B.1.(d)(1) of China's panel request was inconsistent with Article 6.2 of the DSU.

37. China is wrong when it suggests that the United States takes the position that China was required to present arguments in the panel request. That is not the U.S. position. China was obligated by Article 6.2 to briefly explain how and why the measures challenged were

inconsistent with a particular provision of the covered agreements. China failed even to assert the claims it ultimately pursued, *i.e.*, that 48 instances of "facts available" were inconsistent with Article 12.7 of the SCM Agreement because the "facts available" determinations allegedly were not based on facts actually available on the record. That was the sole legal basis of the claims China actually pursued.

38. Had China simply written section B.1.(d)(1) of its panel request as the United States wrote the penultimate sentence of the preceding paragraph, while citing to the 48 instances of concern, the problem likely would have been presented clearly, without the need for any argument in the panel request. China could then have presented arguments in its written submissions and statements to the Panel by, *inter alia*, pointing to what it considers to be textual and contextual support for its position that there is indeed a legal requirement in Article 12.7 to base a "facts available" determination on facts actually available on the administrative record, and by pointing to evidence demonstrating the absence of facts on Commerce's administrative records. China appears to misunderstand the difference between stating a claim clearly and presenting arguments in support of the claim.

39. Despite that misunderstanding, Article 6.2 of the DSU does indeed apply to China, and section B.1(d)(1) of China's panel request is inconsistent with Article 6.2, because it fails to provide a brief summary of the legal basis of China's complaint sufficient to present the problem clearly. Accordingly, China's claims under Article 12.7 of the SCM Agreement were outside the Panel's terms of reference, and the Panel's findings under Article 12.7 should be declared moot.

Conclusion

40. Presiding Member, members of the Division, this concludes our opening statement. We thank you for your attention and would be pleased to respond to any questions that you may have.