

***UNITED STATES – DEFINITIVE ANTI-DUMPING AND
COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA***

(AB-2010-3 / DS379)

Opening Statement of the United States of America

*****Check Against Delivery*****

January 13, 2011

Good morning, Chair and members of the Division.

1. On behalf of the United States, we would like to thank you for the opportunity to appear here today. In our opening statement this morning, we will highlight exactly what China is asking the Appellate Body to do in this dispute. Unhappy with the rules agreed to by Members, and accepted by China when it acceded to the WTO in 2001, China now proposes interpretations of those rules that have little connection with how they are properly understood in light of the customary rules of interpretation of public international law.

2. The United States agrees with China that the issues on appeal in this dispute are “of systemic importance. . . .”¹ This is evidenced by the large number of third participants in this appeal. At stake in this dispute is the ability of Members to effectively apply antidumping and countervailing duty remedies, available to all Members under the covered agreements, to products from Members, such as China, with economies that, by their nature, pose methodological and other challenges to investigating authorities that are not present when examining dumped or subsidized imports from other Members.

3. China’s economy does not yet operate fully on market principles. In this respect, China’s economy is different from that of most other Members. The question is whether the rules to which China and the Members agreed actually apply to Chinese exports. Or whether, if China’s proposed interpretations are accepted, China may avoid the disciplines established by the covered agreements, and may frustrate the right of Members to impose remedies for Chinese dumping and subsidization.

4. In this appeal, the Appellate Body is squarely presented with a number of questions of legal interpretation concerning provisions of the *Agreement on Subsidies and Countervailing Measures* (“the SCM Agreement”) and the *General Agreement on Tariffs and Trade 1994* (“the GATT 1994”). Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“the DSU”) provides that the WTO dispute settlement system serves to clarify the provisions of the covered agreements “in accordance with customary rules of interpretation of public international law.”

5. As it did before the Panel, China advances on appeal proposed interpretations of the covered agreements that cannot be reconciled with the customary rules of interpretation. China seeks to alter the meaning of the covered agreements by departing from the accepted rules of interpretation and by inventing obligations found nowhere in the text of any covered agreement.

6. The legal interpretations and findings of the Panel, on the other hand, are well-reasoned and based on a correct application of the customary rules of interpretation as well as an objective assessment of the facts. Consequently, we respectfully request that the Appellate Body reject China’s appeal and uphold the Panel’s legal interpretations and findings.

¹ Appellant Submission of the People’s Republic of China (December 1, 2010) (“China Appellant Submission”), para. 3.

I. The Panel Did Not Err in its Interpretation and Application of the Term “Public Body” in Article 1.1 of the SCM Agreement

7. China argues that the Panel erred in its interpretation and application of the term “public body” in Article 1.1 of the SCM Agreement. On the contrary, the Panel correctly analyzed the ordinary meaning of the term “public body,” in its context and in light of the object and purpose of the SCM Agreement, and found that this term refers to an entity controlled by a government. We recall that the Panel in this dispute is now the third panel to interpret the term “public body” as meaning an entity controlled by the government.²

8. China’s proposed interpretation, on the other hand, is divorced from the text of the SCM Agreement. China’s argument – that the term “public body” is limited to an entity vested with government authority to exercise government functions – is based on a flawed contextual analysis and a mistaken reliance on the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles”).

9. After considering various dictionary definitions of the term “public,” the Panel found that, although the ordinary meaning of the term “public body” may encompass entities authorized by law to perform functions of a governmental or public character, the meaning of that term is not limited to such entities. The Panel also considered some of the “varying definitions and practices” for “different jurisdictions” “as to what for purposes of their own domestic laws and systems are considered ‘public bodies.’” Despite China’s criticism, this was an entirely appropriate way for the Panel to assess the ordinary meaning of the term “public body” and to determine whether that meaning, as revealed in usages of the term, is limited to entities vested with government authority to perform government functions, which China argues it is. An ordinary meaning analysis is not limited to dictionary definitions, and the Appellate Body has cautioned that dictionary definitions alone are not always capable of resolving complex questions of interpretation.³

10. The Panel also properly found that the context of the term “public body” supports the conclusion that this term refers to an entity controlled by the government. Of particular relevance is the immediate context, including the use of the word “any” before “public body” and the juxtaposition of the terms “public body” and “government” in Article 1.1(a)(1) of the SCM Agreement, as well as the use of the term “private body” in Article 1.1(a)(1)(iv). A “public body” is something distinct from the “government” and a “private body,” and the term “public body” must have a different meaning than the term “government” or the term would be reduced to inutility, contrary to the customary rules of interpretation.

² See *EC – Large Civil Aircraft (Panel)*, para. 7.1359; *Korea – Commercial Vessels*, paras. 7.50, 7.172, 7.353, and 7.356.

³ See *US – Gambling (AB)*, para. 164 (citing *US – Softwood Lumber IV (AB)*, para. 59; *Canada – Aircraft (AB)*, para. 153; and *EC – Asbestos (AB)*, para 92).

11. China’s flawed contextual analysis would result in the terms “public body” and “government” having the same meaning, which would obviate the need for the term “public body” to have been included in the SCM Agreement at all. China argues that Article 9.1 of the Agreement on Agriculture, which includes words different from those in Article 1.1 of the SCM Agreement, should dictate the meaning of the term “public body” in Article 1.1. China ignores the textual differences between these provisions and greatly overstates the relevance of Article 9.1 of the Agreement on Agriculture as context for the interpretation of the term “public body” in Article 1.1 of the SCM Agreement. The Panel rightly rejected China’s contextual arguments.

12. Further evidence of the disconnect between China’s proposed interpretation and the text of the SCM Agreement is China’s effort to graft onto the SCM Agreement certain provisions of the ILC Draft Articles. China asks the Appellate Body not simply to “take[] into account” the Draft Articles, but effectively to replace the text of the SCM Agreement with them. The Panel correctly found that the Draft Articles are not relevant rules of international law applicable in the relations between the parties that must be taken into account in interpreting the term “public body.”

13. China’s proposed interpretation, if accepted, would remove entirely a wide array of government-controlled entities from the scope of the SCM Agreement’s disciplines. This would upset the balance struck in the SCM Agreement. The Appellate Body has explained that the object and purpose of the SCM Agreement is to “strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions.”⁴ The Appellate Body has also emphasized the right of Members to “fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement.”⁵

14. As the Panel found, requiring proof of government entrustment or direction of an entity the government owns or controls would be akin to inquiring whether the government entrusted or directed itself. Moreover, a government would be able to hide behind its ownership interest in an entity and potentially orchestrate subsidization behind closed doors. This would make proving entrustment or direction difficult or impossible. However, an interpretation of the term “public body” that includes government-owned or government-controlled entities avoids these problems.

II. The Panel Did Not Err in Its Interpretation of Article 2 of the SCM Agreement

15. China argues that the Panel erred in its interpretation of Article 2.1(a) of the SCM Agreement. On the contrary, the Panel properly analyzed the text and context of Article 2.1(a), and the Panel’s interpretation of Article 2.1(a) is consistent with the object and purpose of the SCM Agreement.

⁴ *US – Softwood Lumber IV (AB)*, para. 64.

⁵ *US – Softwood Lumber IV (AB)*, para. 95.

16. China offers an exceedingly narrow reading of the phrase “explicitly limits access to a subsidy,” contending that, because the term “subsidy” is defined in Article 1.1 of the SCM Agreement as a financial contribution that confers a benefit, an investigating authority, in order to find a subsidy *de jure* specific, must find that the law expressly identifies both the financial contribution and benefit and explicitly limits access to both of these elements of a subsidy to certain enterprises.

17. The Panel appropriately rejected this interpretation, noting that it could conceive of “many ways in which access to a subsidy could be *explicitly* limited, and [did not] see that both the financial contribution and the benefit necessarily would have to be set forth *explicitly* to effect such a limitation.”⁶ China mischaracterizes the Panel’s report and ignores the extensive textual and contextual analysis of Article 2.1(a) undertaken by the Panel.

18. The Panel’s interpretation is consistent with the object and purpose of the SCM Agreement, which seeks to balance the right of Members to use both subsidies and countervailing measures. The Panel rightly concluded that China’s proposed interpretation “would open considerable scope for circumvention of the SCM Agreement, based on a distinction in form but not substance.”⁷ The Panel further reasoned that, on the other hand, its own interpretation did not have the “potential” to “improperly bring within the scope of the SCM Agreement measures that in fact are not specific subsidies.”⁸

19. Having properly interpreted Article 2.1(a), the Panel then examined the evidence before Commerce to determine if it supported Commerce’s *de jure* specificity determination. On appeal, China misrepresents the evidence on the record and ignores the totality of the evidence that was considered by Commerce and the Panel. The Panel correctly evaluated the totality of the evidence and found that Commerce’s determination was not inconsistent with Article 2.1(a) of the SCM Agreement.

20. China also appeals the Panel’s interpretation of the term “certain enterprises,” but its argument is similarly premised on a flawed analysis that ignores the totality of the evidence before Commerce. As discussed in the U.S. appellee submission, the Government of China promulgated policy documents at the national level that established “encouraged” projects to which lending was provided and “restricted” and “eliminated” projects to which lending was prohibited. These policy documents, in conjunction with policy documents promulgated at the provincial and municipal levels, demonstrated that access to the policy lending subsidy was explicitly limited to certain enterprises, including the OTR Tires industry. Indeed, some of these

⁶ Panel Report, para. 9.26 (emphasis added).

⁷ Panel Report, para. 9.30.

⁸ Panel Report, para. 9.31.

policy documents referenced an investigated tire producer by name and stated that its tire production facility was a government priority.

21. China asks the Appellate Body to ignore the totality of the evidence and focus on a single fact, which China mischaracterizes. It simply is not the case that the policy lending subsidy was available to 539 “industries.” As the Panel found, the government policy documents listed “individual project types, described in very specific and narrowly-circumscribed terms,” which gave the impression not “of broad availability but rather of singling out of very particular types of projects.”⁹ China ignores virtually all of the evidence that was before Commerce and criticizes the Panel for properly basing its conclusion on the totality of the evidence.

22. China also appeals the Panel’s interpretation of the term “subsidy” in Article 2.2 of the SCM Agreement, but this appeal is no different than its appeal of the Panel’s interpretation of the same term in Article 2.1(a). China’s proposed interpretation should be rejected, as it was by the Panel, for the same reasons. In addition, despite prevailing on its claim against Commerce’s regional specificity determination, China appeals what it describes as the Panel’s “finding” that “the existence of a ‘distinct’ or ‘unique’ ‘regime’ for the provision of a subsidy is legally relevant to a determination of specificity” under Article 2.2. As is evident from the Panel’s report, however, the Panel made no “finding” in this regard, and this aspect of China’s appeal should also be rejected.

III. The Panel Did Not Err in Its Interpretation and Application of Article 14(d) of the SCM Agreement

23. China argues that the Panel erred in finding that record evidence showing that the government was the predominant supplier of a good can be sufficient, on its own, to establish market distortion such that rejection of in-country private prices as benchmarks would be permissible under Article 14(d) of the SCM Agreement. China’s appeal presents a straightforward question of legal interpretation; the pertinent facts are not disputed. The question before the Appellate Body is: did the Panel correctly find that it was permissible, under Article 14(d), for Commerce to reject in-country private prices for hot-rolled steel as a benchmark where 96.1 percent of Chinese hot-rolled steel production was from state-owned enterprises and import volume amounted to only three percent of total Chinese hot-rolled steel production? The answer clearly is yes.

24. The Appellate Body has recognized that “investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d) . . .” under certain circumstances.¹⁰ For example, as the panel in *US – Softwood Lumber IV* reasoned, where the

⁹ Panel Report, para. 9.68.

¹⁰ *US – Softwood Lumber IV (AB)*, para. 90; *see also Softwood Lumber IV (AB)*, paras. 96, 101, 103.

government is the only supplier of the particular good in the country, or where the government administratively controls the price of the good in the country, it will not be possible to use an in-country price as a benchmark. To use an in-country price in these situations would literally entail comparing the government price to itself, and would provide no information whatsoever as to whether the recipient of the financial contribution was better off as a result of the financial contribution. In other words, the comparison would be circular.

25. Agreeing with the Appellate Body’s analysis in *US – Softwood Lumber IV*, the Panel here explained that, when the government is the predominant supplier of a good, “the analytical justification for the possibility to reject private in-country prices . . . is identical”¹¹ As the Appellate Body has explained, “[w]henver the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices.”¹² That is, because of the government’s predominance, other prices effectively are determined by the government price, *i.e.*, private market prices align with the government price, and the comparison becomes circular. This circularity is the heart of the problem.

26. China misunderstands the problem. China appears to believe that the problem is that government predominance in the market will cause *private market prices* to be “artificially low.” Consequently, China argues that evidence of government predominance in the market is legally insufficient to support a finding of “distortion,” *i.e.*, that private market prices align with the government price *and are “artificially low,”* and that, in any event, government predominance, as a matter of economics, is unlikely to cause *private market prices* to be “artificially low.”

27. However, the problem with government predominance in the market is that private prices *will align* with the government price, and thus comparing the government price to a benchmark price from the private market in the country of provision would be tantamount to comparing the government price to itself. It is the circularity inherent in such a comparison that results in a *benefit* calculation that is “artificially low.” The “distortion” in the private market prices *is the alignment* with the government price, and such alignment results from government predominance in the market. In other words, the prices are “distorted” because they are effectively established by the government and not by the market.

28. The question of whether the government price is “artificially low” is the very question being addressed by the benefit analysis, *i.e.*, the comparison of the government price to a price from the commercial market. In order to determine whether the government price is “artificially low,” the investigating authority must first identify a benchmark from the market, free from the

¹¹ Panel Report, para. 10.42.

¹² *US – Softwood Lumber IV (AB)*, para. 100; *see also* para. 101.

influence of the government’s own pricing strategy, with which to compare the government price.

29. China’s basic misunderstanding in this regard permeates and undermines all of its arguments. Because of this fundamental flaw, and other errors that are discussed in the U.S. appellee submission, all of China’s arguments are without merit and should be rejected.

IV. The Panel Did Not Err in Concluding that Commerce’s Loan Benchmark Was Not Inconsistent with Article 14(b) of the SCM Agreement

30. China argues that the Panel erred in concluding that Commerce’s loan benchmark was not inconsistent with Article 14(b) of the SCM Agreement. China’s arguments are without merit and, again, are based on a misunderstanding of the obligations in the SCM Agreement.

31. After analyzing the text of Article 14(b), the Panel found that “it is clear that the ‘ideal’ benchmark . . . would be an actual loan from a commercial lender of the same size, maturity, structure and currency, to the investigated entity, taken out on the same day as the investigated government loan.”¹³ However, “[i]t also is clear . . . that in practice the existence of such an ideal benchmark loan will be extremely rare.”¹⁴ In such situations, Article 14(b) does not require an investigating authority to conclude that there simply is no benchmark, and that as a result no benefit amount can be determined. Rather, as the Panel found, “Article 14(b), by its own terms, makes allowance for the use of proxies when an identical or nearly-identical loan is not available as a benchmark.”¹⁵

32. China simply denies the possibility that loans denominated in different currencies could be “comparable.” China’s interpretation of the term “comparable” would effectively require that any benchmark loan used to determine the benefit of a government loan denominated in RMB necessarily must be identified from amongst loans within China. While the Panel “acknowledge[d] that the currency in which a loan is denominated is of course one of its most important characteristics, and that using as a benchmark a loan in another currency poses particular challenges,”¹⁶ it considered that “currency differences do not necessarily pose the insurmountable hurdle that China posits.”¹⁷

33. The problem with China’s narrow, rigid interpretation of Article 14(b) is that it “would effectively limit an investigating authority’s ability to identify an appropriate benchmark, forcing

¹³ Panel Report, para. 10.115.

¹⁴ Panel Report, para. 10.115.

¹⁵ Panel Report, para. 10.117.

¹⁶ Panel Report, para. 10.120.

¹⁷ Panel Report, para. 10.120.

it instead to fall back on a choice from among inappropriate benchmarks.”¹⁸ Indeed, “the implication of China’s argument is that even if all loans in a given country were made by the government, the investigating authority would have no choice but to identify as a benchmark for the investigated government loan another government loan . . .” and “*such a comparison would be entirely circular . . .*”¹⁹ In this regard, the Panel appropriately considered that “the logic of the Appellate Body’s reasoning in *US – Softwood Lumber IV* . . . [is] equally applicable to Article 14(b), and indeed to Article 14 in its entirety.”²⁰

34. China again misunderstands the problem. China argues that there is no evidence of “distortion” in the Chinese lending market, in that there is no evidence that interest rates in China are “artificially low.” The concern is not that Chinese interest rates are necessarily “artificially low,” but that they are effectively established by the government. China fails to understand the circularity inherent in comparing the interest rate of a government-provided loan with a loan interest rate that is effectively dictated by the government’s predominant role and intervention in the lending market. Such a circular comparison would result in a *benefit calculation* that is artificially low or zero.

35. In the underlying investigations, Commerce found that the Chinese government, through its predominant role as a lender in and regulator of the lending market, effectively establishes all retail loan interest rates in the Chinese market. Therefore, using a Chinese loan as a benchmark would result in a comparison of two loans, both with interest rates effectively established by the government. This would be the same kind of circular comparison that was the subject of concern in *US – Softwood Lumber IV*. Accordingly, the Panel correctly found that Commerce’s determination to reject RMB loans within China as a benchmark was not inconsistent with Article 14(b) of the SCM Agreement.

36. The Panel further correctly found that the loan benchmark used by Commerce to measure the benefit of the financial contribution was not inconsistent with Article 14(b). China argues that “it was (and is) self-evident that Commerce’s multi-currency regression model was not ‘a comparable commercial loan which the firm could actually obtain on the market.’”²¹ However, Commerce’s model was simply an average of interest rates, although one which took into account additional factors in order to improve its reliability as a benchmark. China appears to concede the possibility that something other than an “actual” loan, such as a “weighted-average [of] interest rates charged by Chinese banks . . .,”²² may be used as a benchmark consistently with Article 14(b). Ultimately, China’s argument against the loan benchmark Commerce actually

¹⁸ Panel Report, para. 10.121.

¹⁹ Panel Report, para. 10.121 (emphasis added).

²⁰ Panel Report, para. 10.122.

²¹ China Appellant Submission, para. 374.

²² China Appellant Submission, para. 363; *see also id.*, para. 400.

used is little different than its argument against any loan benchmark denominated in a currency different from the government loan, and is, again, based on a narrow, rigid interpretation of Article 14(b), which cannot be accepted.

V. The Panel Correctly Concluded that China Failed To Establish that the CVD Determinations at Issue Were Inconsistent with Articles 10, 19.3, 19.4, or 32.1 of the SCM Agreement or Article VI:3 of the GATT 1994

37. Finally, the Panel correctly found that China failed to establish that Commerce acted inconsistently with any of the cited provisions of the SCM Agreement and the GATT 1994 when it used a non-market economy (“NME”) methodology in the underlying antidumping (“AD”) investigations concurrently with its determinations in the underlying countervailing duty (“CVD”) investigations of subsidization, and its imposition of CVDs on the same products.

38. China’s primary challenge on appeal is based on Article 19.4 of the SCM Agreement, which provides that “[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist.” China argues that, “if a subsidy has been ‘offset’ through the manner in which the importing Member calculates anti-dumping duties, the subsidy no longer ‘exists’ because it can no longer be attributed to the imported products as a cause of injury to domestic producers.”²³ Under China’s reasoning, because such subsidies no longer “exist” for purposes of the SCM Agreement – as a result of application of the NME AD procedures – any CVDs on those goods necessarily exceed the amount of the subsidies and thus are inconsistent with Article 19.4 of the SCM Agreement.

39. Contrary to China’s mistaken interpretation, the Panel correctly found that the existence of subsidies for purposes of the SCM Agreement is governed by Articles 1 and 14 of the SCM Agreement, and has nothing whatsoever to do with the imposition of NME AD duties. The Panel recognized that Article 19.4 limits the amount of CVDs that may be levied to “the amount of the subsidy found to exist,” and correctly concluded that the amount “found to exist” is the amount found in the CVD investigation consistent with Articles 1 and 14 of the SCM Agreement.²⁴ As the Panel noted, China did “not argue that the countervailing duties imposed in each of the investigations at issue, in and of themselves, exceeded the amount of the subsidy *calculated*” by Commerce.²⁵ Likewise, Article VI:3 of the GATT, which provides that CVDs may not exceed the amount of the subsidy, addresses the amount of the subsidy, not any supposed effect of NME AD duties.

²³ China Appellant Submission, para. 500.

²⁴ Panel Report, para. 14.112.

²⁵ Panel Report, para. 14.109 (emphasis in original).

40. Similarly, the Panel properly found that China failed to demonstrate any inconsistency with Article 19.3 of the SCM Agreement, which provides that CVDs shall be levied “in the appropriate amounts in each case.” The Panel correctly found that CVDs are collected in the “appropriate” amounts within the meaning of Article 19.3 where the amount collected does not exceed the amount of subsidy found to exist in the CVD investigation.

41. The Panel properly identified contextual support for its findings in two primary sources outside of the SCM Agreement: Article VI:5 of the GATT 1994 and Article 15 of the Tokyo Round Subsidies Code. The Panel found it significant that Article VI:5, which provides that no product shall be subject to both AD duties and CVDs to compensate for the “same situation of dumping or export subsidization,” is limited to export subsidies, as opposed to the domestic subsidies at issue in the underlying investigations. The Panel also found it significant that the predecessor to the SCM Agreement – the Tokyo Round Subsidies Code – contained a provision that explicitly addressed the concurrent use of NME AD duties and CVDs, but that this provision was not included in the SCM Agreement. In addition, China’s Protocol of Accession to the WTO, in which China specifically agreed that Members could apply both NME AD duties and CVDs to its exports, provides further contextual support for the Panel’s findings.

42. China argues that “it is inconsistent with the object and purpose of the SCM Agreement to permit Members to impose countervailing duties without taking into account the fact that they offset the same subsidies through the manner in which they calculate anti-dumping duties.”²⁶ Contrary to China’s argument, a review of the WTO agreements as a whole establishes that the Members created two distinct remedies for two separate unfair trade practices – dumping and subsidization. Thus, the Panel correctly found that, “. . . the object and purpose of Part V of the SCM Agreement is limited to imposition of disciplines with respect to [CVDs].”²⁷

43. China asks the Appellate Body not only to find that the Panel’s legal interpretation is incorrect, but also to “complete the analysis” and conclude that the measures at issue were inconsistent with U.S. obligations under the covered agreements.²⁸ However, the Panel made no factual findings regarding the existence of any alleged double remedy, and China has not placed sufficient undisputed facts on the record to permit completion of the analysis in this regard. Instead, China relies on unsupported theoretical assumptions.²⁹ Thus, there is no factual basis for the Appellate Body to conclude that the measures at issue were inconsistent with U.S. obligations under the covered agreements.

²⁶ China Appellant Submission, para. 525.

²⁷ Panel Report, para. 14.122.

²⁸ China Appellant Submission, para. 562.

²⁹ See U.S. First Written Submission before the Panel, paras. 450-59; see also U.S. Second Written Submission before the Panel, paras. 180-207.

44. We would also note that the Panel excluded as beyond its terms of reference China’s “as such” claim – which was based on the alleged absence of legal authority in U.S. law for Commerce to avoid the imposition of a double remedy – and China did not appeal that finding.³⁰ Consequently, the measures at issue in this dispute are the four CVD investigations, and, as just explained, there simply is no evidence on the record of any double remedy in any of the underlying investigations.

VI. Conclusion

45. For the reasons we have given, China’s appeal should be rejected, and the Panel’s findings should be upheld. Chair, members of the Division, this concludes our opening statement. We look forward to responding to your questions.

³⁰ Panel Report, paras. 14.26, 14.42.