UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(DS437)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE MEETING OF THE PANEL AND THE PARTIES

May 11, 2017

Mr. Chairperson, members of the Panel:

1. In our closing statement, the United States would like to recall the standard of review to be applied by panels when reviewing an investigating authority's determination in a countervailing duty proceeding. The Appellate Body has explained that:

> [T]he task of a panel [is] to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."[1]

2. As the United States has pointed out repeatedly in our written submissions and throughout this meeting over the last two days, China is attempting to support its arguments by focusing narrowly on individual documents on the record of the section 129 proceedings, which it often mischaracterizes and misrepresents. China's basic approach is to argue that one piece of evidence does not, itself, support the ultimate conclusion the U.S. Department of Commerce ("Commerce") reached. And another piece of evidence, on its own, does not support the ultimate conclusion. And so on. To a large extent, China simply declines to address the vast majority of evidence that was on Commerce's administrative record, and on which Commerce relied. China simply dismisses the bulk of the evidence as not relevant under China's own proposed interpretations. China takes this approach with respect to both its public body and its benchmark claims.

[1] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

3. But the determinations made by Commerce were not based on an individual piece of evidence considered in isolation. Rather, the determinations were based on the totality of the evidence on the record.[2] The Appellate Body has found previously that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the totality of the evidence, how the interaction of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."[3] The panel in *US – Anti-Dumping and Countervailing Duties (China)* followed this approach, explaining that:

> [W]e recall the Appellate Body's ruling that a panel reviewing a determination on a particular issue that is based on the "totality" of the evidence relevant to that issue must conduct its review on the same basis. In particular, the Appellate Body held that if an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination, rather than assessing whether each piece on its own would be sufficient to support that determination.[4]

4. Accordingly, as the Appellate Body has explained, "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[5]

5. China's approach, as we noted earlier, is to focus on selected individual pieces of evidence while ignoring other evidence and also ignoring that Commerce's determination is based on the totality of the evidence. If that approach were taken by a panel, that would be legal error under Article 11 of the DSU.[6] So, the United States struggles to understand why China has presented its arguments to the Panel in the manner that it has.

6. Furthermore, China, in effect, challenges Commerce's weighing of the evidence and invites the Panel to undertake *de novo* review or substitute its own judgment for that of

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[2] *See, e.g.,* Public Bodies Final Determination, p. 5 (Explaining that "the *Public Bodies Memorandum* and accompanying *CCP Memorandum* set forth evidence concerning the extent to which certain categories of state-invested enterprises function as instruments of the GOC.") (p. 6 of the PDF version of Exhibit CHI-5); Public Bodies Preliminary Determination, p. 10 ("We analyzed the input producer information provided by the GOC, the analysis and conclusions of the Public Bodies Memorandum, and other information on the record of these proceedings, which included factual information filed by interested parties and factual information submitted in the underlying administrative investigations.") (p. 11 of the PDF version of Exhibit CHI-4).

[3] *Japan – DRAMs (Korea) (AB)*, para. 131.

[4] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.

[5] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis added).

[6] *See Japan – DRAMSs (Korea) (AB)*, para. 139.

Commerce. As the original Panel in this dispute explained, though, that is not the role of a WTO dispute settlement panel.[7] So, again, China's approach is perplexing.

7. In addition to its limited focus on certain selected pieces of evidence and its misguided invitation for the Panel to undertake its own *de novo* examination of the evidence, China urges the Panel to find that only certain, very specific kinds of analysis – those which China would prefer – are permissible under the SCM Agreement. The United States notes that the third parties this morning did not agree with China's view in this regard. Instead, the third parties that made interventions today understand that the SCM Agreement affords investigating authorities flexibility in terms of the analysis and the evidence that may support findings, for example, that an entity is a public body or that relying on an external benchmark is warranted. China stands alone in its insistence that the SCM Agreement requires the use of the particular analyses for which it argues.

8. Ultimately, as the United States has demonstrated, Commerce's analyses are consistent with the requirements of the SCM Agreement, as well as findings in prior reports concerning those requirements. Commerce explained its section 129 determinations in preliminary and final determinations and supporting analysis memoranda that, altogether, span almost 150 pages. Commerce's determinations are supported by literally thousands of pages of evidence, which Commerce discusses at length. It is clear on the face of those determinations that they are unbiased and objective, they present reasoned and adequate explanations for the conclusions that Commerce reached, and those conclusions are supported by ample – truly massive amounts of – evidence on the administrative record.

9. If what Commerce has done in these section 129 determinations is not sufficient to meet the requirements of the SCM Agreement, the United States is at a loss to understand how any Member will be able to use the tools in the SCM Agreement to discipline injurious subsidies provided by China. That would be a deeply troubling outcome, and one that would have grave implications for the security and predictability of the multilateral trading system.[8]

10. The United States looks forward to responding in writing to the Panel's questions and to commenting on responses provided by China.

11. The United States thanks the Panel, and the Secretariat staff assisting the Panel, for the careful attention you are giving to this matter. And with that, we shall conclude our closing statement.

12. Thank you.

[7] *US – Countervailing Measures (China) (Panel)*, para. 7.10.
[8] *See* DSU, Art. 3.2.