UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA

(DS471)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

November 18, 2015

Mr. Chairperson, members of the Panel:

1. You have heard extensive arguments from both parties in our written submissions and oral presentations. It is evident from the questions you have asked that you have focused on those arguments and studied our submissions closely. Given that, we will not repeat the arguments we have already made.

2. We would simply acknowledge that the legal and interpretative issues before you are challenging and complex. In particular, a short sentence in the AD Agreement[1] setting forth an alternative comparison methodology that may be used under certain conditions sits squarely in the middle of a broad landscape of interpretative analyses by the Appellate Body concerning an issue that, to understate the matter rather significantly, has been of great interest to WTO Members. Reconciling the terms of that provision, its function, and the object and purpose of the AD Agreement itself, as well as the many relevant findings of the Appellate Body will be no small undertaking. The probing questions of the Panel during this meeting, as well as the set of questions the Panel posed in connection with the first panel meeting, indicate that you well understand the difficult task the parties have asked you to undertake. So, thank you for agreeing to take on that task.

3. As the issues in dispute are novel, the Panel has, as I mentioned yesterday, the intellectually tantalizing opportunity, but also the weighty burden to be among the first to reveal your solution to the puzzle presented by the second sentence of Article 2.4.2 of the AD Agreement. Of course, that solution must follow from an application of the customary rules of interpretation. That means, as the Panel well knows, a good faith reading of the ordinary meaning of the terms of that sentence in their context and in light of the object and purpose of the AD Agreement.

4. Additionally, the interpretative solution to the puzzle also must be a general solution. While this is a dispute between China and the United States, in which China asks the Panel to make findings about certain U.S. measures, the preliminary step for the Panel is to do the requisite interpretative analysis to ascertain what the obligations are.

5. The approach to the application of the "pattern clause" that the U.S. Commerce Department ("Commerce") applied in the challenged investigations is, admittedly, quite complicated. The complexity, though, is borne of an effort to deal with thousands of transactions in numerous investigations in an objective, transparent, and predictable way. Commerce has undertaken a good faith effort to grapple with the complexities that can arise from an analysis pursuant to the second sentence of Article 2.4.2, particularly in light of the Appellate Body's many interpretative findings related to zeroing.

6. Another investigating authority, though, might take a different, simpler approach. Perhaps that investigating authority handles antidumping investigations very rarely, or the investigations it handles involve far fewer imports.

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

7. The interpretation of the second sentence of Article 2.4.2 of the AD Agreement must provide space for both kinds of approaches, by both kinds of investigating authorities.

8. As another observation about the interpretation of the second sentence of Article 2.4.2, it will be useful for the Panel to determine for itself and keep firmly in mind what it is that the second sentence is attempting to accomplish. You have our arguments on that. If you agree with us, and with the Appellate Body, that the purpose of the second sentence is to provide an investigating authority with the ability to unmask and remedy targeted or concealed dumping, then it is critical that the interpretation of that provision actually permits that to happen. It should not be the case that higher-priced export transactions, following an application of the second sentence, continue to obscure and mask lower-priced export transactions.

9. If the Panel agrees with that premise, which we urge you to do, then that explains why the alternative, average-to-transaction comparison methodology operates as we argue it does, and cannot operate as China suggests it should.

10. During this meeting, China's arguments have been exposed. China simply does not make sense of the second sentence of Article 2.4.2. As we have shown, China's arguments and its proposed interpretations, in fact, read the second sentence of Article 2.4.2 out of the AD Agreement. For the reasons we have given, China's proposed interpretations simply are not tenable.

11. With respect to the alleged "Single Rate Presumption," we draw the Panel's attention to two points.

12. First, the evidence presented by China to "clearly establish" the existence of the norm remains deficient. As we explained in our Opening Statement, the scope of the norm alleged by China is broader and different than that alleged in the prior disputes that China relies upon and the underlying evidence itself is deficient. In particular, we have demonstrated the deficiencies through rebuttal evidence that was not presented in other disputes.[2] Accordingly, China has failed to establish the existence of a measure, let alone a measure that breaches the AD Agreement.

13. Second, China's "as applied" claims under Article 6.10, 9.2, and 9.4 must fail because China has not even attempted to demonstrate a breach of these provisions in the challenged determinations by actually addressing the specific facts in each of those determinations. In particular, China has not shown that any exporter or producer was wrongfully denied its individual rate[3] or that the China government entity was not subject to examination.

14. With respect to China's claims concerning the alleged Use of Adverse Facts Available Norm, we raise four points.

15. First, during this meeting, China has criticized the U.S. approach to evaluating the evidence proffered by China to establish the alleged norm as being "atomized" because the

[2] U.S. Opening Statement at the Second Panel Meeting, para. 43.
[3] See China's First Written Submission, Sec. V.D.2

United States emphasizes deficiencies with each piece of evidence. But ascertaining the existence of a norm of general and prospective application requires "particular rigour"[4] – which by definition means carefully scrutinizing the proffered evidence.

16. For example, consider the Steel Cylinders OI determination China circulated yesterday. China claimed certain language within that determination reflected a practice that supports a finding for the norm's existence. But China did not explain how that language related to understanding the precise norm. China also alleges that language from that determination can be used to support a finding that there exists an alleged norm of general and prospective application. But China's example demonstrates the opposite. The purported practice reflected in the language highlighted by China was not even carried out in that very determination, thus discrediting the assertion that the language had some normative character to it. Where – as here – a careful examination demonstrates that individual pieces of alleged evidence prove nothing, it logically follows that these pieces of evidence, even when taken together, will continue to prove nothing.

17. Second, based on our discussions over the course of this meeting – particularly China's references to "presumed noncooperation" – you may have the incorrect impression that Commerce always finds non-cooperation with respect to the China government entity. As an initial matter, this is irrelevant to the claims presented here because China is not alleging non-cooperation is an element of the norm. Moreover, there have been instances such as Containers OI[5] where Commerce found the entity fully cooperative and assigned the entity a calculated rate – based on information provided by the entity.

18. The underlying grievance in China's complaint is that Commerce – like any investigating authority – is permitted under the AD Agreement to consider the circumstance of non-cooperation in selecting among the available facts – and may accordingly find that information other than that provided by cooperative respondents might be more probative because of that circumstance. If this is the process that China complains of, then it is simply a basic principle reflected in the text of the AD Agreement.

19. Third, China views it as a "concession" that the United States has not presented a determination by Commerce where an adverse inference was not utilized in selecting facts with respect to the non-cooperative China government entity. No, it is a reflection that China has no *prima facie* case, and that China must turn to arguing – counter to the rules of dispute settlement – that the United States must affirmatively disprove assertions made by China. The basic point is that non-cooperation can be considered by an investigating authority in selecting from available facts, and that the use of an adverse inference may be utilized where non-cooperation is found – particularly in cases likes the challenged determinations where it was not possible to know the extent of the missing information, making the information from one component unreliable for purposes of determining the dumping rate for the China-government entity as a whole.

[4] *US – Zeroing (EC) (AB)*, para. 198
[5] Exhibit USA-100 & Exhibit USA-101.

20. Finally, during this meeting, China has appeared to suggest that Commerce's corroboration process is irrelevant to deciding its claims regarding a lack of special circumspection. Actually, Commerce's corroboration approach is fatal to the claim. Under this approach, Commerce considers all evidence on the record and checks the selected rate with independent sources of information on the record. Corroboration confirms that selected information is reliable and relevant, consistent with the United States' obligations under Article 6.8 and Annex II.

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21. Before we leave this meeting, we think it is appropriate to take stock of where we are in the proceedings. China, at this juncture, is not simply clarifying its legal arguments. Rather, China is still trying to develop and elucidate them as evidenced by the visual aids and exhibits it circulated during this meeting. In particular, China has not demonstrated, *inter alia*, the following:

- A textual underpinning for its interpretation of the second sentence of Article 2.4.2;
- That the analysis in any prior dispute speaks to norms as broad as those alleged in this dispute;
- With respect to its "as applied claims," that any particular exporter, producer, or supplier, was denied an individual rate;
- That the China government entity was not subject to examination;
- The existence of the alleged norms, including, in particular, the precise content of the alleged Use of Adverse Facts Available Norm;
- That China's "as such" claims regarding the alleged Use of Adverse Facts Available Norm is not precluded by China's failure to comply with Article 6.2 of the DSU;
- Why Commerce, after a finding of non-cooperation by a party, is precluded from considering that circumstance in choosing from among the available facts;
- Why Commerce's approach to corroboration does not ensure that any selected facts are a reasonable and reliable replacement for the missing information.

Put plainly, this is not a case where China can assert that its case is better late than never – because China still has failed to make its case, and it is now too late for China to do so.

22. In closing, the United States once again would like to thank the Panel members, as well as the Secretariat staff assisting you, for your time and for the careful attention you are giving to this matter. Thank you.