WORLD TRADE ORGANIZATION

WT/DS379/R
22 October 2010

(10-5262)

Original: English

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

Report of the Panel

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US – FSC (Article 22.6 – US)	Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002, DSR 2002:VI, 2517
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Lead and Bismuth II	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report WT/DS138/AB/R, DSR 2000:VI, 2623
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403
US – MFN Footwear	GATT Panel Report, *United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, DS18/R, adopted 19 June 1992, BISD 39S/128
US – Offset Act (Byrd Amendment)	Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
US – Shrimp (Ecuador)	Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425
US – Shrimp (Thailand) / US – Customs Bond Directive	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS343/AB/R, WT/DS345/AB/R, adopted 1 August 2008
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571

Short Title	Full Case Title and Citation
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, 641
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, 4865
US – Stainless Steel (Mexico)	Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417
US – Zeroing (Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, 3

I. INTRODUCTION

A. COMPLAINT OF CHINA

1.1 On 19 September 2008, China requested consultations with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The consultations concerned definitive anti-dumping and countervailing duties imposed by the United States on imports of four products from China (circular welded carbon quality steel pipe, pneumatic off-the-road tires, light–walled rectangular pipe and tube, laminated woven sacks).[1] China and the United States held consultations on 14 November 2008. These consultations failed to resolve the dispute.

1.2 On 9 December 2008, China requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 30 of the SCM Agreement, and Article 17 of the AD Agreement.[2]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 At its meeting on 20 January 2009, the Dispute Settlement Body ("DSB") established the Panel pursuant to the request of China in document WT/DS379/2, in accordance with Article 6 of the DSU.

1.4 The Panel's terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by China in document WT/DS379/2, the matter referred to the DSB by China in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.5 On 23 February 2009, China requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU.

1.6 On 4 March 2009, the Director-General composed the Panel as follows:

Chairperson: Mr. David Walker

Members: Mr. Thinus Jacobsz
Ms Andrea Marie Brown

1.7 Argentina, Australia, Bahrain, Brazil, Canada, the European Communities[3], India, Japan, Kuwait, Mexico, Norway, Saudi Arabia, Chinese Taipei and Turkey reserved their rights to participate in the Panel proceedings as third parties.[4]

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[1] WT/DS379/1, ("China request for consultations").

[2] WT/DS379/2, ("China request for establishment of the Panel").

[3] On 1 December 2009, the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* ("Treaty of Lisbon") (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the European Union replaces and succeeds the European Community.

1.8 The Panel met with the parties to the dispute on 7-8 July 2009 and 11-12 November 2009, and with the third parties on 7 July 2009.

1.9 The Panel submitted its interim report to the parties on 11 June 2010 and submitted its final report to the parties on 23 July 2010.

C. ADDITIONAL PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION

1.10 On 26 March 2009, China requested the Panel to adopt additional working procedures concerning Business Confidential Information ("BCI"). To that effect, China submitted to the Panel a set of proposed BCI procedures. The parties had the opportunity to present written and oral comments regarding China's request. Following the exchange of views between the parties, on 7 April 2009 the Panel adopted additional procedures for the protection of BCI. These procedures are set forth in Annex E.

II. FACTUAL ASPECTS

2.1 This dispute concerns the definitive anti-dumping and countervailing duties imposed by the United States as a result of four anti-dumping and four countervailing duty investigations conducted by the United States Department of Commerce ("USDOC"), covering four products from China: (i) Circular Welded Carbon Quality Steel Pipe ("CWP"); (ii) Certain New Pneumatic Off-the-Road Tires ("OTR"); (iii) Light–Walled Rectangular Pipe and Tube ("LWR"); and (iv) Laminated Woven Sacks ("LWS").[5] China claims that the final USDOC determinations that led to the imposition of the duties, the orders imposing the duties themselves, and certain aspects of the conduct of the underlying investigations are inconsistent with the United States' obligations under the covered Agreements. China also challenges an alleged imposition by the United States of "double remedies" resulting from the application, in the four sets of investigations at issue, of anti-dumping duties calculated under the US non-market economy ("NME") methodology[6] simultaneously with countervailing duties on the same products. China also makes "as such" claims against the alleged U.S. failure to provide the USDOC with legal authority to avoid the imposition of double remedies in such circumstances.

A. INVESTIGATIONS COVERED BY THIS DISPUTE

1. Circular Welded Carbon Quality Steel Pipe

(a) Countervailing duty investigation

2.2 On 5 July 2007, the USDOC initiated a countervailing duty investigation on imports of CWP from China.[7] The products covered by the investigation were certain circular welded carbon quality steel pipes as classified in tariff sub-headings 7306.30.10.00, 7306.30.50.25, 7306.30.50.32, 7306.30.50.40, 7306.30.50.55, 7306.30.50.85, 7306.30.50.90, 7306.50.10.00, 7306.50.50.50, 7306.50.50.70, 7306.19.10.10, 7306.19.10.50, 7306.19.51.10, and 7306.19.51.50 of the Harmonized Tariff Schedule of the United States ("HTSUS"), and as described more specifically in the USDOC's

[4] WT/DS379/3.

[5] Hereinafter referred to as "the four sets of investigations at issue" or "the four sets of anti-dumping and countervailing duty investigations".

[6] Under Section 773(c) of the US *Tariff Act of 1930* (19 U.S.C. 1677b(c)), normal value in anti-dumping investigations involving products from NME countries is determined on the basis of values of factors of production in countries that the USDOC has designated as market economies.

[7] *Notice of Initiation of Countervailing Duty Investigation: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China* ("CWP Notice of Initiation"), Exhibit CHI-5, pp. 36668 and 36670.

countervailing duty order.[8] The exporters/producers concerned were Tianjin Shuangjie Steel Pipe Group Co., Ltd. ("Shuangjie"), Weifang East Steel Pipe Co., Ltd. ("East Pipe"), and Zhejiang Kingland Pipeline and Technologies Co., Ltd. ("Kingland").[9] The period of investigation for the purpose of the subsidy determination was 1 January to 31 December 2006.[10]

2.3 During the course of the investigation, there were communications and exchanges between the USDOC and the parties to the investigation, *inter alia*, questionnaires and responses including supplemental requests for information pertaining to new subsidy allegations, arguments, and comments.[11] On 13 November 2007, the USDOC published in the Federal Register a notice of preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final countervailing duty determination with final anti-dumping duty determination.[12] On 5 June 2008, the USDOC published a final countervailing duty determination.[13] On 22 July 2008, the USDOC published an amended final determination and notice of countervailing duty order, finding "net subsidy rates" ranging from 29.62 per cent to 616.83 per cent, and indicating that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these net subsidy rates.[14]

2.4 The USDOC determined, *inter alia*, that the government provision of hot-rolled steel ("HRS") to certain producers through state-owned enterprises ("SOEs") constituted subsidies that were *de facto* specific. In addition, the USDOC found that the provision of HRS through private trading companies that had purchased HRS from state-owned producers and/or suppliers also constituted countervailable subsidies. The USDOC resorted to adverse facts available to determine the amount of SOE-produced HRS that investigated pipe producers had purchased from trading company suppliers. The USDOC determined that private prices in China could not be used as benchmarks to determine the existence and amount of benefit conferred by such subsidies and as a result resorted to alternative benchmarks in conducting its benefit determination.

2.5 Based on adverse facts available, the USDOC also determined that China provided subsidies in the form of preferential lending by state-owned commercial banks ("SOCBs") to one investigated producer, East Pipe, and that these subsidies were *de jure* specific. In determining the existence and amount of the benefit from the loans, the USDOC considered that it would not be appropriate to use the interest rate applicable to loans issued by Chinese banks as a benchmark and instead constructed a proxy interest rate to determine the existence and amount of benefit conferred by the loans.[15]

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[8] *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order* ("CWP Countervailing Duty Order"), Exhibit CHI-8, p. 42546.

[9] *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances; and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination* ("CWP Preliminary Countervailing Duty Determination"), Exhibit CHI-6, p. 63876.

[10] Id., p. 63881.

[11] *See, e.g.*, Exhibit CHI-6, pp. 63876-63877; and *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances* ("CWP Final Countervailing Duty Determination"), Exhibit CHI-7, pp. 31966-31967.

[12] Exhibit CHI-6, p. 63876.

[13] Exhibit CHI-7, p. 31969.

[14] Exhibit CHI-8, p. 42547.

[15] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, ("CWP Countervailing Duty I&D Memo"), Exhibit CHI-1, pp. 9-12, 14-15, 62-67 and 72-79.

(b) Anti-dumping investigation

2.6 In parallel to the countervailing duty investigation on CWP from China, the USDOC initiated an anti-dumping investigation with respect to the same product. The period of investigation for the dumping determination was 1 October 2006 to 31 March 2007. The USDOC treated China as an NME country for purposes of determining normal value and calculating the margins of dumping. On 5 June 2008, the USDOC published a final anti-dumping duty determination, finding dumping margins ranging from 69.20 per cent to 85.55 per cent.[16] On 22 July 2008, the USDOC published an anti-dumping duty order, indicating that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these dumping margins.[17]

2. Light–Walled Rectangular Pipe and Tube

(a) Countervailing duty investigation

2.7 On 24 July 2007, the USDOC initiated a countervailing duty investigation on imports of LWR from China.[18] The products covered by the investigation were certain welded carbon-quality light-walled steel pipe and tube, of rectangular (including square) cross section, having a wall thickness of less than 4mm as classified in tariff sub-headings 7306.61.50.00 and 7306.61.70.60 of the HTSUS, and as described more specifically in the USDOC's countervailing duty order.[19] The exporters/producers concerned were Qingdao Xiangxing Steel Pipe Co., Ltd. ("Qingdao"); Zhangjiagang Zhongyuan Pipe–Making Co., Ltd. ("ZZPC"); and Lets Win.[20] The period of investigation for purposes of the subsidy determination was 1 January to 31 December 2006.[21]

2.8 During the course of the investigation, there were communications and exchanges between the USDOC and the parties to the investigation, *inter alia*, questionnaires and responses including supplemental requests for information pertaining to new subsidy allegations, arguments, and comments.[22] On 30 November 2007, the USDOC published in the Federal Register a notice of preliminary affirmative countervailing duty determination and alignment of final countervailing duty determination with final anti-dumping duty determination.[23] On 24 June 2008, the USDOC published a final countervailing duty determination, finding "net subsidy rates" ranging from 2.17 per cent to 200.58 per cent.[24] On 5 August 2008, the USDOC published a countervailing duty order, indicating

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[16] *Issues and Decision Memorandum for the Final Determination of Sales at Less than Fair Value* ("CWP Anti-Dumping Duty I&D Memo"), Exhibit CHI-9, pp. 10-14; Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China* ("CWP Final Anti-Dumping Duty Determination"), Exhibits CHI-10, pp. 31970-31973.

[17] *Notice of Antidumping Duty Order: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China* ("CWP Anti-Dumping Duty Order"), Exhibit CHI-11, pp. 42548-42549.

[18] *Notice of Initiation of Countervailing Duty Investigation: Light–Walled Rectangular Pipe and Tube from the People's Republic of China* ("LWR Notice of Initiation"), Exhibit CHI-18, pp. 40281 and 40283.

[19] *Light–Walled Rectangular Pipe and Tube from the People's Republic of China: Notice of Countervailing Duty Order* ("LWR Countervailing Duty Order"), Exhibit CHI-21, pp. 45405-45406.

[20] *Light–Walled Rectangular Pipe and Tube from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination* ("LWR Preliminary Countervailing Duty Determination"), Exhibit CHI-19, p. 67703.

[21] Id., p. 67706.

[22] *See, e.g.*, Exhibit CHI-19, pp. 67703-67704; and *Light–Walled Rectangular Pipe and Tube from the People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination* ("LWR Final Countervailing Duty Determination"), Exhibit CHI-20, p. 35643.

[23] Exhibit CHI-19, p. 67703.

[24] Exhibit CHI-20, p. 35642.

that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these net subsidy rates.[25]

2.9 The USDOC determined, *inter alia*, that the government provision of HRS through SOEs constituted financial contributions that conferred benefits, and that such subsidies were *de facto* specific. The USDOC also determined that the provision of SOE-produced HRS through private trading companies constituted countervailable subsidies. The USDOC resorted to facts available to determine the amount of SOE-produced HRS that investigated producers purchased from trading companies. The USDOC considered that private prices for HRS in China could not be used as benchmarks to determine the existence and amount of benefit conferred and, as a result, resorted to out-of-country benchmarks for the purposes of benefit determinations.[26]

(b) Anti-dumping investigation

2.10 In parallel to the countervailing duty investigation on LWR from China, the USDOC initiated an anti-dumping investigation with respect to the same product. The period of investigation for the dumping determination was 1 October 2006 to 31 March 2007. The USDOC treated China as an NME country for purposes of calculating the normal value and margins of dumping. On 24 June 2008, the USDOC published a final anti-dumping duty determination, finding dumping margins ranging from 249.12 per cent to 264.64 per cent.[27] On 5 August 2008, the USDOC published an anti-dumping duty order, indicating that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these dumping margins.[28]

3. Laminated Woven Sacks

(a) Countervailing duty investigation

2.11 On 25 July 2007, the USDOC initiated a countervailing duty investigation on imports of LWS from China[29], as classified in tariff sub-headings 6305.33.0050, 6305.33.0080, 3923.21.0080, 3923.21.0095, 3923.29.0000, 3917.39.0050, 3921.90.1100, 3921.90.1500, 5903.90.2500, 4601.99.0500, 4601.99.9000, and 4602.90.000 of the HTSUS, and as described more specifically in the USDOC's countervailing duty order.[30] The exporters/producers concerned were Han Shing Chemical Co., Ltd. ("Han Shing Chemical"); Ningbo Yong Feng Packaging Co., Ltd. ("Ningbo"); Shangdong Qilu Plastic Fabric Group, Ltd. ("Qilu"); Shangdong Shouguang Jianyuan Chun Co., Ltd.

[25] Exhibit CHI-21, p. 45406.

[26] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Light–Walled Rectangular Pipe and Tube from the People's Republic of China* ("LWR Countervailing Duty I&D Memo"), Exhibit CHI-2, pp. 8-10 and 25-37; and Exhibit CHI-19, pp. 67707-67708.

[27] *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light–Walled Rectangular Pipe and Tube from the People's Republic of China* ("LWR Final Anti-Dumping Determination"), Exhibit CHI-23, pp. 35652-35654.

[28] *Light–Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light–Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value* ("LWR Anti-Dumping Duty Order"), Exhibit CHI-24, p. 45405-45406.

[29] *Laminated Woven Sacks from the People's Republic of China: Initiation of Countervailing Duty Investigation* ("LWS Notice of Initiation"), Exhibit CHI-33, pp. 40839-40840.

[30] *Laminated Woven Sacks from the People's Republic of China: Countervailing Duty Order* ("LWS Countervailing Duty Order"), Exhibit CHI-36, pp. 45955-45956.

("SSJ"); and Zibo Aifudi Plastic Packaging Company Limited ("Aifudi").[31] The investigation concerned imports during the period from 1 January to 31 December 2006.[32]

2.12 During the course of the investigation, there were communications and exchanges between the USDOC and the parties to the investigation, *inter alia*, questionnaires and responses including supplemental requests for information pertaining to new subsidy allegations, arguments, and comments.[33] On 3 December 2007, the USDOC published in the Federal Register a notice of preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final countervailing duty determination with final anti-dumping duty determination.[34] On 24 June 2008, the USDOC published a final countervailing duty determination, finding "net subsidy rates" ranging from 29.54 per cent to 352.82 per cent.[35] On 7 August 2008, the USDOC published a countervailing duty order, indicating that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these net subsidy rates.[36]

2.13 The USDOC determined, *inter alia*, that the provision of biaxial-oriented polypropylene ("BOPP") by SOEs constituted a financial contribution which conferred a benefit and that this subsidy was specific. The USDOC used an out-of-country benchmark to determine the existence and amount of the subsidy benefits and relied on adverse facts available to determine the extent of government ownership of BOPP producers in China. Also based on adverse facts available, the USDOC found that the provision of preferential loans by government policy banks and SOCBs constituted subsidies which were *de jure* specific. In determining the existence and amount of the benefit from the loans, the USDOC considered that it would not be appropriate to use the interest rate applicable to loans issued by Chinese banks as a benchmark and instead constructed a proxy interest rate to determine the existence and amount of benefit conferred by the loans. Finally, the USDOC also found that the government provision of land-use rights was a countervailable subsidy, and used out-of-country benchmarks to determine the existence and amount of the subsidy benefits.[37]

(b) Anti-dumping investigation

2.14 In parallel to the countervailing duty investigation on LWS from China, the USDOC initiated an anti-dumping investigation with respect to the same product. The period of investigation for the dumping determination was 1 October 2006 to 31 March 2007. The USDOC treated China as an NME country for purposes of determining normal value and calculating the margins of dumping. On 24 June 2008, the USDOC published a final anti-dumping duty determination, finding dumping

[31] *Laminated Woven Sacks from the People's Republic of China: preliminary Affirmative Countervailing Duty Determination; Preliminary Affirmative Determination of Critical Circumstances, In Part; and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination* ("LWS Preliminary Countervailing Duty Determination"), Exhibit CHI-34, pp. 67893-67894.

[32] Id., p. 67899.

[33] *See, e.g.*, Exhibit CHI-34, pp. 67893-67894 and 67905; and *Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances* ("LWS Final Countervailing Duty Determination"), Exhibit CHI-35, pp. 35639-35640.

[34] Exhibit CHI-34, p. 67893.

[35] Exhibits CHI-35, pp. 35639 and 35641.

[36] Exhibit CHI-36, pp. 45955-45956.

[37] *Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Laminated Woven Sacks from the People's Republic of China* ("LWS Countervailing Duty I&D Memo"), Exhibit CHI-3, pp. 11-21, 49-70 and 82-83.

margins ranging from 64.28 per cent to 91.73 per cent.[38] On 7 August 2008, the USDOC published an anti-dumping duty order indicating that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these anti-dumping margins.[39]

4. Certain New Pneumatic Off-the-Road Tires

(a) Countervailing duty investigation

2.15 On 7 August 2007, the USDOC initiated a countervailing duty investigation on imports of OTR from China.[40] The products covered were certain new pneumatic off-the-road tires as classified in tariff sub-headings 4011.20.10.25, 4011.20.10.35, 4011.20.50.30, 4011.20.50.50, 4011.61.00.00, 4011.62.00.00, 4011.63.00.00, 4011.69.00.00, 4011.92.00.00, 4011.93.40.00, 4011.93.80.00, 4011.94.40.00, and 4011.94.80.00 of the HTSUS, and as described more specifically in the USDOC's countervailing duty order.[41] The exporters/producers concerned were Guizhou Tire Co., Ltd. ("GTC"); Hebei Starbright Tire Co., Ltd. ("Starbright"); and Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC").[42] The period of investigation for purposes of the subsidy determination covered 1 January to 31 December 2006.[43]

2.16 During the course of the investigation, there were communications and exchanges between the USDOC and the parties to the investigation, *inter alia*, questionnaires and responses, including supplemental requests for information pertaining to new subsidy allegations, arguments, and comments.[44] On 17 December 2007, the USDOC published in the Federal Register its preliminary affirmative countervailing duty determination.[45] On 15 July 2008, the USDOC published a final countervailing duty determination, finding "net subsidy rates" ranging from 2.45 per cent to 14.00 per cent.[46] On 4 September 2008, the USDOC published a countervailing duty order indicating that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these net subsidy rates.[47]

2.17 The USDOC determined, *inter alia*, that the government provision of preferential loans, through government policy banks and SOCBs, constituted a subsidy which was *de jure* specific. With respect to one investigated producer, the USDOC also found that the government provision of land-use rights constituted a countervailable subsidy. With respect to both types of subsidies, the USDOC used out-of-country benchmarks to determine the existence and amount of benefit conferred. The USDOC further found that the government provision of natural and synthetic rubber through SOEs

[38] *Laminated Woven Sacks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances* ("LWS Final Anti-Dumping Duty Determination"), Exhibit CHI-38, pp. 35646-35648.

[39] *Notice of Antidumping Duty Order: Laminated Woven Sacks from the People's Republic of China* ("LWS Anti-Dumping Duty Order"), Exhibit CHI-39, pp. 45941-45943.

[40] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Initiation of Countervailing Duty Investigation* ("OTR Notice of Initiation"), Exhibit CHI-49, pp. 44122 and 44124.

[41] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Countervailing Duty Order* ("OTR Countervailing Duty Order"), Exhibit CHI-52, pp. 51627-51628.

[42] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination* ("OTR Preliminary Countervailing Duty Determination"), Exhibit CHI-50, p. 71361.

[43] Id., p. 71363.

[44] *See, e.g.*, Exhibit CHI-50, pp. 71361 and 71363-71376; and *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances* ("OTR Final Countervailing Duty Determination"), Exhibits CHI-51, p. 40481.

[45] Exhibit CHI-50, pp. 71360, 71366-71370, 71372-71374 and 71376.

[46] Exhibits CHI-51, pp. 40480 and 40483.

[47] Exhibit CHI-52, p. 51629.

constituted a countervailable subsidy. The USDOC also found that the provision of rubber through private trading companies that had purchased rubber from state-owned producers constituted a countervailable subsidy. To determine whether the government provision of rubber, either through SOEs or private trading companies, had conferred a benefit on investigated producers, the USDOC used import prices of rubber paid by investigated producers and, where available, private prices in China as a benchmark.[48]

(b) Anti-dumping investigation

2.18 In parallel to the countervailing duty investigation on OTR from China, the USDOC initiated an anti-dumping investigation on the same product. The period of investigation for the dumping determination was 1 October 2006 to 31 March 2007. The USDOC treated China as an NME country for purposes of determining normal value and calculating the margins of dumping. On 15 July 2008, the USDOC published a final anti-dumping duty determination.[49] On 4 September 2008, the USDOC published an amended final determination and anti-dumping duty order, finding dumping margins ranging from 5.25 per cent to 210.48 per cent, indicating that it would direct U.S. Customs and Border Protection to require importers to post cash deposits equal to these dumping margins.[50]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CHINA

3.1 China requests that the Panel make the following findings:[51]

(i) The USDOC's findings that the government of China provided a financial contribution in the form of goods in the four countervailing duty determinations were inconsistent with Article 1.1 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(ii) The USDOC's findings that private trading companies provided a financial contribution in the form of goods in the LWR, CWP, and OTR countervailing duty determinations were inconsistent with Article 1.1 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(iii) The USDOC's findings of benefit in the four countervailing duty determinations in respect of the goods allegedly provided by the government of China and private trading companies were inconsistent with Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

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[48] *Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-the-Road Tires (OTR Tires) from the People's Republic of China* ("OTR Countervailing Duty I&D Memo"), Exhibit CHI-4, pp. 7-15, 25-26, 80-83, 93-112, 151-155 and 169-191.

[49] *Certain New Pneumatic Off–The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances* ("OTR Final Anti-dumping Determination"), Exhibit CHI-54, pp. 40485-40491.

[50] *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order* ("OTR Anti-dumping Duty Order"), Exhibit CHI-55, pp. 51624 and 51626.

[51] China first written submission, para. 468; second written submission, para. 315.

(iv) The USDOC's inclusion of only positive benefits in its calculations of whether producers in the OTR countervailing duty investigation obtained benefits from the alleged provision of goods, while excluding negative benefits in those calculations, was inconsistent with Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(v) The USDOC's findings of financial contribution and specificity in the OTR countervailing duty determination in respect of the alleged "policy lending" subsidy were inconsistent, respectively, with Article 1.1 and Article 2 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(vi) The USDOC's findings of benefit in the LWS, CWP, and OTR countervailing duty determinations in respect of the alleged "policy lending" subsidy were inconsistent with Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(vii) The USDOC's findings of specificity and benefit in the LWS countervailing duty determination in respect of the provision of land-use rights were inconsistent, respectively, with Article 2 and Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(viii) The USDOC's finding of benefit in the OTR countervailing duty determination in respect of the provision of land-use rights was inconsistent with Article 14 of the SCM Agreement and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(ix) In connection with the four sets of anti-dumping and countervailing duty determinations at issue, the USDOC's use of its NME methodology to determine normal value in the anti-dumping determinations, concurrently with a determination of subsidization and the imposition of countervailing duties on the same products, was inconsistent with Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and with Article VI of the GATT 1994;

(x) The United States' failure to provide sufficient legal authority for the USDOC to avoid the imposition of double remedies for the same alleged acts of subsidization when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product means that US law is, in all such instances, inconsistent "as such" with Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and with Article VI of the GATT 1994;

(xi) In each of the four sets of anti-dumping and countervailing duty determinations at issue, the USDOC's failure to extend to imports from China the same unconditional entitlement to the avoidance of a double remedy for the same alleged acts of subsidization that it extends to like products originating in the territory of other Members was inconsistent with Article I:1 of the GATT 1994;

(xii) The United States' failure to provide sufficient legal authority for the USDOC to avoid the imposition of double remedies for the same alleged acts of subsidization when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product means that, in all such instances, the United States will fail to extend to imports from China the same unconditional entitlement to the avoidance of a double remedy that it extends to like products originating in the territory of other Members, in violation of Article I:1 of the GATT 1994;

(xiii) The USDOC's failure in the four countervailing duty investigations to give the Government of China and interested parties 30 days to respond to all questionnaires used in the investigations was inconsistent with Article 12.1.1 of the SCM Agreement;

(xiv) The USDOC's failure in the LWR and CWP countervailing duty investigations to notify respondent producers of the information it required and to provide them with an ample opportunity to present relevant evidence prior to resorting to facts available was inconsistent with Article 12.1 and Article 12.7 of the SCM Agreement.[52]

3.2 In addition, China requests that the Panel reject the United States' requests for preliminary rulings, referred to in the next paragraph.[53]

B. UNITED STATES

3.3 The United States requests that the Panel reject China's claims in their entirety.[54] In addition, the United States requests that the Panel make certain preliminary rulings: the United States requests that the Panel find that the measure identified in China's Request for the Establishment of a Panel as part of China's "as such" claims with respect to "double remedies" (i.e., "the failure of the United States to provide legal authority for the US Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the US NME methodology simultaneously with the imposition of countervailing duties on the same product") as well as China's "as such" claims on double remedies themselves fall outside the Panel's terms of reference.[55]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set forth in the executive summaries of their submissions provided to the Panel, are attached to this Report in Annexes A, C and D (see List of Annexes, pages xi and xii).

[52] In its second written submission, China withdrew the request for findings and recommendations it made in its first written submission with respect to its claim against the USDOC's failure to invite China for consultations prior to its initiation of investigations into new subsidy allegations, which China had alleged was inconsistent with Article 13.1 of the SCM Agreement. China indicated that it withdrew its request in this respect "[i]n light of the United States' confirmation that it considers Article 13.2 of the SCM Agreement to impose an obligation to provide China with the opportunity to consult throughout a CVD investigation, including with respect to new subsidy allegations." (China second written submission, footnote 260).

[53] China response to the United States' request for preliminary rulings, para. 40.

[54] United States first written submission, para. 495.

[55] Id., para. 86.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, as set forth in the executive summaries of their submissions provided to the Panel, are attached to this Report in Annex B (see List of Annexes, pages xi and xii).[56]

VI. INTERIM REVIEW

6.1 On 11 June 2010, the Panel issued its Interim Report to the parties. On 25 June 2010, both parties submitted requests for the review of precise aspects of the Interim Report. On 2 July, the parties submitted comments on one another's requests for review.

6.2 This Interim Review section summarizes the parties' requests for review and comments thereon, as well as our responses. Because the footnote numbering (but not the paragraph numbering) of our Report has changed due to changes made at the interim review stage, for the sake of clarity the footnote references in this section reflect the numbering in the Final Report.

A. REQUEST FOR REVIEW SUBMITTED BY CHINA

6.3 **China** requests that we refer in **footnote 52 to paragraph 3.1** to the reason given by China for withdrawing its request for findings and recommendations with respect to its claim under Article 13.1 of the SCM Agreement. The United States does not object to this request. We have modified footnote 52 as requested by China.

6.4 **China** proposes that we either entirely delete, or modify, **paragraph 8.3**, arguing that this paragraph does not accurately summarize its argument, which according to China is accurately summarized in paragraphs 8.4-8.6. In particular, China submits that (as the Panel correctly notes elsewhere) it did not argue that SOEs and SOCBs in general, or the particular ones involved in these investigations, as a matter of law could never be considered public bodies, and must in all cases be treated as private bodies under Article 1.1; but that instead it argued that the actions of state-owned corporate entities are *prima facie* private, and thus *presumptively* not attributable to a Member under Article 1.1 of the SCM Agreement absent either a finding of entrustment or direction, or a finding that such entities were public bodies, as China believes that term should be interpreted in accordance with the Vienna Convention on the Law of Treaties. China similarly suggests that we change the drafting of the first sentence of **paragraph 8.55** to indicate that a public body, although not identical to a government, must nonetheless possess characteristics similar to those of a "government" as identified by the Appellate Body in *Canada – Dairy*, i.e., should be defined as "an entity which exercise powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character". Finally, China suggests that we make similar modifications to the last sentence of **paragraph 8.64**. The United States objects to China's request to delete paragraph 8.3, and suggests instead that we delete its third, fourth and fifth sentences, as China does not appear to object to the first two sentences. The United States does not object to China's proposed modifications of paragraphs 8.55 and 8.64. We have introduced drafting changes to paragraph 8.3 to more accurately reflect China's argument as summarized in paragraphs 8.4-8.6, and have added citations in new footnote 67. We also have modified paragraphs 8.55 and 8.64 to reflect China's suggestions and have added citations in new footnote 149. Furthermore, for the sake of internal consistency and to more accurately reflect China's position, we have introduced corresponding changes to paragraphs 8.63, 8.66, 8.69, 8.70, 8.73, and 8.82.

[56] Argentina, Australia, Brazil, Canada, the European Communities, Japan, Mexico, Norway, Saudi Arabia and Turkey provided written submissions and/or made oral statements at the Panel's meeting with the third parties. Bahrain, Kuwait and Chinese Taipei did not provide written submissions or make oral presentations.

6.5 **China** submits that **paragraph 8.18** does not accurately describe its position with respect to the so-called "five-factor" test applied by the USDOC in certain prior countervailing duty investigations, arguing that before the Panel it never endorsed the five-factor test as a proper basis for determining the existence of a public body under the SCM Agreement or criticized the USDOC for failing to employ that test. China submits that it made clear in its submissions to the Panel that the five-factor test was "exclusively a creature of U.S. law," whose "consistency *vel non* with Article 1.1 of the SCM Agreement, as interpreted in accordance with Article 31 of the Vienna Convention, is not before the Panel in this case." China recalls its statements to the Panel that while two of the five factors were "highly germane" to the public body inquiry, the remainder of the factors were of "little relevance," and adds that in this same paragraph the Panel correctly notes China's view that the five-factor test is relevant for this proceeding only to establish that prior to the four countervailing duty investigations at issue, the USDOC itself had recognized that determining whether a state-owned entity qualified as a public entity was a multi-factor, fact-intensive inquiry under U.S. law. We note that China requests no specific modifications to this paragraph, however. Related to the issue it raises in regard to paragraph 8.18, China also objects to **paragraph 8.125**. China argues that this paragraph incorrectly suggests that China made "arguments" regarding the meaning of "public body" based on the five-factor test, and incorrectly characterizes China's statement, that it took "no solace" from the USDOC's statement that it would reconsider application of the five-factor test in an eventual future administrative review, as indicating that China considers application of that test to be mandatory. Rather, China indicates, it made this statement in connection with its argument that the USDOC not only had applied the wrong substantive rule with respect to the term "public body", but also had improperly shifted the burden to China to disprove the USDOC's presumption based on a *per se* majority ownership rule that all SOEs are public bodies. China considers that paragraph 8.125 not only is an incorrect summary of China's position but also is wholly unnecessary to the Panel's analysis, and should be deleted.

6.6 The United States disagrees with China's comments on paragraphs 8.18 and 8.125. Regarding paragraph 8.18, the United States notes China's statements before the Panel that the USDOC "abandoned" the five-factor test in favour of a "*per se* rule, and concerning the USDOC's commitment to "reconsider the feasibility of applying the five-factor test during an administrative review," that "[a] Member may not avoid responsibility for failing to honour its WTO obligations by promising to consider complying with them in the future." The United States asserts that despite China's effort to "emphasize" that it was not asking the Panel to determine the consistency of the five-factor test with Article 1.1 of the SCM Agreement, it was nevertheless critical of the USDOC's determination not to employ the test in the investigations at issue in this dispute. The United States similarly considers that paragraph 8.125 accurately describes China's argument before the Panel concerning the five-factor test, this paragraph noting both China's affirmative "disclaimer that it is not arguing about the consistency of the five-factor test with Article 1.1 of the SCM Agreement" and the *implication* in China's argument that the "USDOC was obligated to have applied that test. . . ." The United States recalls that China raised the five-factor test and appeared to consider that the test addresses what China identified the "'key' question regarding whether an entity is a public body" (*i.e.*, whether it exercises governmental authority). The United States therefore considers that it was prudent of the Panel to address in this paragraph the legal question whether under the SCM Agreement it is necessary to examine the five factors to establish that an entity is government-controlled.

6.7 We have made certain modifications to the paragraphs identified by China in response to these comments. First, to more comprehensively reflect China's arguments regarding the five-factor test, we have introduced new footnote 94 to paragraph 8.18. In paragraph 8.125, we have modified the drafting and have added a cross-reference in footnote 248 to more clearly distinguish between China's arguments and the Panel's appreciation of those arguments. We also have clarified that we examine the potential relevance of the five-factor test under Article 1.1 of the SCM Agreement for the sake of the completeness of our analysis, notwithstanding China's disclaimer.

6.8 **China** objects to the wording in **footnote 186**, which it requests that we modify to reflect language in the Panel Report in *US – Countervailing Duty Investigation on DRAMS* that the USDOC might have been able to treat wholly-government-owned entities as 'public bodies' rather than 'private' bodies, depending on the circumstances. The United States does not share China's concern, but considers that if we amend the drafting of this footnote in response to China's request, we should more closely track the language used by the Appellate Body in that dispute. We have modified footnote 186 to reflect the language used by the Appellate Body.

6.9 **China** requests that we add a statement to **footnote 274** to indicate that China had referred to evidence that borrowers in the OTR tire industry obtained loans from SOCBs at interest rates that were not materially different from interest rates on loans made by SOCBs to borrowers in other industries. The United States does not object to this request. We have amended this footnote as requested by China.

6.10 **China** requests that we modify **paragraph 9.25** to clarify that China's position is that the term "subsidy" in Article 2.1(a) of the SCM Agreement means a "subsidy" as defined in Article 1 of that Agreement. The United States does not object to this request. We have modified the drafting of this paragraph to reflect China's comment.

6.11 **China** notes that, unlike in footnote 693, the Panel makes no reference in **paragraphs 10.26 and 10.70** of the Report either to the United States' clarification that the United States was not relying on the Protocol of Accession in its arguments against China's claims under Article 14, or to the Panel's reliance on that clarification to conclude that its analysis of those claims would not take the arguments of the United States referring to the Protocol into account. The United States does not believe that any modification to the Report as requested by China's comments is necessary, and in particular considers it unnecessary to duplicate, in the paragraphs identified by China, the Panel's summary in paragraph 10.11 and in footnote 693 of the U.S. position with respect to China's Protocol of Accession. In response to China's request we have added new footnote 464 to paragraph 10.12 indicating that while we include the United States' arguments referencing China's Protocol of Accession in our summary of arguments with respect to the interpretation of Article 14(d), we do not take those arguments into account in our analysis of China's claims on benchmarks.

6.12 **China** requests that, for the sake of completeness, we add a statement to **footnote 582 to paragraph 10.88** of the Report noting China's reference before us to a statement concerning government intervention in credit markets, contained in an expert report that had been submitted during the countervailing duty investigation. The United States does not consider that an additional specific reference to the Report would enhance the clarity or completeness of the citation in the footnote, but provides no further basis for its objection. We have inserted into footnote 582 a reference to the expert report.

6.13 **China** requests that the Panel delete the phrase "(a term for which China offers no explanation)" in the second sentence of **paragraph 10.121**. China submits that it provided, in paragraph 235 of its first written submission and Exhibit CHI-107, a definition of the term "commercial" from the New Shorter Oxford English Dictionary, and cited two other panel reports that have considered the meaning of the term "commercial". China submits that its reference to the "ordinary course of commerce" is consistent with these definitions. The United States objects to China's request because in its view the explanation that China provides in support of its request serves only to highlight that China failed to provide any explanation for the term "ordinary course of commerce," a term that China invented in an effort to persuade the Panel to give a particular meaning to the term "commercial" in Article 14(b) of the SCM Agreement. We have not accepted China's request to delete the phrase in question, and have added new footnote 620 regarding the sources cited by China for the meaning of the term "commercial".

6.14 **China** requests that in **paragraph 11.11** and **footnote 821 to paragraph 11.59** we reflect that China's use of the term "basic reasonableness test" with respect to Article 14 was a reference to the Panel Report in *EC – Countervailing Measures on DRAM Chips*, as reflected in China's answer to Panel question 7 following the second meeting. The United States does not object to including a reference or a footnote in paragraph 11.11 indicating that China cited to the *EC – DRAMs* report, but disagrees that such a note should be repeated in footnote 821, as that footnote reflects the Panel's conclusion. The United States considers that the test that China sought to have the Panel establish in the present dispute is not at all similar to that applied by the panel in *EC – DRAMs*. In response to China's request, we have indicated in footnote 768 to paragraph 11.11 that China was referring to the *EC – DRAMs* panel report. In addition, in footnote 821, we have introduced language further explaining our conclusion contained in that footnote.

6.15 **China** requests that we delete the first sentence of **paragraph 14.84** on the grounds that China has never stated that "the issue of double remedies in respect of domestic subsidies is an issue which the covered agreements do not address." The United States does not object to this request. As requested by China, we have deleted this sentence.

B. REQUEST FOR REVIEW SUBMITTED BY THE UNITED STATES

6.16 The **United States** requests that we delete the second sentence of **paragraph 8.104** of the Interim Report, including the footnote thereto, as that sentence is inaccurate. In particular, the United States indicates that, contrary to the characterization in that sentence, in the LWR investigation the USDOC did not rely on facts available to determine that certain SOEs were "public bodies". The United States also requests us to delete the third sentence of **paragraph 8.129** of the Interim Report for the same reason, and that we identify Baosteel as a trading company rather than as a producer. China does not object to these requests. We have made the modifications requested by the United States.

6.17 The **United States** requests that in **paragraph 8.122**, we refer to Bridgestone as "a domestic interested party", rather than as "the applicant". China does not object to this request. We have made the change requested by the United States.

6.18 The **United States** requests that in **paragraph 9.14** we modify the drafting to indicate that the USDOC found that the planning documents prohibited policy lending to "restricted" projects and "projects to be abolished". China raises no objection to this request. We have modified paragraph 9.14 as requested by the United States.

6.19 The **United States** requests that we add to **paragraph 9.101** references to two pieces of evidence in addition to those already referred to as the basis for the USDOC's determination that SOCBs followed government policies in making their lending decisions. The United States requests, in particular, that we indicate that the USDOC also had before it a Chairperson's report on the transitional review of China at the WTO, and interviews of independent financial experts conducted by the USDOC in 2007. China objects to this request. Concerning the Chairman's report on the transitional review of China at the WTO, China submits that the modification requested by the United States would be misleading as the statement in that report quoted by the United States in its request for interim review in fact was a statement by the United States during the transitional review, and was not, contrary to the United States' implication, a finding by the WTO Committee on Subsidies and Countervailing Measures. China further argues that, contrary to the language proposed by the United States, the Committee did not make any "finding" that could have been "confirmed" through USDOC interviews of "financial experts". China further notes that the identities of these "experts" were never disclosed, and that the only record of their opinions are the summaries that the USDOC itself prepared in *ex parte* meetings from which all interested parties were excluded. The **United States** also requests that we clarify, in the fourth sentence of this paragraph, that the

verification referred to was that in the *CFS Paper* investigation. China does not object to this request. We have inserted the requested reference to the *CFS Paper* investigation, but have not made the other changes requested by the United States. Concerning the report on the transitional review of China, while this document apparently was at least partially on the record of the investigation, we find no reference to it in the USDOC's determination. Concerning the USDOC's interviews of financial experts, we see no need to add anything to our Report, given that footnote 394 already cites the references to these interviews in the USDOC's determination.

6.20 The **United States** requests that we insert in **paragraph 11.19** a summary of two points that it raised in response to China's argument based on the term "good" in Article 14(d) of the SCM Agreement, as in the Interim Report this paragraph reflected only one of the three points raised by the United States. China raises no objection to this request. We have modified paragraph 11.19 as requested by the United States.

6.21 The **United States** requests that we insert in **footnotes 863 and 864 to paragraph 12.53** references to the exhibits containing information on GTC, as in the Interim Report these footnotes only referred to exhibits pertaining to TUTRIC. China does not object to this request. We have modified these footnotes to refer to the exhibits pertaining to GTC identified by the United States.

6.22 The **United States** requests that we make certain changes to **paragraph 14.69 and footnote 965**. The United States submits that this paragraph and footnote could be misunderstood to suggest that the NME methodology necessarily entails a comparison with unsubsidized costs of production, whereas there is nothing inherent in the use of an NME methodology that results in a comparison with unsubsidized costs of production, and the costs of production in the surrogate economy may well be subsidized themselves. The United States therefore requests that the Panel revise its statement to reflect the fact that the use of an NME methodology *may* result in the use of unsubsidized costs of production. For similar reasons, the United States suggests that we revise the second sentence in **paragraph 14.72** so that it would read: "... the use of an NME methodology leads to an asymmetric dumping margin comparison *to the extent that* an unsubsidized normal value *is being compared* to a subsidized export price." (our emphasis) China objects to the changes proposed by the United States, arguing that, as it explained in its first written submission, when using its NME methodology the USDOC seeks to ensure that the surrogate values that it uses represent "market determined" values, which by definition are unsubsidized values, and that the USDOC avoids the use of any surrogate value that may itself be subsidized in the surrogate economy. Referring to Exhibit CHI-123, China also submits that the U.S. Congress has specifically directed the USDOC to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized"; China also notes that in *GPX*, the CIT observed that the U.S. NME methodology compares the producer's export price to a "presumptively subsidy-free constructed normal value." We note, in response to the United States' request, that paragraphs 14.69 and 14.72 form part of the Panel's discussion of the effects, *at the conceptual level*, of the use of NME methodologies. As indicated in these paragraphs, conceptually, a market-economy surrogate value is a value that is market-determined, and therefore unsubsidized. Thus, in our view, making the change requested by the United States would not add to the clarity of the Panel's discussion of the effects of the use of NME methodologies. We have nonetheless added the word "presumptively" in footnote 965 to reflect the fact that, in practice, surrogate values may not, in all instances, be exempt from any subsidization. In response to the United States' request we also have clarified the parties' arguments on the issue (by adding new footnote 936 and modifying footnote 974) to more accurately reflect their respective positions on the issue.

6.23 The **United States** also suggests typographical and other technical corrections to **paragraph 9.24**, **footnote 425 to paragraph 9.118**, **paragraph 11.39**, **footnote 998 to paragraph 14.90**, **paragraph 14.138**, **footnote 1109 to paragraph 15.9**, **footnote 1125 to paragraph 15.30**, and **footnote 1146 to paragraph 15.48**. China does not object to these

suggestions. We have made the corrections suggested by the United States, as well as a number of others in other paragraphs of the Report.

VII. INTRODUCTION TO FINDINGS BY THE PANEL

A. GENERAL PRINCIPLES REGARDING TREATY INTERPRETATION, THE APPLICABLE STANDARD OF REVIEW, AND BURDEN OF PROOF

1. Rules of treaty interpretation

7.1 Article 3.2 of the DSU directs panels to apply "customary rules of interpretation of public international law" in the interpretation of the provisions of the covered agreements. It is well settled in WTO law that the principles codified in Articles 31-33 of the *Vienna Convention on the Law of Treaties ("Vienna Convention")* are such customary rules. These provisions read as follows:

"*Article 31: General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33: Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

2. Standard of review

7.2 Article 11 of the DSU sets out the standard of review applicable in WTO panel proceedings in general. This provision imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", both factual and legal. Article 11 of the DSU provides, in relevant part:

> "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

7.3 It is well settled that in reviewing (*inter alia*) a countervailing duty determination, a panel may not conduct a "*de novo* review" of the evidence or substitute its judgement for that of the competent authorities. A panel may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself.[57] A panel must also limit its examination to the evidence that was before the agency during the course of the investigation, and must take into account all such evidence submitted by the parties to the dispute. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[58]

7.4 A panel reviewing an investigating authority's determination should examine whether the determination is "reasoned and adequate", and more specifically, whether the investigating authority provided a "reasoned and adequate" explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.[59] In *US – Softwood Lumber VI (Article 21.5 – Canada)*, the Appellate Body provided more guidance on how a panel should apply these principles in its evaluation of factual findings:

> "A panel's examination of [an investigating authority's] conclusions must be critical and searching, and be based on the information contained in the record and the

[57] Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, paras. 183 and 187.
[58] Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[59] Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, para. 186.

> explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities'".[60]

3. Burden of proof

7.5 The general principles regarding the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement by another Member assert and prove its claim.[61] With respect to these general rules on allocation of the burden of proof, the Appellate Body observed that:

> "[...] in WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence. The nature and scope of arguments and evidence required 'will necessarily vary from measure to measure, provision to provision, and case to case'. When a claim is brought against a WTO Member's legislation or regulation, a panel may, in some circumstances, consider that the text of the relevant legal instrument is sufficiently clear to establish the scope and meaning of the law. However, in other cases, a panel may consider that additional evidence is necessary to do so. Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it".[62]

7.6 China, as the complaining party in this dispute, must therefore make a *prima facie* case of violation of the relevant provisions of the WTO agreements it invokes, which the United States must refute. A *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case. We also note, however, that it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof. In this respect, therefore, it is also for the United States to provide evidence supporting the facts which it asserts.

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[60] Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. (footnote omitted, emphasis original).

[61] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, at 323.

[62] Appellate Body Report on *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134. (footnotes omitted)

B. CHINA'S PROTOCOL OF ACCESSION

7.7 In addition to the obligations contained in the covered agreements, which apply to all Members, China has undertaken special obligations under its Protocol of Accession. Section 15 of China's Protocol of Accession is of relevance to the issues before the Panel. It provides as follows:

> "15. Price Comparability in Determining Subsidies and Dumping
>
> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> (b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.
>
> (c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures".[63]

[63] China's Protocol of Accession, annexed to Ministerial Decision on China's Accession, WT/L/432.

7.8 Also referred to by the parties and of potential relevance to this dispute are certain paragraphs of the Report of the Working Party on the Accession of China (the "Working Party Report"), namely paragraphs 150-151 and 171-173.[64]

VIII. CHINA'S CLAIMS PERTAINING TO THE USDOC'S DETERMINATIONS THAT CERTAIN SOES AND SOCBS WERE PUBLIC BODIES

A. CLAIMS OF CHINA

8.1 China claims, in respect of the provision of goods (inputs), that the USDOC's determinations that certain SOEs were "public bodies" were inconsistent with Article 1.1(a)(1) of the SCM Agreement. Thus, China argues, the USDOC's findings in the four countervailing duty investigations of financial contributions by a government in the form of provision of goods to respondent producers were inconsistent with Article 1.1 of the SCM Agreement. China further claims that, as a consequence, the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.[65]

8.2 China claims, in respect of the provision of loans, that the USDOC's determinations that certain SOCBs were "public bodies" were inconsistent with Article 1.1(a)(1) of the SCM Agreement. Thus, China argues, the USDOC's finding in the OTR countervailing duty investigation of financial contribution by a government in the form of alleged "policy lending" was inconsistent with Article 1.1 of the SCM Agreement. China further claims that, as a consequence, the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.[66]

B. MAIN ARGUMENTS OF THE PARTIES

1. China

8.3 China challenges as invalid the USDOC's findings in the investigations at issue that SOEs producing inputs, and SOCBs providing loans, were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Therefore, China considers inconsistent with that Article the USDOC's determinations that the provision of inputs and of loans by these entities constituted financial contributions by public bodies. China argues that in the absence of evidence that these entities were vested with and exercised governmental authority, as a matter of law their actions needed to be deemed those of private, not public, bodies.[67] Given this, only if the USDOC had found that these entities were "entrusted or directed" in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement to provide the inputs or the loans could it have lawfully concluded that that the financial contributions were made by the Government of China. China maintains that because the USDOC did not examine whether there had been such entrustment or direction, its determinations of financial contributions by the Government of China were inconsistent with Article 1.1 of the SCM Agreement, and as a consequence, with Articles 10 and 32.1 of the SCM Agreement, as well as with Article VI:3 of the GATT 1994.[68]

8.4 China argues that the Appellate Body recognized in *US – Countervailing Duty Investigation on DRAMS* that under well-established principles of customary international law, the actions of state-

[64] Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and WT/ACC/CHN/49/Corr.1 reproduced in WT/MIN(01)/3.

[65] Paragraphs B.1(a)(i) and B.1(e)(i)-(iii) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (a); second written submission, para. 315 (a).

[66] Paragraphs B.1(c)(i) and B.1(e)(i)-(iii) of the "as applied" claims in China request for establishment of the Panel, China first written submission, para. 468 (d); second written submission, para. 315 (e).

[67] *See, e.g.*, China first written submission, paras. 95-96 and 158-160.

[68] China first written submission. paras. 34-40.

owned corporate entities are *prima facie* private, and thus presumptively not attributable to a Member under Article 1.1 of the SCM Agreement.[69] China argues that instead of focusing as it should have on whether the SOEs and SOCBs were "private bodies" that had been "entrusted or directed" by the Government of China or a public body to provide inputs and loans, respectively, the USDOC relied on a *per se* rule of majority government ownership in determining that these entities were "public bodies".[70] In China's view, this interpretation of the term "public body" is impermissible under a correct application of the principles of treaty interpretation. For China, while government ownership is relevant to the question of control, and thus to the inquiry in Article 1.1(a)(1)(iv) as to whether a private body has been directed to perform governmental functions, ownership has little relevance in determining whether an entity is a public body.[71]

8.5 Rather, China asserts, to be a "public body", an entity must be authorized by the law of the state to exercise functions of a governmental or public character, and the acts in question must be performed in the exercise of such authority. In this context China, paraphrasing the Appellate Body in *Canada – Dairy*, argues that a "public body" should be defined as "an entity which exercises powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character".[72] According to China, what distinguishes the conduct of public bodies from that of private bodies is not the degree of government ownership – the government may have ownership interests in both – but the source and nature of the authority the entities possess and exercise. China states therefore that in the investigations at issue in the present dispute, absent actual evidence establishing that the state-owned entities were vested with authority to exercise governmental authority in connection with the provision of the alleged financial contributions at issue, as a matter of law those entities' actions must be deemed to be those of private entities.[73]

8.6 China asserts that it is not arguing that government-owned entities can never be public bodies within the meaning of Article 1.1(a)(1), but rather that their conduct should be deemed presumptively private, and consistent with that presumption, their conduct ordinarily should be examined under the entrustment or direction standard of Article 1.1(a)(1)(iv) of the SCM Agreement. If the evidence in a particular case established that a government-owned entity was exercising delegated authority to perform functions of a governmental character, then it would be appropriate to conclude that it was a public body and that subparagraph (iv) was inapplicable. But absent such evidence, China argues, subparagraph (iv) should apply and there is no legitimate justification in the text, context or object and purpose of the SCM Agreement for the arbitrary test the United States has advanced that would make such entities public bodies in all cases merely by virtue of their government ownership.[74]

8.7 China relies on various dictionary definitions of the term "public" to argue that the ordinary meaning of the term "public body" requires the essential elements that such an entity acts for the welfare and best interests of a nation or community as a whole, and does so under the authority, or officially on behalf, of the nation or community as a whole.[75] China argues further that the phrase in Article 1.1(a)(1), "a government or other public body" explicitly equates, and treats as "functional equivalents", the terms "government" and "public body".[76] According to China, the Agreement differentiates between this type of entity and "private bodies" in Article 1.1(a)(1)(iv), the actions of which require "entrustment or direction" from a government to perform one of the functions

[69] Id., para. 34, citing to Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, para. 112 and footnote 179.

[70] *See, e.g.*, China first written submission, paras. 34-36; second written submission, para. 23.

[71] China first written submission, paras. 39-40 and 48.

[72] Id., paras. 53-55, citing to Appellate Body Report on *Canada – Dairy*, para. 97; second written submission, para. 4.

[73] China first written submission, para. 61.

[74] China oral statement at the second meeting of the Panel, paras. 30-31.

[75] China first written submission, paras. 50-51; second written submission, para. 6.

[76] China first written submission, para. 52.

enumerated in Article 1.1(a)(1)(i)-(iii) in order to be deemed financial contributions by a government. For China, the fact that entrustment or direction of the actions of private bodies brings those actions within the purview of "government financial contribution" demonstrates that in all cases, the *sine qua non* of a "financial contribution" is the exercise of some element of governmental authority in connection with performing functions of a governmental character.[77]

8.8 China also considers that the definitions of the corresponding French and Spanish terms "organisme public" and "organismo público" in Article 1.1 of the SCM Agreement support its argument concerning the ordinary meaning of the term "public body". China argues that all three terms are presumed to have the same meaning under Article 33(3) of the Vienna Convention, and that the Panel must examine this meaning. According to China, the French term "public" and the Spanish term "público" connote "governmental", which is consistent with several dictionary definitions of the English term "public". China also points to the OECD Economics Glossary which it argues equates "organisme public" with the English term "government agency".[78] China further argues that in the Agreement on Agriculture the Spanish term "organismo público" is expressly equated to the English term "government agency", and that the Appellate Body in *Canada – Dairy* established unequivocally that the same Spanish and French terms at issue in Article 1.1 of the SCM Agreement have the same meaning as the English term "government agency".[79] According to China, Article 33 of the Vienna Convention requires the Panel to interpret the English term "public body" consistently with the fact that the French and Spanish versions of that term mean "government agency", and the only coherent way to do so is to interpret the English terms "public body" and "government agency" as functional equivalents, just as they are treated in the French and Spanish languages.[80]

8.9 China disagrees with the United States concerning the meaning of the conjunction "or" in Article 1.1(a)(1) between the terms "government" and "public body". In China's view, this word does not suggest that the two terms must have wholly dissimilar and unrelated meanings, but only that the terms are not identical. China argues that "or" frequently connects words or phrases that are similar or functional equivalents, and cites the report of the *US – Export Restraints* panel's reference to the word "or" between the phrases "a government makes payments to a funding mechanism" and "entrusts or directs a private body" in subparagraph (iv) of Article 1.1(a)(1) as meaning that the two phrases captured equivalent government actions.[81]

8.10 China also disagrees with the United States concerning the significance of the adjective "any" to modify "public body" in Article 1.1(a)(1) of the Agreement. According to China, the "any" only indicates that all entities that qualify as public bodies – however that term is defined – are captured within the scope of Article 1.1, but says nothing about the characteristics that define a public body, and offers no support for the United States' *per se* majority government ownership test.[82]

8.11 China argues that its interpretation of the term "public body" also is supported contextually by the General Agreement on Trade in Services (the "GATS"). According to China, paragraph 5(c)(i) of the Annex on Financial Services to the GATS (the "GATS Financial Services Annex") defines the term "public entity" as an "entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes [...]". For China, this

[77] Id., paras. 56-58.

[78] China second written submission, paras. 8-9; oral statement at the first meeting of the Panel, paras. 23-24.

[79] China second written submission, paras. 10-11, citing to Appellate Body Report on *Canada – Dairy*, para. 97.

[80] Id., paras. 8 and 13; oral statement at the second meeting of the Panel, paras. 4-10.

[81] China response to Panel question 14 (first meeting); oral statement at the second meeting of the Panel, paras. 11-12, citing to Panel Report on *US – Export Restraints*, para. 8.32.

[82] China oral statement at the second meeting of the Panel, para. 13.

definition reflects a similar view of the functional equivalence between "government" and "public body" that, in China's view, exists in Article 1.1 of the SCM Agreement. In addition, China argues, the GATS definition indicates that when an entity is "merely 'owned or controlled by a Member'", it will qualify as a public entity only if it is "carrying out governmental functions or activities for governmental purposes", that entities owned or controlled by governments may carry out both governmental and commercial functions, and that they are deemed to be "public" only when principally engaged in the former. According to China, Article I:3(a) of the GATS also provides relevant context by defining "measures by Members" to include measures by governmental actors ("central, regional or local governments or authorities") and non-governmental bodies "in the exercise of powers delegated by central, regional or local governments or authorities". China argues that if the actions of non-governmental bodies may be attributed to a Member for purposes of the GATS only when they are exercising authority delegated to them by the government, it is difficult to envision any rational justification for applying any less demanding a standard for attributing the actions of a "public body" to a Member under Article 1.1 of the Agreement.[83]

8.12 China refers to the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (the "Draft Articles") as compelling its interpretation of the term "public body" in Article 1.1 of the SCM Agreement. According to China, as a general matter prior panels and the Appellate Body have considered the Draft Articles "relevant rules of international law applicable in the relations between the parties", in the sense of Article 31(3)(c) of the Vienna Convention, for purposes of interpreting the covered agreements.[84]

8.13 In this regard, concerning the interpretation of Article 1.1 of the SCM Agreement, China recalls that in *US – Countervailing Duty Investigation on DRAMS* the Appellate Body referred to the Draft Articles in the section of its report entitled "The meaning of the terms 'entrusts' and 'directs'" in Article 1.1(a)(1)(iv).[85] In particular, China notes the Commentary to Article 8 of the Draft Articles, to which the Appellate Body referred in a footnote in the *US – Countervailing Duty Investigation on DRAMS* report.[86] According to China, this passage of the Commentary makes clear that state ownership is not sufficient to attribute the conduct of a state-owned corporate entity to a state, and by extension to a Member for purposes of Article 1.1 of the SCM Agreement, and that instead it supports China's view of the term "public body". Furthermore, in China's view, the Appellate Body's citation of this passage demonstrates that the Draft Articles are "relevant rules of international law" for purposes of interpreting the WTO Agreement, and thus must be relied upon in the present dispute in determining whether the USDOC's determination that the SOEs and SOCBs were public bodies was consistent with the SCM Agreement.[87]

8.14 China further argues that to the extent that the panel in *Korea – Commercial Vessels* can be read as endorsing a test for determining whether an entity is a public body solely by reference to government ownership or control, its reasoning is not persuasive and should not be followed. China argues in this regard that among other errors, that panel failed to acknowledge the mandatory nature

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[83] China first written submission, paras. 62-67; response to Panel question 21 (first meeting).

[84] *See, e.g.*, China first written submission, para. 70; citing to Appellate Body Reports on *Canada – Continued Suspension*, para. 382; *US – Line Pipe*, para. 259; *US – Cotton Yarn*, para. 120 and footnote 90; Panel Reports on *Brazil – Retreaded Tyres*, para. 7.305 and footnote 1480; *Mexico – Taxes on Soft Drinks*, para. 8.180; and Decision by the Arbitrator(s) on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44; *US – FSC (Article 22.6 – US)*, paras. 5.26 and 5.58-5.61; and *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.16.

[85] China first written submission, para. 72, citing to Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, para. 112 and footnote 179.

[86] Id. The cited passage from the Commentary reads: "Since corporate entities, although owned by and in that sense subject to the control of the States, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority [within the meaning of Article 5 of the Draft Articles]". (Id.).

[87] China first written submission, paras. 72-73.

of recourse to customary principles of international law under Article 31(3)(c) of the Vienna Convention, an oversight that in China's view cannot be reconciled with what it considers the Appellate Body's express reliance on the Draft Articles in interpreting Article 1.1(a)(1)(iv) of the SCM Agreement. According to China, defining "public body" solely by reference to government ownership or control cannot be reconciled with the Appellate Body's recognition in *US – Countervailing Duty Investigation on DRAMS*, consistent with customary international law, that the conduct of a state-owned corporate entity presumptively is not attributable to a government unless that entity is exercising governmental authority within the meaning of Article 5, or determined to be under the direction or control of the State within the meaning of Article 8, of the Draft Articles.[88]

8.15 Concerning the object and purpose of the SCM Agreement, China considers that the United States' interpretation, if accepted, would have far-reaching and troubling implications for the proper application of the SCM Agreement. Here, China disagrees with the argument advanced by the United States that a majority ownership rule is necessary to "prevent circumvention of the SCM Agreement […] so that subsidizing governments cannot hide behind their ownership interests in enterprises to avoid the reach of the SCM Agreement." China considers this to be a baseless concern, because subparagraph (iv) of Article 1.1 is an acknowledged anti-circumvention provision that squarely addresses it.[89] China also disagrees with what it views as the United States' argument that the entrustment or direction standard is too burdensome and might be evaded when government-owned entities are involved. China is concerned that if the position of the United States is accepted, subparagraph (iv) would become a dead letter for entities with majority government ownership – a category of entities to which, in China's view, subparagraph (iv) was previously considered applicable by both panels and WTO Members alike.[90]

8.16 China considers that the interpretation advocated by the United States, which in its view is not based on the actual treaty standards, would flout the object and purpose of the SCM Agreement. In particular, China argues, the SCM Agreement "reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures". Both aspects of this "balance" are evident in Article 1.1, including the "discipline" imposed by the entrustment or direction standard. For China, the possibility that it may not be easy, as a practical matter, to meet the standards of a covered agreement has never dissuaded the Appellate Body from strictly enforcing those standards, and it urges the Panel to be guided by the same approach here.[91]

8.17 Concerning the USDOC's findings of financial contribution in the form of provision of inputs by SOEs, China argues that the determination that the SOEs were public bodies was flawed, such that the financial contribution findings were inconsistent with the SCM Agreement. In particular, China argues that for the USDOC to have validly concluded that the SOEs were public bodies, it would have had to, but did not, examine whether they were authorized by Chinese law to exercise functions of a governmental character or public character normally exercised by State actors, "and" the acts alleged to have constituted financial contributions were performed in the exercise of such authority. Rather, China argues, the USDOC applied a *per se* rule of majority ownership to conclude that the SOEs were public bodies.[92] China makes the same argument in respect of the USDOC's findings that the SOCBs were public bodies.[93]

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[88] China first written submission, para. 83.
[89] China oral statement at the second meeting of the Panel, paras. 21-24.
[90] Id., paras. 25-27.
[91] Id., paras. 28-29.
[92] China first written submission, paras. 86-87.
[93] In its first written submission, China argues that the analytical framework applied by the USDOC to determining whether the SOCBs were public bodies "bears some resemblance to a proper interpretation of

8.18 China criticizes the USDOC for not applying the five-factor test that it had applied in certain prior cases[94]: (i) government ownership; (ii) the government's presence on the entity's board of directors; (iii) the government's control over the entity's activities; (iv) the entity's pursuit of governmental policies or interests; and (v) whether the entity is created by statute. China argues that in some prior cases where this test was applied, the USDOC had found that even 100 per cent government-owned entities were not public bodies under U.S. law, and thus could not convey financial contributions unless they were "entrusted or directed" to do so.[95] While China asserts that it is not raising before the Panel the consistency with Article 1.1 of the SCM Agreement of the five-factor test[96], China also takes issue with the USDOC's statements in three of the investigations in the present dispute that there was insufficient record evidence to apply the five-factor test as, beyond the levels of government ownership for some companies, the Government of China had not provided the information needed to apply the test. China argues that this statement indicates that for the USDOC any provision of goods by a state-owned entity may be presumed to be a financial contribution unless there is evidence establishing that the entity is not a public body.[97] China states that the five-factor test is relevant for this dispute to establish that prior to the investigations at issue, the USDOC had recognized that determining whether a state-owned entity qualified as a public entity was a multi-factor, fact-intensive inquiry even under U.S. law.[98] China considers that the USDOC improperly shifted the burden to the Government of China to disprove the presumption that all SOEs are public bodies, thereby abrogating its responsibilities as an investigating authority. In this context, China cites a statement by the Appellate Body that "the investigating authority has a duty to seek out information on relevant factors and evaluate their probative value in order *to ensure that its determination is based not on presumptions, but on a sufficient factual basis*".[99] (emphasis added by China)

2. United States

8.19 The United States rejects China's arguments. Concerning the ordinary meaning of "public body", the United States submits that the definitions of the term "public" include: "belonging to, affecting, or concerning the community or nation", and that dictionary definitions identified by China include: "Relating or belonging to an entire community, state, or nation" and "of or relating to the people as a whole; that belongs to, affects or concerns the community or the nation". The

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Article 1.1(a)(1)", in that the USDOC appeared to recognize that in order for loans by SOCBs to constitute a financial contribution by a public body there must be evidence that the banks were endowed with governmental authority to provide preferential loans in furtherance of a public purpose, and that the countervailable loans were made by the SOCBs in the exercise of this authority. (Id., paras. 186-187). In response to the United States' arguments that the USDOC analysis was not based on the considerations referred to by China, but instead was based on control by the government, with government ownership figuring prominently in regard to control, China states that although the USDOC did not conclude that the SOCBs were public bodies by applying a rule of majority ownership, this is the defence the United States advances to the Panel, which in China's view fails.

[94] While China indicates that the five-factor test is "exclusively a creature of U.S. law" whose consistency with the SCM Agreement is not before the Panel (China first written submission, footnote 69), China also states that in the investigations at issue, the USDOC "abandoned" this test in favour of a "*per se* majority ownership test" (Id., para. 91); China refers to the "fatal" problems with the USDOC's "excuse" and "rationale" for not applying the test (Id., paras. 94-95); and China indicates that it "takes no solace" in the USDOC's statement in some of the final determinations at issue that it would reconsider the feasibility of applying the five-factor test during an administrative, should a countervailing duty order be imposed (Id., para. 100), arguing that a Member "may not avoid responsibility for failure to honour its WTO obligations by promising to consider complying with them in the future" (Id., para. 101)..

[95] China first written submission, para. 90.

[96] Id., footnote 69.

[97] Id., paras. 94-95.

[98] Id., footnote 69.

[99] Id., para. 98, citing to Appellate Body Report on *US – Anti Dumping Measures on Oil Country Tubular Goods*, para. 201.

United States notes that one of the dictionaries relied upon by China defines "public" as: "In general, and in most of the senses, the opposite of private (adj.)", and that the word "private" means: "Of a service, business, etc.: provided or owned by an individual rather than the State or a public body". For the United States, this is an important point because the bodies at issue in the dispute are businesses. Accordingly, because the ordinary meaning of the term "public" is the opposite of "private", the meaning of the term "public" would include "provided or owned by the State or a public body rather than an individual".[100] According to the United States, therefore, however the term "public" is examined, its ordinary meaning includes the notion of belonging to, or being owned by, the state, and if an entity is owned by the state, the ordinary meaning of the term "public" indicates that it can be a "public body" under the SCM Agreement.[101]

8.20 In terms of context, the United States notes that the term "public body" in Article 1.1(a)(1) is part of the disjunctive phrase "by a government or any public body [...]". By using two different terms to refer to the type of entity that can provide a financial contribution, the SCM Agreement expresses distinct and different meanings for the terms "government" and "public body". Treaty interpretation should give meaning and effect to all terms of a treaty, and "a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility".[102] The United States also argues that the word "any" before "public body" means, *inter alia*, "of whatever kind" of the being or thing at issue, and that through the use of the term "any", the SCM Agreement indicates that there might be different "kinds" of public bodies. For the United States, "any" also indicates that the drafters of the SCM Agreement did not intend the term "public body" to have a meaning that would relate back to the term "government".[103]

8.21 The United States also disagrees with China that the French and Spanish versions of the SCM Agreement require reading the term "public body" as "government agency" (i.e., as the same as "government"). The United States argues that the issue in the present dispute is the interpretation of the term "public body" or "organismo público" or "organisme public". The United States considers that there is no discrepancy between these terms. Regarding China's argument that in Article 9.1 of the Agreement on Agriculture the English term "government agency" is translated in the Spanish version as "organismo público", the United States considers that any discrepancy between the English and Spanish versions exists in that Agreement, which is not before this Panel.[104]

8.22 The United States rejects China's argument that Article 1.1(a)(1) "explicitly equates" the terms "government" and "public body" making them "functional equivalents", and that therefore the essence of a "public body" should be the same as the essence of a "government", namely to perform certain functions pursuant to government authority and power. In the view of the United States, if this were the case, there would have been no need for the use of two different terms in Article 1.1(a)(1). Pursuant to accepted rules of treaty interpretation, the terms "public body" and "government" cannot be equivalent.[105] The United States argues that the term "private body" in Article 1.1(a)(1)(iv) is relevant context. In the view of the United States, given that the term "private body" is the opposite of "public body", and the ordinary meaning of the term "private" includes the notion of being owned by individuals, not the state, the term "private" in the context of Article 1.1(a)(1) indicates that a "public body" can be an entity owned by the state. For the United States, because "government" and

[100] United States first written submission, paras. 95-96.
[101] Id. para. 97; opening statement at the first meeting of the Panel, para. 22.
[102] United States first written submission, para. 98; second written submission, para. 24.
[103] United States second written submission, paras. 20-21; opening statement at the second meeting of the Panel, para. 4.
[104] United States second written submission, para. 36; opening statement at the second meeting of the Panel, paras. 11 and 14.
[105] United States first written submission, para. 99; opening statement at the first meeting of the Panel, para. 23.

"public body" are distinct, the fact that state-owned enterprises and state-owned commercial banks are not the government does not bar them from being considered public bodies. The United States also considers that the distinct terms "private body" and "public body", mean that a public body is not a privately-owned entity, and can be an entity owned by the government. Taken together, this means that a "public body" includes entities owned by the government, but not necessarily exercising functions of a governmental character. The United States argues that, not surprisingly this interpretation is consistent with the ordinary meaning of the word "public".[106]

8.23 The United States finds further context in China's Protocol of Accession, which "include[s] the commitments referred to in paragraph 342 of the Working Party Report" as an "integral part of the WTO Agreement". The United States cites language in the Report concerning the discussion of state-owned enterprises in China (including banks) which in its view makes clear that China's state-owned enterprises are government actors, or at least public bodies, within the meaning of the SCM Agreement. The United States argues that at the very least this language demonstrates that China accepts that actions by state-owned enterprises constitute financial contributions by a government, without the need for a finding of entrustment or direction, and that this is a recognition that Chinese state-owned enterprises are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.[107]

8.24 The United States disagrees with the contextual argument of China based on the term "public entity" in the GATS Financial Services Annex. The United States argues that the GATS is a different agreement with an entirely different field of application, and that the term "public entity" used in the GATS is different from the term "public body". The United States argues that the term "public entity" in that context should not be considered to have the same meaning as "public body" in the SCM Agreement; and that the definition of "public entity" is solely "for the purposes of" the GATS, and thus was not intended to create implications for other Agreements. The United States also disagrees with China that Article I:3 of the GATS is relevant context, as that provision contains neither the term "public body" nor anything else that sheds light on the meaning of that term.[108]

8.25 The United States points to prior statements of the Appellate Body and panels 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" and "to impose multilateral disciplines on trade-distorting subsidization".[109] Accordingly, the United States argues, the Appellate Body and panels have sought to ensure that the SCM Agreement not be interpreted rigidly or formalistically in a manner that would undermine its disciplines on trade-distorting subsidization. Consistent with this object and purpose, and the need to prevent circumvention of the SCM Agreement, in the view of the United States the term "public body" should be interpreted so that subsidizing governments cannot hide behind their ownership interests in enterprises to avoid the reach of the SCM Agreement.[110]

8.26 The United States disagrees with China that the Draft Articles are relevant rules of international law for purposes of interpreting the term "public bodies". The United States argues that the Draft Articles are not an agreement relating to the SCM Agreement made in connection with the

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[106] United States first written submission, paras. 100-101.

[107] *See, e.g.,* United States first written submission, paras. 102-103; second written submission, para. 39.

[108] United States first written submission, paras. 104 and 106; response to Panel question 21 (first meeting); second written submission, para. 35.

[109] *See, e.g.,* United States first written submission, para. 107, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 64 and Panel Report on *Brazil – Aircraft*, para. 7.80.

[110] Id., para. 108, citing to Panel Reports on *Canada* – Autos, para. 142; *Australia – Leather II*, para. 9.56; and Appellate Body Report on *US – Softwood Lumber IV*, para. 95 (quoting Appellate Body Report on *US – Carbon Steel*, paras. 73-74).

conclusion of the SCM Agreement, nor an instrument made by any parties relating to the SCM Agreement, in the sense of Article 31 of the Vienna Convention, nor one of the "covered agreements" set forth in Appendix 1 to the DSU. They thus are not "context" as that term is used in the Vienna Convention. Nor are the Draft Articles a subsequent agreement or practice regarding the interpretation or application of the SCM Agreement. A report of which the United Nations General Assembly merely "took note" in 2001 cannot, in the view of the United States, inform the meaning of provisions of the WTO agreements that entered into force almost six years earlier.[111] The United States also disagrees that the Draft Articles are a "relevant rule of international law" that are applicable in this case. The United States further considers that China inappropriately lifts the standards in the Draft Articles and reads them almost *verbatim* into the SCM Agreement. The United States argues that by their own terms, the Draft Articles are inapplicable to an interpretation of Article 1.1(a)(1) of the SCM Agreement.[112]

8.27 In this regard, the United States submits that the Draft Articles state that their purpose is not to define the primary rules establishing obligations under international law, but rather to define when a state (as opposed to some other entity) is responsible for a breach of those primary rules. In the context of countervailing duties under the SCM Agreement, according to the United States the primary rule is contained in Article 10 of the SCM Agreement, and the question in the present dispute is whether the United States breached this primary obligation, about which the Draft Articles have nothing to say.[113] The United States also notes the *lex specialis* clause of the Draft Articles. In the view of the United States, the SCM Agreement is a special rule of international law in the sense of that provision, which governs when a financial contribution occurs, and defines the "State" in a way that may produce different consequences from the Draft Articles, using the phrase "a government or any public body within the territory of a Member [. . .]", the proper interpretation of which is based on its ordinary meaning when read in its context and in light of the object and purpose of the SCM Agreement. The United States argues that the standards in the Draft Articles thus have no relevance or application to the special rule in Article 1.1(a)(1) of the SCM Agreement.[114]

8.28 The United States also disagrees that the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* endorsed the principles in the Draft Articles. Rather, in a footnote constituting *dicta*, the Appellate Body noted the unremarkable proposition that the conduct of private bodies is presumptively not attributable to the State and cited to the commentaries on the Draft Articles. The question in *US – Countervailing Duty Investigation on DRAMS*, whether certain private bodies were entrusted or directed by the government within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, such that their provision of loans and equity was attributable to the government, is different from that in the present dispute, i.e., whether certain entities constitute "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement, a question to which the Appellate Body did not speak in *US – Countervailing Duty Investigation on DRAMS*.[115]

8.29 The United States further disagrees that the Appellate Body found the Draft Articles to be relevant rules of international law. The United States submits that the Appellate Body's comment only notes the existence of the Draft Articles, and appears in passing, making the reference to the Draft Articles all the less compelling. By contrast, in the view of the United States, China reads

[111] United States first written submission, paras. 112-113; opening statement at the first meeting of the Panel, para. 18.

[112] United States first written submission, para. 114; second written submission, para. 47.

[113] United States first written submission, para. 115.

[114] Id., paras. 116-117.

[115] *See, e.g.*, United States first written submission, para. 118; response to Panel question 16 (first meeting); second written submission, para. 41.

provisions of the Draft Articles into the SCM Agreement as integral parts of the text, although they are not relevant to interpreting the term "public body".[116]

8.30 The United States agrees with the conclusion of the panel in *Korea – Commercial Vessels* that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)". In the view of the United States, this reasoning is consistent with the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement.[117] The United States states that majority government ownership can demonstrate control, in that government ownership gives the government the ability to appoint managers and directors and thereby to oversee operations. For the United States, it would be an unusual situation where the owners of the entirety of, or a majority share in, a company could not appoint the leadership (and thereby oversee operations), or could not control the company.[118] The United States thus agrees with the *Korea – Commercial Vessels* panel that in all cases, public body status "can be determined on the basis of government (or other public body) control", and notes that in analyzing control, although the panel cited evidence that the government appointed various entities' managers and directors, and that the government approved and oversaw the entities' operations, it gave the most weight to government ownership of the body. It called the fact that one bank was almost fully government-owned "highly relevant and arguably determinative" in the question of government control.[119]

8.31 The United States submits that when concluding that a public body is one controlled by a government or other public body, the panel rejected Korea's argument that an entity is not a "public body" if it engages in market activities on commercial terms. The panel noted that this would mean that the panel should apply the "benefit" test in a "public body" analysis, such that on one day a given entity could provide financing on market terms, and thus constitute a "private" entity, while the next day it could make cash grants and then constitute a "public" body. For that panel, "the question of whether an entity is a public body should not depend on an examination of whether that entity acts pursuant to commercial principles". In the view of the United States, China repeats Korea's failed argument when it argues that an entity is only a public body when it engages in government functions, not commercial activities.[120] The United States also agrees with the *Korea – Commercial Vessels* panel that pursuit of a public policy objective is not essential to a public body determination. The United States asserts that China's proposed elements of (i) legal authority to exercise functions of a governmental or public character, and (ii) actions performed in exercise of such authority, are similar to those rejected in *Korea – Commercial Vessels.*[121] In the view of the United States, a standard of government ownership or control is consistent with the object and purpose of the SCM Agreement because it will ensure that subsidizing governments cannot hide behind their ownership interests, while at the same time not treating any entity with which a government has a merely tangential relationship as a public body.[122]

8.32 The United States thus rejects China's argument that ownership and control are irrelevant to a "public body" analysis, and are only relevant to an "entrustment or direction" analysis pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement. The United States asserts that most of China's argument on this point flows from its mistaken reliance upon the Draft Articles, in particular Article 5, which China analogizes to the public body question, and Article 8, which it analogizes to the entrustment or

[116] United States first written submission, para. 119.
[117] Id., para. 121, citing to Panel Report on *Korea – Commercial Vessels*, para. 7.50.
[118] Id., paras. 121 and 125.
[119] Id., paras. 124-125, citing to Panel Report on *Korea – Commercial Vessels*, paras. 7.50, 7.55, 7.172, 7.353 and 7.356.
[120] Id., para. 122, citing to Panel Report on *Korea – Commercial Vessels*, paras. 7.44-45.
[121] Id., para. 123, citing to Panel Report on *Korea – Commercial Vessels*, para. 7.55.
[122] Id., para. 126.

direction question.[123] According to the United States, in *US – Countervailing Duty Investigation on DRAMS* (which China cites in support of its argument concerning the Draft Articles), both the panel and Appellate Body recognized a distinction between, on the one hand, entities which potentially could be public bodies because they were owned or controlled by a government and, on the other hand, entities which could not be public bodies because they were not owned or controlled by a government. The Appellate Body noted that there were three classes of creditors in that case, following from the USDOC's grouping of the creditors in the countervailing duty investigation: (A) public bodies; (B) government-owned or controlled creditors; and (C) creditors not owned or controlled by the government. The United States notes that some creditors in Group B were 100 per cent owned by the government, and recalls that the Appellate Body in this context cited the panel's statement that "in its view, the USDOC might have been entitled to treat these 100 per cent-owned firms as 'public bodies', but having refused to so classify them, the USDOC was required to establish entrustment or direction with respect to such creditors". In the view of the United States, while this statement does not constitute a finding by the Appellate Body or the panel in that case, it suggests that the distinction in that case was between creditors that were owned or controlled by the government, on the one hand, and creditors that were not owned or controlled by the government, on the other hand. Those in the first group could be public bodies and those in the second group were entrusted or directed by the government or by public bodies.[124]

8.33 The United States considers this distinction important because, in its view, China posits a false dichotomy whereby ownership or control is relevant only to the question of entrustment or direction, but not to the question of whether an entity is a public body. For the United States, ownership and control, while perhaps relevant in an entrustment or direction analysis, are the central factors in a public body analysis, as was recognized by the panel and the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, and rightly adopted by the panel in *Korea – Commercial Vessels*. Control, indicated by whole or majority ownership, can lead to a public body analysis, while the giving of responsibility to, or exercising authority over, an entity that is not necessarily government-owned or controlled will lead to an entrustment or direction analysis.[125]

8.34 The United States maintains that the USDOC's determinations in the investigations at issue that certain state-owned enterprise producers of HRS, rubber, and petrochemicals were "public bodies" are consistent with Article 1.1(a)(1) of the SCM Agreement. According to the United States, the USDOC applied a rule of majority ownership to determine whether an entity was a public body, and found that if the government was the majority owner, then that producer was a public body. Given that the "public body" findings are consistent with the SCM Agreement, the United States argues that there was no need for the USDOC to determine whether the government entrusted or directed the state-owned enterprises to provide goods for less than adequate remuneration.[126]

8.35 Concerning the provision of loans by SOCBs in the OTR investigation, and the USDOC's determination that the SOCBs in question were public bodies, the United States rejects China's characterization that this determination was based on (i) whether there was a policy in place to provide preferential lending to the OTR industry, and (ii) whether there was evidence that the SOCBs provided preferential loans to the industry pursuant to this policy. Rather, the United States argues, the USDOC relied upon "'all information on the record'" and its finding in the 2007 *Coated Free Sheet Paper* countervailing duty investigation (the "*CFS Paper* investigation").[127] In the *CFS Paper* investigation, according to the United States, the USDOC found that the SOCBs were public bodies

[123] United States first written submission, para. 131.
[124] Id., para. 132, citing to Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, para. 131.
[125] Id., para. 133.
[126] Id., para. 135.
[127] Id., paras. 164-166.

on the basis that they were controlled by the government, in which connection "[g]overnment ownership of the banks, of course, figured prominently". Other factors included the legacy of state control over the banks, the incomplete banking sector reforms in China, and government involvement in bank decision-making. The United States argues that the USDOC's finding in the OTR investigation thus was based on these same factors.[128]

8.36 The United States rejects China's assertion that the USDOC should have applied a fact-intensive inquiry to determine whether the input producers were empowered by Chinese law to exercise governmental authority and in fact were exercising that authority, rather than applying a rule of majority ownership. In the view of the United States, the USDOC's use of a five-factor approach in prior cases is irrelevant in the present dispute, as the only question for the Panel is whether the USDOC's determination in the challenged investigations that the Chinese state-owned enterprises are "public bod[ies]" is consistent with the SCM Agreement.[129]

8.37 The United States nevertheless discusses the five-factor test to clarify for the Panel some of China's statements. In the countervailing duty investigation of *DRAMs from Korea*, the USDOC analyzed five factors to determine whether entities were public bodies. This approach was based upon factors analyzed in a 1987 investigation of *Fresh Cut Flowers from the Netherlands* and a 1992 investigation of *Pure Magnesium and Alloy Magnesium from Canada*. The United States notes first that these two investigations pre-dated by many years the adoption in the SCM Agreement of the "public body" and "entrusts or directs" language, as well as the equivalent language in U.S. domestic law.[130] In the *Flowers* investigation, the relevant entity was 50 per cent owned by the government, and it therefore was necessary to examine other factors, because majority ownership by the government was not present. The USDOC concluded that the government provided subsidies "through" this entity, but there is no way to tell whether this conclusion would be a "public body" finding or an "entrustment or direction" finding under today's standards. In the *Magnesium* investigation, the USDOC found that an entity was a "government entity" (which is probably more akin to today's "public body" term) based largely upon government ownership and control.[131]

8.38 In answer to a question from the Panel, the United States indicates that the USDOC also had applied the five-factor test in an investigation of *Coated Paper from Korea*, in an investigation and review of *DRAMs from Korea*, in an investigation of *Hot-Rolled Steel Flat Products from South Africa*, and in an initiation of an investigation of *steel wire rod from various countries*. The United States indicated that in other cases, however, the USDOC had taken a different approach, analyzing primarily ownership or control. According to the United States, these past cases indicate that the USDOC approaches public body issues on a case-by-case basis, with the five-factor test usually arising where there is not clear evidence of government ownership or control. For the United States, this makes sense as most of the five factors relate to ownership or control of an entity.[132]

8.39 The United States thus considers that these past decisions do not indicate a USDOC interpretation of the "public body" language in the SCM Agreement. Concerning the *DRAMS from Korea* investigation, the United States recalls that the USDOC analyzed five factors and, as China notes, concluded that certain 100 per cent government-owned banks in that case were not public bodies. The United States submits that the critical factor explaining this determination that 100 per cent government-owned banks were not necessarily public bodies was that, as the USDOC stated in that investigation, "temporary [government] ownership of the banks due to the financial crisis is not,

[128] United States first written submission, paras. 166-167.
[129] Id., para. 137.
[130] Id., paras. 138-139.
[131] Id., para. 140.
[132] United States response to Panel question 22 (first meeting).

by itself, indicative that these banks are [government] authorities". Accordingly, the United States argues, the history of this issue makes clear that the USDOC's analysis of more factors than ownership was born out of a case (the *Flowers from the Netherlands* investigation) in which there was a 50-50 ownership split between the government and a private entity. Then, in the *DRAMS from Korea* investigation, an analysis of more than ownership, and even of entrustment or direction for some banks, was necessary due to the fact that the Korean government had assumed many temporary ownership stakes as a result of the Korean financial crisis.[133] The United States considers logical the statement of the panel in *US – Countervailing Duty Investigation on DRAMS* that "[d]epending on the circumstances, 100 percent government ownership might well have justified the treatment of such creditors as public bodies".[134] The United States further notes that in a subsequent countervailing duty administrative review of *Hot-Rolled Carbon Steel Flat Products from India*, the USDOC found that a 98 per cent government-owned mining company governed by the Ministry of Steel was a public body, without reference to any more factors.[135]

8.40 Thus, in the view of the United States, the USDOC did not abandon any five-factor analysis, and no such analysis was either pertinent or necessary, in the cases in the present dispute. Furthermore, any five-factor analysis or abandonment thereof is irrelevant to the question before the Panel in the present dispute, that is, whether the USDOC's application of a rule of majority ownership to Chinese state-owned companies is consistent with the SCM Agreement. In the view of the United States, while the discussion concerning the investigation of *DRAMS from Korea* demonstrates that there may be situations in which government ownership, even majority government ownership, may not be determinative of the public body question, the present dispute is not such a case.[136]

8.41 Finally, concerning burden, the United States objects to China's argument that the USDOC improperly placed the burden upon the Government of China to provide evidence pertaining to the public body question. The United States argues that given China's recognition in the Working Party Report that state-owned enterprises can be treated as public bodies, the USDOC's approach was entirely reasonable, and that there was no evidence on the record to suggest that Chinese state-owned enterprises should be treated any differently during the four countervailing duty investigations at issue than what China committed to at the time of its accession to the WTO. For these reasons, the United States asserts that the USDOC's findings that Chinese state-owned enterprises are "public bodies" are not inconsistent with the SCM Agreement, and that accordingly, the USDOC had no obligation to consider whether these entities were entrusted or directed to provide financial contributions.[137]

C. MAIN ARGUMENTS OF THE THIRD PARTIES

1. Argentina

8.42 Argentina disagrees with China that "welfare" and "best interests" are more relevant factors than government control to determine whether an entity is a "public body" within the meaning of the SCM Agreement. Argentina considers that the difference between public and private in Article 1.1 of the SCM Agreement has to do with the corporate form of control of entities and not with the ultimate destination of the goods and services that these entities provide. In fact, Argentina argues, while there are public entities producing private goods, there are private entities producing public goods. Thus, Argentina agrees with the standard of government control enunciated by the *Korea – Commercial*

[133] United States first written submission, paras. 141-142.
[134] Id., para. 143, citing to Panel Report on *US – Countervailing Duty Investigation on DRAMS*, para. 7.8 and footnote 29.
[135] Id., para.143.
[136] Id., para. 144.
[137] Id., paras. 145-146.

Vessels panel as the basis for determining whether an entity is a public body. In Argentina's view, government ownership is sufficient to establish control and to establish that an entity is a public body within the meaning of the SCM Agreement.[138]

2. Australia

8.43 Australia believes that, consistent with the findings of the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, it is important not to conflate the test for entrustment or direction (which has to do with the nature of the action being undertaken) with the definition of a public body (which has to do with the identity of the actor). In Australia's view, the government control test enunciated in *Korea – Commercial Vessels* is correct, and government ownership is strong evidence of government control, but not necessarily determinative. Australia considers that the Draft Articles do not address the definition of "public body", and that therefore they offer no interpretative assistance as to Article 1.1 of the Agreement. Similarly, Australia considers that the definition of "public entity" in paragraph 5(c) of the GATS Financial Services Annex does not provide relevant interpretative context since this definition is limited to the purpose of that agreement. In Australia's view, an apparent interpretative recourse to "context" cannot be used to transform the scope of a provision in a way that is not otherwise available from the text. Nor can interpretative context be used to include an additional test of exercising government authority that is not apparent from the text, particularly when the inclusion of such a test would undermine the clear distinction between the definition of public body and the test for entrustment or direction. Finally, Australia considers that paragraph 172 of China's Working Party Report provides historical evidence of the nature of Chinese SOEs (including banks), rather than evidence of their current nature, but that such historical evidence could be relevant for assessing whether an entity is a "public body" within the meaning of the SCM Agreement.[139]

3. Brazil

8.44 Brazil considers that majority state shareholding does not suffice to characterize an enterprise totally or partially-owned by the State as a "public body". Rather, "public body" refers to an entity closely assimilated to the government itself and, consistent with the approach adopted by the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, the use of the term "government" throughout the Agreement – to refer indistinctly to "a government or any public body" – emphasizes the closeness of the nexus between both concepts. Brazil believes that an entity is closely assimilated to the government if it performs functions and exercises attributions that are typical of the government, and that this understanding is confirmed by the Draft Articles and by the Appellate Body precedents. Relying on the Appellate Body's reasoning in *US – Countervailing Duty Investigation on DRAMS*, Brazil considers that ownership is not determinative but that it may be one relevant element in assessing both if an entity has the nature of a "public body" or if it is a "private body" entrusted or directed by the government. Thus, for Brazil, investigating authorities must establish whether the government entrusted or directed a company which, albeit owned or controlled by the government, is *prima facie* a private entity; or if investigating authorities believe that such company has the nature of a public body, they must establish that the company is closely assimilated to the government itself. In Brazil's view, the anti-circumvention objective in the SCM Agreement was meant to be achieved through the standard of "entrustment or direction" and not by a broad and "fast track" interpretation of the term "public body" which, Brazil adds, would rather allow the

[138] Argentina third-party submission, paras. 39 and 47-48.

[139] Australia third-party submission, paras. 9-13; third-party oral statement, paras. 10-14; third-party response to Panel question 1(a).

circumvention of the steps provided for in Article 1.1(a) for the determination of a financial contribution.[140]

4. Canada

8.45 Canada believes that government control determines whether an entity is a "public body", consistent with the findings of the *Korea – Commercial Vessels* panel which, according to Canada, found that control was "evidenced primarily" by the fact that an entity was wholly government-owned. Canada also notes that upon its accession to the WTO, China conceded that its SOEs constitute public bodies. Further, Canada argues that China's interpretation of the term "public body" would render such term *inutile*, i.e., in the case of government provision of goods, SOEs would putatively be "private bodies" except where they are exercising governmental authority attributed to them by the law of the State to sell such goods. Thus, Canada argues, there would be no need for SOEs to be defined as "public bodies" for their actions to be considered as a financial contribution under Article 1.1 (a)(1)(iii). In addition, Canada argues that under China's interpretation of "public body", sales made by Chinese SOEs would not be considered "financial contributions" under Article 1.1(a)(1)(iii). Moreover, Canada agrees with the United States that the term "private" excludes the notion of being owned by the State, and argues that sales made by Chinese SOEs also could not be considered "financial contribution" under Article 1.1 (a)(1)(iv). As a result, Canada submits that under China's interpretation, a government could do indirectly (through an entity it controls) what it cannot do directly (i.e., to provide goods without the application of the SCM Agreement's disciplines). Thus, in Canada's view, China's interpretation is inconsistent with the main object and purpose of the SCM Agreement.[141]

5. European Communities

8.46 The European Communities considers that the Panel should examine China's Working Party Report in assessing whether the SOEs at issue are "public bodies". Regarding Article 1.1 of the SCM Agreement, the European Communities considers that the terms "government" and "public body" should be understood as equivalents, since Article 1.1(a)(1) states that both are "referred to in this Agreement as 'government'". The European Communities also considers that a high level of government ownership is a very relevant factor in determining whether an entity is a "public body" in the sense of the Agreement, and notes that previous panels and the Appellate Body have considered this factor (although among other factors) in determining whether an action by an entity is attributable (directly or indirectly) to the government. The European Communities does not consider that a test, such as the "five-factor" test alleged by China, is required by the SCM Agreement.[142]

6. Japan

8.47 Japan considers that the Draft Articles are irrelevant to interpreting the term "public body", in particular that they neither define nor use the term "public body" in any way. Japan points to the fact that Members agreed to the definition of "public entity" in paragraph 5(c) of the GATS Financial Services Annex as suggesting that Members did not import this definition into the SCM Agreement but rather left the term "public body" undefined. Japan also considers that no provision of the WTO Agreements suggests that a "public body" under Article 1.1(a)(1) of the SCM Agreement would be limited to entities that have been empowered by the "law of the State", and that the scope of this term should be rather examined in accordance with the particular facts of any given case. Thus, Japan is of the view that the consistency of the USDOC's findings of public bodies should be examined based on

[140] Brazil third-party submission, paras. 4-12; third-party oral statement, paras. 3-7.
[141] Canada third-party submission, paras. 10-17; third-party response to Panel questions 1 and 2.
[142] European Communities third-party submission, paras. 6-12; third-party response to Panel question 1.

the totality of the facts underlying the investigations at issue. Japan agrees with China that government ownership does not conclusively establish that an entity is a "public body".[143]

7. India

8.48 India considers that the ordinary meaning of the term "public body" does not warrant a presumption that government control or ownership are sufficient to determine that a company is a "public body". India is of the view that a high level of government ownership may be a pertinent factor, but not determinant for determining whether an entity is a "public body", and that such an interpretation is consistent with previous WTO cases where panels have looked at the level of government ownership and at "other" relevant factors. India also considers that in order to consider an entity closely assimilated to the government, such assimilation must go beyond mere ownership and the entity must perform functions or attributions that are typical of the government. Finally, India states that because government ownership is considered insufficient as to guarantee "entrustment" in Article 1.1(a)(1)(iv), it is even more implausible to argue that ownership brings to the conclusion that an entity is a "public body".[144]

8. Mexico

8.49 Mexico considers that China's interpretation of "public body" is erroneous. According to Mexico, this interpretation is not only inconsistent with the Working Party Report but also would exclude public enterprises that provide goods and services as provided for in Article 1.1(a)(1)(iii) of the Agreement. Mexico further notes that in *US – Countervailing Duty Investigation on DRAMS* the Appellate Body did not address the definition of "public body", nor did the Appellate Body determine that the "public" characterization of an entity was dependant on the way in which such entity acts. Mexico adds that whether an entity acts in accordance with market principles is relevant to the benefit determination but that whether an entity is a "public body" must be determined on the basis the level of government ownership. Mexico also considers that the Draft Articles are irrelevant to interpreting the term "public body" (i.e., the concept of "public entity" in the Draft Articles is limited to the context of "wrongful acts", whereas subsidies under the WTO rules are not considered wrongful acts) and that the fact that a term appears in several WTO Agreements does not imply that its meaning is the same in all agreements (i.e., the ordinary meaning of a term should be determined in its context and in light of the purpose of the Agreement in which the term appears). According to Mexico, an entity is a "public body" if it is controlled by the government and there is evidence that the government, in fact, exercises such control. Mexico considers that this interpretation is consistent with the ordinary meaning of this term, arguing that according to the "Dictionario Esencial de la Lengua Española", "public body" means any legal person that belongs to the State.[145]

9. Norway

8.50 Norway considers that Article 1.1(a)(1)(iv) of the Agreement is relevant to interpreting the term "public body" in the SCM Agreement. According to Norway, this provision makes clear that the distinction between "public bodies" and "private bodies" rests on whether the body in question performs governmental functions or not. That is, if the body does not perform governmental functions, any financial contribution it provides is only attributable to the State if the government has entrusted or directed it to provide such contribution. Although the panel reports on *EC – Countervailing Measures on DRAM Chips* and *Korea – Commercial Vessels* are differently worded (i.e., while the former considered 100 per cent ownership as insufficient to establish "entrustment" or

[143] Japan third-party submission, paras. 16-21.
[144] India third-party submission. (This submission contains no paragraph numbering).
[145] Mexico third-party submission, paras. 38-43 and 47; third-party oral statement, paras. 10-11 and 13-16; third-party response to Panel questions 1 and 2.

"direction", the latter considered that such percentage (among other factors) was sufficient to establish that an entity was a public body), Norway considers that both reports support the position that government ownership is not sufficient, in itself, to determine that an entity is a "public body", and that other factors (in particular, the exercise of governmental functions) must be present. Thus, Norway submits, not all companies with more than 50 per cent government ownership (or even 100 per cent ownership) are automatically to be considered "public bodies", but rather, the determining factor would be whether the body exercises "governmental functions".[146]

10. Saudi Arabia

8.51 Saudi Arabia considers that the term "public body" refers to an entity vested with governmental authority that exercises governmental functions and that government ownership (alone) does not suffice to deem an entity a "public body" under the Agreement. Saudi Arabia argues, *inter alia*, that: (i) the terms "organismo publico" and "organisme public" (in the Spanish and French versions of the Agreement, respectively) refer indistinctively to both "public body" and "government agency", and that in *Canada – Dairy* the Appellate Body interpreted both terms to mean an entity that "exercises powers vested in it by a government to perform functions of governmental character"; (ii) the drafters considered the terms "government" and "public body" to be equivalents since Article 1.1(a)(1) states that both are to be "referred to in this Agreement as 'government'"; (iii) the fact that "public bodies" can "entrust or direct" private bodies confirms that they must possess some sort of governmental authority; (iv) consistently with the panel's finding in *EC – Countervailing Measures on DRAM Chips*, state ownership is not sufficient to conclude that an entity is entrusted or directed and, thus, a *fortiori*, such ownership is not sufficient to consider an entity to be a "public body", as such a finding would eliminate the need to determine the existence of entrustment or direction; (v) in *US – Countervailing Duty Investigation on DRAMS* the Appellate Body accepted, in the context of Article 1 of the Agreement, the Draft Articles' conclusion that the conduct of state-owned entities is not attributable to the State "unless they are exercising elements of governmental authority"; (vi) in *Korea – Commercial Vessels*, the panel's findings were based on "control" and not "ownership" and therefore that report supports that a "public body" is an entity that is controlled by the government; and (v) the GATS definition of "public entity", which requires more than mere government ownership or control, provides useful context to interpreting "public body" in the SCM Agreement. Finally, Saudi Arabia considers that China's Working Party Report should not be used as the basis for interpreting the term "public bodies", i.e., the Working Party Report contains commitments specific to China, while the WTO Agreement, including Article 1 of the SCM Agreement, applies to all WTO Members.[147]

11. Turkey

8.52 Turkey considers the terms "government" and "public body" in Article 1.1(a)(1) of the SCM Agreement as distinct, and thus requiring to be constructed differently. Namely, Turkey is of the view that institutions falling under the definition of the term "government" cannot be classified as "public bodies". According to Turkey, China's interpretation narrows the actual meaning of the term "public body" and equates it to the term "government", annulling therefore the distinction between the two terms and rendering the term "public body" meaningless. Turkey considers both the Draft Articles and the GATS Financial Services Annex to be irrelevant. In Turkey's view, the Draft Articles' *lex specialis* clause makes it impossible to apply them, and the GATS Financial Services Annex makes clear that the definition provided therein applies "for the purposes of [that] Annex" exclusively. Turkey agrees with the panel in *Korea – Commercial Vessels* that government control is the most

[146] Norway third-party submission, paras. 12-21.

[147] Saudi Arabia third-party submission, paras. 23-28, 32-46 and 47-50; third-party oral statement, paras. 2-12.

proper criterion for determining whether an entity is a "public body", and that government ownership is the main indicator of control.[148]

D. ASSESSMENT BY THE PANEL

1. Interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement

8.53 In examining China's claims concerning the USDOC's determinations in all four of the countervailing duty investigations at issue in this dispute that the SOEs that provided certain inputs were public bodies, and in the OTR investigation that the SOCBs that provided loans also were public bodies, the first issue that we must address is the meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

8.54 The relevant text of Article 1.1 of the SCM Agreement reads as follows:

> "1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a *government* or *any public body* within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> [...]
>
> (iv) a government makes payments to a funding mechanism, or *entrusts or directs a private body* to carry out one or more of the type of functions illustrated [...] above." (emphasis added)

On its face, Article 1.1 of the SCM Agreement identifies three possible types of actors that could convey government financial contributions: "governments", "public bodies", and "private bodies" that have been "entrusted or directed" by the government to make a financial contribution. Given that the USDOC found that the entities in question were "public bodies", the focus of China's claim is the meaning of the term "public body" in the SCM Agreement. We note nevertheless that we must interpret the entire phrase "a government or any public body within the territory of a Member (referred to in this Agreement as 'government')" in order to find that meaning.

8.55 We recall that China's argument is that the terms "government" and "public body" are "functional equivalents", with the meaning of the latter (while not identical to "a government")[149] being "'an entity which exercises powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character'" (in essence, the same definition as that given by the Appellate Body to the term "government agency" in Article 9.1 of the Agreement on Agriculture).[150] For the United States, on the other hand, the terms "government" and "public body" have distinct meanings.[151] The particular interpretative question thus posed by China's claim is how broad or narrow a meaning should be given to the term "public body", as used in Article 1.1(a)(1) of the SCM Agreement.

8.56 We note that the interpretative process under Article 31 of the Vienna Convention is a holistic one, that the ordinary meaning of treaty terms may be ascertained only in their context and in light of

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[148] Turkey third-party submission, paras. 4-25; third-party oral statement, paras. 4-8.

[149] China second written submission, paras. 15-16.

[150] China first written submission, para. 55, paraphrasing the definition of "government agency" set forth by the Appellate Body in *Canada – Dairy*.

[151] United States first written submission, para. 98.

the object and purpose of the treaty[152], and that dictionary meanings alone are not necessarily capable of resolving complex questions of interpretation.[153] That said, the task of interpreting a treaty must begin with its specific terms.[154]

8.57 As the SCM Agreement contains no definition of either "government" or "public body", dictionary definitions provide a useful starting point. The definitions of "government" include: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry".[155] The definition of "to form a government" is consistent with this definition: "Establish an administration, esp. after a general election".[156] These definitions seem to conform to the meaning of this term in common parlance as referring to the formal organs of government (agencies, offices, ministries, etc.). This is in fact the meaning ascribed to the term "government" by both parties.

8.58 The dictionary definition of "public" includes the following: "Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation".[157] Both parties submit definitions of the term "public" that are similar to this. China also submits additional definitions which, in its view, indicate that the essential elements of a "public" body are that it acts for the welfare and best interests of a nation or community as a whole, and does so under the authority of, or officially on behalf of, the nation or community as a whole.[158]

8.59 The dictionary definition of "body" includes: "a group of individuals regarded as an entity; a corporation"[159]; and "a number of individuals spoken of collectively, usually as united by some common tie, or as organized for some purpose; a collective whole or totality; a corporation; as, a legislative body, a clerical body".[160] On the basis of these definitions, therefore, the term "public body" standing alone could include, *inter alia*, "corporations" "belonging to the community or nation". We note here that there seems to be no universally-accepted definition of the term "public body", and China has not put one forward. We recall that China argues that the dictionary definitions of the word "public" compel a narrow reading of the term "public body" as something functionally equivalent to "government agency" or "government", i.e., as an entity authorized by law to exercise functions of a governmental or public character, whose acts are performed in the exercise of such authority. We consider that the above definitions would appear to encompass, but could not be said to be limited to, such entities.

8.60 Nor, in practice, do governments share a uniform and narrowly-drawn meaning of the term "public body" such that as proposed by China in their actual usage. To the contrary, different jurisdictions have varying definitions and practices as to what for purposes of their own domestic laws

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[152] Appellate Body Report on *China – Publications and Audiovisual Products*, para. 348.

[153] Appellate Body Report on *US – Gambling*, para. 164.

[154] Appellate Body Report on *US – Carbon Steel*, para. 62.

[155] Shorter Oxford English Dictionary, L. Brown (ed.) (Claredon Press, 1993), Vol. I, p. 1123 (the "Shorter Oxford English Dictionary").

[156] Id., Vol. I, p. 1123.

[157] Id., Vol. II, p. 2404.

[158] China first written submission, para. 51. The definitions submitted by China are: "of or relating to the people as a whole; that belongs to, affects or concerns the community or the nation"; "authorized by, serving or representing, the community; carried out or made on behalf of the community or State"; "aimed at or devoted to the promotion of the general welfare; committed to the best interests of the community or nation"; "[a]cting in an official capacity on behalf of the people as a whole"; "of, relating to, or affecting all the people or the whole area of a nation or state … of or relating to a government"; and "relating or belonging to an entire community, state, or nation". (Id., para. 50).

[159] *Free Dictionary online* (accessed 28 April 2010) <http://www.thefreedictionary.com>.

[160] *Accurate and Reliable Dictionary online* (accessed 28 April 2010) <http://ardictionary.com/>. (emphasis added)

and systems are considered "public bodies". Some of these go well beyond government agencies or similar organs of government, and include, *inter alia*, government-owned or -controlled corporations providing goods and/or services.[161]

8.61 We also consider the French and Spanish versions of Article 1.1(a)(1) of the SCM Agreement, and in particular, of the term "public body", about which the parties have presented arguments. The French term for public body is "organisme public", and the Spanish is "organismo público". In French, the word "organisme" (in the non-biological sense) has the broad meaning of an organized grouping of elements (persons, offices, etc.) working to a common purpose (e.g., "institution formée d'un ensemble d'éléments coordonnés entre eux et remplissant des fonctions déterminées; […], chacun des services ainsi coordonnés, ou des associations de personnes les constituant"[162], and "[e]nsemble des services, des bureaux affectés à une tâche").[163] The French word "public" also has a broad meaning, including related to, belonging to, or controlled by the State (e.g., "d'État, qui est sous contrôle de l'État, qui appartient à l'État, qui dépend de l'État, géré par l'État").[164] The Spanish term "organismo" is defined similarly to the French "organisme" as referring to a grouping of elements forming a body or institution (e.g., "conjunto de oficinas, dependencias o empleos que forman un cuerpo o institución").[165] The Spanish term "público", like the French "public", is defined as belonging to or related to the government (e.g., "perteneciente o relativo al Estado o a otra administración").[166] Here, as in the English, we consider that while these definitions

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[161] We note two examples:

> *Example 1*: (from *Free Dictionary online* (accessed 28 April 2010) <http://encyclopedia.thefreedictionary.com/Scottish+public+bodies>):
> "Scottish public bodies are a group of organizations that are funded by the Scottish Government. It includes executive and advisory non-departmental public bodies [...]; tribunals, and nationalised industries. These bodies are distinct from executive agencies of the Scottish Government, as they are not considered to be part of the Government and staff of public bodies are not civil servants". (emphasis added)

> *Example 2*: (from EC Commission Research Directorate note on "Public bodies in FP6 contracts", (accessed 28 April 2010) <http://ec.europa.eu/research/fp6/model-contract/pdf/fp6-public-bodies-annex5231_en.pdf>):
> "**What is a public sector body**?
> Any public authority or entity set up under public law by a state or one of its authorities (e.g. government). Even if such an entity has a legal personality (e.g. French universities), it acts on behalf of the State with regard to and within the limits of its specific areas or competencies. Activities carried out by such authorities or entities may be of a commercial nature". (emphasis added)

[162] "Institution composed of inter-related elements, and performing a specific function; each of the services thus coordinated, or of the associations of the persons comprising it". (*Centre National de Ressources Textuelles et Lexicales* (accessed 28 April 2010) <http://www.cnrtl.fr/definition/organisme>).

[163] "Ensemble of services and offices devoted to a task". (Le Nouveau Petit Robert, J. Rey-Debove and A. Rey (ed.) (Dictionnaires Le Robert, 2002), p. 1798).

[164] "Of the State, that is controlled by the State, that belongs to the State, that depends on the State, that is run by the State". (*Centre National de Ressources Textuelles et Lexicales* (accessed 28 April 2010) <http://www.cnrtl.fr/definition/public>). *See* also Le Nouveau Petit Robert, J. Rey-Debove and A. Rey (ed.) (Dictionnaires Le Robert, 2002), p. 2114)): "Qui concerne le peuple pris dans son ensemble, qui appartient à la collectivité sociale, politique et en émane; qui appartient à l'État ou à une personne administrative [...]" ("That relates to the people taken in its totality, that belongs to society, the body politic, and emanates from it; that belongs to the State or to an administrative entity").

[165] "Group of offices, dependencies or employments that form a body or institution". (*Real Academia Española Dictionary online* (accessed 28 April 2010) <http://buscon.rae.es/draeI/>).

[166] "Belonging or related to the State or other administration". (*Real Academia Española Dictionary online* (accessed 28 April 2010) <http://www.rae.es>). We note that this is the Spanish definition put forward

could encompass the narrow meaning espoused by China of the term public body, or organisme public, or organismo público, we see no indication that they are limited to that meaning.

8.62 Our view is confirmed by examples that we find of uses of the terms "organisme public" and "organismo público" to cover, *inter alia*, government-owned or -controlled entities that are engaged in activities other than those of a strictly governmental character. For example, in French one use of the term "organisme public" (identified as a synonym of the term "organisme gouvernemental") is a body or entity created by a law or decree, the majority of whose directors are appointed by the government or a minister, and which has a certain autonomy, even if a large part of its global financing comes from the State.[167] The synonymous term "organisme gouvernmental" in turn can mean "distinguished from the Ministerial apparatus, from other decentralized public entities, and from entities covered by private law", and as including "State enterprises", whose "main function is [...] of a commercial, financial or industrial nature, and which seeks to be self-financing".[168] An example in Spanish is Spain's Law 6/1997 of 14 April 1997, on the Organization and Functioning of the General Administration of the State, which identifies three types of "organismos públicos": "autonomous bodies", "public business entities", and "State agencies".[169] Not only do the above sources showing various governments' usages give meaning to the terms "organisme public (gouvernemental)" and "organismo público" that go well beyond government agencies and formal arms of the government as such, both also include as public bodies certain "business" entities owned and/or controlled by governments.

8.63 Given the above, we are not persuaded by China's argument that the meaning of the terms "organisme public" and "organismo público" is limited to "government agency" or other entity vested with and exercising governmental authority, and thus that the English term "public body" must be understood to be the "functional equivalent" of "government". China bases this argument principally on the fact that the English term "governments or their agencies" in Article 9.1 of the Agreement on Agriculture appears in the Spanish version as "gobiernos o [...] organismos públicos", and on the French and Spanish versions of the Appellate Body Report in *Canada – Dairy*, in which the English term "government agency" is translated respectively as "organisme public" and "organismo público". China also cites the OECD Economics Glossary which translates "organisme public" as "government agency" in this context. While these definitions and usages indicate that "public body" can have the narrow meaning of "government agency" or similar entity, as discussed above we have found other definitions and usages showing a broader possible scope. We thus do not consider this definitional

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by China for the word "público". While China translates the term "perteneciente a" as "pertaining to", in fact this term connotes "belonging to". (*See, e.g.*, The Oxford Spanish Dictionary, B. Galimberti (ed.) (Oxford University Press, 2003), p. 630; *Spanish Dict online* (accessed 28 April 2010) <http://www.spanishdict.com/translate/perteneciente>).

[167] "Organisme créé par une loi ou un décret dont la majorité des dirigeants et des administrateurs sont nommés par le gouvernement ou par l'un de ses ministres, et qui jouit d'une certaine autonomie, même si une bonne part de son financement global provient de l'État. Synonyme : organisme gouvernemental". (Johanne Turbide et al, HEC Montreal, Chaire de gestion des arts, "Règles de Base TPS-TVQ pour les OBNL Culturels" (accessed 28 April 2010) <http://www.gestiondesarts.com/index.php?id=1519>).

[168] "[…] les sociétés d'État, dont la fonction dominante est la gestion de nature commerciale, financière ou industrielle tout en poursuivant un objectif d'autofinancement". (ENAP, L'Observatoire de l'administration publique, "Les organismes gouvernmentaux" (2010) (accessed 28 April 2010) <http://www.etatquebecois.enap.ca/docs/ste/organisation/a-organismes.pdf>).

[169] In particular, Article 43.1 of this Law reads:

"1. Los Organismos públicos se clasifican en:

a. Organismos autónomos.
b. Entidades públicas empresariales.
c. Agencias Estatales, que se regirán por su normativa específica y, supletoriamente, por esta Ley."

analysis to give a conclusive answer to how the term "public body", as it appears in the SCM Agreement, should be understood.

8.64 Indeed, as noted, a treaty term can only be properly understood in its context and in the light of the object and purpose of the treaty, and we thus now turn to the immediate context of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, and in particular how "public body" is related to the term "a government" in the drafting of the provision. In this regard, the question raised by China's claim is whether the clause "*a government or any public body* within the territory of a Member (referred to in this Agreement as *'government'*)", by collectively referring to the two terms "a government" and "any public body" as "government", means that these terms must be read as "functional equivalents", such that a "public body" must possess characteristics similar to those of a government, i.e., must be an entity which "exercises powers [or authority] vested in it by a 'government' for the purposes of performing functions of a 'governmental' character".

8.65 We consider significant that in Article 1.1(a)(1) the terms "a government" and "any public body" are separated by the disjunctive "or", suggesting that they are two separate concepts rather than a single concept or nearly synonymous. In addition, the use of the word "a" before "government" at the beginning of the clause, and the use of the word "any" before "public body", further suggest that these terms have separate meanings. Furthermore, the word "any" before "public body" suggests a rather broader than narrower meaning of that term, i.e., as referring to "public bodies" of "any" kind. Taking these contextual elements together suggests a meaning of the term "public body" as something separate from and broader than "government" or "government agency", and we consider that given the use of the words "a", "or" and "any", this reading of the phrase "a government or any public body" gives meaning to that phrase as a whole.

8.66 We now turn to the collective term "government" that is equated to the entire phrase "a government or any public body within the territory of a Member" in the clause at issue. We recall that the phrase as a whole reads: "a government or any public body within the territory of a Member (referred to in this Agreement as 'government')". While for China, the use of the collective expression "government" compels a reading of the terms "a government" and "any public body" as "functional equivalents", we consider more likely that the use of the collective expression is merely a device to simplify the drafting, to avoid having to repeat the entire phrase "a government or any public body" throughout the SCM Agreement. This can easily be the case even if the two elements "a government" and "any public body" have very distinct meanings. We note that a similar drafting device is employed in Article 2.1 of the SCM Agreement, on specificity, where the undeniably very different concepts of "an enterprise or industry or group of enterprises or industries" are collectively referred to as "certain enterprises". In our view, this collective expression is used to simplify the drafting of Article 2, as it obviates the need to repeat the entire long phrase "an enterprise or industry or group of enterprises or industries" every time this concept appears in the text. Yet, given that the term "certain enterprises" is defined as having the meaning of the longer phrase, where "certain enterprises" appears in Article 2 it must, by definition, refer to <u>any</u> of its underlying constituent elements. Thus, a subsidy that is limited to a single enterprise ("an enterprise") is, for purposes of the SCM Agreement, limited to "certain enterprises". Equally, a subsidy that is limited to, e.g., three industries (i.e., a "group of industries") also is limited to "certain enterprises". This does not mean that a single enterprise is the functional equivalent of, or synonymous with, a group of industries. Nor must this be the case for the term "certain enterprises" to make sense in the text of the Agreement. In the same way, while the drafting of the phrase that we are examining does not on its face exclude an interpretation of the terms "any public body" and "a government" as "functional equivalents", the latter referring to entities vested with and exercising governmental authority, such an interpretation is certainly not necessary for the collective term "government" to make sense in the text of the SCM Agreement. To the contrary, entities of whatever type controlled by governments, along with formal governmental organs, could all be encompassed by the collective term "government" as that term subsequently is used throughout the Agreement.

8.67 The phrase "within the territory of a Member" that also appears in the same phrase in Article 1.1(a)(1) of the SCM Agreement provides additional immediate context, as a further modifier to the collective term "government" that appears in parentheses and that encompasses both "a government" and "any public body". Again, the entire phrase in Article 1.1(a)(1) reads "by *a* government or *any* public body within the territory of a *Member* (referred to in this Agreement as 'government')". This phrase seems to say, in essence, that where the author of the financial contribution is either an executive organ of any level of government, or a public body of any kind at any level of government, within the territory of a Member, the Agreement considers the financial contribution to have been made by the "government" of that "Member" (directly). In other words, the drafting "a government […] within the territory of a Member" seems to connote a broad reading of the term "a government" to cover whatever forms and organs of government, be they national, provincial, municipal, etc., that may be present within the territory of a given Member. Similarly, the word "any" before "public body" also conveys a broad sense of that term, particularly when coupled with the phrase "within the territory of a Member", reinforcing that the word "or" means that "any public body" is something other than "a government" as such. Seen in its totality, therefore, in our view the collective term "government" – which equates to "a government within the territory of a Member, or any public body within the territory of a Member" – conveys breadth, suggesting a wide range of different possible types of entities whether formally part of, or owned by, or controlled by, any level of government.

8.68 Perhaps the most important contextual element in Article 1.1(a)(1) is the term "private body" in Article 1.1(a)(1)(iv), and its relationship with the terms "a government" and "any public body". In particular, we note that Article 1.1(a)(1) describes three kinds of potential providers of subsidies for purposes of the SCM Agreement, namely "governments", "public bodies" and "private bodies". From the standpoint of pure logic, this is a complete universe of all potential actors: every entity (individual, corporation, association, agency, Ministry, etc.) must fall into one of these three categories. In other words, the SCM Agreement does not *a priori* rule out <u>any</u> entity from <u>potentially</u> coming within its scope. The specific question raised in this dispute is whether wholly or majority government-owned enterprises that produce and sell goods and services are more appropriately categorized as "governments", "public bodies" or "private bodies" for purposes of the SCM Agreement. Neither party argues, and we do not consider, that such enterprises could in any way be termed "government" as such. Rather, China's argument is that such enterprises are, as a matter of law, presumptively "private bodies", whose actions would be covered by the SCM Agreement only to the extent that those actions were the result of "entrustment or direction" by a government. Thus, the question is the correct basis on which to distinguish between "public" and "private" bodies.

8.69 We find the dictionary definitions of the terms "private enterprise" ("a business etc. that is privately owned and <u>not</u> under State <u>control</u>")[170], and "public sector" ("that part of an economy, industry etc. <u>controlled</u> by the State")[171] helpful in understanding the relationship between the terms "private body" and "public body". In particular, these definitions taken together suggest that a "public" body is any entity that is under State control, while a "private" body is an entity not controlled by the State, and that ownership is highly relevant to the question of control, a point which we address below. This is fully in keeping with the everyday notions of "private" meaning unrelated to the government, and "public" meaning governmental in some sense. It also is consistent with the usage of the term "public body" (and its French and Spanish equivalents) by various governments, as discussed above. If we were nonetheless to interpret the term "public body" narrowly, as meaning government agencies and other entities vested with and exercising governmental authority, and as presumptively excluding government-owned and/or government-controlled enterprises, by default this

[170] Shorter Oxford English Dictionary, Vol. II, p. 2359. (emphasis added).
[171] Id. (emphasis added).

would mean that such entities would be "private bodies".[172] In our view, such a reading would constitute a complete reversal of the ordinary meaning of the term "private body", and we find no support for in the text of the SCM Agreement for such a reversal.

8.70 A further contextual element informing the meaning of the term "any public body" is the list of types of financial contributions in Article 1.1(a)(1)(i)-(iii), i.e.:

> "(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits) [footnote omitted];
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods".

In particular, pursuant to the chapeau of Article 1.1(a)(1), these are the functions that "a government" or "any public body" might in the first instance perform directly (i.e., rather than by entrustment or direction of a private body in the sense of subparagraph (iv)). Among these functions are the provision of loans and loan guarantees, as well as the provision of goods or services, functions that are typically carried out by, indeed in the first instance are the core business of, firms or corporations rather than governments. Thus, to read the term "any public body" as presumptively excluding government-owned or -controlled corporations or any other types of public entities engaging in these sorts of typical business functions (absent specific evidence in a particular case that they are vested with and exercising governmental authority), would appear largely to deprive these provisions of their common sense meaning and role.

8.71 We also note the reasoning of the panel in *Korea – Commercial Vessels*, in respect of a similar issue raised before it. In that case, Korea had argued that for an entity to be a public body, it must be acting in an official capacity, or pursuing a public policy purpose, and that if in a particular instance or overall it was behaving commercially, it would not be a public body in that instance, or overall. The panel rejected that argument, in part because it introduced the concept of benefit (i.e., whether the entity was behaving commercially in a particular instance or overall) into the determination of whether the entity in question was a public body, while, as has been confirmed by the Appellate Body, the SCM Agreement treats "financial contribution" (where the question of "public body" arises) as a separate, independent concept from "benefit".[173] The panel noted in this

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[172] This is China's legal interpretation of the Agreement. For instance, at the second substantive meeting with the Panel, China stated:

> "China is not arguing that government-owned entities can never be public bodies within the meaning of Article 1.1(a)(1). Our position is only that their conduct should be deemed presumptively private […]. Consistent with that presumption, their conduct ordinarily should be examined under the entrustment or direction standard of Article 1.1(a)(1)(iv). If the evidence in a particular case established that a government-owned entity was exercising delegated authority to perform functions of a governmental character, then it would be appropriate to conclude that it was a public body and that subparagraph (iv) was inapplicable. But absent such evidence, subparagraph (iv) should apply […]". (China oral statement at the second substantive meeting, paras. 30-31).

[173] The *Korea – Commercial Vessels* panel stated in this regard:

regard that if the test advanced by Korea was applied, a given entity potentially could be a "public body" on one day and a "private body" the next, solely on the basis of its behaviour on those days, a result that the panel did not accept because it would make the public/private body determination entirely dependent on the existence of a benefit in particular transactions.[174]

8.72 We share the concern of the *Korea – Commercial Vessels* panel in respect of China's argument that "public bodies" are limited to "entities which exercise powers or authority vested in them by a 'government' for the purpose of performing functions of a 'governmental' character". In this regard, we note that China argues that only if, in a particular case, a government-owned or -controlled firm were actually exercising governmental authority to carry out governmental functions would such an entity, in that particular instance, be a "public body". We consider that such an approach would suffer from the same flaw of mixing considerations of benefit (behaviour in a particular instance) with determining the nature of the entity (without regard for its behaviour in a particular instance). Contrary to China's argument, under the SCM Agreement the question of the nature of the entity (i.e., whether it is "a government or any public body") is entirely separate from the behaviour of that entity in a given instance (i.e., whether there is a financial contribution, whether a benefit is thereby conferred, and whether there is specificity).

8.73 To us, the foregoing detailed examination of the text of Article 1.1(a)(1) of the SCM Agreement in its context strongly suggests that a "public body" extends to entities controlled by governments, and is not limited to government agencies and other entities vested with and exercising governmental authority. We now consider this reading in the light of the object and purpose of the SCM Agreement.

8.74 This object and purpose has been characterized by the Appellate Body as "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"[175], and by various panels as, *inter alia*, "to impose multilateral disciplines on subsidies which distort international trade"[176] and to "disciplin[e] trade-distorting subsidies in a way that provides legally binding security of expectations to Members".[177] As these statements indicate, subsidies are certain types of government interventions in markets on non-commercial terms, which interventions can distort trade to the detriment of other Members' interests.

8.75 In their discussions of the object and purpose of the SCM Agreement, including in respect of predictability and certainty, the Appellate Body and various panels have emphasized the importance of avoiding overly-narrow interpretations of the Agreement that would create loopholes by which Members could largely, if not entirely, escape the reach of these disciplines. For example, the Appellate Body stated in *US – Softwood Lumber IV* that:

> "It is in furtherance of [the Agreement's] object and purpose [of strengthening GATT disciplines] that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not

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"The Appellate Body ruled in *Brazil – Aircraft* that 'the issues – and the respective definitions – of a 'financial contribution' and a 'benefit' [are] [...] two separate legal elements'. (footnote omitted) Likewise, we consider that the concepts of 'public body' and 'benefit' should also be treated as separate legal elements. Thus, the question whether an entity is a public body should not depend on an examination of whether that entity acts pursuant to commercial principles. Rather, it is the fact that a financial contribution is provided by a public body (or pursuant to entrustment or direction by a public body) *that gives rise to the possibility* that the financial contribution might be provided on below-market terms in order to advance public policy goals." (Panel Report on *Korea – Commercial Vessels*, para. 7.44 (quoting Appellate Body Report on *Brazil – Aircraft*, para.157)).

[174] Panel Report on *Korea – Commercial Vessels*, para. 7.45.

[175] Appellate Body Report on *US – Softwood Lumber IV*, para. 64.

[176] Panel Report on *Brazil – Aircraft*, para. 7.26.

[177] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.39.

> only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money[...]".[178]

Similarly, the panel in *US – FSC (Article 21.5 – EC)* stated that:

> "[I]t is evident that the interpretation [of 'revenue foregone'] advanced by the United States would be irreconcilable with th[e] object and purpose [of disciplining trade distorting subsidies in a way that provides security to Members], given that it would offer governments '*carte-blanche*' to evade any effective disciplines, thereby creating fundamental uncertainty and unpredictability. In short, such an approach would eviscerate the subsidies disciplines in the SCM Agreement".[179] (emphasis original)

8.76 In keeping with this object and purpose, we consider it important to read Article 1.1(a)(1) in a manner that does not allow avoidance of the SCM Agreement's disciplines by excluding whole categories of government non-commercial behaviour undertaken by government-controlled entities. In this regard, we note that the categorization of a given entity as a government, a public body or a private body under Article 1.1(a)(1) is simply the first filter in a multi-part analysis to determine whether a given measure is covered by the SCM Agreement. That first filter does not look at the behaviour (i.e., the measure), but rather is concerned with whether the entity undertaking the behaviour is or is not the WTO Member, i.e., the entity covered by the WTO Agreement. In this sense, the juxtaposition of "a government or any public body" with the term "private body" makes clear that the SCM Agreement does not cover and thus does not discipline, in any way, any purely private "subsidies" or other purely private transactions, in which the government has no involvement (direct or via entrustment or direction).

8.77 In this connection, we agree with the following statement by the *Korea – Commercial Vessels* panel:

> "We do not accept Korea's argument that there is only a 'financial contribution' in the meaning of Article 1.1(a)(1(i) if the relevant government or public body is engaged in 'government practice' such as regulation or taxation. Article 1.1(a)(1) states in relevant part that the term 'government' refers to both 'government' and 'public body'. Since the phrase 'government practice' in Article 1.1(a)(1)(i) therefore refers to the practice of both governments and public bodies, the practice at issue need not necessarily be purely 'governmental' in the narrow sense advocated by Korea. In this regard, we consider that the concept of 'financial contribution' is writ broadly to cover government and public body actions that might involve subsidization. Whether the government or public body action in fact gives rise to subsidization will depend on whether it gives rise to a 'benefit'. Since the concept of 'benefit' acts as a screen to filter out commercial conduct, it is not necessary to introduce such a screen into the concept of 'financial contribution'".[180]

8.78 Thus, to say that an entity is part of the SCM Agreement's collective term "government" is not to condemn that entity, or otherwise to cast it in a negative light. Rather, such a characterization simply allows a further analysis to be conducted as to whether the entity's behaviour in particular instances is covered by the SCM Agreement. (Obviously, much "government" behaviour has nothing

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[178] Appellate Body Report on *US – Softwood Lumber IV*, para. 64.
[179] Panel Report on *US – FSC (Article 21.5 – EC)*, para. 8.39.
[180] Panel Report on *Korea – Commercial Vessels*, para. 7.28.

to do with "financial contributions" and thus subsidization). Similarly, to say that certain behaviour of an entity is covered by the SCM Agreement (i.e., is a specific subsidy) in itself carries no negative connotation. Only in the particular, narrow instance of a prohibited subsidy does the existence of the subsidy give rise to such a connotation, and otherwise the existence of specific subsidies is a neutral event under the Agreement, actionable only where it causes, in particular instances, defined forms of adverse effects on another Member's interests.

8.79 In this sense, we consider that interpreting "any public body" to mean any entity that is controlled by the government best serves the object and purpose of the SCM Agreement. This reading ensures that whatever form a public entity takes (whether agency, Ministry, board, corporation, etc.) the government that controls it is directly responsible for those of its actions that are relevant under the Agreement. In our view, the particular form of government-controlled entity intervening in a market cannot be determinative of whether a government financial contribution (and hence potentially a subsidy) exists. To read "any public body" in Article 1.1(a)(1) as excusing from a Member government's direct responsibility a wide swathe of government-controlled entities engaging in exactly the sorts of transactions listed in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement would fundamentally undermine the Agreement's logic, coherence and effectiveness, and thus would be at odds with its object and purpose.

8.80 Here, we agree with the finding of the panel in *Korea – Commercial Vessels* that a public body is an entity controlled by a government. In terms of the object and purpose of the SCM Agreement, we consider particularly relevant that panel's statement that "it is the fact that a financial contribution is provided by a public body (or pursuant to entrustment or direction by a public body) *that gives rise to the possibility* that the financial contribution might be provided on below-market terms in order to advance public policy goals".[181] In our view, it is the government's control of an entity that gives that entity the *potential* to intervene in markets so as to advance public policy goals, by providing financial contributions on better-than-market terms.

8.81 In short, the systemic implications for Members of interpreting "any public body" to mean any government-controlled entity are fully in line with the object and purpose of the SCM Agreement of effectively disciplining trade distorting subsidies provided by Member governments. These implications fall very far from disciplining, let alone condemning, every act of such entities. This interpretation simply means that the actions of a government-controlled entity are, for purposes of the SCM Agreement, directly attributable to the government itself – no more, no less. Finding that a given entity is a public body does not speak to the nature of its actions, including whether they are even covered by the Agreement.

8.82 By contrast, the systemic implications of interpreting "any public body" as limited to government agencies or other entities vested with and exercising governmental authority would be to seriously undermine the entire SCM Agreement, something that cannot be reconciled with the Agreement's object and purpose. Large numbers of government-controlled entities whose very *raison d'être* is to engage in the kinds of transactions identified in Article 1.1(a)(1)(i)-(iii) would be legally presumed to be unrelated to the government (i.e., effectively "private bodies"). Governments could easily hide behind the presumptively "private" nature of such entities, even while running those entities so as deliberately to provide trade-distorting subsidies. Yet, before the SCM Agreement could even apply to any such entity, such that an inquiry could be started into the possible existence of a subsidy and specificity, a particular instance of "entrustment or direction" in the sense of Article 1.1(a)(1)(iv) would need to be established. In our view, this would be equivalent to inquiring whether the government "entrusted or directed" itself to do something, and would turning the "entrustment or direction of a private body" provision on its head.

[181] Panel Report on *Korea – Commercial Vessels*, para. 7.44. (emphasis added).

8.83 The foregoing analysis of the ordinary meaning of the terms of the treaty at issue, in their context and in the light of the object and purpose of the treaty, leads us to conclude that for the purposes of the SCM Agreement, "any public body" is any government-controlled entity. By contrast, in our view, the narrow reading advanced by China is not supported either by the context of this term or by the object and purpose of the SCM Agreement and, to the contrary, would seriously weaken the integrity and effectiveness of the SCM Agreement.

8.84 We recall that China's arguments are not limited to the foregoing elements based on the SCM Agreement itself. Rather, China also has advanced arguments based on other international instruments that it considers relevant context for interpreting the term "any public body". The question we now turn to is whether any of these other instruments would override our analysis and conclusions based on the text of the SCM Agreement itself.

8.85 The first of the other instruments cited by China is the Draft Articles. China argues that these Draft Articles constitute "relevant rules of international law applicable in the relations between the parties" in the sense of Article 31(3)(c) of the Vienna Convention, and that they thus must be "taken into account" in the analysis of the term "public body". In particular, China considers that the Draft Articles codify customary international law with respect to certain principles of state responsibility, a proposition that in China's view has repeatedly been recognized by panels and the Appellate Body.[182]

8.86 As such, China argues, the term "public body" must be interpreted in a manner analogous to Article 5 of the Draft Articles such that the actions of state-owned corporate entities will be attributed to the State only when "empowered by the law of that State to exercise elements of the governmental authority [...] provided the person or entity is acting in that capacity in the particular instance").[183] China considers that the Appellate Body "expressly endorsed" the principles of the Draft Articles with respect to when the conduct of state-owned entities may constitute a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.[184]

8.87 Before we address the substance of this argument, we consider the status of the Draft Articles, and in particular whether as China argues we must as a matter of law interpret the provisions of the SCM Agreement at issue in conformity with language and concepts in certain provisions of the Draft Articles. In this regard, the first question is whether the Draft Articles are recognized in the WTO as "rules of international law applicable in the relations between the parties" to the dispute, and the second question is whether they are "relevant" to this dispute. On the first question, in our view, China significantly overstates the status that has been accorded to the Draft Articles where they have been referred to by panels and the Appellate Body. Indeed, in not a single instance of such citations identified by China has a panel or the Appellate Body identified the Draft Articles as "relevant rules of international law applicable in the relations between the parties" in the sense of Article 31(3)(c) of the Vienna Convention, such that they should be "taken into account together with the context" when interpreting the treaty. Rather, in our view, the various citations to the Draft Articles have been as conceptual guidance only to supplement or confirm, but not to replace[185], the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements. In particular, while in some cases the Draft Articles have been cited as containing similar provisions to those in certain areas of the WTO Agreement, in others they have been cited by way of contrast with the

[182] *See, e.g.*, China response to Panel question 15(a) (first meeting).
[183] *See., e.g.*, China first written submission, paras. 75-79.
[184] Id., para. 72.
[185] Indeed, in at least one prior proceeding, one of the parties strenuously objected to preferring the meaning of the term "countermeasures" in the Draft Articles over dictionary definitions advanced by the parties, on the grounds that the Draft Articles are not "relevant rules of international law applicable to the relations between the parties" within the meaning of Article 31(3)(c) of the Vienna Convention. (Decision by the Arbitrators on *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44 and footnote 48).

provisions of the WTO Agreement, as a way to better understand the possible meaning of the provisions of the WTO Agreement. In all cases, however, the exercise undertaken by these panels and the Appellate Body has been to interpret the WTO Agreement on its own terms, i.e., on the basis of the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty.

8.88 We note that this is true of the Appellate Body's reference to the Draft Articles in *US – Countervailing Duty Investigation on DRAMS*, the instance at the heart of China's arguments before us concerning the Draft Articles. In particular, that reference – which appears in a footnote making the observation, in the context of the issue of "entrustment or direction" of a "private body", that the conduct of private bodies is presumptively not attributable to the state – does not state that the Draft Articles constitute relevant rules of international law in the sense of Article 31(3)(c) of the Vienna Convention for purposes of interpreting language in the SCM Agreement. Indeed, the footnote says nothing whatsoever about the status of the Draft Articles *vis-à-vis* the WTO Agreement.[186]

8.89 Furthermore, in some cases, panels and the Appellate Body have made explicit that the Draft Articles are not binding.[187] We thus find no basis for the assertion that as a general matter the Appellate Body and panels have found that the Draft Articles must be "taken into account" as "rules of international law applicable in the relations between the parties" in interpreting the WTO Agreement, and we note that in the present dispute, the United States has explicitly rejected this proposition.[188]

8.90 In any event, even by their own terms, the Draft Articles "do not attempt to define the content of the international obligations the breach of which gives rise to responsibility"[189], i.e., they are not concerned with the substance of the underlying international obligations, but are rather concerned with determining whether a state is or is not responsible for a given action that may constitute a substantive breach of such an obligation. In this regard, of particular relevance to the issue before us, the Draft Articles contain a provision on *lex specialis*: "These articles do not apply where and to the extent that the conditions for an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".[190] We view the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of "government" for purposes of the Agreement, as well as when "private" actors may be said to be acting on behalf of "government". This has precisely to do with "the content or implementation of the international responsibility of a State"[191] for purposes of the SCM Agreement, a further indication that the Draft Articles are not

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[186] We recall that in another footnote in the *US – Countervailing Duty Investigation on DRAMS* report, the Appellate Body also noted the statement of the panel that the USDOC might have been entitled to treat wholly-government owned entities as "public" rather than "private" bodies. (Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, footnote 225).

[187] See, *e.g.*, Appellate Body Report on *US – Line Pipe*, para. 259; Panel Report on *US – Gambling*, para. 6.128.

[188] The United States argues, for example, that even if certain parts of the Draft Articles may have the status of customary international law, this does not mean that the Draft Articles in their entirety, and in their full detail have that status, a question which the United States characterizes as "open" and "contested". (United States second written submission, para. 58).

[189] General Commentary, para. 1 of the Draft Articles.

[190] Article 55 of the Draft Articles.

[191] We emphasize that here we express no view as to other possible parts of the WTO Agreement that might also fall within the scope of the *lex specialis* provision of the Draft Articles. The issue before us is the interpretation of Article 1.1 of the SCM Agreement, and our analysis thus is limited to that provision. We do note, however, that the Commentary to this provision of the Draft Articles refers at length to the WTO Dispute Settlement Understanding as an example of a treaty whose text makes clear "that only the consequences specified [therein] are to flow". (Commentary (3) to Article 55 of the Draft Articles).

relevant to interpreting Article 1.1 of the SCM Agreement.[192] In this connection, we recall that the panel in *Korea – Commercial Vessels*, presented with virtually the same argument by Korea that China makes before us, declined to rely on the Draft Articles. In that panel's view, Korea's entire line of argumentation concerning the meaning of "public body" (which included its arguments based on the Draft Articles) conflated the concept of "benefit" with the nature of the actor.

8.91 On the basis of the foregoing considerations, we do not find that the Draft Articles are "relevant rules of international law applicable to the relations between the parties", such that we should "take them into account, together with the context" in the sense of Article 31(3)(c) of the Vienna Convention. Given this, we do not need to take up the other issues that would need to be resolved in that situation, not least of which is the meaning of "take into account" for that purpose.

8.92 The second instrument invoked by China as context is the GATS, in particular its Annex on Financial Services. This Annex contains the term "public entity", and China argues that this term must inform the meaning of the term "public body" in the SCM Agreement. We note that China's argument is the same as one raised by Korea in *Korea – Commercial Vessels:* That panel rejected this argument, on the grounds that the argument continued to conflate the concepts of financial contribution and benefit. The panel also questioned the relevance of the GATS to the interpretation of different language in an entirely different agreement, and finally noted that even the text of the GATS Financial Services Annex itself seemed to imply that, in the absence of the clarification in the cited provision, "an entity principally engaged in supplying financial services on commercial terms" might be treated as a "public entity", a fact that in the view of the panel undermined Korea's argument that a public entity acting on commercial terms could not be treated as a "public body".[193] We, like the panel in *Korea – Commercial Vessels*, do not see the relevance for the interpretation of the term "public body" in Article 1.1 of the SCM Agreement, of the different term "public entity" in a different Agreement, and in particular we see nothing to require us to equate these terms or to give them the same interpretation.[194] Nor do we consider the term "non-governmental bodies" in Article I:3 of the GATS, which China invokes, to be relevant to the interpretation of "public body" in Article 1.1(a)(1) of the SCM Agreement. These are very different terms in separate Agreements, and we find no indication in either Agreement of any conceptual or other link between them.

8.93 Finally, in terms of other instruments, we recall that the United States points to the discussion in paragraph 172 of the Working Party Report on China's accession as relevant context making clear

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[192] The panel in *EC – Commercial Vessels* reached a similar conclusion that it was unwarranted to read public international law concepts including elements of the Draft Articles into the WTO Agreement to determine the meaning of Article 23.1 of the DSU. In this regard, that panel stated:

> "The Panel recalls that it has concluded, based on an interpretation of Article 23.1 of the DSU in accordance with the ordinary meaning of its terms and in light of the object and purpose of the provision, that measures not involving a suspension of WTO concessions or other obligations are not excluded from its scope. While the Panel realizes that in a number of WTO dispute settlement and arbitration cases reference has been made to the public international law concepts invoked by the European Communities, the Panel can see no basis for using these concepts to read into Article 23.1 a limitation that is unsupported by an interpretation based on its text, context and object and purpose.". (footnotes omitted) (Panel Report on *Korea – Commercial – Vessels*, para. 7.205).

Similarly to that panel, we can see no basis to read into Article 1.1 of the SCM Agreement any concept from public international law that is unsupported by an interpretation based on that Article's text, context and object and purpose.

[193] Panel Report on *Korea – Commercial Vessels*, footnote 42.
[194] Id., para. 7.47.

that China accepted that its state-owned enterprises (including banks) are government actors, or at least public bodies, within the meaning of the SCM Agreement.[195] We note that the United States does not rely directly on this language, and does not argue that it constitutes a commitment by China as to any particular interpretation of Article 1.1(a)(1) of the Agreement. In light of our conclusions based on the text of that provision, we do not consider it necessary to analyze the cited language of the Working Party Report.

8.94 For the foregoing reasons, we conclude that a "public body", as that term is used in Article 1.1 of the SCM Agreement, is any entity controlled by a government. In our view, this is the correct interpretation, which emerges from an analysis of the ordinary meaning of the term in its context and in the light of the object and purpose of the provision and of the SCM Agreement.

2. The USDOC's determinations that certain SOEs and SOCBs were "public bodies"

8.95 Having interpreted the term "public body", we now turn to the USDOC determinations in the four countervailing duty investigations before us that certain entities were public bodies, and that their respective provisions of inputs and loans thus were financial contributions by the government, in the sense of Article 1.1(a)(1) of the SCM Agreement.

(a) Background

8.96 The USDOC made "public body" and "financial contribution" determinations in respect of (i) state-owned suppliers of inputs, including some transactions made through private trading companies (government provision of goods); and (ii) state-owned commercial banks (government provision of loans).

8.97 In the four investigations at issue, the USDOC determined that China's provision of inputs through state-owned producers (SOEs) constituted countervailable subsidies. It particular, the USDOC determined that the SOEs were "public bodies" that provided financial contributions in the form of certain goods – HRS, rubber, and petrochemicals – to investigated producers of, respectively, CWP, LWR, OTR, and LWS, for less than adequate remuneration thus conferring benefits to those producers, and that these subsidies were specific.[196] Before us, China challenges all of these public body determinations.

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[195] The passage of paragraph 172 of the Working Party Report reads as follows:

"Some members of the Working Party, in view of the special characteristics of China's economy, sought to clarify that when state-owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement. The representative of China noted, however, that such financial contributions would not necessarily give rise to a benefit within the meaning of Article 1.1(b) of the SCM Agreement. He pointed out that China's objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own profits and losses. The Working Party took note of this commitment."

[196] In the CWP and LWR investigations, the USDOC determined that the government provision of HRS through SOE producers for less than adequate remuneration was a financial contribution which conferred a benefit to CWP and LWR investigated producers. (*See, e.g.*, Exhibits CHI-1, p. 9 and CHI-2 p. 8).

In the LWS investigation, the USDOC determined that the government provision of petrochemicals – BOPP – through SOE producers for less than adequate remuneration was a financial contribution which conferred a benefit to LWS investigated producers. (*See, e.g.*, Exhibit CHI-3, p. 18).

In the OTR investigation, the USDOC determined that the government provision of natural and synthetic rubber through SOE producers for less than adequate remuneration was a financial contribution which conferred a benefit to OTR investigated producers. (*See, e.g.*, Exhibit CHI-4, pp. 9-10).

8.98 In three of the four investigations at issue (CWP, OTR and LWS), the USDOC also determined that loans provided by SOCBs to investigated producers constituted countervailable subsidies.[197] In particular, the USDOC found that the SOCBs were "public bodies" providing financial contributions in the form of loans, that the loans were on terms more favourable than the market, and that these subsidies were specific. In the present dispute, China only challenges the USDOC's "public body" determination regarding SOCBs in the OTR investigation.[198]

(b) USDOC public body determinations in respect of government-owned input suppliers (SOEs)

8.99 In all of the investigations at issue, the USDOC determined that the SOE input suppliers were "public bodies" (referred to as "authorities" in the U.S. statute and thus in the USDOC's determinations[199]) by applying a rule of majority government-ownership. Under this approach, the USDOC treated as a public body any input producer in which the government held a majority ownership share.[200] Where the parties presented additional arguments and evidence related to this issue, the USDOC also referred to these in its determinations. The analysis conducted in each of the investigations is summarized below.

(i) CWP investigation

8.100 In its final determination in the CWP investigation, the USDOC determined that SOE producer-suppliers of HRS were public bodies ("authorities"). In particular, any producer-supplier in which a government entity held a majority ownership share was treated as a public body.[201] In this regard the determination indicates, and China does not contest, that the Government of China provided ownership information only in respect of some of the investigated producer-suppliers of HRS. The USDOC treated the entities in respect of which the Government of China failed to provide the requested ownership information as public bodies (on the basis of applying facts available or adverse facts available).[202]

8.101 During the course of the investigation, the Government of China contested the USDOC's majority-ownership approach to its public body determinations, which also had been used in the preliminary determination. China argued that the USDOC should conduct the factual five-factor analysis it had applied in certain prior investigations, in particular *Korea – DRAMS*, to determine whether entities were public bodies. The five factors that the USDOC had examined in that case were: (i) government ownership; (ii) government presence on the board of directors; (iii) government

[197] In the LWR investigation, the USDOC concluded that any government programme to provide loans to the steel industry was "not used" by the respondents. (Exhibit CHI-2, p. 47).

[198] China first written submission, footnote 132. As discussed in Section X, *infra*, China challenges the USDOC's determinations of benefit from these loans in all three of the investigations in which producers were found to have received countervailable subsidies in the form of government-provided loans.

[199] According to the United States, under its domestic statute the definition of the term "authority" includes the term "public entity", and this latter term means "public body". (United States first written submission, footnote 87). There is no disagreement between the parties as to the equivalence of the terms "public entity" under U.S. law and "public body" in Article 1.1(a)(1) of the SCM Agreement.

[200] Exhibits CHI-1, p. 63; CHI-2, pp. 29-30; CHI-3, p. 67; and CHI-4, p. 77.

[201] Exhibit CHI-1, pp. 62-63.

[202] Id., pp. 10-11. With regard to other specific suppliers for which petitioners had claimed SOE status, the USDOC noted that the identities of those suppliers were proprietary and therefore addressed petitioners' comments in a "BPI Memorandum". (Id., p. 63). This document is not on the record of the present dispute.

control over activities; (iv) pursuit of governmental policies/interests; and (v) whether the entity was created by statute.[203]

8.102 The USDOC acknowledged that it had used such a five-factor test in prior investigations[204] but stated that there was insufficient evidence on the record to do so in the CWP investigation. In particular, the USDOC noted that other than the levels of government ownership of certain companies, the Government of China had not provided the information that was needed to consider the five-factor analysis, and that therefore the USDOC had applied a rule of majority ownership.[205] The USDOC noted, however, that it would reconsider the feasibility of applying the five-factor test during an administrative review, should a countervailing duty order result from the investigation.[206]

8.103 Finally, the USDOC stated that because it had determined that the SOEs were public bodies, it did not reach the issue of whether they were private entities entrusted or directed by the government to provide financial contributions.[207]

(ii) LWR investigation

8.104 In its final determination in the LWR investigation, the USDOC determined on the basis of majority government ownership that SOE producer-suppliers of HRS were public bodies, pursuant to an essentially identical analysis to that performed in the CWP investigation.[208]

8.105 During the course of the investigation, the Government of China and an investigated producer/exporter contested the USDOC's "public body" preliminary determinations, which were made on the same basis. They asserted that government ownership was insufficient grounds for an entity to be a public body, and that not every government entity is a public body, as the USDOC had recognized in the Preamble to its countervailing duty regulations. (The Preamble states that the USDOC would continue to treat "most" government-owned corporations as the government itself).[209] These respondents further argued that the USDOC should have applied the five-factor factual analysis that it had used in *Korea – DRAMS* (as described above in respect of the CWP investigation).[210] They noted that in *Korea – DRAMS*, the USDOC itself had found that certain wholly government-owned companies should not be treated as government entities. For these respondents, the "real question" under the approach taken in *DRAMS* was whether an entity exercised governmental authority.

8.106 The USDOC acknowledged that it had used such a five-factor test in some, but not all, prior investigations[211], but determined that there was insufficient evidence on the record of the LWR investigation to perform such an analysis because, beyond the levels of government ownership of the companies involved, the Government of China had not provided the information needed to conduct

[203] Exhibit CHI-1, p. 62. In addition to contesting the basis for the public body determination, the Government of China also asserted that the USDOC had not established that the Government of China had "entrusted" or "directed" those companies to provide the financial contributions at issue. (Id.).

[204] Specifically, the USDOC noted that it had used the five-factor test in *DRAMS from Korea* and *Magnesium from Canada*. (Id., p. 62).

[205] Exhibit CHI-1, pp. 62-63.

[206] Id., p. 63.

[207] Id.

[208] Exhibit CHI-2, pp. 28-30.

[209] Id., pp. 26-27.

[210] Id., p. 27.

[211] The USDOC noted that it had previously used the five-factor test in *DRAMS from Korea* and *Magnesium from Canada*, but also noted that in other investigations it had not applied this test where a government-owned entity provided a financial contribution to a respondent. (Id., p. 28 and footnote 103).

the analysis.[212] The USDOC noted that it would reconsider the necessity and feasibility of applying the five-factor test during an administrative review.[213]

8.107 The USDOC nevertheless specifically discussed in its final determination China's arguments in support of the five-factor analysis in respect of one input supplier, Baosteel. In so doing, however, the USDOC stated that it was not making a finding as to whether it was required to apply the five-factor test in respect of Baosteel.

8.108 Concerning the five factors as applied to Baosteel, the USDOC stated that although the Government of China had cited record information related to each of the five factors, the information was not sufficient for the USDOC to conclude that Baosteel was not an "'authority'". Further, because Baosteel was majority-owned by the government, the first of the five factors clearly supported that it was a public body.[214] On the other four factors, the USDOC's analysis was as follows:

- With respect to government presence on the Board of Directors, the USDOC stated that the Government of China had contended that there was no evidence that any member of Baosteel's board of directors was a government official. The USDOC referred to record evidence suggesting that some members of the board had ties to the government.[215]

- Concerning government control over activities, the USDOC stated that the Government of China had argued that there was no evidence of government control over Baosteel's activities, including production or pricing, and in support had contended that no government authority regulated steel producers or set prices. The USDOC noted, however, that the Government of China had cited no information specific to the activities of Baosteel.[216]

- With respect to pursuit of government policies or interests, the USDOC noted the Government of China's argument that Baosteel did not pursue government interests because it had a duty under Chinese law to protect shareholders and maximize profitability. The USDOC stated that these facts did not demonstrate that Baosteel did not pursue government interests. In this regard, the USDOC cited statements from Baosteel's 2005 and 2006 annual reports referring, *inter alia*, to implementation of the government's five year plan, and the government's steel industry policy. The USDOC noted that although these were general statements, they suggested that the government might pursue government policies and interests through its ownership of Baosteel.[217]

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[212] Exhibit CHI-2, pp. 28-29.

[213] Id., p. 29.

[214] According to China, Baosteel's private ownership amounted to 27 per cent. (Exhibit CHI-2, p. 27).

[215] Id., p. 29. The USDOC noted that according to the Baosteel's 2006 Annual Report ("2006 Annual Report"), one of the members of the board of directors during the period of investigation "has been trusted by the State-Owned Assets Supervision and Administration Commission of the State Council as the outside director of Baosteel Group as well as director of the Company". Moreover, it noted that the Baosteel's 2005 Annual Report ("2005 Annual Report") indicated that at least one independent director was also a director of state-owned China Minmetals Corp. Ltd. (Id.).

[216] Id., p. 30.

[217] Id., p. 30. The USDOC noted that the 2005 Annual Report indicated that "China has strengthened macroeconomic control over steel industry since 2004 and issued the first Steel Industry Development Policies in 2005 […] The Steel industry will undergo strategic restructuring" and that "one of the Major Tasks of Baosteel's 2006 Business Plan is to Speed up the implementation of the 11th Five Year Projects". It further noted that the 2006 Annual Report also referred to China's steel industry policy and indicated that "Baosteel Group Corporation, the controlling shareholder [of Baosteel], mainly deals with state-owned assets within the authorized scope set by the State Council". (Id.).

- Concerning creation by statute, the USDOC noted the Government of China's argument that Baosteel operated under the same Chinese law as private enterprises, but stated that this information was not sufficient to determine that Baosteel was not created by statute. The USDOC indicated that China had provided no information on Baosteel's ultimate controlling shareholder, the State-owned Assets Supervision and Administration Commission of the State Council ("SASAC").[218]

8.109 Overall, the USDOC found that the information on the record was not sufficient to conclude that Baosteel was not an '"authority"', noting that the Government of China had presented general information on each of the five factors, which was contradicted by other general information on the record. The USDOC stated that it therefore had used the same rule of majority ownership applied to other producer-suppliers to determine whether Baosteel was an '"authority"'. The USDOC noted that because it determined that the SOEs at issue were public bodies, it did not reach the issue of entrustment or direction.[219]

(iii) LWS investigation

8.110 In the LWS investigation, the USDOC determined that the state-owned petrochemical producers under consideration were public bodies on the basis of majority government ownership. The USDOC stated that this was consistent with its approach in the CWP investigation, as well as with the Preamble to its countervailing duty regulations ("we intend to continue our longstanding practice of treating most government-owned corporations as the government itself […]").[220]

8.111 During the investigation, the Government of China contested the public body preliminary determinations, arguing, *inter alia*, that the USDOC should have applied the five-factor test, and that the respondents had provided sufficient information for the test to be applied.[221]

8.112 Although the USDOC acknowledged that it had used such a five-factor test in some prior investigations[222], it rejected the Government of China's argument on the grounds that there was insufficient evidence on the record, as beyond the levels of government ownership of the companies in question, the Government of China had not provided the information necessary to conduct a complete analysis. Nevertheless, the USDOC responded to the Government of China's arguments and "limited" evidence on this issue as follows:

- Concerning government ownership, the USDOC stated that the Government of China had simply relied on the fact that the companies were not wholly government-owned (one being a joint venture with a publicly listed corporation, and the other being a publicly listed company with shares traded on foreign and Chinese stock exchanges), but had not demonstrated that the companies had significant private ownership. Rather, the record evidence was "clear" that the SOE suppliers were majority government-owned.[223]

- Concerning government presence on the Board of Directors and pursuit of governmental interests, the USDOC stated that China's argument simply rested on the fact that the companies were listed on domestic and foreign stock exchanges, and that this argument

[218] Exhibit CHI-2, p. 30.
[219] Id.
[220] Exhibit CHI-3, p. 67.
[221] Id., p. 65.
[222] Id., pp. 66-67. The USDOC noted that it had used the five-factor test in the following prior investigations: *DRAMS from Korea* and *Magnesium from Canada*. (Id., p. 67).
[223] Id. p. 67. The USDOC cites the February 1, 2008 submission of verification exhibits, which are not on the record of the present dispute. (Id.) China does not contest this point before the Panel.

reflected the unsubstantiated assumption that being listed on these exchanges somehow showed that the directors of the companies acted independently in pursuing only commercial and not governmental interests.[224]

- Concerning government control over the activities of the companies relating to pricing and production decisions, the USDOC stated that the Government of China failed to acknowledge the role that the SASAC exercised over managing SOEs "based on 'the rights attendant to the ownership of shares'" (citing to the Government of China's questionnaire response). The USDOC considered that this management would be substantial based on the government's majority ownership of the SOEs in question.[225]

8.113 The USDOC concluded that it had therefore applied a rule of majority ownership to determine whether a government-owned petrochemical input supplier was an "authority" (a public body). It further concluded that because it had found these SOEs to be public bodies, it did not reach the issue of entrustment or direction.[226]

(iv) OTR investigation

8.114 In the OTR investigation, the USDOC determined that majority government ownership of a rubber producer qualified it as a public body, and that this was consistent with the Preamble to its countervailing duty regulations and with past practice (namely, the CWP and LWS investigations, *Hot-Rolled Steel from India*, and *Stainless Steel from Korea*).[227] While respondents argued that the USDOC was required to apply the five-factor test, the USDOC found that "conducting such a test is not necessary absent information that calls into question whether government ownership does not mean government control".[228] In this respect, it cited other investigations where it had not applied the five-factor test, but had made a public body determination purely on the basis of government ownership.[229] The USDOC noted that it would, if appropriate, reconsider the necessity of applying the test if there were a countervailing duty order, and an administrative review were required.[230]

8.115 Finally, the USDOC found that because it had determined that SOEs were public bodies, it was not necessary to evaluate the question of entrustment or direction.[231]

(c) USDOC public body determination in respect of SOCBs

8.116 As discussed above, concerning loans by SOCBs China challenges the USDOC's public body determinations only in the OTR investigation, although it challenges the USDOC's benefit

[224] Exhibit CHI-3, p. 67. The Government of China's arguments were (i) that several directors were independent non-executive directors and that some were officers of the company with no outside government positions, and that these companies pursued only commercial interests based on their stock exchange listings; (ii) that by law they were required to protect the interest of shareholders and to maximize profits; (iii) that one was listed on the New York Stock Exchange and thus was subject to US corporate governance requirements; and (iv) that SOEs in China operate under the same company law as private enterprises and they do not exist by virtue of any special statute. (Id., pp. 65-66).

[225] Exhibit CHI-3, p. 67. The cited questionnaire response is not on the record of this dispute, but China does not contest the USDOC's characterization thereof.

[226] Id.

[227] Exhibit CHI-4, pp. 10 and 77.

[228] Id., p. 10.

[229] The USDOC cited, for example, its prior investigation in *Hot-Rolled Steel from India*, where it had countervailed the provision of iron ore from a mostly government-owned mine without any reference to the five-factor test. (Id., pp. 10 and 77).

[230] Id., p. 10.

[231] Id., p. 77.

determinations in respect of loans by SOCBs in three of the four countervailing duty investigations before us. (The claims concerning these benefit determinations are addressed in Section X, *infra*).

8.117 In the OTR investigation, the USDOC found that the Government of China provided subsidies to the tire industry in the form of preferential lending by state-owned commercial banks.[232] It determined that the SOCBs were "authorities" (i.e., public bodies) on the basis of its previous finding in the *CFS Paper* investigation, where it had concluded that Chinese policy banks and SOCBs constituted such "authorities". In the OTR investigation, the USDOC stated that the parties in the investigation had not demonstrated that the Chinese banking sector had significantly changed such that reconsideration of the *CFS* decision was warranted.[233] The USDOC also cited scholarly publications on the record that reported that SOCBs were required to support the government's industrial policies.[234]

8.118 In the *CFS Paper* investigation, in turn, the USDOC stated that in its general practice, loans provided in any given country by state-owned commercial banks are not necessarily, or in all cases, treated as government loans, since these banks may operate on a commercial basis.[235] However, it determined that in respect of China, treatment of SOCBs as commercial banks was not warranted. The USDOC found that the record evidence did not indicate that China's banking sector operated on a commercial basis, as it was subject to significant distortions, mainly from the continued dominant role of the government in that sector and the legacies associated with the sector's longstanding pursuit of government policy objectives.[236] Therefore, while stating that government control over SOCBs in China had been changing and that the record evidence in that regard was mixed, the USDOC nevertheless determined that the reforms were still in transition and that the government's influence remained a significant factor in the operation of China's banking sector.[237]

8.119 In the *CFS Paper* investigation, the USDOC first stated that the central government had been very cautious on completely reforming the banking system; and that as a result, and because banks in China had never operated on a commercial basis, the government was still very involved in the banking sector.[238] The USDOC found this view, to varying degrees, confirmed by independent experts. It reported some experts stating that "recent trends have moved away from local government influence over bank operations" and "[t]here still is some local government control over the bank branches, but [while] this has lessened in recent years […] it is still an ongoing process". Other experts stated that "the banking law prohibited government interference […] but […] this prohibition was not very effective in decreasing local government influence [...] [however] the creation of the

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[232] According to China, there are four principal state-owned commercial banks in China (i.e., the so-called "Big Four" banks): the China Construction Bank ("CCB"); the Industrial and Construction Bank of China ("ICBC"); the Bank of China ("BOC"); and the Agricultural Bank of China ("ABC"). (China first written submission, para. 164; second written submission, para. 116).

[233] Exhibit CHI-4, p. 101. For example, the USDOC noted that at verification, an official from the Tianjin municipal government confirmed that SOCBs are supervised by the Tianjin State-Owned Assets Supervision and Administration Commission ("Tianjin SASAC"). Tianjin is the city where an investigated OTR producer (TUTRIC) was located. (Id.).

[234] As an example, the USDOC cites the IMF Working Paper on China's Banking System Reform (Exhibit US-52), which states that "it is difficult to find clear evidence that SCBs have changed their behavior and became commercially oriented" and that governments should avoid "interference for policy purposes". (Exhibit CHI-4, footnote 45).

[235] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China* ("CFS Paper Countervailing Duty I&D Memo"), Exhibit CHI-93, p. 55. As an example, the USDOC cites its previous findings in *DRAMS from Korea*. (Id.).

[236] Id., p. 55.

[237] Id., pp. 58, 60-61.

[238] Id., p. 56.

[Chinese Banking Regulatory Commission] [has led] to significant decreases in the extent of local government interference […] [although it] continues to lack the enforcement powers it needs to properly implement its regulations and fulfill its mandate" and "there is still a control perspective, as banks continue to be dominated by government and are exposed to outside political influences".[239]

8.120 Second, the USDOC determined that China's banking system still operated in accordance with governmental planning policies.[240] For example, the Chinese Commercial Banking Law required banks to carry out their loan activities consistently with "the needs of national economy and the social development and under the guidance of State industrial policies".[241] Further, the USDOC found that while SOCBs were improving their risk management capacities, they still lacked adequate risk management and analysis skills. It also stated that interest rates remained generally undifferentiated – interest rates were quite close to the benchmark set by the People's Bank of China ("PBOC").[242]

8.121 Furthermore in this context, in addition to its findings as to inadequate risk management and analysis, and as to SOCBs' lending in pursuance of government economic plans, the USDOC pointed to government ownership in the banking sector. In particular, the USDOC determined that China's banking sector remained almost entirely state-owned[243] and that even if the largest SOCBs had undergone some reorganization to become formal corporate entities – limited initial public offerings, and sale of minority stakes to foreign interests – the Government of China as the majority shareholder continued to exert control over the largest commercial banks.[244] The USDOC noted in this regard that foreign investment in Chinese banks was tightly constrained, with total foreign ownership limited to 25 per cent in SOCBs.[245]

8.122 According to the USDOC's OTR Countervailing Duty I&D Memo, the Government of China argued in that case that the SOCBs' specific actions should be analyzed to determine whether "a financial contribution was provided through preferential lending". TUTRIC (one of the investigated producers), is cited as arguing that the SOCBs were not necessarily government authorities, as they had undergone significant reorganizations to become formal corporate entities operating under market

[239] Exhibit CHI-93, pp. 56-57.

[240] Id., pp. 57-58.

[241] Id., p. 58. Similarly, it noted that the Bank of China Offering states that "Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions. [They] are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies". (Id.) The USDOC also noted that, at verification, officials from the People's Bank of China stated that "it may be necessary for banks to heed industrial policies; banks may be taking on great risk if their customers use loans in a way that is inconsistent with industrial policies". (Id.).

[242] Id., p. 59. For example, the USDOC noted that at verification, the PBOC explained that interest rate spreads are close to the PBOC-set benchmark rate because "the Big Four [(the largest SOCBs in China)] attract the largest borrowers [...] [which] are creditworthy [...] and have long-term relationship with the banks". (Id.).

[243] The USDOC's examination of the SOCBs' ownership appears in the section of the Issues and Decision Memorandum covering "benchmarks" for SOCB lending, which is cross-referenced in the section of the Memorandum addressing "policy lending". The analyses in these two sections overlap substantively to a considerable extent.

[244] The USDOC noted that according to the data provided by the OECD ("Economic Survey of China, Paris: Organization for Economic Cooperation and Development" (2005)) the state ownership in the Chinese banking sector is much more widespread than in any other major world economy. The OECD report states that the "extent of ownership in China's financial system is exceptional. All but one of the major commercial banks are controlled by the central or local government […] the four largest banks […] known as the state owned commercial banks (SOCBs), still account for almost three-quarters of commercial bank assets". (Exhibit CHI-93, p. 67; and *OECD Economic Surveys: China (2005)*, Exhibit US-54, p. 140). In its first written submission, China acknowledges that at the end of 2006, China's ownership in the Big Four was as follows: 75 per cent in the ICBC; 74 per cent in the CCB; 68 per cent in the BOC; and 100 per cent in the ABC. (China first written submission, para. 165).

[245] Exhibit CHI-93, p. 67.

conditions, and that the USDOC had in previous cases found that wholly government-owned banks were not government authorities. Starbright (another investigated producer), is cited as arguing that its loan from the Bank of China was not countervailable as the USDOC had incorrectly determined that SOCBs in China were government authorities. The Memorandum also indicates that Bridgestone (a domestic interested party in the investigation) disagreed with the Government of China that the banks were private entities not controlled by the government, arguing that record evidence and scholarly publications demonstrated that the Government of China owned almost all banks in China, and that Chinese law required that the banks support government industrial policies. Bridgestone contended that trends such as decreasing government ownership did not contradict the record evidence that during the period of investigation the government "maintained a strong hold on both bank ownership and lending", such that in Bridgestone's view the USDOC should find that SOCB lending and debt forgiveness to the tire producers were financial contributions.[246]

8.123 The final determination in the OTR investigation summarizes the USDOC's finding that the SOCBs were public bodies as being based on the facts: (i) that national, provincial and municipal government authorities effectuated policies to provide countervailable loans to OTR producers, and that the loans at issue were provided pursuant to these policies; (ii) that the parties in the OTR investigation had not demonstrated that conditions in the Chinese banking sector had significantly changed since the *CFS Paper* determination, such that a reconsideration was warranted, citing in this regard the verification report of the Tianjin Government, where a Tianjin municipal government authority had confirmed that SOCBs were under Tianjin SASAC supervision; and (iii) that scholarly publications on the record reported that SOCBs were required to support the government's industrial policies.[247]

(d) Assessment by the Panel

8.124 We recall our finding above that the meaning of "public body" in Article 1.1 of the SCM Agreement is an entity controlled by a government. We note that China's claim concerning the USDOC's determinations that the SOEs and SOCBs at issue were public bodies is based not only on its own, different, legal interpretation of the term "public body", but also on the public body analysis and conclusions of the USDOC in the four investigations. In particular, China claims that these determinations by the USDOC were based on the application of a "*per se* majority ownership test", and that the USDOC did not conduct the "five-factor analysis" that it had applied in some prior cases, which China holds up as evidence that the USDOC had recognized that a "fact-intensive" inquiry (including an entity's pursuit of governmental policies or interests, and whether an entity is created by statute), was necessary to establish that an entity is a public body in the sense of Article 1.1 of the SCM Agreement. More generally, China considers that the USDOC failed to meet its investigatory burden by improperly basing its public body determinations on a presumption that government-owned entities are public bodies, rather than gathering and analyzing the factual information necessary for the five-factor test.

8.125 We start by considering China's statements concerning the five-factor test. While we note China's disclaimer that it is not arguing about the consistency of the five-factor test with Article 1.1 of the SCM Agreement, we view China's statements about the test as implying (as China had argued during the investigations), that the USDOC was obligated to have applied that test, in which government ownership is just one factor. For example, citing the USDOC's statements regarding the non-application of the test in the investigations, that it would "reconsider the feasibility of applying the five-factor test during an administrative review", China states that it "takes no solace in this response".[248] Thus, for the sake of the completeness of our analysis, we examine the potential

[246] Exhibit CHI-4, pp. 100-101.
[247] Id., p. 101.
[248] China first written submission, para. 100. See also footnote 94, *supra*.

relevance of the five-factor test to the concept of "public body" in Article 1.1 of the SCM Agreement. In this regard, we recall China's argument that the "key" question regarding whether an entity is a public body is whether it exercises governmental authority, and China appears to consider that the five-factor test addresses that question.[249] Given our finding that a public body is an entity controlled by a government, however, the legal question is whether under the SCM Agreement it would be necessary to examine the five factors to establish that an entity is government-controlled. We recall that the factors are (i) government ownership; (ii) the government's presence on the entity's board of directors; (iii) the government's control over the entity's activities; (iv) the entity's pursuit of governmental policies or interests; and (v) whether the entity is created by statute. While these factors appear generally to be related to the issue of control, we see no basis in the SCM Agreement on which to conclude that consideration of these particular five factors (or any other specific factors) is a legal prerequisite for a valid finding that an entity is controlled by a government and thus a public body in the sense of the Article 1.1 of the SCM Agreement. Put another way, even if under U.S. law application of the five-factor test were mandatory for a finding that an entity is a "government authority" (which the evidence before us suggests is not the case), the failure to conduct that test in a given investigation would be a matter for the U.S. judicial review system, not the WTO.

8.126 This brings us to the analyses that the USDOC did conduct in the four investigations in respect of the SOE input suppliers, and in the OTR investigation in respect of SOCBs. The question for the Panel is whether these analyses were reasoned and were based on adequate evidence of government control of the entities in question.

(i) SOE input suppliers as public bodies

8.127 Concerning the SOE input suppliers in the four investigations, as described above the USDOC's public body determinations were principally based on the uncontested fact that these entities were majority government-owned. China characterizes this as a simple *per se* majority ownership test. We read the USDOC's determinations differently, however. In particular, we do not see the USDOC's determinations as depicting the mechanical application of a per cent-of-ownership test, without regard for any other evidence or arguments. To the contrary, these determinations show that the USDOC examined all of the evidence and arguments that were before it in reaching its conclusions that the SOEs were public bodies.

8.128 In particular, in the CWP investigation, the USDOC noted that other than the levels of government ownership of certain companies producing HRS, the Government of China had not provided the information that was needed to consider the five-factor analysis, and that therefore the USDOC had applied a rule of majority ownership.[250] In this context, where ownership information was not available for certain HRS producers, the USDOC found them to be government-owned, and thus public bodies, on the basis of facts available.

8.129 In the LWR investigation, the USDOC determined that there was insufficient evidence on the record to perform the five-factor analysis in respect of HRS producers, because the Government of China had not provided such evidence. Rather, it had provided only ownership information, and only for some companies, but otherwise had not furnished information necessary to conduct the five-factor analysis.[251] Despite this, the USDOC did include a specific, detailed discussion of the arguments advanced by the Government of China concerning the five factors in respect of one trading company, Baosteel, while stating that it made no finding as to whether a five-factor test was required. As described *supra*, the USDOC found that the evidence was insufficient to conclude that Baosteel was

[249] *See, e.g.*, China first written submission, paras. 90-102.
[250] Exhibit CHI-1, pp. 62-63.
[251] Exhibit CHI-2, pp. 28-29.

not a public body, and/or that the evidence contradicted the factual assertion in support of which it was advanced.[252]

8.130 In the LWS investigation, the USDOC again found that there was insufficient evidence on the record for it to be able to conduct a five-factor analysis, as beyond the levels of government ownership of the companies in question, the Government of China had not provided the information necessary to conduct a complete analysis. The USDOC nevertheless conducted a detailed discussion of the Government of China's arguments and "limited" evidence on the five factors, concluding that either that evidence was not apposite to the questions examined, or disproved the Government of China's argument. Of particular relevance in this regard was the statement in the Government of China's questionnaire response that the State-Owned Assets Supervision and Administration Commission of the State Council played a role in managing SOEs "based on 'the rights attendant to the ownership of shares'".[253]

8.131 In the OTR investigation, the USDOC found that a five factor test is not necessary in the absence of evidence calling into question whether government ownership does not mean government control.[254] The record documents before us make no mention of any party submitting evidence suggesting an absence of government control, and before us China points to none. Rather, the USDOC's OTR Countervailing Duty I&D Memo indicates that the Government of China and the respondent parties focused most of their argumentation on the USDOCs' failure to conduct an entrustment or direction analysis. Thus, it appears that there was no evidence other than that of the government's share of ownership of the input suppliers before the USDOC in respect of whether these SOEs were public bodies.

8.132 On the basis of our review of the USDOC's public body determinations, we find sufficient discussion and analysis to explain the basis for those determinations and the reasons therefore. In other words, it is clear to us from these determinations what evidence was before the USDOC and, where there were gaps, the reasons for those gaps, and how the USDOC addressed them. It also is clear to us from the determinations what specific arguments and evidence were presented to the USDOC and how the USDOC took them into consideration. In particular, we note the statements of the USDOC that in a number of instances, factual assertions were made without any supporting evidence, or with evidence that contradicted the assertions. We further note that the USDOC explained why it considered that it was not legally required to conduct the five-factor test, in particular that in making its public body findings, it relied on the evidence of record that the input suppliers in question were majority government-owned.

8.133 This then brings us to the legal question of whether the evidence of government ownership of the SOE input producers was a sufficient basis on which to conclude that they were government controlled and thus public bodies. Here, the United States argues extensively before us that majority ownership indicates control, and indeed China also acknowledges that ownership can indicate control. The difference is that for China, government control is the wrong legal test for determining whether an entity is a public body.[255]

8.134 We recall, however, our conclusion that a public body is any entity controlled by a government, and in this regard we consider government ownership to be highly relevant (indeed potentially dispositive) evidence of government control. Here we note in particular the everyday

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[252] *See* summary at para. 8.109, *supra*. *See* also Exhibit CHI-2, pp. 29-30.

[253] Exhibit CHI-3, p. 67.

[254] In this investigation, a petitioner had argued that "treating Chinese SOEs as public entities is consistent with China's commitments to the WTO" (citing paragraph 172 of the WTO Working Party Report). (Exhibit CHI-4, p. 76). The USDOC, however, did not address this argument in its "public body" analysis.

[255] *See, e.g.*, China first written submission, para. 61.

financial concept of a "controlling interest" in a company. The technical definition of what is needed for a controlling interest is a maximum of 50 per cent plus one share of the voting stock of a company, with the possibility that a much smaller voting block can be controlling, depending on how dispersed the ownership of the remaining shares is, and the extent to which the other shareholders participate in voting.[256]

[256] "Controlling interest" is defined as:
"Strictly speaking, an ownership stake of any business which is 50% or more. In practice it means a sufficiently large stake in a company by an individual **shareholder** to allow effective control. In principle, a stake of 50% plus one share gives a blocking majority, but in practice effective control can be had with a smaller holding. Key holding levels are 25%, which can block changes in the articles of the company, 51%, which gives voting control, and 76%, which permits changes to the articles. In a **company** setting it usually means holding a majority of the **voting rights** which usually comes from the ownership of **equity**. The ability to capture ownership, or **acceptances** or pledges, of around this percentage of the voting equity in a company can be crucial in such situations as **contested takeovers**". (The Handbook of International Financial Terms, P. Moles (ed.) (Oxford University Press, 1999), p. 110). (emphasis original)

See also the following online dictionaries:

- From *Investment Dictionary*: "When one shareholder or a group acting in kind holds a high enough percentage of ownership in a company to enact changes at the highest level. By definition, this figure is 50 per cent of the outstanding shares or voting shares, plus one. However, controlling interest can be achieved with less than 50 per cent ownership of the stock if that person/group owns a significant proportion of the voting shares, because in many cases, not every share carries a vote in shareholder meetings."

- From *Financial & Investment Dictionary* and *Business Dictionary*: "Ownership of more than 50 per cent of a corporation's voting shares. A much smaller interest, owned individually or by a group in combination, can be controlling if the other shares are widely dispersed and not actively voted."

- From *Wikipedia*: "Controlling interest in a corporation means to have control of a large enough block of voting stock shares in a company such that no one stock holder or coalition of stock holders can successfully oppose a motion. In theory this normally means that controlling interest would be 50 per cent of the voting shares plus one.

  In practice, though, controlling interest can be far less than that, as it is rare that 100 per cent of a company's voting shareholders actively vote.

  In addition, a company that requires a 2/3 super-majority of shares to vote in favour of a motion, can grant, in effect, veto power to a minority shareholder or block of shareholders that own essentially 1/3 of the shares. Thus in some cases, a single entity can essentially maintain control, with only 33.4 per cent of the outstanding shares. Ford Motor Company's former 33.9 per cent ownership of Mazda is an example of a controlling interest with minority shareholding."

- From *Investopedia*: "For the majority of large public companies (such as those that belong to the S&P 500), a shareholder with much less than 50 per cent of the outstanding shares can still cause a lot of shake-up at the company. Single shareholders with as little as 5-10 per cent ownership can push for their own seats on the board, or enact changes at shareholder meetings by publicly lobbying for them."

(Answers.com (accessed 28 April 2010) <http://www.answers.com/topic/controlling-interest>).

8.135 We see no reason to consider that the concept that "control" of a company resides with its majority owner, which is uncontested in the private sector, would be inapplicable to government-owned companies. Logically, quite the reverse should be true, given the generalized power of governments over economic affairs within their territories. As such, we consider that, on its own, majority government ownership is clear and highly indicative evidence of government control, and thus of whether an entity is a public body for purposes of the SCM Agreement.

8.136 We find no legal error, in analyzing whether an entity is a public body, in giving primacy to evidence of majority government-ownership. Of course, public body determinations are to be made case-by-case, on the basis of the evidence of record in a given investigation, and the authority's determination must explain its analysis based on the evidence before it, in order for that determination to be reasoned and adequate and thus consistent with the SCM Agreement.[257] We note in this regard that there could be cases (however rare in practice) in which a government-owned entity was completely insulated (e.g., by law) from any government involvement in, or influence over, its operations, such that the entity was not controlled by the government and thus fell outside the scope of the term "public body". In such a situation, it would be the entity and the government in question that would have in their possession the information as to the absence of government control, and in our view it would be incumbent upon them, and certainly it would be in their interest, to bring that information to the attention of the investigating authority. To the extent that such evidence were placed on the record, the investigating authority would be required to include its analysis of that evidence in its determination as to whether the entity was or was not a public body.

8.137 In the investigations at issue in this dispute, as noted above, respondents advanced certain information and/or arguments regarding the question of public body in respect of SOE input producers – mainly based on the five-factor test that the respondents considered the USDOC was legally required to perform, and some of which went to the issue of control – and in all such instances the USDOC in its determinations discussed and responded to that information and those arguments. In no case does it appear that the USDOC refused to consider, or dismissed summarily, any such information or arguments, and China does not allege any such instances. The USDOC did not find in any case that there was record evidence to indicate that in spite of being owned by the government, the SOEs in question were not public bodies. Furthermore, it is not the USDOC's factual findings as to the extent of government ownership or control of input suppliers that is the focus of China's challenge, but rather the legal relevance thereof as determinative of whether an entity is a public body. In particular, China advances the same argument that the respondents advanced in the investigations, namely that the USDOC – as a matter of law – should have treated the SOEs as private bodies, and thus conducted an entrustment or direction analysis.

8.138 We have rejected this legal argument, as well as the legal test advanced by China, in respect of "public body". We also have concluded that the USDOC's determinations that the SOE input suppliers were public bodies were based on relevant evidence of government control (which in these cases was principally evidence of government ownership), and that the determinations acknowledge and come to reasoned conclusions in respect of all of the additional evidence and arguments before it, including in particular those advanced by respondents, as to the question of public body. We therefore find that China has failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining in the four countervailing investigations at issue in this dispute that the SOE input producers were public bodies.[258]

[257] *See*, Section VII.A.2, *supra*.

[258] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

(ii) SOCBs as public bodies

8.139 We turn now to the USDOC's determination in the OTR investigation that the SOCBs were public bodies. In that case, the undisputed record evidence shows that the government owned the large majority share of the SOCBs, and exercised significant control over their operations. Before us China does not contest these factual findings but instead argues that government ownership and control are not relevant to whether the banks in question are public bodies.

8.140 In particular, in the OTR investigation, the USDOC's determination that SOCBs were public bodies is based on, and incorporates by reference, the entirety of its analysis of the same issue in the earlier *CFS Paper* investigation. In the OTR investigation, the USDOC maintained the same conclusions that it had reached in *CFS Paper* on this issue, stating that the parties in the investigation had not demonstrated that the Chinese banking sector had significantly changed such that reconsideration of the *CFS Paper* decision was warranted. We find no indication in the USDOC's determination in the OTR investigation that the respondents provided evidence or arguments seeking to establish that the USDOC's factual findings from the *CFS Paper* case were no longer valid, nor did they challenge the USDOC's characterization in the OTR investigation that the situation in the banking sector had not significantly changed since the *CFS Paper* investigation. In particular, the respondents in the OTR investigation did not contest any of the information or analysis from the *CFS Paper* investigation either as to the degree of government ownership of these banks or the extent to which they were controlled by the government. In this regard, we note the uncontested statement on the record of the OTR investigation, by a Tianjin government official, that the SOCBs were under government supervision. Rather, the respondents advanced legal arguments as to the interpretation of the term "public body" and as to the kind of analysis they considered that the USDOC was required to conduct.

8.141 Before us China does not challenge either the factual evidence or the conclusions drawn therefrom by the USDOC as to the extent of government ownership of the SOCBs or the government's involvement in their operations. Rather, China argues that the USDOC's analysis was based on the legally incorrect and irrelevant element of government ownership and control, i.e., the same legal argument that it advances in respect of the SOE input suppliers.

8.142 For the same reasons as discussed *supra* in the context of the SOE input producers, we reject China's arguments as to the interpretation of the term "public body", and as to the necessity of applying the five factor test or any other specific test to determine whether an entity is a public body. Rather, we have found that the determinant of whether an entity is a public body is government control, and that majority government ownership is strong evidence of control.

8.143 We have reviewed the determination in the OTR investigation, and the cross-referenced determination from the *CFS Paper* investigation, that the SOCBs are public bodies. We note the lengthy discussion in the *CFS Paper* determination of the evidence that the SOCBs during the period of investigation were either wholly or majority government-owned, and that there was extensive government involvement in and control over their operations. As noted, China does not challenge these factual findings. We consider that the USDOC's findings constitute a sufficient basis for its public body determination in respect of the SOCBs. We therefore conclude that China has failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining that the SOCBs were public bodies.[259]

[259] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

(iii) Concluding remark

8.144 Having found that China has failed to establish that the United States acted inconsistently with its obligations in so far as its determinations of "public body" in the investigations before us in this dispute, we recall, as we have already emphasized, that a finding that an entity is a public body is simply the first step in a multi-part analysis. This finding, on its own, does not mean in any way that the entity in question acted in a non-commercial manner, by conferring a benefit, nor that any such benefit was specific. Those elements are independent and as such each must established in order for a valid basis to exist for the imposition of a countervailing measure.

IX. CHINA'S CLAIMS PERTAINING TO SPECIFICITY

A. *DE JURE* SPECIFICITY OF SOCB LENDING TO THE TIRE INDUSTRY

1. Claims of China

9.1 China claims that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(a) of the SCM Agreement, by finding in the OTR investigation that preferential lending by SOCBs to the tire industry was *de jure* specific. China further claims that, as a consequence, the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.[260]

2. Main arguments of the Parties

(a) China

9.2 China submits that the legislation upon which the USDOC relied as the basis for this finding of *de jure* specificity neither refers to the alleged subsidy, nor explicitly limits access to the alleged subsidy to the tire industry.[261] China further argues that the SOCB loans were not made pursuant to the legislation in question.[262]

9.3 According to China, a valid determination under Article 2.1(a) of the SCM Agreement that certain legislation confers a subsidy that is *de jure* specific requires the establishment of three elements: (i) that the legislation define or refer to all of the elements of a subsidy (i.e., the financial contribution and the benefits that will be conferred thereby); (ii) that the legislation explicitly limit the access to the subsidy to certain enterprises (i.e., that it must clearly and unambiguously provide that the relevant subsidy – the financial contribution and benefit – is only available to "certain enterprises", to the exclusion of other "certain enterprises"); and (iii) that the countervailed transaction must have been made pursuant to the subject legislation (i.e., must be an instance of the subsidy that the legislation defines, and the recipient must be among the "certain enterprises" to which the subsidy is explicitly limited).[263]

9.4 China notes in addition that pursuant to Article 2.4 of the SCM Agreement, any specificity determination must be "clearly substantiated on the basis of positive evidence", and argues that "clear substantiation" is an even higher standard than "positive evidence" as that term was interpreted by the

[260] Paragraphs B.1(c)(iii) and B.1(e)(i)-(iii) of the "as applied" claims in China request for establishment of a Panel; China first written submission, para. 468 (d); second written submission, para. 315 (e).
[261] China first written submission, paras. 208 and 214.
[262] Id., paras. 223 and 225.
[263] Id., para. 209.

Appellate Body in *US – Hot-Rolled Steel*.[264] In this regard, China submits that evidence showing that a particular subsidy is broadly available throughout an economy is inconsistent with a valid finding of specificity.[265]

9.5 China argues that the USDOC's specificity determination in respect of SOCB lending to the tire industry is deficient in respect of all three of the elements it considers to be necessary. First, China asserts, the USDOC relied on broad statements in various planning documents and then implicitly linked these statements to other statements in the same planning documents that refer to providing support to various industries.[266] China submits that none of these statements refers to preferential lending by SOCBs to the tire industry – the subsidy that the USDOC actually countervailed – and that the only statement in which SOCBs are mentioned does not indicate that SOCBs provide loans at preferential interest rates.[267] For example, China argues that the USDOC misinterpreted the statement in the "Hebei Province 9th Five-Year Plan" that the "'automobile and components industry' would, among other industries, be 'developed greatly and stronger'" as requiring SOCBs (which are not even mentioned) to provide preferential loans (which also are not mentioned) to companies in the "automobile and components industry".[268] In China's view, these documents do not explicitly refer to the alleged subsidy, and therefore (on that basis alone) cannot constitute the basis for a finding of *de jure* specificity within the meaning of Article 2.1(a) of the SCM Agreement.[269]

9.6 Second, China submits, even assuming that the legislation at issue referred to the alleged subsidy, the USDOC's final determination provided no analysis of and made no findings as to whether the alleged subsidy was explicitly limited to companies in the tire industry.[270] China considers that the USDOC's statement that "there are no discrete policy plans for the tire industry, *per se*, [but] the totality of the information on this record […] shows that the government is directing policy lending to the tire industry or to specific enterprises in the tire industry" does not support the conclusion that the alleged subsidy was explicitly limited to the tire industry.[271] China argues that no statements in the planning documents indicate that the alleged subsidies were "explicitly limited" to the tire industry. In this connection, China asserts that if the SOCBs were required to support China's industrial policies as the USDOC contended, this would mean that the SOCBs were required to support all of the Chinese industrial policies that concerned the vast array of industries covered by the planning documents. In this regard, China notes that the "GOC Catalogue" (one of the documents on which the USDOC based its specificity determination) identifies 539 "encouraged national projects" in 26 broad categories. China contends that if the "subsidy" inferred from this document applied to the tire industry, then it should apply to all of the industries identified in the GOC Catalogue.[272] In this regard, China considers that the list of encouraged national projects is both so long (539) and so broad (in 26 diverse categories) that it could not, as a legal matter, form the basis for a specificity finding. China considers that the findings of the panel in *US – Upland Cotton*, in particular its statement that "a subsidy would cease to be specific because it is sufficiently broadly available throughout an

[264] China first written submission, paras. 210-211, citing to Appellate Body Report on *US – Hot-Rolled Steel*, para. 192. China contends in this regard that any determination of specificity must be based upon a thorough examination of all relevant evidence. (Id., para. 212).

[265] Id., para. 213.

[266] China first written submission, para. 215.

[267] Id., paras. 214, 216-217; oral statement at the first meeting of the Panel, para. 61.

[268] China first written submission, footnote 184 (referring to Exhibit CHI-4, p. 14).

[269] Id., para. 217.

[270] Id., para. 219.

[271] Id., para 219 and footnote 185 (referring to Exhibit CHI-4, p. 98).

[272] Id., para. 221 and footnote 186 (referring to the *Guiding Catalogue of the Industrial Restructuring (2005), promulgated by the National Development and Reform Commission* (the "GOC Catalogue"), Exhibit CHI-70).

economy as not to benefit a particular limited group of producers of certain products" supports its view.[273]

9.7 China further argues in this context that contrary to the USDOC's finding, the preferential loans by SOCBs are available to any borrower in China that borrows money from SOCBs at prevailing interest rates.[274] For China, given the broad availability and use of this financing, it cannot be considered specific.[275]

9.8 Finally, China asserts that the USDOC failed to demonstrate that the SOCB loans were made pursuant to the legislation on which the USDOC relied. China submits that the USDOC merely "presumed" that all of the loans that SOCBs extended to GTC were made pursuant to the legislation identified by the USDOC. According to China, such a presumption does not meet the stringent requirements for a finding of specificity under Article 2.1(a) of the SCM Agreement.[276] Furthermore, China submits, the evidence on the record does not support this presumption. China asserts that the interest rates that GTC paid on RMB-denominated loans from SOCBs were entirely in the range of interest rates paid by borrowers across all other industry sectors in China, and that the interest rates that GTC paid on dollar-denominated loans were consistent with the USDOC's own benchmark.[277]

9.9 For these reasons, China contends that the USDOC did not clearly substantiate, based on positive evidence, its *de jure* specificity determination in the OTR investigation.[278]

(b) United States

9.10 The United States argues that the USDOC's *de jure* specificity finding in respect of SOCB loans to the tire industry was consistent with Article 2 of the SCM Agreement. According to the United States, the USDOC found the "policy lending" in question to be specific because the loans were provided as part of government programmes guiding financial institutions to lend to tire producers.[279]

9.11 The United States notes that Article 2.1 of the SCM Agreement provides that a subsidy is *de jure* specific if the granting authority, or the legislation pursuant to which that authority operates, explicitly limits access to the subsidy to certain enterprises. The United States points to Article 2.4, which requires that any determination of specificity must be "clearly substantiated on the basis of positive evidence", and notes the Appellate Body's finding that such evidence must be of "an affirmative, objective and verifiable character", which is "credible".[280] The United States argues that where an investigating authority clearly substantiates on the basis of positive evidence that access to a subsidy is explicitly limited, then a finding of specificity is consistent with Article 2 of the SCM Agreement; and the USDOC's finding of *de jure* specificity in respect of SOCB lending to the tire industry met this test.[281]

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[273] China response to Panel question 56 (first meeting), citing to Panel Report on *US – Upland Cotton*, para. 7.1142.

[274] China first written submission, para.228. China refers, in this connection, to record evidence that borrowers in the OTR tires industry obtained loans from SOCBs at interest rates that were not materially different from the interest rates on loans that SOCBs provided to borrowers in other industries. (China first written submission, paras. 168-173; response to Panel question 62 (first meeting)).

[275] Id., para. 229.

[276] China first written submission, para. 223.

[277] Id., para. 224.

[278] *See, e.g.*, China first written submission, paras. 217 and 219; second written submission, para. 191.

[279] United States first written submission, paras. 330-332.

[280] Id., paras. 333-334, citing to Appellate Body Report on *US – Hot-Rolled Steel*, para. 192.

[281] Id., para. 335.

9.12 The United States argues that the USDOC found that the Chinese laws, plans and policies – which operated at central, provincial and municipal levels of government – limited access to policy lending to a group of industries that explicitly included the OTR tires industry. Furthermore, the USDOC found that the provincial and municipal policies and plans were designed to implement central government plans and were intended to be consistent with those.[282]

9.13 According to the United States, a catalogue of encouraged projects, which formed "an important basis for guiding investment directions" and for government investment and fiscal policies, *inter alia*, pursuant to the central government's 11th Five-Year Plan, included "advanced belt tires" and related materials and equipment. The 10th Five-Year Plan had referred to "meridian radial tires" as a national security priority, to which the contribution of funds should be "reasonably directed". The United States asserts that the provincial and municipal governments closely coordinated their own plans with those in the central plans.[283]

9.14 Regarding the interpretation of Article 2 of the SCM Agreement, the United States argues that this provision does not require the identification of legislation that defines the elements of a subsidy, as this would conflate the determination of specificity and benefit with that of financial contribution.[284] The United States also disagrees with China that the range of projects in the planning documents was so broad as to render policy lending non-specific. In the view of the United States, the referenced projects concerned a "group of industries" (the terminology of Article 2.1 of the SCM Agreement). The United States also notes that the USDOC found that the planning documents prohibited policy lending to projects in the "restricted" and "to be abolished" categories.[285]

9.15 The United States further argues that the question of specificity in respect of the SOCB lending is different from that of benefit (i.e., the terms of the lending): specificity has to do with making credit available to certain enterprises, including tire companies.[286] In this regard, the United States argues that the USDOC found that SOCBs acted pursuant to Chinese laws, policies and plans in providing policy loans to the OTR tire industry. The United States considers that the primary means of differentiating among borrowers from the SOCBs was not lending rates (most borrowers paid rates near government-set benchmarks) but the availability of credit at all.[287]

3. Main arguments of the Third Parties

(a) Australia

9.16 Australia disagrees with China's contention that for a *de jure* specificity finding the legislation must specify a subsidy, that the legislation must explicitly limit access to the subsidy to certain enterprises "to the exclusion of other enterprises", and that the specific transaction must be made pursuant to the legislation forming the basis of the *de jure* specificity finding. According to Australia, this argument conflates elements of Article 1 with Article 2.1, whereas *de jure* specificity does not require legislation identifying the elements of a subsidy. Rather, Australia considers that the tests for the existence of a subsidy, and for specificity, are separate, and that this approach is consistent with that taken by previous panels. Australia considers that statements of government policies, plans and intentions are highly relevant in determining, *inter alia*, that subsidies are targeted to certain enterprises. Quoting Article 2.1 of the SCM Agreement, Australia argues that for a finding that policy

[282] United States first written submission, para. 336; response to Panel question 61 (first meeting).
[283] United States first written submission, paras. 337-338.
[284] Id., paras. 346-347; opening statement at the first meeting of the Panel, para. 43.
[285] United States first written submission, paras. 348 and 351-353; opening statement at the first meeting of the Panel, para. 33.
[286] United States first written submission, paras. 354-356.
[287] Id., paras. 357-360.

lending is *de jure* specific, the policy statement that forms the basis of the programme must "'explicitly limit access to certain enterprises'". Australia sees nothing in this language requiring that such limitation be *explicitly* to the exclusion of others. Australia adds that the test for *de jure* specificity does not require a direction from the government on "what the benefit will be" and "who it will go to". Australia also argues that once the existence of a subsidy, and specificity, are established in accordance with Articles 1 and 2 of the SCM Agreement, there is no need to impose the third requirement advanced by China that the individual transactions be made pursuant to the legislation in question.[288]

(b) European Communities

9.17 Without prejudice to the determination of specificity in the present dispute, the European Communities submits that a subsidy that reaches a wide number of beneficiaries and industries may call into question the specificity of the measure. Recalling the panel report on *US – FSC (Article 21.5 – EC)*, the European Communities notes that it is unlikely that a subsidy in the form of a loan could be either *de jure* or *de facto* specific under Article 2 of the SCM Agreement if the loan can be obtained by companies of all sizes (as long as they are sufficiently credit-worthy) with respect to projects across all sectors of the economy. The European Communities also submits that the specificity analysis should focus on the characteristics of the measure at issue rather than merely on the disbursements made thereunder, because it is the subsidy itself that *de jure* or *de facto* limits access to an "enterprise or industry or group of enterprises or industries". The European Communities adds that the Panel must determine "financial contribution" and "benefit" as a matter independent from "specificity" since these elements must be identified and examined separately in order to find the existence of specific subsidies within the meaning of the Agreement.[289]

(c) Saudi Arabia

9.18 Saudi Arabia considers that specificity is a separate and independent condition from financial contribution and benefit, consistent with previous panels' decisions. Saudi Arabia is also of the view that specificity must be found with regard to the subsidy as a whole, i.e., financial contribution and benefit. To illustrate its point, Saudi Arabia argues that the provision of low-interest loans to a limited group of enterprises or industries does not fulfil the specificity criterion if the preferential lending rates do not differ materially from the rates that all enterprises in the country of provision may receive for similar loans.[290]

4. Assessment by the Panel

9.19 The issues presented by this claim are: what the required analytical elements are for a valid finding of *de jure* specificity under Article 2.1(a) of the SCM Agreement; in this regard whether the three-part test advanced by China is required by that provision; and finally, on the basis of both the facts of the OTR investigation and applicable legal requirements, whether the USDOC's *de jure* specificity determination in respect of SOCB lending to the OTR tire industry was inconsistent with the United States' obligations under the SCM Agreement. Concerning the analytical elements for a valid finding of *de jure* specificity, China's claim raises both how the limitation of access to a subsidy must be structured, and the meaning of the term "certain enterprises".

[288] Australia third-party submission, paras. 26-30 and 32; third-party response to Panel questions 10 and 11.

[289] European Communities third-party submission, paras. 41-44; third-party response to Panel questions 10 and 11.

[290] Saudi Arabia third-party response to Panel questions 10 and 11.

(a) Interpretation of Article 2.1 of the SCM Agreement

9.20 We start by considering the text of Article 2.1 of the SCM Agreement:

> *"Article 2*
>
> *Specificity*
>
> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation".

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[2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[3] In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

(i) Limitation of access

9.21 We begin our analysis of this claim by noting the general role in the SCM Agreement of the specificity requirement, which is related to the overall object and purpose of the SCM Agreement to

discipline trade-distorting subsidies. In particular, the specificity provisions establish that the subsidies deemed under the Agreement to be potentially trade distortive are those that are targeted in some way to particular beneficiaries, rather than being broadly available throughout the economy of a Member. In other words, the specificity requirement is not about the existence of a subsidy, which is dealt with in Article 1.1, but rather about access thereto. Article 2 of the SCM Agreement makes clear that specificity can take a number of different forms (enterprise, industry, regional, as well as deemed specificity in the case of prohibited subsidies), and that the superficial appearance of non-specificity is not sufficient for a subsidy to avoid coverage by the SCM Agreement. In short, the issue under Article 2 of the Agreement is the limitation, on some basis, of access to the subsidy. Subsidies to which access is limited in *any* of the ways referred to in that provision are specific and thus covered by the SCM Agreement.

9.22 Furthermore, the limitation can be "explicit" (commonly referred to as "*de jure*") as *per* Article 2.1(a), or can be determined on the basis of how, in practice, an apparently non-specific subsidy is allocated (commonly referred to as "*de facto*") as *per* Article 2.1(c) of the SCM Agreement. In this regard, we note the balance struck in Article 2 of the SCM Agreement – a subsidy to which access is automatic based on neutral, horizontally-applicable economic criteria is not specific, and thus falls outside the scope of the SCM Agreement, but the appearance of non-specificity can be overridden by the facts of how the subsidy is allocated in practice. We thus must guard against both an overly-broad reading of the specificity requirement which would sweep within the coverage of the SCM Agreement non-specific subsidies, and an overly-rigid or restrictive reading which would subvert the purpose of the specificity requirement, and thus undermine the effectiveness of the SCM Agreement.

9.23 In the provision at issue, Article 2.1(a) of the SCM Agreement, the text requires, and the parties do not dispute, that the limitation in question must be explicit. Where the parties disagree is with respect to how that explicit limitation must be structured for a measure to fall within the scope of Article 2.1(a) of the SCM Agreement.

9.24 We recall that the text of Article 2.1(a) of the SCM Agreement establishes two bases on which *de jure* specificity can be established: either the granting authority, or the legislation pursuant to which it operates, "explicitly limits access to a subsidy to certain enterprises". We recall that the first element of the test advanced by China is that the granting authority, or the legislation setting forth the measure in question, must identify or specify the elements of a subsidy, i.e., financial contribution *and* benefit. We understand that China bases this contention on the words "explicitly" and "subsidy" in Article 2.1(a), i.e., that the granting authority, or the legislation pursuant to which it operates, must *explicitly* limit access to *a subsidy*. For China, this means that if the granting authority or the legislation in question does not explicitly set forth both the financial contribution and the benefit elements, the measure cannot be a *de jure* specific subsidy.[291] (China does not rule out that such a measure could, in particular instances, be a *de facto* specific subsidy).[292]

9.25 The first issue raised by this claim is whether, to explicitly limit access to a subsidy, a granting authority or a legislation must specify all of the elements of a subsidy, i.e., financial contribution and benefit. As noted, for China, this is first and foremost a textual question following from the definition of "subsidy" in Article 1 of the SCM Agreement, i.e., that the use of the word "subsidy" in Article 2.1(a) requires that both the financial contribution and the benefit be explicitly

[291] For instance, in response to a question from the Panel, China states: "[T]he necessary consequence of the use of the defined term 'subsidy' in Article 2 of the SCM Agreement is that the investigating authority must find that the subsidy is 'explicitly limited' [...] It is [ ] inadequate, as a matter of law, for an investigating authority to find that only a financial contribution or a benefit is *de jure* specific". (China response to Panel question 55 (first meeting)).

[292] Id.

identified by the granting authority or the law. Another way to look at this issue, however, is from a functional standpoint. That is, functionally, could a granting authority or a legislation explicitly limit access to a "subsidy" without identifying both the financial contribution and the benefit flowing therefrom? Or put another way, would the only way for a granting authority or a legislation to explicitly limit access to a subsidy be to explicitly identify both the financial contribution and the benefit, and explicitly limit access to both?

9.26 We consider that there are many ways in which access to a subsidy could be explicitly limited, and we do not see that both the financial contribution and the benefit necessarily would have to be set forth explicitly to effect such a limitation. In particular, if access is explicitly limited to a particular type of financial contribution, which sometimes but not always gives rise to benefits, the particular cases in which the benefits existed would be *de jure* specific subsidies. This is because the explicit limitation of access to the financial contribution would have the effect of also limiting any benefits resulting from the financial contribution, without the limitation of access to the benefits itself needing to be explicit. Similarly, access could be explicitly limited to a particular set of benefits without the access to the underlying financial contributions also needing to be explicitly limited, and again, in our view, the access to the "subsidy", the combination of the financial contribution and the benefit, would be explicitly limited.

9.27 Hypothetical examples help to illustrate this point. Suppose that a law established a government credit facility exclusively for the cardboard box industry, but was silent concerning the terms and conditions on which the financing was to be provided. In this example, it is clear that while access to the financial contribution would be explicitly limited to a particular industry, there would be no explicit limitation of any benefits that might arise therefrom. Suppose that some of the financing under this facility were provided on better-than-market terms, i.e., that benefits were conferred. In this scenario, because by law *only* the cardboard box industry could obtain any financial contributions (the loans) under the programme, any benefits flowing therefrom necessarily also would be limited to the cardboard box industry, meaning that any subsidies under this programme would be *de jure* specific to that industry. Alternatively, suppose that a law established a government credit facility accessible to all enterprises in all industries, and further provided that companies in the cardboard box industry (and only that industry) would get loans under this facility on better-than-market terms. In this second example, access to the financial contribution (the loans) would not be limited, but access to the benefits flowing therefrom would be – to a single industry. By virtue of this explicit limitation on access to the benefits, this subsidy also would be *de jure* specific.

9.28 We consider that a reading of Article 2.1(a) of the SCM Agreement that would require explicit limitation of both the financial contribution and the benefit, such as China advocates, is not supported by the text of that provision. In our view, it would limit *de jure* specificity to a single, narrow set of circumstances, in which a single piece of legislation (or perhaps more than one formally interrelated pieces of legislation) or some action by the granting authority, would explicitly set forth, in the form of a formal programme, the financial contribution and benefit elements (including the form they would take and how they would operate) and would then specify the particular eligible beneficiaries (and possibly also would state explicitly that only those beneficiaries were eligible). We cannot agree with such a reading, which in our view would exclude many situations in which access to a given subsidy *was* explicitly limited, by virtue of a limitation of access to *either* the financial contribution *or* the benefit.

9.29 We note that a wide variety of possible forms of subsidization falls within the definition in Article 1 of the SCM Agreement, and we see nothing in Article 2 that would narrow down those forms, in a scenario of either *de jure* or *de facto* specificity. In this regard, Article 1.2 of the SCM Agreement treats the concepts of subsidy and specificity as separate. In particular, that provision establishes that subsidies in the sense of Article 1 are subject to the SCM Agreement only if they are specific in the sense of Article 2. Indeed, financial contribution, benefit and specificity are three

independent and cumulative elements, all of which must be present for a measure to be covered by the SCM Agreement. Concerning financial contribution and benefit in this regard, we recall the findings of the Appellate Body in *Brazil – Aircraft*, that these are independent concepts, both of which must be present for a measure to be a subsidy in the sense of the SCM Agreement.[293] Similarly, we agree with the approach taken by the panels in *EC – Countervailing Measures on DRAM Chips*, *US – Countervailing Duty Investigation on DRAMS*, and *Korea – Commercial Vessels*, all of which analyzed the question of specificity separately from financial contribution and benefit. In *EC – Countervailing Measures on DRAM Chips*, the panel overturned some of the European Communities' determinations as to the existence of financial contributions and the amounts of benefits pursuant to the measures at issue, but nevertheless as a separate matter considered, and upheld, the European Communities' specificity finding in respect of the measures as a whole.[294] The *US – Countervailing Duty Investigation on DRAMS* panel followed the same approach, affirming the investigating authority's finding of *de jure* specificity of the measures at issue while overturning some of the investigating authority's findings of financial contribution and benefit.[295] The panel in *Korea – Commercial Vessels* likewise separately evaluated the existence of specificity of the measures before it from the questions of financial contribution and benefit.[296]

9.30 While ultimately all three elements (financial contribution, benefit and specificity) must be present for a given measure to be covered by the SCM Agreement, a formalistic reading of the specificity provisions as implying a particular conjunction of these elements, or a particular order of analysis, might have the effect of omitting from coverage measures which viewed in their entirety have all three necessary elements to be covered by the SCM Agreement. As we noted above, in the particular case of *de jure* specificity, to require that a given legislation or granting authority lay out all elements of a specific subsidy, explicitly limiting access to both the financial contribution and the benefit, would have the effect of treating as non-*de jure* specific a wide variety of subsidies to which access was explicitly limited. This would mean that the only basis on which specificity could be found for such subsidies would be on a *de facto* basis, a fact-intensive, case-by-case inquiry that would be both illogical and entirely superfluous under the described scenarios where an explicit limitation of access to a subsidy existed. Furthermore, where the details as to the actual distribution of the subsidy could not be obtained, the subsidy would be left outside the scope of the SCM Agreement in spite of its undeniably being explicitly limited to particular beneficiaries. We consider that such a reading would frustrate the purpose of the specificity provisions, and would open considerable scope for circumvention of the SCM Agreement, based on a distinction in form but not substance.

9.31 By the same token, we see no potential that being able to establish *de jure* specificity on the basis of an explicit limitation of access *either* to a financial contribution *or* to a set of benefits could improperly bring within the scope of the SCM Agreement measures that in fact are not specific subsidies. In whatever order the analysis is conducted, and regardless of whether access is explicitly limited in respect of the financial contribution or the benefit or both, the three elements of financial contribution, benefit and explicit limitation of access would be present, and the measure thus would be a *de jure* specific subsidy and hence covered by the SCM Agreement.

9.32 For the same reasons, we disagree with the third part of China's three-part test, i.e., that the specific transaction under investigation must be an instance of the subsidy that the legislation defines. We consider that this is largely a restatement of China's argument that the *de jure* specificity provision

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[293] Appellate Body Report on *Brazil – Aircraft*, para. 157.

[294] Panel Report on *EC – Countervailing Measures on DRAM Chips*, paras. 7.110, 7.186, 7.215 and 7.230-7.232.

[295] Panel Report on *US – Countervailing Duty Investigation on DRAMS*, paras. 7.206-7.208. *See* also *Japan – DRAMs (Korea)*, paras. 7.253-7-254, 7-316, 7-361 and 7.375.

[296] Panel Report on *Korea – Commercial Vessels*, para. 7.192.

requires the granting authority or the relevant legislation to identify both the financial contribution and the benefit. We see no limitation in the text to such a specific scenario, and thus no such requirement. Again, we note that subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit. Of course, where a countervailing measure is applied in respect of *de jure* specific subsidies, the limitation to "certain enterprises" must be explicit, but again we consider that the limitation to those recipients could be in respect of the financial contribution, or the benefit, or both. Furthermore, for the application of a countervailing measure, there must be evidence that the subsidy that has been provided and is being countervailed is the subsidy that has been found to be specific, but this would be the case for any sort of specific subsidy, not just a *de jure* specific subsidy.

(ii) "Certain enterprises"

9.33 China's claim also raises the meaning of the term "certain enterprises" in Article 2.1 of the SCM Agreement. In particular, the second element of China's three-part test is that the legislation pursuant to which the subsidy is provided must clearly provide that the subsidy (the financial contribution and benefit) is only available to "certain enterprises" to the exclusion of other "certain enterprises". We understand that what China is emphasizing in this element is the explicit limitation to "certain enterprises". While Article 2.1(a) of the SCM Agreement requires such an explicit limitation, that provision does not address the related but separate question of the breadth or narrowness of the term "certain enterprises".

9.34 The relevant text of Article 2.1 of the SCM Agreement reads:

> "In order to determine whether a subsidy [...] is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises"), the following principles shall apply:"

9.35 Concerning the meaning of the term "certain enterprises", China cites with approval the statement of the panel in *US – Upland Cotton* that:

> "'[a]t some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a *particular limited group of producers* of certain products'".[297] (emphasis added by China)

China argues on the basis of this statement that "a 'group of enterprises or industries' within the meaning of Article 2 of the SCM Agreement must be 'sufficiently discrete' so that the 'group of enterprises or industries' represents no more than a 'limited group of producers of certain products'".[298] China acknowledges that there is a certain amount of "indeterminacy" in the concept of specificity, but argues that the "539 'encouraged' industries in China spanning 26 broad sectors of economic activity" identified in the GOC Catalogue (one of the documents on which the USDOC's *de jure* specificity determination was based), are too broad to be "specific" for purposes of the SCM Agreement.[299]

9.36 We see China's argument as pointing to two different elements of the availability of a subsidy: the diversity of the recipients, and the breadth of availability of the subsidy. Concerning diversity, we

[297] China response to Panel question 56 (first meeting), citing to Panel Report on *US – Upland Cotton*, para. 7.1142.
[298] Id.
[299] China response to Panel question 54 (first meeting).

understand China's argument to mean that the sheer diversity of the "encouraged" projects or industries, and of the economic sectors from which they come, as identified in the documents relied on by the USDOC, is too great to support a finding of specificity.

9.37 Starting with the text of the definition of "certain enterprises" we see nothing that addresses the question of diversity of the "certain enterprises". The text simply says that "certain enterprises" can be single enterprises or industries, or groups thereof, but in our view does not imply that there needs to be any similarity among them in order for them to constitute "certain enterprises". If anything, the context suggests the contrary. Article 2.1(b) of the SCM Agreement, on non-specificity, emphasizes entirely other factors, namely the non-selectivity of the eligibility criteria (economic in nature and horizontal in application) and the automaticity of eligibility, which speak to broad availability. Article 2.1(c), on *de facto* specificity, suggests that an apparently non-specific subsidy might be confirmed as non-specific even if the facts concerning its actual distribution show that it is being used by a narrow range of enterprises, again emphasizing the breadth of availability of a subsidy throughout an economy. In particular, this provision cautions that in examining whether *de facto* specificity exists based on patterns of usage, "account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority". This suggests that where the extent of the underlying economic diversification is low, lack of diversification in the distribution of benefits would not by itself give rise to a finding of *de facto* specificity. We note that the panel in *US – Upland Cotton* based its analysis of specificity on how broadly available a subsidy is throughout an economy, and that the panel in *US – Softwood Lumber IV* found that specificity has to do with subsidies that, either in law or in fact, "[are] not broadly available".[300] We consider the breadth of availability of a given subsidy in an economy to be a fundamentally different concept from the diversity of activities of the subsidy's recipients.

9.38 For these reasons, we do not consider that the sheer diversity of economic activities supported by a given subsidy is sufficient by itself to preclude that subsidy from being specific, and we do not read *US – Upland Cotton* as standing for such a proposition. To the contrary, the main emphasis of the panel in *US – Upland Cotton* was on the case-by-case nature of the analysis of the breadth of availability of a subsidy in the context of a specificity finding[301], and we consider that if anything the panel was cautioning against interpreting the concept of specificity too narrowly. For example, the panel emphasized that the SCM Agreement, as an agreement covering trade in goods, is applicable to *all* goods, and that the concept of specificity must be understood from that perspective.[302] We note as well in this context that the *US – Upland Cotton* panel found that a particular subsidy programme benefiting some 100 different agricultural commodities (crops as well as livestock) was a "sufficiently discrete" segment of the United States economy to qualify as specific for purposes of the SCM Agreement.[303] We take these as indications that that panel did not consider the economic diversity of beneficiaries, by itself, necessarily to bar a finding of specificity.

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[300] Panel Report on *US – Upland Cotton*, paras. 7.1142-7.1152; and Panel Report on *US – Softwood Lumber IV*, para. 7.116.

[301] In this regard, we agree with the *US – Upland Cotton* panel that: "The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis". (Panel Report on *US – Upland Cotton*, para. 7.1142).

[302] The panel specifically stated that: "the concept of specificity in Article 2 of the *SCM Agreement* is germane to the disciplines imposed by the *SCM Agreement*. The *SCM Agreement* is an agreement on trade in goods, in Annex 1A of the *WTO Agreement*. By its own terms, subject to considerations reflected in the text of some of its provisions, it applies in respect of *all* goods. The concept of specificity must be considered within the legal framework and frame of reference of that agreement as a whole". (emphasis original) (Id., para. 7.1144). The panel noted in this connection that the *Agreement on Agriculture* contains no specificity requirement. (Id., footnote 1274).

[303] Id., paras. 7.1150-7.1151.

9.39 Indeed, we can imagine many examples of subsidies that could be specific in spite of benefiting very diverse recipients. For instance, a subsidy might be limited to producers of oranges, producers of dental implants, producers of computers, producers of scuba diving equipment, and producers of certain parts for the space shuttle. There is no question that these are extremely diverse industries – their products are essentially totally unrelated, and come from five very different sectors of the economy. Or a subsidy might be explicitly limited to one particular company in each of 200 distinct and unrelated industries or sectors. Again, there would be no question that the recipients were economically very diverse. Yet, (subject to the complete facts of the case), we consider that each of these subsidies could easily be specific, given its availability to only that particular "group of enterprises or industries".

9.40 Thus, as a matter of legal interpretation, we do not consider that economic diversity of subsidy recipients, by itself, is sufficient to prevent a subsidy from being *de jure* specific.

9.41 The second element of China's argument has to do with the breadth of availability of a subsidy which, as noted, is the question addressed by the *US – Upland Cotton* panel. We agree with that panel that the dividing line between a subsidy to which access is limited enough to be specific, as opposed to broadly enough available throughout an economy to be non-specific, is not precisely defined in the SCM Agreement and can only be determined on a case-by-case basis. We therefore consider this question *infra*, in our analysis of the details of the USDOC's determination of *de jure* specificity in respect of lending by SOCBs to the OTR tire industry.

9.42 We note, finally, that China also argues in regard to "certain enterprises" that "the legislation must provide that the relevant subsidy [...] is only available to 'certain enterprises', to the exclusion of other 'certain enterprises'".[304] China does not make clear whether it is suggesting that Article 2.1(a) of the SCM Agreement requires the granting authority or the legislation to identify explicitly both the "certain enterprises" that are and the "certain enterprises" that are not eligible for the subsidy. To the extent that China is making this argument, we find no such requirement in Article 2.1(a) of the SCM Agreement.

9.43 To recall, the provision states that for *de jure* specificity to exist, the granting authority or the legislation must explicitly limit access *to* certain recipients, i.e., it must in some manner identify or define the eligible or affected enterprises, and these enterprises must be "certain enterprises" in the sense of Article 2.1(a) of the SCM Agreement. We see no requirement that in addition, the legislation must explicitly exclude *from* access the other "certain enterprises" that are *not* eligible.

(b) USDOC *de jure* specificity determination

9.44 In the light of the foregoing considerations as to the interpretation of Article 2 of the SCM Agreement, we now take up China's arguments concerning the USDOC's determination that SOCB lending to the OTR tire industry was *de jure* specific. In particular, we examine whether the USDOC provided a "reasoned and adequate" explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported its determination of *de jure* specificity.[305]

9.45 In the OTR investigation, the USDOC determined that China provided subsidies in the form of preferential lending by SOCBs (referred to by the USDOC as "policy lending"[306]) to the tire

[304] China first written submission, para. 209.
[305] Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[306] China contests this term, arguing that there is no programme known as "policy lending" by SOCBs in China, and that to the contrary, the SOCBs are commercial banks operating on a commercial basis. (*See, e.g.*, China first written submission, paras. 155 and 165).

industry, in particular to two companies, GTC and Starbright.[307] It determined that these subsidies were *de jure* specific on the basis that relevant Chinese laws, plans and policies explicitly limited access to such "policy lending" by SOCBs to a group of industries that included the OTR tires industry.

9.46 We turn to an assessment of this determination in the light of our interpretation, above, of Article 2.1(a) of the SCM Agreement regarding *de jure* specificity. In particular, we understand that the USDOC based this determination on a finding that a number of central, provincial and municipal government planning documents provided for the development of the OTR tire industry, *inter alia*, through the provision of loan financing by SOCBs (i.e., government financial contributions) to the tire producers, in some instances identified by name. The USDOC's benefit determination in respect of this lending was made in a separate part of its determination, not on the basis of these planning documents. Given our interpretation of Article 2.1(a), we find no legal error in this separate analysis of these two elements.

9.47 The remaining question before us in respect of the USDOC's *de jure* specificity determination, therefore, is whether that determination is reasonably supported by the documents on which it was based. We must consider, in particular whether the evidence before the USDOC supports its findings that the various planning documents identified "certain enterprises", which included the OTR tires industry, for development, *inter alia*, through the provision of loan financing, and whether documents on the record also support the USDOC's finding that that SOCBs were acting pursuant to the prescriptions of the planning documents when they provided loan financing to the OTR tire producers.

9.48 Turning now to the USDOC's findings and the related record evidence, the USDOC found that at the central government level the Government of China's Five-Year Plans set the overall economic policies for China, which policies then were implemented in detail through subsidiary central government-level instruments (the Implementing Regulations, the GOC Catalogue, the SETC Circular). The USDOC further found that the provincial and local governments implemented at their respective levels these national plans and policies.[308] The USDOC stated, *inter alia*, that the record indicated that GTC had been a "key target for economic development by Guizhou province and Guiyang municipality", citing specific references to GTC in their respective provincial and municipal five-year plans, and indicating that the plans also stated that lending should be allocated according to the plans, and that record evidence showed that GTC had received numerous project development loans from SOCBs.[309] Summarizing its view of how these policies at the various levels of government were related, the USDOC found that "central level plans should be considered a central government policy or programme that local governments adopt and implement through their own five-year plans".[310]

9.49 Via this statement, we consider that the USDOC made a finding that the "policy lending programme" was a central-government programme, i.e., a programme designed and mandated at the central government level, and that this central-level policy then was implemented at the provincial and municipal levels. This is significant as it defines the level of analysis for our review of the USDOC's determination. Thus our first and principal task is to analyze whether the central government-level planning documents could support the USDOC's finding of *de jure* specificity. Put another way, given the USDOC's determination that the programme is a central level programme, we must analyze

[307] The USDOC found that a third company, TUTRIC, had received debt forgiveness with respect to certain of its outstanding loans, and the USDOC therefore did not calculate a benefit for this company in respect of government policy lending. (Exhibit CHI-4, footnote 16).
[308] Exhibit CHI-4, pp.13 and 98.
[309] Id., p. 112.
[310] Id., pp. 13-14.

its specificity determination at the same level. If we were to find that the specificity determination was not supported by the central government-level planning documents, such that the programme was non-specific, then provincial and/or municipal-level evidence of specific instances of implementation of the central-level programme (even if they referred explicitly to particular industries and/or enterprises) could not override the programme's non-specificity. We thus begin our analysis by reviewing the USDOC's findings in respect of the central government-level planning documents.

9.50 Here, we recall that specificity is an issue in respect of which an investigating authority has affirmative obligations under the SCM Agreement, even without any party raising arguments during an investigation. We also recall that pursuant to Article 2.4 of the SCM Agreement, any determination of specificity must be "clearly substantiated on the basis of positive evidence".[311] We thus cannot reach a conclusion on China's claim under Article 2.1(a) without considering in some detail the evidence relied upon, and the conclusions drawn therefrom, by the USDOC, as well as the arguments raised both during the investigation and before us concerning that evidence. In conducting this analysis, we are conscious of the need to avoid a *de novo* review of the evidence, but we are equally mindful of the Appellate Body's admonition that it is the duty of a panel reviewing an investigating authority's determination to conduct a "critical and searching" examination, based on the information contained in the record and the explanations given by the authority in its published report.[312] We also recall the Appellate Body's finding that it is not necessary for an authority conducting a countervailing duty investigation to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[313] By the same reasoning, we consider *a fortiori* that where a given piece of evidence forms an explicit part of a finding by an investigating authority, it can be presumed that that evidence has been fully examined even if the discussion in the determination is limited to certain of its aspects.

9.51 These are admittedly fine lines, which can only be drawn on a case-by-case basis. In this case, we consider that the most appropriate way to approach our consideration of the various planning documents referred to in the USDOC's specificity determination is to examine them both on their own terms and in the light of the USDOC's actual determination, with a view to seeing whether they constitute positive evidence on the basis of which a reasonable and objective administering authority could have found that these documents describe a "sufficiently discrete segment of the economy" (in the words of the *US – Upland Cotton* panel) as to support a finding of *de jure* specificity in respect of any subsidies provided thereunder to that segment of the economy.

9.52 Finally, we note that by its own terms, the USDOC's specificity determination in respect of SOCB lending to the OTR tire industry was based on the "totality" of the evidence.[314] In this regard, we 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. Furthermore, 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. In

[311] We note that although China refers to Article 2.4 of the SCM Agreement in its arguments, it makes no claim pursuant to that provision. Nonetheless, the standard in Article 2.4 must guide our evaluation of the USDOC's findings of specificity.

[312] Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

[313] Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, para. 164.

[314] *See* para. 9.80, *infra*.

particular, where a piece of evidence led the investigating authority to an intermediate inference, the panel should examine whether that evidence supports that intermediate inference, rather than whether that evidence could directly lead to the ultimate conclusion arrived at on the basis of the totality of the evidence.[315] We will follow this approach in reviewing the USDOC's *de jure* specificity finding in respect of SOCB lending to the OTR tire industry.

(i) Central Government planning documents

9.53 At the central government level, the USDOC determined that through a number of related planning documents the Government of China encouraged the tire industry. The USDOC noted in particular that: (i) the 11th Five-Year Plan of the Government of China (the "GOC 11th Five-Year Plan") provided for increasing the development of important spare parts for the automobile industry[316]; (ii) the GOC Catalogue identified the "production of advanced belt tires" as an "an encouraged national project"[317]; (iii) the "Implementing Regulation"[318] identified the GOC Catalogue as the "'important basis for funding investments directions, etc.'"[319]; and (iv) the "SETC Circular 716"[320] under the 10th Five-Year Plan identified the production of "meridian tyres" as a national priority and required that the contribution of public funds be reasonably directed in order to guarantee the realization of the target under the plan.[321] In reviewing this determination, we examine in some detail the documents cited by the USDOC in the light of its determination, with a view to seeing whether those documents support the inferences, and the ultimate conclusion, drawn from them by the USDOC.

(1) The GOC 11th Five-Year Plan[322] (2006-2010)

9.54 The USDOC determined that in general, under its 11th Five-Year Plan covering 2006-2010, the central government of China set goals regarding macroeconomic policies. In this regard, the USDOC quotes a questionnaire response of the Government of China as indicating that the plans "'provide a vision for economic development, market and regulatory activities, social administration and the provision of public services".[323] Concerning the GOC 11th Five-Year Plan in particular, the USDOC found that it calls for "increasing the development of important spare parts for the automobile industry".[324]

9.55 We note that in its own words, the stated purpose of the GOC 11th Five-Year Plan is "to clarify the national strategic intention, define the key emphasis in the government work and guide the

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[315] Appellate Body Report on *US – Countervailing Duty Investigation on DRAMS*, paras. 150-151; Appellate Body Report on *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 94.

[316] The USDOC identifies the GOC 11th Five-Year Plan as the source document for this statement. (Exhibit CHI-4, p. 13). We understand that this is the same document as that identified by China as the "Guidelines of the 11th Five-Year Plan for Economic and Social Development" in Exhibit CHI-69 (p. 3) on the *Examination of the Measures identified by Commerce in the OTR Final Determination as the Basis for its Finding of De Jure Specificity in Respect of the Alleged "Policy Lending" Programme*. The full text of the "Guidelines of the 11th Five-Year Plan for Economic and Social Development" is contained in Exhibit CHI-71.

[317] Exhibit CHI-4, p. 13. The GOC Catalogue, as provided by the parties, is contained in Exhibits CHI-70 and US-86.

[318] The *Decision of the State Council on Promulgating the "Interim Provisions on Promoting Industrial Structure Adjustment" for Implementation* (the "Implementing Regulation"), Exhibit US-87.

[319] Exhibit CHI-4, p. 13.

[320] The *Circular of the State Economy and Trade Commission on the Promulgation of the Guidance of Recent Development in the Industrial Sector* (2002) (the "SETC Circular 716"), Exhibit US-83.

[321] Exhibit CHI-4, p. 13.

[322] Exhibit CHI-71.

[323] Exhibit CHI-4, pp. 13 and 98.

[324] Id., p. 13.

behaviour of market subject".[325] Given that it constitutes the guidance for the economy as a whole, its scope clearly is very broad. In particular, the GOC 11th Five-Year Plan contains 14 Parts and 48 Chapters. The Parts refer in general terms to: Guiding Principles and Development Objectives, Construction of Social Villages, Industrial Structure Optimization and Upgrading, Service Industry, Regional Development, Resource Efficiency and Environment, Science and Education, Structural Reform, Trade and Foreign Investment, Construction of Socialist Society, National Defence, and Mechanism for Implementation.[326] That said, particular industries and sectors are mentioned explicitly as priorities for development. One of these industries is the automobile industry: in Chapter 11, "Vigorously Develop Equipment Manufacturing Industry", Section 2 is devoted to "Promote Automobile Industry Level" and calls for "accelerat[ion of] the development of automobile engine, automobile electronics, key assemblies and parts and components with independent intellectual property rights". (emphasis added) This section also "encourage[s] the development and use of energy saving and environmental protection and new type fuel automobiles".[327] In addition, in Chapter 19, "Implement the Overall Regional Development Strategy", both Section 2 ("Boom the Old Industrial Bases such as Northeast Region") and Section 3 ("Promote the Grow-Up of Central Region") refer to the automobile industry among the industries to be promoted/supported.[328] Given these references, we consider that this document supports the USDOC's conclusion that this document identified automobile spare parts as a target for development.

(2) The Implementing Regulation of the 11th Five-Year Plan[329]

9.56 The Implementing Regulation, in its own words, sets forth implementing provisions "to achieve the objective of the Eleventh Five-Year planning" (2006-2010) and to "propel the industrial structure adjustment" (among other goals).[330] According to the USDOC, this Regulation identifies the GOC Catalogue as the "'important basis for funding investments directions, etc.'".[331]

9.57 The Implementing Regulation provides that:

> "[t]he people's governments of all provinces, autonomous regions and municipalities directly under the Central Government [...] shall, in accordance with the [Regulation] and in light of the local situation on industrial development, formulate specific measures, rationally guide the investment directions, encourage and support the development of advanced production capacities, restrict and eliminate outdated production capacities, prevent blind investments and low-level redundant construction, and effectively propel industrial structure optimization and upgrading. All relevant administrative departments shall speed up the formulation and amendment of policies of public finance, taxation, credit, land, import and export, etc., effectively intensify the coordination and cooperation with industrial policies, and further improve and promote the policy system on industrial structure adjustment".[332]

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[325] Exhibit CHI-71, p. 1.
[326] Id.
[327] Exhibit CHI-71, pp. 13-14. Chapter 11, Section 2 appears in Part 3 of the Guidelines, entitled "Push Forward Industrial Structure Optimization and Upgrading". (Id., p. 12).
[328] Id., p. 23.
[329] Exhibits CHI-4, p. 13; and US-87.
[330] Exhibit US-87, p. 5.
[331] Exhibit CHI-4, pp. 13. The text of the Implementing Regulation cited in the USDOC's determination refers to "guiding" rather than "funding" investment directions (Exhibit USA-87, p. 11).
[332] Exhibit US-87, p. 5.

9.58 As indicated in the USDOC's determination, the Implementing Regulation states that the GOC Catalogue constitutes the "important basis for guiding investment directions".[333] It also indicates that the GOC Catalogue is the important basis "for the [sub-central] governments to administer investment projects, to formulate and enforce policies on public finance [...] credit [...] import and export, etc.".[334]

9.59 Of particular relevance to the present dispute, the Implementing Regulation further describes the functions of the industry categories referred to in the GOC Catalogue (discussed in the next section) as follows:

- Encouraged category: The Regulation describes this category as covering investment projects that are to be encouraged and supported with policies and measures. The Regulation further indicates that the category mainly includes key technologies, equipment, and products with important functions of economic and social development, resource saving, environmental protection, and industrial structure optimization and upgrading, and states that investment projects within this category must be examined, approved, ratified or archived according to the relevant provisions of the state on investment administration. In addition, it indicates that "all financial institutions are required to provide credit supports in compliance with economic principles". Furthermore, it provides that equipment imported in connection with encouraged projects shall be exempted from customs duties and import value added tax.

- Restricted category: The Regulation describes this category as covering production capacities, techniques, equipment and products with outdated techniques that do not meet the conditions for industry access, are unconducive to industrial structure optimization and upgrading, and thus need to be transformed or prohibited from being newly built. The Regulation prohibits investments in projects in this category, and provides that no financial institution shall grant loans for such projects, and that no administrative departments, urban planning, construction, customs, etc. are permitted to handle the procedures for such projects. Violations of any of these provisions are subject to penalties. The Regulation indicates that nevertheless, under certain circumstances, enterprises with existing production capacities in a restricted industry can be allowed to transform or upgrade themselves, and that in those circumstances, the financial institutions shall, in compliance with the credit principles, continue providing supports.

- Eliminated category: The Regulation describes this category as covering outdated techniques, equipment and products that do not conform to the relevant laws and regulations, seriously waste resources, pollute the environment, do not meet work safety conditions, and need to be eliminated. Not only are financial institutions required to stop providing any form of credits in support of such projects, but those institutions are instructed to take measures to recover previously granted loans. Furthermore, the Regulation provides that all localities and departments "shall take powerful measures" to eliminate such projects, and that violations will be subject to penalties.

- Non-listed projects: Article 13 of the Regulation states that projects not belonging to the encouraged category, the restricted category or the eliminated category, but conforming to the relevant laws, regulations and policies of the state, belong to the "permitted" category, and are not listed in the catalogue.[335]

[333] Exhibit USA-87, p. 11.
[334] Exhibit US-87, p. 10.
[335] Exhibit US-87, pp. 5 and 10-12.

9.60 In our view, the Implementing Regulation in its own words confirms the finding of the USDOC that the function of the GOC Catalogue which it cross-references is to form the basis for investment direction by the various levels of government. It also appears from the mandatory wording of the Regulation, and its references to penalties for violating the restrictions on financing, investment, and business transactions relating to the categories, that the categories, and thus the GOC Catalogue elaborating the details thereof, are mandatory. We further note that the Regulation explicitly provides that a principal function of the GOC Catalogue is the allocation of loan financing by financial institutions – the categories are defined in large part in terms of whether funds are required to be provided, prohibited from being provided, and/or subject to recovery. In other words, the Regulation indicates that the function of the GOC Catalogue is to provide the details on how the investment priorities in the central government plan are to be implemented by the lower levels of government. We thus find the USDOC's characterization of the Implementing Regulation to be reasonable and supported by the record evidence.

(3) The GOC Catalogue[336] (11th Five-Year Plan)

9.61 This brings us to the GOC Catalogue itself. Before considering its contents in detail, it is important to place this document into its context among the various central government planning documents. In particular, we recall that the central government's five-year plan indicates certain priority industries and activities for investment, and that its Implementing Regulation both defines the encouraged, restricted and prohibited categories, and indicates that the GOC Catalogue contains the list of the particular projects that fall within each of these categories. Thus, the GOC Catalogue – in particular its encouraged category – identifies the universe of types of projects singled out as a matter of national policy for encouragement and investment. Thus, in our view, this document is the central document in the USDOC's specificity determination: our conclusion as to the *de jure* specificity finding must necessarily hinge on whether the encouraged projects, taken as a whole, could reasonably be viewed as a sufficiently discrete segment of the economy as to constitute, collectively, "certain enterprises". If so, then we must continue our analysis by examining the remaining documents relied upon by the USDOC. If we find, by contrast, that the universe of encouraged projects must be seen as so broad as to be non-specific, then our analysis necessarily would stop at that point, as no further references to particular instances of funding pursuant to this category would override the non-specificity of the programme as a whole.

9.62 We recall that the USDOC in its determination cites the GOC Catalogue's listing as an "encouraged national project" of "the production of advanced belt tire radial, its supporting materials and equipment production".[337] We note in this regard that the Catalogue lists types of projects, and not, for example, either whole industries or single enterprises.

9.63 As discussed above in connection with the Implementing Regulation, the GOC Catalogue classifies projects into three categories, "encouraged", "restricted" and "to be abolished", as follows:

- Encouraged: 539 projects are listed, in the following 26 sectors: Agriculture and Forestry; Irrigation and Water Conservancy; Coal; Electric Power; Nuclear Energy; Petroleum and Natural Gas; Steel; Nonferrous Metals; Chemical Industry; Building Materials; Medicine; Machinery; Automobiles; Ships; Aerospace; Light Industry; Textile; Architecture/Construction; City Infrastructure and Real Estate; Railway; Highway; Shipping; Air Transport; Information Industry; Other Service Industry; and Combination of Environmental Protection and Resources Savings. (As noted by the USDOC, the

[336] Exhibits CHI-70 and US-86. In this section, we rely principally on the version of the GOC Catalogue submitted by the United States (Exhibit US-86), as in many places in the version submitted by China (Exhibit CHI-70), the English translations are unintelligible.

[337] Exhibit CHI-4, p. 13.

"[p]roduction of advanced belt tyre radial, its supporting materials and equipment production" is identified as an encouraged project within the Chemical Industry sector).[338] (emphasis added)

- Restricted: 190 projects are listed, in the following 17 sectors: Agriculture and Forestry; Coal; Electric Power; Petroleum, Natural Gas and Chemical Industry; Information Industry; Steel; Non-ferrous Metals; Gold; Building Materials; Medicine; Machinery; Ships; Light Industry; Textile; Tobacco; Fire Fighting Equipment; Other.

- To be abolished: 399 projects (subdivided into "Backward Production Technique Equipment" and "Backward Products") are listed, in the following 17 sectors: Agriculture and Forestry; Coal; Electric Power; Petroleum, Natural Gas and Chemical Industry; Steel; Nonferrous Metals; Gold; Building Materials, Medicine; Machinery; Railway, Light Industry; Textiles; Printing; Fire Fighting; Other.[339]

9.64 The record documents before us do not contain any indication that either the parties to the investigation or the USDOC engaged in detailed discussion of the GOC Catalogue, in particular concerning the diversity or breadth of the "encouraged" projects listed therein, during the investigation.[340] Rather, this point has only been raised before us.

9.65 In the present dispute China's main argument about the GOC Catalogue is that, even if this document referred to all elements of a subsidy, its coverage is too broad to give rise to a finding of specificity. China points in this regard to both the diversity and the breadth of the sectors covered by the "encouraged" category ("26 broad categories spanning virtually the entire range of economic activity").[341] Concerning diversity, as discussed above, as a legal matter we are not persuaded that the diversity of the listed sectors in the "encouraged" category by itself precludes a finding of *de jure* specificity based on the GOC Catalogue.

9.66 Concerning the breadth of the sectors referred to in the GOC Catalogue we note that, as China argues, the sectors or categories under which the encouraged projects are grouped do cover a wide swath of economic activity. Nonetheless, as a factual matter what is either "encouraged", "restricted", or "to be abolished" within a given sector pursuant to the GOC Catalogue is clearly not the entirety of that sector. Indeed, there is considerable overlap in the sectors identified in the three respective categories: twelve sectors appear in all three lists[342]; and an additional five sectors appear in two of the lists.[343] Purely as a matter of logic, it would be impossible for a given sector, in its entirety, to be

[338] We note that the USDOC's determination refers to the "production of advanced belt tires [...] and equipment production", which is how this item appears in the translation of the GOC Catalogue submitted by the United States (Id., p. 13 and US-86). The translation of the same item in the version of the GOC Catalogue submitted to us by China reads: "high-performance meridian tires and the special materials and equipment". (Exhibit CHI-70, p. 7).

[339] Exhibit US-86.

[340] The arguments by the parties during the investigation, in particular those of the Government of China and the Chinese tire producers, were in the main that the planning documents were not binding, and that references to particular industries or companies did not mean that support for those industries was required. These respondent parties also raised arguments similar to those raised by China before us that the planning documents did not refer to, or require, preferential SOCB lending to the tire industry. (*See, e.g.*, Exhibit CHI-4, pp. 93-94).

[341] *See, e.g.*, China response to Panel question 54 (first meeting).

[342] That is, agriculture and forestry; coal; electric power; steel; non-ferrous metals; chemical products; petroleum and natural gas; building materials; medicine; machinery; light industry; and textiles. (In the "encouraged" category, chemicals is treated as a separate sector from petroleum and natural gas, while in the other two categories, chemicals, petroleum and natural gas are treated as a single sector).

[343] Ships; railway; information industry; gold; and fire fighting equipment.

simultaneously "encouraged", "restricted", and/or "to be abolished". Thus, to note that the sectors under which the encouraged projects are grouped cover a broad spectrum of economic activity adds little to our analysis of the USDOC's *de jure* specificity determination.

9.67 We consider more relevant the characterization by the *US – Upland Cotton* panel that non-specific subsidies are broadly *available* throughout an economy, in contrast to specific subsidies to which access is *limited* to a "sufficiently discrete segment" of an economy as to constitute "certain enterprises". From this perspective, we consider whether the USDOC could reasonably have concluded on the basis of positive evidence before it that the list of encouraged projects taken as a whole, in spite of being lengthy and diverse, constituted a "sufficiently discrete segment of the economy" as to constitute "certain enterprises".

9.68 In this respect, we consider significant that the GOC Catalogue does not describe what is to be either encouraged, restricted or abolished in general, broad terms. To the contrary, these are individual project types, described in very specific and narrowly-circumscribed terms. To us, the impression given by the narrowness of the projects described *within* each of the listed sectors (in spite of the breadth of those sectors as a whole, individually and collectively), is not one of broad availability but rather of singling out of very particular types of projects. Furthermore, as the Implementing Regulation makes clear, the express purpose of both the "restricted" and "eliminated"/"to be abolished" categories is to impose *limitations* on investment, provision of credit, etc., in respect of the projects in those categories.

9.69 We note that in a number of cases, closely related projects appear in two or three of the categories, with one variant to be encouraged, a second to be restricted, and a third to be abolished. For example, among the "encouraged" projects in the "chemical products" sector is "manufacture of PVC by oxychlorination means with the annual yield no less than 200,000 tons"; while the "restricted" category lists "ethylene oxychlorination PVC units with its annual yield no more than 200,000 tons annually, calcium PVC units with its annual yield no more than 120,000 tons".[344] In other words, it appears that in respect of the PVC industry, the emphasis pursuant to the GOC Catalogue is to increase the size of production facilities, on the basis of detailed parameters. A similar tendency appears in respect of electric power: among the encouraged projects are "heat-supply machines with the concentrated integrated thermal power capacity no less than 300,000 kw [...]", whereas among the restricted projects are "normal coal-fuel thermal power generating units with the unit machine capacity no more than 300,000 kw [...]", and among projects be abolished are "normal condenser coal-fueled thermal power generation units with [...] single machine less than 10,000 kw within the range of large grid coverage".[345] Most significantly for the present dispute, tires of various kinds appear in all three lists, with an apparent tendency away from bias tires and toward radial tires. In particular, "production of advanced belt tyre radial, its supporting materials and equipment production" is listed as an encouraged project, "bias ty[r]e"[346] (not further described) appears as a restricted project, and "bias tyre or tyre production line with natural cotton flat chafer fabric as framework and with its annual yield no more than 500,000" is identified as a project to be abolished.[347]

9.70 In addition, we recall that the Implementing Regulation makes explicit that the "encouraged", "restricted" and "eliminated" projects, taken together, do not describe all economic activity in China.

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[344] Exhibit US-86, pp. 7 and 19.

[345] Id., pp. 4, 19 and 25.

[346] The English translation of the GOC Catalogue submitted by the United States contains a typographical error, i.e., for this entry it reads "bias type" (emphasis added) (Exhibit US-86, p. 20). We note, however, that the corresponding entry in the version of the Catalogue submitted by China refers to "Inclined tire item." (Exhibit CHI-70, p. 24).

[347] Exhibit US-86, pp. 7 and 25.

Rather, as noted *supra*, there is a default "permitted" category, which covers all activities not specifically listed but otherwise in conformity with the relevant laws and regulations. While there is no information on the record as to the absolute or relative magnitude of this category, or of the three listed categories, the existence of a "permitted" category by definition narrows the maximum possible scope of the "encouraged" category (as well as of the "restricted" and "eliminated" categories) relative to the economy as a whole.

9.71 In this respect, we do not see that the documents of record demonstrate that the list of projects in the "encouraged" category spans "virtually the entire range of economic activity in China", as suggested by China.[348] We thus do not consider that these documents would compel a reasonable and objective investigating authority to conclude that any subsidies granted on the basis of that category were non-specific. To the contrary, we consider that a reasonable and objective investigating authority could conclude that any subsidies granted on the basis of the "encouraged" category were to a sufficiently discrete segment of the economy as to be limited to "certain enterprises".

9.72 For these reasons, we consider reasonable the USDOC's reliance, in reaching its *de jure* specificity determination in respect of SOCB lending to the OTR industry, on the reference in the GOC Catalogue to "'advanced belt tires […]"' as an "'encouraged"' project.

(4) The GOC 10th Five-Year Plan (2001 – 2005) and the SETC Circular 716

9.73 In addition to the central government planning documents pertaining to the 11th Five-Year Plan, the USDOC also examined and took into account in its specificity analysis the SETC Circular 716 [349], which relates to China's 10th Five-Year Plan (2001-2005).

9.74 The USDOC points to two particular statements in the Circular; first, its reference to "the production of 'meridian tires' (i.e., radial tires) as a national priority under the GOC 10th Five-Year Plan"[350], and second, that the contribution of public funds be reasonably directed "so as to [...] guarantee the realization of the target [...]".[351]

9.75 We note, first, that the SETC Circular 716 is directed to:

> "The economy and trade commissions (economy commissions) of all provinces, autonomous regions, municipalities directly under the Central Government and municipalities separately listed on the State plan and Xinjiang Army Corps of Production and Construction, all associations directly under the State Economy and Trade Commission".[352]

We further note that in the preamble to the Circular, the SETC states that:

> "We have printed the Guidance of Recent Development in the Industrial Sector and hereby distribute it to you. Please *abide by* and *implement* it".[353] (emphasis added)

9.76 The full passage partially quoted in the USDOC's determination, which sets forth in general terms the orientation of the Circular, reads:

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[348] China response to Panel question 54 (first meeting).
[349] Exhibit US-83.
[350] Exhibit CHI-4, p. 13.
[351] Id. According to the USDOC, "OTR tires" can be "bias ply" tires, "meridian tires" and "radial" tires. (Id., pp. 14 and 99).
[352] Exhibit US-83, p. 1.
[353] Id.

> "[W]e should, taking the enterprises as the main body, the market as the orientation, the development as the topic, the structural adjustment as the motif, and the improvement of the competitive power as the target, reasonably direct the contribution of public funds and foreign investments, adjust the public investment structure, improve the efficiency and benefits of using funds, so as to promote the structural adjustment of the industrial sector, and guarantee the realization of the target under planning".[354]

The Circular goes on to say:

> "The recent development orientation of the industrial sector is hereby proposed pursuant to the industrial development direction clarified in the industry and sector planning of the Tenth Five-Year Plan for the sake of strengthening the macro-control, leading the acts of market subjects, and optimizing the allocation of resources".[355]

9.77 The Circular then identifies five "basic principles" – market orientation, highlighting key industries and products, technical progress, coordinative development, and sustainable development – in accordance with which:

> "[W]e have proposed the recent development orientation for machinery, automobiles, metallurgy, non-ferrous metal, petroleum, petrochemical industry, chemical industry, medicine, coal, building materials light industry, textiles, etc., which is offered to all investors and the financial, securities and public consulting departments for reference".[356]

Following this introductory section, the Circular then contains sections headed "Recent Development Orientation" for each of the sectors listed in the above-quoted passage. These sections set forth in some detail (in similar fashion to the project listings in the GOC Catalogue under the 11th Five-Year Plan), a series of priority projects or areas for investment.

9.78 The section on "Recent Development Orientation for Chemical Industry" contains four subheadings, one of which is "Meridian Line Tires". The text of this subsection reads:

> "We should accelerate the product structural adjustment of tyre enterprise, and continue developing meridian line tyres. We should accelerate the development of new varieties, and emphatically develop the 65, 60, 55 and 50 series with the rim diameter at 15-17 inches, and meridian tyres of high-speed serial saloon cars and high-capacity meridian tyres of low section without inner tyres; we should enhance the technical renovations of a few major enterprises, and form 2 to 3 large tyre enterprise groups with the annual production capacity reaching 5 to 8 million (with the annual consumption of raw rubber at 40,000 tons or more). We should appropriately support the backbone tire enterprises in central and western regions, so as to enable the regional distribution of meridian tyre production to become more reasonable".[357]

9.79 We note that some of the language in the SETC Circular 716 appears to be non-mandatory, and that before the USDOC the Government of China argued that the central government planning documents were "aspirational recitations of general development goals", rather than "instruments

[354] Exhibit US-83, p. 2.
[355] Id.
[356] Id., p. 3.
[357] Id., p. 15.

through which government policies are implemented". Likewise before us, China argues that the central planning documents are non-binding general policy orientations. Given the detailed and precise descriptions, in respect of tire industry investments to be "encouraged" or "supported", however, and the fact that these encouraged investment projects are specifically addressed to all of the sub-central government entities, which are enjoined to "abide by and implement" the Circular, we consider that their own wording seems to support the USDOC's finding that the SETC Circular 716 conveyed policy directions, *inter alia*, concerning investment in the OTR tires industry, to those other levels of government.

(ii) Provincial and municipal governments planning documents

(1) General

9.80 We now take up the USDOC's analysis and conclusions in respect of the sub-central planning documents, with a view to assessing whether they contain evidence, as the USDOC found, that the sub-central governments established and carried out their own planning by implementing the central government plans. Concerning these documents, the USDOC found that:

> "Information on the record shows that provincial and municipality goals and objectives conform with and implement the central government policy goals and objectives with a focus more tailored to the particular interests and circumstances of that province or municipality. Specifically, the central-level plans set goals regarding macroeconomic policies and [quoting a Government of China's questionnaire response] 'provide a vision for economic development, market and regulatory activities, social administration, and the provision of public services'. [citation to record omitted] Information on the record also shows that the provincial and municipal five-year plans are drafted based on the goals and objectives of the central-level plans. [citation to record omitted] In other words, local governments (i.e., provinces and municipalities) align their policies with stated central government policies and carry out those policies to the extent that such measures affect their locality. Therefore, central-level plans should be considered a central government policy or program that local governments adopt and implement through their own five-year plans. [cross-reference omitted]
>
> [...] Although in this case there are no discrete policy plans for the tire industry, *per se*, the totality of the information on this record […] shows that the government is directing policy lending to the tire industry or to specific enterprises in the tire industry".[358]

9.81 In this respect, the USDOC indicated that it disagreed with the Government of China that the plans were purely aspirational in nature, stating:

> "If [the plans] were simply aspirational recitations of general development goals with no meaning, there would be little reason for the provinces and municipalities to develop plans in accordance with central government plans. Nor would there be any reason for provinces or municipalities to tailor their plans to conditions and needs within their jurisdictions, and there certainly would be no reason to single out companies, industries or specific development projects (e.g., technology renovation) within those plans. The fact that companies or tires or rubber are specifically mentioned in these plans or catalogues and the fact that these plans and catalogues

[358] Exhibit CHI-4, p. 98.

discuss support, including loans for 'key' or promoted projects demonstrates that government policy lending in the OTR tires industry is *de jure* specific".[359]

(2) GTC

(A) USDOC determination

9.82 With respect to GTC, the USDOC examined record evidence pertaining to Guizhou province, and within that province, Guiyang municipality where GTC was located. The USDOC determination noted that: (i) GTC had been explicitly targeted as a key enterprise for economic development by Guizhou province and Guiyang municipality since earlier five-year plans; (ii) the number of enterprises specifically targeted was limited (in particular, that the Guizhou 10th Five-Year Plan, besides singling out GTC for the project of technology renovation for two meridian tire lines, mentioned three other enterprises); (iii) the Guizhou 10th Five-Year Plan further required that policy bank loans and loans from abroad be allocated according to the plans; and (iv) the loans were actually provided to GTC by Guizhou province and Guiyang municipal policy lending.[360] The USDOC further noted that the plans indicated that both the provincial and municipal governments were required to give priority to the 5-million-unit semi-steel radial tire project of GTC.[361]

9.83 In this regard, the USDOC cited the Guizhou 11th Five-Year Plan as requiring that "under 'the leadership of Guizhou Tyre, [the rubber industry] shall give priority to the 5-million-unit semi-steel radial tire project of Guizhou Tyre".[362] The USDOC stated that Section 6 of the Guizhou 10th Five-Year plan also singled out GTC, for the project of technology renovation for two meridian tire lines (i.e., "radial" tires), noting that OTR tires also can be "bias ply" tires. The USDOC noted that the number of enterprises specifically targeted in Section 6 was limited, in that only three other enterprises, in addition to GTC, were singled out for the technology renovation, and concluded that therefore section 6 was "clearly targeted rather than broad in its scope".[363] In addition, the USDOC stated that that plan indicated that policy bank loans and loans from abroad were to be allocated according to the plans.[364] Finally, the USDOC stated that, at the municipal level, the Guiyang 10th Five-Year Plan also had given priority to GTC's 5-million-unit radial tire project.[365]

(B) Guizhou and Guiyang planning documents

9.84 We now examine the Guizhou (provincial) and Guiyang (municipal) plans relied upon by the USDOC, in the light of the USDOC's analysis and conclusions.

9.85 At the provincial level, we note that the Guizhou Province 11th Special Industrial Development Plan (the "Guizhou 11th Five-Year Plan") makes very specific reference to GTC's five-million unit tire project, stating that "under the leadership of Guizhou Tyre, (the rubber industry shall) [...] reduce the production of bias tires, vigorously develop radial tires and new high-speed low-section tubeless and give priority to the 5-million-unit semi-steel radial tire project of Guizhou Tyre".[366]

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[359] Exhibit CHI-4, p. 99.

[360] Exhibit CHI-4, pp. 13-14 and 99. The USDOC noted that business proprietary information provided by GTC underlined GTC's importance in early five-year plans. (Id., p. 14).

[361] Id., p. 112.

[362] Id.

[363] Id., pp. 14 and 99.

[364] Id., p. 112.

[365] Id.

[366] Exhibit CHI-77. It is not clear whether this document also refers to other industries/projects since the document (as presented) only contains the translation of this one paragraph.

9.86 The Tenth Five-Year Plan Outline For the National Economic and Social Development of Guizhou Province (the "Guizhou 10th Five-Year Plan"), in Section 6 ("Traditional industry shall be improved through high technology") of Chapter 7 ("Industry shall be optimized, industry with specific advantages shall be promoted"), states that the "renovation of traditional industry and development of high technology industry shall be combined to promote the whole industry's updating and continuous development".[367] This Section states that the technology renovation of industries with chemistry advantages must be supported, and specifically refers to the technology renovation project of meridian line tires of GTC as well as the renovation projects for three other enterprises. The same plan also encourages support to, *inter alia*, automobile components, and states that by 2005, the renovation and updating of key equipment of enterprises of chemicals, machinery, etc., must be completed and the production base of automobile components established.[368]

9.87 The Guizhou 9th Five-Year Plan states that "policy banks loans and loans from abroad should continue to be allocated according to the plans".[369] Here we note that although in the USDOC's determination this statement is attributed to the Guizhou 10th Five-Year Plan, before us it was clarified between the parties that this statement in fact appears in the Guizhou 9th Five-Year Plan. According to the United States, this mistake was due to errors made by the Government of China in the information it submitted to the USDOC.[370]

9.88 At the municipal level, the Guiyang Municipality Economic and Social Development 11th Five Year Plan (the "Guiyang 11th Five-Year Plan") states that the automotive manufacturing industry must, *inter alia*, "develop auto parts, tires and other auto-use rubber products aimed at both domestic and world markets" as well as "facilitate the development of new products [...] and foster famous products with intellectual property rights".[371] This plan explicitly requires the government to give priority to GTC's 5-million-unit tire project. The plan also calls for "loans from State policy banks" and strengthening the "public credit system, and increase credit loans".[372] The plan also "encourage[s] financial institutions to provide funds to the projects in conformity with economic policies" and states that "cooperation between banks and enterprises" should be "enhanced".[373]

9.89 Given the explicit references to GTC's tire project in the provincial and municipal planning documents cited by the USDOC, and the similarity of the priorities for the tire industry in these documents to the description in the GOC Catalogue of the "encouraged" tire project, and the references to the provision of credit financing to the projects targeted for development, and given the indications in the central-level documents that the lower-level governments are to establish their own plans based on the central plans, we consider that it was reasonable for the USDOC to have concluded, in respect of GTC, that these provincial and municipal plans implemented the central plans for development of the OTR tires industry, including in respect of the provision of credit financing.

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[367] Exhibit CHI-72, p. 2.
[368] Exhibit CHI-72, p.2.
[369] Exhibit US-82, p.41.
[370] In its first written submission, the United States notes that, as China has pointed out to the Panel, this statement was mistakenly cited to the 10th Five-Year Plan rather than the 9th Five-Year Plan. The United States attributes this error to the fact that when it submitted the 9th and 10th Five-Year Plans to the USDOC, China had reversed all but the first pages of both documents, attaching the Chinese language version of the 10th Five-Year Plan to the English translation of the 9th Five-Year Plan and *vice versa*. The United States further argues that China failed to provide the USDOC with an English translation of the portion of the 9th five-year plan discussing the allocation of loans, which the USDOC only became aware of because a domestic producer provided the USDOC with a partial translation of the Chinese language version. (United States first written submission, footnote 518 (referring to Exhibits CHI-69, US-84 and US-82)). China does not contest this representation by the United States.
[371] Exhibit CHI-78.
[372] Id.
[373] Id.

(3) Starbright

(A) USDOC determination

9.90 Concerning Starbright, the USDOC's determination states that, in contrast to the Guizhou and Guiyang five-year plans, the five-year plan of the province of Hebei (where Starbright was located) identified as "key projects" for development certain industries, rather than individual enterprises or projects. According to the USDOC's determination, the Hebei 11th Five-Year Plan for technology referred to "automobile parts and the rubber industry as 'key projects'" and the Implementing Guidelines of this plan "direct[ed] commercial banks to support 'key projects'".[374] The USDOC also found that the Hebei 10th Five-Year Plan stated that "'auto parts', among other industries, shall be supported'", and that the Hebei 9th Five-Year Plan stated that the "automobile and components" industry, among other industries, would be "developed greatly and stronger".[375] According to the USDOC, tires were considered to be part of the automobile parts industry in China.[376]

(B) Hebei planning documents

9.91 Starting with the Hebei Province Science & Technology 11th Five Year Plan & 2020 Long Term Target (the "Hebei 11th Five-Year Plan for technology"), we note that this plan states that the "economic and social development of the Province heavily depends on the technology development".[377] In this context, *inter alia*, the plan calls for arranging "a layout for the key industries" and developing "new products with independent intellectual property rights", referring specifically to the "development of key automobile parts".[378] In addition, among "key technology projects", the plan identifies the establishment of industrial bases for several industries, including the "rubber industry" and the "rubber and plastics industry".[379] The plan designates the automobile and automobile spare parts industries, among several others, as the priority industries for accomplishing the provincial "equipment manufacture industry" goal, and states that three to five leading enterprises will be involved in the provincial equipment manufacture industry scheme.[380] Furthermore, the plan designates certain cities (including Xingtai City, where Starbright is located)[381] as the bases for automobile development, and identifies automobile spare parts as among the "supported products" for which the production base was to be developed.[382]

9.92 The Guidelines for the Implementation of Hebei Province Science & Technology 11th Five Year Plan (the "Implementation Guidelines of the Hebei 11th Five-Year Plan") state that policy financial institutions "shall support" national and provincial key technology projects and key technology industrialization projects. The Guidelines further state that commercial banks "shall support" these projects through the granting of credit loans in accordance with national investments and credit loan policies.[383]

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[374] Exhibit CHI-4, pp. 14 and 99.
[375] Id., p. 99-100.
[376] In this regard, the USDOC noted that the Guiyang 11th Five-Year Plan referred to the GTC 5-million-unit tire project within the context of identifying automobile parts as a key industry, and that given the parallels among the central and provincial plans, the central, provincial and municipal governments appeared to consider radial tires to be part of the automobile parts industry. (Id., footnote 17).
[377] Exhibit CHI-73.
[378] Id.
[379] Id.
[380] Exhibit US-88.
[381] United States first written submission, para. 342.
[382] Exhibit US-88.
[383] Exhibit CHI-74.

9.93 The Tenth Five-Year Plan Outline for the National Economic and Social Development of Hebei Province (the "Hebei 10th Five-Year Plan") requires that "the equipment industry such as environment protection, auto parts, packing, foodstuff, machinery shall be supported".[384] Finally, the Ninth Five-Year Plan Outline for the National Economic and Social Development of Hebei Province and Year 2010's Prospective Goals (the "Hebei 9th Five-Year Plan") identifies the automobile industry as one of the "mainstay" industries "which can take the lead for the whole economic growth and structural upgrade. The plan specifies that among other "mainstay" industries, "the machinery industry which takes the automobile and its components and large-scale complete plants and equipment as the dominance", "will be developed greatly and stronger".[385]

9.94 Given the explicit references in the Hebei planning documents to the rubber industry and the automobile parts industry, as well as to the provision of credit financing in support of projects in these industries, we consider that it was reasonable for the USDOC to have concluded that these documents implemented the central-level plan in respect of the OTR tires industry, which included the provision of financing to that industry.

(iii) Conclusion in respect of planning documents

9.95 For the foregoing reasons, we conclude that a reasonable and objective investigating authority could have determined, on the basis of the evidence on the record, that the Government of China, at the central level, explicitly identified "certain enterprises" in the sense of Article 2.1(a) of the SCM Agreement for encouragement and development (including the tire industry), and instructed the sub-central governments to implement this policy. We also conclude that a reasonable and objective investigating authority could have determined that pursuant to these same planning documents, SOCBs (among other financial institutions) were instructed to provide financing to the "encouraged" projects. Thus, we find no legal error in the USDOC's determination on the basis of these documents that government authorities at all levels of government in China (central, provincial and municipal) effectuated policies to ensure the provision of loans to the OTR tire industry.

(iv) USDOC determination that SOCBs acted pursuant to government industrial policies in making loans to the tire industry

9.96 The final element of the USDOC's *de jure* specificity determination in respect of SOCB lending to both GTC and Starbright was its finding that both policy banks and SOCBs acted pursuant to the government policies set forth in the planning documents just discussed when they provided loans to tire producers. We note in this regard that there is no disagreement between the parties as to the existence of SOCB lending to the two tire producers. Instead, the disagreement in the context of the *de jure* specificity finding centres on whether the SOCBs made these loans pursuant to the policies set forth in the planning documents.

9.97 Concerning GTC, the USDOC's determination indicates that business confidential information on the record indicated that loans to GTC were policy lending by Guizhou and Guiyang, at the provincial and municipal levels, respectively. The determination states in this regard:

> "The Department notes that both the provincial and municipal five-year plans discuss GTC. Based on verification and the documentation on the on the record, we have determined that these loans were provided to GTC by Guizhou provincial and Guiyang municipal policy lending. (A full discussion of our analysis concerning GTC's loans is only possible by means of reference to business proprietary information. [cross-reference omitted]) Therefore, the Department continues to find

[384] Exhibit CHI-76, p. 5.
[385] Exhibit CHI-75, p.4.

> that all of the loans received by GTC and its cross-owned affiliates from SOCBs were made pursuant to a government policy to provide loans to the tire industry."[386]

9.98 Concerning Starbright, the USDOC cited the Heibei Five-Year Plans and related documents just discussed, which identified automobile parts and the rubber industry as key projects, and called for financing support to these projects. The USDOC then stated that "[t]herefore, the Department continues to find that the loans received by Starbright from SOCBs were made pursuant to a government policy to provide loans to the tire industry".[387]

9.99 Concerning SOCBs' lending to the OTR tire producers in general, the USDOC stated that:

> "After examining all information on the record, we continue to find that national, provincial and municipal government authorities effectuate policies to provide countervailable loans to OTR tire producers. Acting pursuant to these official policies, PRC policy banks and SOCBs provided loans to OTR tire producers".[388]

The USDOC then cited its prior "public body" finding in respect of Chinese policy banks and SOCBs, in the investigation on *CFS Paper*, incorporating by reference that finding and analysis into the record of the OTR investigation.[389] The USDOC stated that in the OTR investigation, parties "ha[d] not demonstrated that conditions within the Chinese banking sector ha[d] changed significantly since that previous decision such that a reconsideration of that decision is warranted".[390] The USDOC also cited a statement at verification by an official from the Tianjin municipal government confirming that SOCBs there were supervised by the Tianjin SASAC, and noted that there were scholarly publications on the record reporting that SOCBs were required to support the Government of China's policies.[391]

9.100 One such publication cited by the USDOC in this context was the IMF Working Paper. The USDOC quoted that publication as stating that "it is difficult to find clear evidence that SCBs have changed their behavior and become commercially oriented" and as recommending that governments should avoid "interference for policy purposes".[392]

9.101 We note that in the *CFS Paper* investigation, which formed part of the record in the OTR investigation, the USDOC had determined that SOCBs followed government policies in making their lending decisions.[393] First, the USDOC had found that the state ownership of the Chinese banking sector and the legacies associated with the longstanding pursuit of government policy objectives undermined the SOCBs' ability to act on a commercial basis.[394] Second, the USDOC had examined the Chinese legal framework for banking, noting that the Chinese Commercial Banking Law required banks to carry out their loan activities consistently with "the needs of national economy and the social

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[386] Exhibit CHI-4, p. 99.
[387] Id., p. 100.
[388] Id., p. 101. This statement appears in the section entitled "SOCBs and Financial Contribution".
[389] Id.
[390] Id.
[391] Id. TUTRIC, the third investigated tire producer, was located in Tianjin. The USDOC did not calculate a benefit to TUTRIC from policy lending, as it found that instead outstanding loans to TUTRIC had been forgiven. (Id., footnote 16).
[392] Id., footnote 45 (quoting the IMF Working Paper, pp. 18-19).
[393] Exhibit CHI-93, pp. 49-58.
[394] Id., p. 55. The USDOC noted that it had found evidence of reforms in almost all sectors of the economy in China, including the banking sector. It stated that the central government however had been very cautious in completely reforming the banking system, and that as a result, and because banks in China had never operated on a commercial basis, the government was still very involved in the sector. The USDOC noted that this view was to varying degrees confirmed by independent experts interviewed by the USDOC. (Id., pp. 55-58).

development and under the guidance of State industrial policies".[395] At the *CFS Paper* verification, officials from the People's Bank of China had stated that "it may be necessary for banks to heed industrial policies, banks may be taking on greater risk if their customers use loans in a way that is inconsistent with industrial policies".[396] Similarly, the Bank of China Offering had stated that "Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions. [They] are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies".[397] Third, the USDOC had determined that while SOCBs were improving their risk management capacities, they still lacked adequate risk management and analysis skills. The USDOC had stated that interest rates remained generally undifferentiated, and were close to the benchmark set by the People's Bank of China.[398]

9.102 In the OTR investigation, as noted, the USDOC determined that the respondent parties had not demonstrated that this situation had changed sufficiently to warrant a reconsideration of the analysis and conclusions concerning SOCBs from the *CFS Paper* investigation. In this regard, the main specificity-related argument of the respondents in the OTR investigation was that the central government and provincial and municipal planning documents were indicative only, and not mandatory. It is not clear what evidence was put on the record of the investigation in support of this point, and before us China identifies none. As noted above, the USDOC determined in this regard that "central-level plans should be considered a central government policy or program that local governments adopt and implement through their own five-year plans".[399] We recall in this context the USDOC's specific rejection of the respondents' argument that the plans were not binding, as described in paragraph 9.81, *supra*.

9.103 In addition, before us, the United States refers to a range of documents from the *CFS Paper* investigation, on the record of the OTR investigation, which in the view of the United States demonstrates that the SOCBs lent in accordance with government policies.[400] These documents include annual reports and other publications of certain Chinese banks, verification reports, and other documents. In particular, the United States cites to the following statements by banks: (i) the People's Bank of China "'guided financial institutions to grant loans at a proper pace'"[401]; (ii) the People's Bank of China briefs bank officers on "'how credit should be guided'"[402]; (iii) the Bank of China takes industrial policies into account "'in assessing a company's total credit limit'"[403]; and (iv) "'commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies'".[404]

9.104 We note that China does not contest the accuracy of the United States' representations of these statements. Nor does it point to any evidence contradicting the USDOC's conclusion, from either the *CFS Paper* or OTR investigation.

9.105 For the reasons described above, we consider that a reasonable and objective investigating authority could conclude on the basis of the record evidence that the SOCBs followed the policies set forth in the planning documents in providing credit to GTC and Starbright. We thus find no error in this conclusion by the USDOC.

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[395] Exhibit CHI-93, p. 58.
[396] Id.
[397] Exhibit CHI-4, p. 58.
[398] Id., p. 59.
[399] Id., p. 98.
[400] United States first written submission, paras. 357-358.
[401] Id., para. 358 (quoting the *People's Bank of China 2006 Annual Report*, p. 37, Exhibit US-93).
[402] Id., para. 358 (referring to the. *CFS CVD GOC Verification Report*, p. 5, Exhibit US-89).
[403] Id., (referring to Exhibit US-89, p. 17).
[404] Id., (referring to Exhibit CHI-93, p. 58).

(v) Conclusion by the Panel

9.106 As discussed *supra*, we have found that a reasonable and objective investigating authority could have determined, on the basis of the evidence on the record, that the government of China, at the central level, explicitly identified "certain enterprises" in the sense of Article 2.1(a) of the SCM Agreement for encouragement and development, and instructed the sub-central governments to implement this policy, and that among these "certain enterprises" were advanced radial tires, which all parties acknowledge include OTR tires. We have found that a reasonable and objective investigating authority could have determined that pursuant to these same planning documents, SOCBs (among other financial institutions) were instructed to provide financing to the "encouraged" projects, and that SOCBs did lend to both GTC and Starbright's OTR tire facilities. Finally, we have found that a reasonable and objective investigating authority could conclude on the basis of the record evidence that the SOCBs followed the policies set forth in the planning documents when they lent to GTC and Starbright.

9.107 For these reasons, we therefore conclude that China has failed to establish that the USDOC's finding in the OTR investigation, that lending by SOCBs to the OTR tire industry (in particular to GTC and Starbright) was *de jure* specific, was inconsistent with the obligations of the United States under Article 2.1(a) of the SCM Agreement.[405]

B. REGIONAL SPECIFICITY OF LAND-USE RIGHTS

1. Claims of China

9.108 China challenges the USDOC's determination in the LWS investigation that the provision of land-use rights to one company (Aifudi) located in the "New Century Industrial Park" (the "Industrial Park" or the "Park") was regionally specific. China claims that this determination was inconsistent with Article 2 of the SCM Agreement and, as a consequence, Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.[406]

2. Main arguments of the Parties

(a) China

9.109 China argues that for a subsidy to be regionally specific, it must be limited in three ways: (i) it must be limited to certain enterprises within a designated geographical region within the jurisdiction of the granting authority; (ii) it must be limited to "certain enterprises" as that term is defined in Article 2.1 of the SCM Agreement; and (iii) those certain enterprises must be located within the designated region. China argues that it follows *a contrario* from the limitations in Article 2.2, that if a subsidy is available to *all* enterprises within the designated region, then it is not regionally specific; and that if it is available to enterprises outside that region, it likewise is not regionally specific.[407]

9.110 In respect of the provision of land-use rights in the New Century Industrial Park, China argues that it is implicit in its specificity analysis that the USDOC considered the industrial park to be the "designated geographical region" in the sense of Article 2.2 of the SCM Agreement. China considers, however, that the term "designated geographical region" should be understood to mean an economic or administrative subdivision (region) within a particular physical area of a country

[405] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

[406] Paragraphs B.1(b)(i) and B.1(e)(i)-(iii) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (f); second written submission, para. 315 (g).

[407] China first written submission, paras. 283-284.

(geographical) that has been set apart for some special purpose (designated).[408] China finds contextual support for this reading of the term in Article 8.2(b) of the SCM Agreement (non-actionable subsidies), which referred to an eligible disadvantaged region, *inter alia*, as "a clearly designated contiguous geographical area with a definable economic and administrative identity". China argues that the similarity of the phrasing in Articles 2.2 and 8.2(b) means that the same concepts should apply to the term "designated geographical region" in Article 2.2 of the SCM Agreement.[409]

9.111 China cites the negotiating history of Article 2.2 of the SCM Agreement in support of its position. In particular, China recalls that the Dunkel Draft of the SCM Agreement provided that "a subsidy which is available to *all enterprises* located within a designated geographical region shall be specific irrespective of the nature of the granting authority", but that the phrase "available to all enterprises" was changed to "limited to certain enterprises" in the final version of the SCM Agreement.[410] For China this signifies that the drafters of the SCM Agreement considered – and rejected – the meaning that the United States now seeks to give to Article 2.2 of the SCM Agreement. By using the term "certain enterprises" in Article 2.2, as it is used elsewhere in Article 2, the drafters clearly intended that a subsidy would be regionally specific if it were limited to "*certain enterprises* located within a designated geographical region". This requires the same inquiry into whether the beneficiaries of the regional subsidy represent no more than a "discrete segment" of the economy, just as it does elsewhere in Article 2 of the SCM Agreement.[411]

9.112 In this regard, in response to a question from the Panel concerning the purpose of Article 2.2, in the light of this argument that for a subsidy to be specific under Article 2.2 it would need to be limited to only certain beneficiaries within the region, China states that this provision addresses the particular circumstance in which a subsidy is *in fact* limited to certain enterprises located within such a region. China notes in this regard that unlike Article 2.1(a), Article 2.2 does not refer to an "explicit limitation" of access to the subsidy by the granting authority or the legislation in question.[412]

9.113 China argues that the New Century Industrial Park is not a designated geographical region in the sense of Article 2.2 of the SCM Agreement because it did not have its own definable economic and administrative identity and had not been designated for any purpose, let alone to provide subsidies. Rather, it was simply an area of land that Huantai County had rezoned from agricultural to industrial use, and which it decided to call the "New Century Industrial Park".[413] China considers that the United States' argument, under which provision of land to any single company for less than adequate remuneration would be regionally specific to that land, would be "absurd". In particular, under the logic of the USDOC's "regional specificity" finding in respect of the Industrial Park, *any* parcel of land could be called "regionally specific".[414]

9.114 China asserts that during the investigation, the USDOC made no finding that the alleged subsidy was limited to "certain" enterprises located "within" the Industrial Park (i.e., a subset of all enterprises in the Park), and thus that it was not limited in the manner required by Article 2.2 of the SCM Agreement.[415] China further states that the USDOC did not find that the alleged subsidy was limited to enterprises obtaining land use rights in the Industrial Park, to the exclusion of companies obtaining such rights elsewhere in the county where the Park is located.[416] Finally, China argues, the

[408] China first written submission, paras. 286-287.
[409] Id., paras. 288-289.
[410] China response to Panel question 58 (first meeting); second written submission, para. 195.
[411] China second written submission, para. 195.
[412] China response to Panel question 58 (first meeting).
[413] China first written submission, para. 290.
[414] Id., para. 291.
[415] Id., paras. 293-294.
[416] Id., para. 295.

USDOC's specificity finding was that the provision of land rights (i.e., the financial contribution) was limited to enterprises in an industrial park within the county's jurisdiction, whereas the Agreement requires that for a valid finding of specificity, the USDOC would have needed to find that the *subsidy* was limited to certain enterprises within the Park, to the exclusion of others within the Park, and to the exclusion of others located elsewhere in the county.[417]

9.115 Finally, China argues, even if the USDOC had applied the legal framework advanced by China, the evidence would not support a finding that the alleged subsidy was limited to the Industrial Park. According to China, the evidence showed that all companies (with a small number of exceptions) within the Park paid the same lease rate, such that if there were a subsidy, it was not specific as all holders of the land-use rights paid the same rate. China states that the evidence also demonstrated that commercial leaseholders elsewhere in the county paid the same or lower rates than those within the Park. Thus, any subsidy was not limited to the Park, the area considered by USDOC as the "designated geographic region".[418]

(b) United States

9.116 The United States argues that the USDOC found that China's provision of land-use rights to Aifudi was regionally specific because it was limited by a county to enterprises located in an industrial park within the county's jurisdiction.[419] The United States argues that pursuant to Article 2.2 of the SCM Agreement, a subsidy is specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority, and Huantai County limited the land rights to enterprises located within a designated geographical region – the Industrial Park.[420] The United States argues that China's interpretation – that a "designated geographical region" must have its own economic and administrative identity – is overly strict, as these requirements do not appear in Article 2.2 of the SCM Agreement. Nevertheless, even by this overly-restrictive definition, the industrial park would qualify.[421] For the United States, "designated" means "'specified'" or "'called by a name'". Geographical means, *inter alia*, "'pertaining to, or of the nature of, geography'", with geography defined to include "'the features or arrangement of a region or a place, building, etc.'"; and "region" means, *inter alia*, "'[a] large tract of land; a country; a definable portion of the earth's surface".[422] Thus, for the United States, a "designated geographical region" is a large tract of land, defined by the tract of land's feature or arrangement, called by a name or described. According to the United States, the Industrial Park met this definition.[423]

9.117 The United States considers that it and China are of more or less the same view in terms of the meanings of "designated" and "geographical", but that they differ in respect of "region", where the United States' reading is much broader than China's "economic or administrative subdivision". Here, the United States disagrees that Article 8.2(b) of the SCM Agreement supports China's argument: among other things, if the drafters had meant "region" to connote "administrative or economic subdivision", they would not have had to include in Article 8.2(b) of the SCM Agreement the modifier "a definable economic and administrative identity" to the term "disadvantaged region".[424]

9.118 The United States takes further issue with China's argument that Article 2.2 of the SCM Agreement requires that a subsidy must be limited to "certain enterprises" (i.e., a subset of enterprises)

[417] China first written submission, paras. 296-297.
[418] Id., paras. 299-301.
[419] United States first written submission, para. 364.
[420] Id., para. 366.
[421] Id., paras. 367-368.
[422] Id., para. 369.
[423] Id., para. 370.
[424] Id., paras. 371-372.

within the region in order to be regionally specific. For the United States this would render Article 2.2 itself redundant, as in any case, even without any geographical limitation, the subsidy would be specific to "certain enterprises" pursuant to Article 2.1(a), and such an interpretation would be impermissible.[425] Furthermore, the United States considers that Article 8.2(b) of the SCM Agreement supports its, not China's view, as that provision indicates that in order to be non-actionable, the specified regional subsidies among other things would need to be "non-specific" within the regions. Under China's interpretation, this would be unnecessary to specify, as such non-specific aid within a region would already fall outside the scope of the Agreement.[426] The United States also points to Article 8.1(b) of the SCM Agreement which refers to the various non-actionable subsidies listed in Article 8.2 as specific, including the regional subsidies referred to in Article 8.2(b) which are, by definition, non-specific within the regions in question. According to the United States, here again, the non-specificity requirement in Article 8.2(b) would be unnecessary if those subsidies already were, in general, non-specific pursuant to Article 2.2 of the SCM Agreement.[427]

9.119 Finally, the United States argues that the availability of similar subsidies to enterprises outside the region does not invalidate a finding of regional specificity. The United States asserts that if this were the case, governments could easily circumvent the SCM Agreement by providing a given subsidy to one company outside the region. According to the United States, the land-use rights subsidy at issue was used as an incentive to relocate producers to the Industrial Park, and was tied to the level of investment within the Park. The fact that the county granted other types of land-use rights to other leaseholders outside the Park is irrelevant to the regional specificity of the land-use subsidy provided to enterprises in the Park.[428]

9.120 Concerning the facts of the investigation, the United States asserts that evidence on the record distinguished the way in which land-use rights were provided by the government in the Industrial Park, in that only enterprises with a certain level of investment qualified, and the subsidy was available only to enterprises willing to physically locate in the Park. In addition, the record evidence indicated that land-use rights were not provided in accordance with government-established requirements, as the land in question had not been converted from agricultural to industrial use at the time the land-use rights were provided to the enterprises in the Park. Furthermore, the local authorities had not conducted a formal appraisal of the land, as was required. In these ways, the United States argues, the provision by the county government of land-use rights in the Park was distinct from its provision of land-use rights outside the Park.[429]

3. Main arguments of the Third Parties

(a) Australia

9.121 Australia disagrees with China that a subsidy is non-specific if it is available to all enterprises located within a designated geographic region under the jurisdiction of the granting authority. Rather, regional specificity stems from the limitation based on regional locality. Australia therefore disagrees with China that Article 2.2 of the SCM Agreement involves a three-step test. Australia considers that such a test would render the regional specificity provision (Article 2.2) redundant, as one of the other bases for specificity (2.1(a)-(c)) already would be present under the three-step test. Australia considers Articles 8.1(b) and 8.2(b) of the SCM Agreement to be relevant context, and also suggests

[425] *See, e.g.,* United States first written submission, paras. 374-376; opening statement at the first meeting of the Panel, para. 35; second written submission, para. 167.
[426] United States first written submission, para. 377.
[427] Id.
[428] Id., paras. 380-382.
[429] United States response to Panel question 8 (second meeting).

that the Panel consider whether the reference in Article 2.2 to "certain enterprises" is descriptive to distinguish between enterprises that are located within the designated geographical regional and those that are outside.[430]

(b) Canada

9.122 Canada agrees with the United States that Article 2.2 of the SCM Agreement simply covers subsidies that are limited to a designated geographical region. According to Canada, reading Article 2.2 as also targeting subsidies that are limited to certain enterprises as provided for in Article 2.1, would allow all enterprises located in a designated geographical region to escape the disciplines of the SCM Agreement, even if these subsidies are not broadly available within the country.[431]

(c) European Communities

9.123 The European Communities argues that subsidies destined to *all* enterprises in *a* geographical region are not considered specific under Article 2.2 of the SCM Agreement, noting that the text of this provision was changed from what was proposed in the Dunkel Draft of the SCM Agreement, which would have rendered all regional subsidies specific. For the European Communities, such a change should have meaning. The European Communities argues that the specificity of regional subsidies must be established by an integrated reading of Article 2 of the SCM Agreement. In particular, the European Communities is of the view that if eligible regions under a regional subsidy programme are chosen on the basis of objective criteria under Article 2.1(b), there would be no regional specificity.[432]

4. Assessment by the Panel

(a) Interpretation of Article 2.2 of the SCM Agreement

9.124 We begin our analysis with the text of Article 2.2 of the SCM Agreement which reads as follows:

> "2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement".

9.125 The particular language in dispute between the parties is the first sentence. First, the parties disagree whether the reference to "certain enterprises" means that for specificity in the sense of Article 2.2 of the SCM Agreement to exist, there must be a limitation of a subsidy to a subset of enterprises located within a designated geographical region, or instead whether limitation of a subsidy on a purely geographic basis, to part of the territory within the jurisdiction of the granting authority, is sufficient.

9.126 The parties also disagree as to the meaning of "designated geographical region". For China, this language refers to a formal administrative entity, whereas for the United States it refers to any specified, identified large piece of land (whether or not it has a separate administrative identity or apparatus).

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[430] Australia third-party submission, paras. 33-36.
[431] Canada third-party submission, paras. 60-62.
[432] European Communities third-party submission, para. 46.

(i) "Certain enterprises" as referred to in Article 2.2 of the SCM Agreement

9.127 Beginning with the term "certain enterprises" we recall, as discussed *supra* in the context of *de jure* specificity, that the chapeau to Article 2.1 of the SCM Agreement defines this term as follows:

> "In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific *to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises")* within the jurisdiction of the granting authority, the following principles shall apply:". (emphasis added)

9.128 Thus, the first question concerning the meaning of the term "certain enterprises" in Article 2.2 of the SCM Agreement is whether that phrase covers all enterprises located within the designated geographical region within the jurisdiction of the granting authority, or is limited to some subset thereof. For China, this term should be understood to mean that only if a subsidy is limited to some subset of enterprises within the region is that subsidy regionally specific. For the United States, however, the reference to "certain enterprises" in the particular context of Article 2.2 serves to distinguish those enterprises within the designated region from those outside it. To try to answer this question, we first substitute into the text of Article 2.2 of the SCM Agreement the full phrase that is equivalent to the contraction "certain enterprises". This would read, in pertinent part, "[a] subsidy which is limited to [*an enterprise or industry or group of enterprises or industries*] located within a designated geographical region within the jurisdiction" of a granting authority. We do not consider, however, that the text of the provision, in isolation, either with or without this substitution, sheds particular light on the question at issue.

9.129 We thus next turn to the context of the provision, the most relevant of which we find to be that afforded by Articles 8.1(b) and 8.2(b) of the SCM Agreement, as these Articles together shed considerable light on the question before us. These provisions read, in relevant part:

> "8.1 The following subsidies shall be considered as non-actionable [footnote omitted]:
>
> (a) subsidies which are not specific within the meaning of Article 2;
>
> (b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.
>
> 8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:
>
> [...]
>
> (b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development [footnote omitted] and non-specific (within the meaning of Article 2) within eligible regions provided that:
>
> (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;

(ii) the region is considered as disadvantaged on the basis of neutral and objective criteria [footnote omitted], indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

[...]".

9.130 Before considering the exact wording of these provisions, we first recall that the overall purpose and effect of Article 8 of the SCM Agreement during the period when it was in force[433], as indicated in Article 8.1(b), was not to change the specificity rule of Article 2 of the SCM Agreement. Rather, Article 8 gave a special non-actionable status to a limited subset of the universe of specific subsidies which, in the absence of that Article, would have been actionable by virtue of their specificity. Upon the lapsing of Article 8, the formerly non-actionable subsidies simply reverted to the same (actionable) status as all other specific subsidies.

9.131 Turning now to the text of Article 8.1(b) of the SCM Agreement, we note that this provision explicitly identifies as "specific" all of the subsidies described in Article 8.2 as non-actionable. In particular, this provision describes the non-actionable subsidies as "subsidies which are specific within the meaning of Article 2 but which meet" the conditions provided for in the various sub-paragraphs of Article 8.2, including Article 8.2(b), covering assistance to disadvantaged regions. In other words, Article 8.1(b) makes clear that the subsidies for disadvantaged regions described in Article 8.2(b), as well as the other subsidies described in Article 8.2 are, by definition, "specific" within the meaning of the SCM Agreement. This of course is logical, as if these subsidies were not specific, they would not be covered by, and thus would not be actionable pursuant to, the SCM Agreement. Indeed, Article 8.1(a) of the SCM Agreement makes this point explicitly, identifying as one of the two categories of non-actionable subsidies those "subsidies which are not specific within the meaning of Article 2".

9.132 As for Article 8.2(b) of the SCM Agreement, the relevant point for this dispute is that in order for a subsidy to a disadvantaged region to have had non-actionable status, that subsidy, *inter alia*, had to be "*non-specific* [...] *within* [an] eligible region [...]". What this means is that a subsidy to a particular, disadvantaged region was defined by the SCM Agreement as specific in the sense of Article 2 of the Agreement, in spite of being non-specific *within* the region in question. Had the non-specificity within the region been enough to render the subsidy non-specific in the sense of Article 2, this would have made Article 8.2(b) entirely redundant given, as just noted, that non-specific subsidies are not covered by, and thus not actionable in any way under, the SCM Agreement. Furthermore, in view of the fact that the regional aid in question, to be non-actionable, had to be non-specific within the region in question, the only possible basis for such aid to be specific pursuant to Article 2 was its geographical limitation, i.e., on the basis of Article 2.2 of the SCM Agreement on regional specificity.

[433] Pursuant to Article 31 of the SCM Agreement, Articles 6.1, 8 and 9 applied provisionally for five years from the entry into force of the WTO Agreement, and the period of application could have been extended by consensus decision of the SCM Committee. No such consensus was reached, however, and these provisions thus lapsed.

9.133 Finally, we consider the role of Article 2.2 within Article 2, especially in relation to Article2.1 of the SCM Agreement. Here, we are concerned by the implications of China's argument that subsidies limited to a designated geographical region within the jurisdiction of a granting authority would have to be *further* limited to a *subset* of the enterprises located within that region in order to be specific in the sense of Article 2.2 of the SCM Agreement. In our view, such an interpretation would be inconsistent with the principle of effective treaty interpretation: it would entirely deprive Article 2.2 of meaning and purpose, as any such subsidy already would be specific pursuant to Article 2.1 of the SCM Agreement. By the same token, to view Article 2.2 as a particular case of the specificity referred to in Article 2.1, i.e., where the "certain enterprises" in Article 2.2 are those located within the designated geographical region, does not render Article 2.2 redundant. This is particularly clear when Article 2.2 and Article 8.2(b) are considered together, given that Article 8.2(b) defined and singled out for special treatment under the disciplines of the SCM Agreement a subset of the regionally specific subsidies covered by Article 2.2 of the SCM Agreement.

9.134 We recall that in response to our question on this point, China argued that the purpose of Article 2.2 of the SCM Agreement is to address "the particular circumstance in which a subsidy is *in fact* limited to certain enterprises located within" a designated geographical region, by which we understand China to argue that specificity in the sense of Article 2.2 can exist only in the *de facto*, and not in the *de jure*, sense. In the first place, such an interpretation would not resolve the issue, as a subsidy such as the one described by China already would be specific pursuant to Article 2.1(c) of the Agreement. Nor do we see any limitation to *de facto* specificity in the text of Article 2.2 of the SCM Agreement. Indeed, the only textual basis that China offers in support of this argument is that, unlike Article 2.1(a), Article 2.2 does not refer to an "explicit limitation" of access to the subsidy by the granting authority or the legislation in question. Given, however, that regional specificity appears in its own article (Article 2.2), separate from the general provisions containing the respective definitions of *de jure* and *de facto* specificity, and given as well that Article 2.2 does not refer either to *de jure* or *de facto* specificity, we see no basis in the text for concluding that Article 2.2 would pertain only to a *de facto* situation, and not a *de jure* one, or *vice versa*. In our view, such an interpretation not only is unsupported by the text, but also is considerably less plausible than one that would read Article 2.2 as a particular case of specificity, on the basis of geographic limitations, which could arise in either the *de jure* or the *de facto* sense.

9.135 On the basis of the foregoing analysis we conclude that the term "certain enterprises" in Article 2.2 of the SCM Agreement refers to those enterprises located within, as opposed to outside, the designated geographical region in question, with no further limitation within the region being required.

9.136 Given that we find this meaning to be clear based on the text of the provision in its context and in light of the object and purpose of the provision and the SCM Agreement, we see no need to resort to supplemental means of interpretation in respect of this issue. We note, however, that China has raised arguments based on the negotiating history of Article 2.2 of the SCM Agreement, and we thus now consider those arguments.

9.137 In particular, China compares the adopted Uruguay Round text of Article 2.2 of the SCM Agreement with the counterpart provision in the "Dunkel Draft"[434] of the Agreement. China recalls that the Dunkel text read, in pertinent part:

[434] China refers to the Draft Text on Subsidies and Countervailing Measures of 7 November 1990 (MTN.GNG/NG10/23). (China second written submission, footnote 160). We note that this document is one of the so-called "Cartland drafts" of 1990 and that the "Dunkel Draft" (20 December 1991) was circulated in document MTN.TNC/W/FA. The relevant texts of both documents, however, contain the wording on regional specificity cited by China.

> "A subsidy which is available to all enterprises located within a designated geographical region shall be specific irrespective of the nature of the granting authority".

while the adopted language in the SCM Agreement reads:

> "A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific".

For China, the change of the language from "available to all enterprises" in the Dunkel Draft to "limited to certain enterprises" in the final, adopted Agreement means that the negotiators considered – and rejected – the meaning whereby a subsidy would be specific pursuant to Article 2.2 based on geographical limitation only.

9.138 In considering this argument, we note that the changes between the Dunkel text and the adopted text of the SCM Agreement go beyond the substitution of the term "limited to certain enterprises" for "available to all enterprises", and that the meaning of this change can only be understood by looking at the entirety of the two sentences. In particular, the Dunkel text provided that *even if* a subsidy granted within a region were completely generally available, to "all enterprises" within a designated geographical region, it would have been specific, without regard to who the granting authority was or what its territorial reach was. In practical terms, this would have meant that even a subsidy granted by a provincial government to *all* enterprises within the *entirety* of its own territory would have been regionally specific.

9.139 By contrast, Article 2.2 of the SCM Agreement changes the focus of the provision, to the granting authority in juxtaposition with its geographical jurisdiction, such that only where a subsidy is *limited* to a *subpart* of the territory within the jurisdiction of the granting authority would specificity arise under this provision. It is this change in orientation and focus between the Dunkel text and the SCM Agreement that explains the need, from the point of view of technical drafting, to change "available to all" to "limited to certain". The negotiating history of the provision thus certainly does not detract from, and if anything supports, the conclusion that we have reached regarding the term "certain enterprises" in Article 2.2 of the SCM Agreement based on our analysis of that provision itself.

(ii) "Designated geographical region" in Article 2.2 of the SCM Agreement

9.140 A further question of legal interpretation raised by China's claim is whether a "designated geographical region" in the sense of Article 2.2 of the SCM Agreement must necessarily have some sort of formal administrative or economic identity as China argues, or whether any identified tract of land within the territory of a granting authority can be a "designated geographical region" for the purposes of a specificity finding pursuant to Article 2.2 of the Agreement. Starting with the text of Article 2.2, we find no limitation of the kind advanced by China, nor does China point to one. Thus, the text on its own would appear to allow any identified tract of land within the jurisdiction of a granting authority to be a "designated geographical region" in the sense of Article 2.2 of the SCM Agreement.

9.141 We recall that China's main support for its argument is the context provided by Article 8.2(b) of the SCM Agreement. In particular, China recalls that Article 8.2(b) required that a disadvantaged region in the sense of that provision, *inter alia*, had to be clearly designated and contiguous, and had to have a definable economic and administrative identity. China argues that due to the similarity of the language in Articles 2.2 and 8.2(b), the concepts in the latter provision should also apply to the term "designated geographical region" in Article 2.2 of the SCM Agreement.

9.142 We note first that in fact the texts of the two provisions are different. As an initial matter, we consider that if the drafters had intended for their meanings to be the same, they would have used the same language in both places.

9.143 In addition, we recall that the purpose and function of Article 8 of the SCM Agreement was to confer non-actionable status on a certain subset of the subsidies that are specific in the sense of Article 2 of the SCM Agreement. Given this, we consider that the context provided by Article 8.2(b) in respect of the meaning of the term "designated geographical region" in Article 2.2 points rather to the opposite conclusion from that drawn by China. In particular, the requirements in Article 8.2(b) imposed special restrictions and conditions the purpose of which was to define and circumscribe, from among the universe of subsidies that were specific on the basis of Article 2.2, those that were non-actionable. The need for these restrictions and conditions thus is obvious, i.e., to ensure that the assistance was in reality limited to generalized economic assistance to regions that were economically disadvantaged based on specified, quantifiable parameters, and to prevent the non-actionability provisions from being used to disguise what in fact were targeted, trade distortive subsidies. Indeed, without the additional restriction that a disadvantaged region, to qualify under Article 8.2(b), among other things had to have a definable economic and administrative identity, it would have been possible for Members to define any parcel of land – including, say, a particular, individual factory – as a "disadvantaged region" and on that basis to provide non-actionable subsidies to that plant, thus entirely avoiding the disciplines of the SCM Agreement. Similarly, if China's argument as to the meaning of "designated geographical region" in Article 2.2 were correct, it would become a simple matter to circumvent the SCM Agreement by providing subsidies through industrial parks or similar geographical areas, without targeting particular enterprises within those areas.

9.144 On the basis of the foregoing analysis, we conclude that a "designated geographic region" in the sense of Article 2.2 of the SCM Agreement can encompass any identified tract of land within the jurisdiction of a granting authority.

(b) USDOC regional specificity determination

9.145 Having reached our conclusions regarding the legal interpretation of Article 2.2 of the SCM Agreement, we now turn to the USDOC's regional specificity determination in the LWS investigation, in respect of the provision of allegedly subsidized land-use rights.

(i) USDOC determination

9.146 In the LWS investigation, the USDOC determined that China's provision of land-use rights in the New Century Industrial Park to an investigated producer (Aifudi)[435] constituted a countervailable subsidy in the form of land-use rights for less than adequate remuneration. The USDOC first found that China's provision of land-use rights to Aifudi constituted a financial contribution by a government in the form of provision of goods or services. The USDOC then found that this financial contribution was *de jure* specific because the provision of the land-use rights within the Industrial Park was limited to an enterprise or industry located within a designated geographical region. Furthermore, since the provision of land-use rights was found to be "regionally specific", the USDOC determined that factors such as the number of users and the types of industries were not relevant to its specificity analysis.[436] The USDOC then found, as a separate step, that the land-use rights were

[435] The USDOC's determination indicates that "Golden Moon" was the enterprise that actually obtained the land-use rights, that it shared the land with Aifudi in the Industrial Park, and that the two enterprises were cross-owned. The USDOC therefore referred to Aifudi as the buyer of the land-use rights. (Exhibits CHI-3, p. 14 and CHI-34, p. 67906).

[436] Exhibit CHI-3, pp. 14 and 55.

provided for less than adequate remuneration and therefore conferred a benefit.[437] We consider China's claims in respect of this benefit determination in Section X, *infra*.

9.147 Concerning specificity, the USDOC found that the provision of land-use rights was specific because the provision of those rights in an industrial park within the county's jurisdiction was limited to an enterprise or industry or group thereof located within a designated geographical region.[438] In particular, the USDOC found that Aifudi was situated in an industrial park that had been created by the Huantai County government for the purpose of providing industrial land-use rights to industries within that government's jurisdiction, i.e., that the New Century Industrial Park was within the authority of Huantai County and thus that Aifudi received land-use rights by virtue of its location in the Industrial Park.[439]

9.148 The USDOC indicated that at verification it had confirmed that the county had identified a specific, contiguous area of land within its jurisdiction, designated that land as an industrial park, and controlled the granting of land-use rights within the industrial park.[440] On the latter point, officials from the Huantai County Land Bureau had indicated at verification that the county government gave the final approval to companies for land-use rights, and that all levels and all agencies of the county government had to approve land-use rights.[441]

9.149 Thus, the USDOC's determination makes clear that its regional specificity finding was in respect of the government financial contribution, i.e., the provision of land-use rights. The USDOC's benefit determination was a separate step in its analysis of this programme.

9.150 As discussed *supra*, China's basic arguments against this approach are that regional specificity cannot be determined solely on the basis of geographic location but must involve a further selectivity, and that regional specificity can only exist in a *de facto* but not in a *de jure* sense. China's general argument that *de jure* specificity (on whatever basis) cannot be found unless the law or regulation in question specifies all elements of a specific subsidy (financial contribution and benefit, as well as specificity) also is relevant here.

9.151 Part of China's specificity argument thus also concerns the benefit element of USDOC's finding regarding the provision of land-use rights. That part of the finding was that the land prices within the park, the purpose of which was to provide land-use rights, were below-market, as measured against an external market benchmark (certain land-use prices in Bangkok and adjacent provinces). China argues however that the evidence on record showed that land prices within the Industrial Park were if anything higher than those outside the Park in the same county, and that this comparison should have factored into both the specificity and benefit determinations. In particular, for China, even if regional specificity were determined on the basis of geography alone, the price for land use inside the Industrial Park would need to be lower than land use prices elsewhere in the county for either a benefit or any possibility of regional specificity to exist.

(ii) Assessment by the Panel

9.152 The question before the Panel in respect of the LWS investigation is whether the USDOC's finding that the provision of land-use rights to Aifudi was regionally-specific was consistent with the SCM Agreement. The United States argues that there was a financial contribution by a government (provision of land-use rights which are totally controlled by the government), and that the particular

[437] Exhibit CHI-3, p. 14.
[438] Id.
[439] Id., p. 55.
[440] Id.
[441] Id., pp.14 and 55.

land-use rights in question – those to Aifudi, which were in the Industrial Park – were regionally specific because they were available only to the companies operating in the Industrial Park. The United States also argues that there was very little record evidence on prices of land-use outside the Park, and that even if there were some subsidies conferred to some land-users outside the Park that would not alter the fact that land-users in the Park were receiving land-use subsidies by virtue of their location (i.e., regionally-specific subsidies).

9.153 China, in addition to its legal arguments that regional specificity cannot be determined on the basis of a geographic limitation alone, and that an industrial park cannot be a designated geographic region, argues that the evidence of record did not show that any benefit was enjoyed by Aifudi that was not also enjoyed by other companies inside the Industrial Park and, moreover, showed that the price for land-use in the Industrial Park was if anything higher than that outside the Park in Huantai County.[442] As such, according to China, being located in the Industrial Park conferred no special advantage.[443] China thus seems to be saying that even if any subsidy existed, it was generally available to purchasers of land-use rights in Huantai County. China also argues that by the USDOC's logic, the provision by a government of any piece of land would be regionally specific purely by virtue of the geographical nature of land; an outcome that China considers would be absurd.

9.154 We note that there is no substantial disagreement between the parties as to the facts of the situation. The record evidence indicates that all of the land in China ultimately was owned by the government, that before agricultural land could be put to industrial use it had to be converted by the relevant provincial government, and that the provision of land-use rights to particular enterprises was the responsibility of the relevant municipal (county) government. The record evidence also indicates, and the parties do not disagree, (i) that the Industrial Park was created through the conversion, by the Huantai County government, of a tract of agricultural land to industrial use, and (ii) that only sometime after the establishment of the Industrial Park and the installation of a number of enterprises (including Aifudi) in the Park was that land conversion brought to the attention of, and approved by, the provincial government. Finally, there is no disagreement between the parties as to the price that Aifudi paid for the land, or as to the prices paid under other land-use contracts on the record, for certain land both inside and outside of the Industrial Park. Where the disagreement on the latter point lies is in respect of the relevance of such other land prices to the question of specificity, and in respect of the representativeness of this other pricing information (the United States notes that only a few such contracts were produced by the respondents in response to the USDOC's request).

9.155 We recall our finding, *supra*, that it is not necessary for a granting authority or the relevant legislation to identify all elements of a specific subsidy for a valid finding of *de jure* specificity. We thus find no legal error in the USDOC having based its determination of regional specificity on the element of the financial contribution, i.e., on the provision of land-use rights by Huantai County.

9.156 We also recall our finding that an industrial park, as a designated tract of land within the jurisdiction of a granting authority, would fall within the scope of the term "designated geographical area within the jurisdiction of the granting authority" in Article 2.2 of the SCM Agreement. We thus find no error in the USDOC's having found the Industrial Park to be a "designated geographical area" within the jurisdiction of Huantai County.

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[442] China second written submission, para. 200.

[443] Id., para 202. In particular, China argues that the subsidy that the USDOC determined to be countervailable was the provision of land by the government at a price that the USDOC considered to represent less than adequate remuneration, but that the United States fails to identify any aspect of the alleged subsidy that was "only available" to companies located within the New Century Industrial Park. According to China, the same government – Huantai County – provided land to enterprises located outside of the "designated geographical region" at the same or lower prices, and the subsidy identified by the USDOC therefore was not "unique" or "only available" to companies located within the New Century Industrial Park. (Id.).

9.157 Finally, we recall our finding that specificity in the sense of Article 2.2 of the SCM Agreement refers to limitation of access to a subsidy on the basis of geographic location alone, and that no further limitation to a subset of the enterprises in the region in question is necessary for such specificity to exist. Thus, we find no error in the fact that the USDOC, in reaching its regional specificity determination, did not examine whether some of the companies in the Industrial Park obtained their land-use rights on more favourable terms than others.

9.158 We do not consider that these findings fully resolve this claim, however. In particular, we are troubled by the implications of the USDOC's analytical approach in the context of the specific facts of the LWS investigation. In this regard, we read the USDOC's determination as meaning that the provision of the land-use rights to Aifudi was regionally specific because the land was physically located in a designated area within the jurisdiction of the granting authority, i.e., inside the Industrial Park. In particular, the USDOC indicated in its determination that the Industrial Park was created for the purpose of providing land-use rights to companies that were located there, and thus met the criteria for regional specificity. We consider that this reasoning is essentially circular, however, given that land itself *is* a location.

9.159 Furthermore, we recall the undisputed fact of record that in China the government was the ultimate owner of all land. This implies first that any time an enterprise obtained land-use rights anywhere in China it was receiving a financial contribution by a government. The further implication of the USDOC's approach would be that those land-use rights, wherever in China they were provided, would be regionally specific, given that land is by definition always limited by and to its geographic location. Here, we note that in the investigation before us, while a perimeter was drawn around a particular tract of land within the jurisdiction of the granting authority, which was labelled the New Century Industrial Park, and the USDOC considered the Park, rather than Aifudi's particular piece of land within it, to be the "geographical region" in question, we see no basis under the USDOC's analytical approach, and the United States points to no record evidence, to establish that the provision of land-use rights in the Industrial Park constituted a distinct regime for the provision of that financial contribution, compared with the provision of financial contributions in the form of land-use rights outside the Park.

9.160 Nor has the United States pointed to anything in the record that shows that the creation of the Industrial Park went beyond the re-zoning of a particular tract of land from agricultural to industrial use. While this re-zoning initially was undertaken by the county government without the required provincial government authorization, that authorization was subsequently obtained. We note in this regard that the verification report indicates that there was no separate land policy for land in industrial zones, and that as long as land was for industrial use, it had to be in accordance with industrial land policy, which applied whether the land was inside or outside an industrial zone.[444] We further recall that the USDOC's determination and the evidence cited therein indicates that the county government set the industrial land-use prices both within and outside the Industrial Park, and the United States points to no record evidence showing that the industrial land-use prices within the Park were uniform[445], or that these prices had any clear distinctive identity compared with the prices outside the Park, indicating that the land-use regime for the Park was a distinct financial contribution. We emphasize that we refer here to land-use prices, and in particular to any indication on the record of differences in land-use prices within and outside the Industrial Park, as possible factual evidence of the existence of a separate land-use regime for the Industrial Park. We do not mean to imply that any such price differences would be indicative of the existence or amount of a benefit, which is a separate issue, addressed in Section X, *infra*. The ultimate implication of the USDOC approach to regional

[444] *Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Provincial and Local Government* (the "Verification Report"), Exhibit US-79, p. 8.

[445] The Verification Report indicates that there were at least two land-use prices within the Park. (Id., pp. 12-14).

specificity in respect of the land-use rights at issue is that if it was then determined (as was the case in the LWS investigation) that the particular land-use rights in question were provided for less than adequate remuneration, the result would be that a regionally specific subsidy would be provided. This would be the case even if all purchasers of land-use rights throughout the jurisdiction of the granting authority paid exactly the same below-market price for land, because each individual purchase, due to its inherent geographical limitation, would be regionally specific.

9.161 We consider that such an outcome, and thus the approach that generates it, cannot be reconciled with Article 2 of the SCM Agreement, the purpose of which is to identify those subsidies that by virtue of being limited on some basis, are subject to the Agreement's disciplines. We therefore find that the USDOC's determination of regional specificity in respect of the provision of land-use rights to Aifudi is inconsistent with the obligations of the United States under Article 2 of the SCM Agreement.

9.162 We emphasize here that our conclusion concerning the USDOC's regional specificity finding in the LWS investigation is driven by the specific facts that were on the record of that investigation. In particular, we emphasize that we are not saying that the intrinsic geographic nature of land-use rights would always preclude a regional specificity finding in respect of the provision of land-use rights. Nor, when we say that the United States has pointed to no record evidence that the Industrial Park constituted a unique land-use regime, as might have been indicated by special rules or distinctive pricing or other elements that distinguished the provision of land in the Park from the provision of land outside the Park, do we mean to imply any factual findings of our own that the Industrial Park was or was not such a regime, or that the terms and conditions for land-use inside the Park were or were not indistinguishable from those outside. It is entirely possible that evidence relevant to these points existed, and had such evidence been placed on the record, it might have resulted in a finding of regional specificity consistent with Article 2.2 of the SCM Agreement.

9.163 It does not appear to us, however, that the USDOC pursued these or similar lines of inquiry assiduously. Indeed, while before us the United States argues that the record evidence on land prices outside the Industrial Park was thin because China only supplied a few examples of such land-use contracts, and while in its determination the USDOC implies that those contracts were not fully relevant to its inquiry[446], we note that when it verified that information, the USDOC appears not to have requested any additional land-use contracts, but instead simply verified the ones it was given.[447] As for the nature of the Industrial Park, we see no indication in the record evidence that the USDOC examined whether it constituted a land-use regime that was clearly distinguishable from the general provision of land-use rights by the county government. Instead, the USDOC appears to have focused principally on the process by which the Industrial Park was created, and the irregularities in that process, as well as on how the land-use prices were set both inside and outside the Industrial Park, but with no findings as to any clear basis on which the provision of a financial contribution in the form of land-use rights differed as between land inside and outside the Park. In short, had the USDOC made

[446] On this point, the USDOC's determination reads:

> "Although the Department was provided some documentation at verification showing the prices charged for land-use rights in an industrial park in another county, these two contracts were not contemporaneous with the original contracts negotiated for Aifudi's land-use rights [...] Similarly, our examination of two other contracts for industrial land located in Huantai county that is outside of the industrial park, did not provide us any information as to how these prices were determined". (Exhibit CHI-3, p. 59).

[447] The Verification Report indicates that "we [...] requested and the land bureau provided us with information on contracts for industrial land outside of the industrial zone". (Exhibit US-79, p. 14). There is no indication in the report either that the information in the contracts was unable to be verified, or that any additional contracts were requested.

further inquiries into these or similar issues, and depending on the outcome of those inquiries, our conclusions as to the WTO-consistency of the USDOC's regional specificity finding in respect of the provision of land-use rights to Aifudi might have been different.

9.164 For the foregoing reasons, we conclude that the USDOC's determination of regional specificity in respect of the provision of land-use rights to Aifudi was inconsistent with the obligations of the United States under Article 2 of the SCM Agreement.[448]

X. CHINA'S CLAIMS PERTAINING TO BENCHMARKS

A. CLAIMS OF CHINA

10.1 China claims that, "in connection with each instance in which US authorities resorted to a benchmark outside of China for the purpose of determining the existence and amount of any alleged subsidy benefit", the USDOC's "rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, subject producers received a subsidy benefit under the methodologies set forth in Article 14" was inconsistent with that provision and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994.[449] Under this generally-worded claim, China raises the following series of specific allegations.

10.2 First, China alleges, in respect of SOE-produced inputs[450] in the CWP, LWR and LWS investigations, that the USDOC unlawfully presumed that Chinese private prices were distorted, based exclusively on the extent of government involvement in the market, and that it thus acted inconsistently with Article 14(d) of the SCM Agreement when it rejected those prices as benchmarks and resorted instead to benchmarks based on out-of-country prices, i.e., it failed to determine the adequacy of remuneration for the inputs in relation to prevailing market conditions in China. China argues that the USDOC's reliance on these alternative benchmarks for measuring adequate remuneration with respect to the provision of inputs in the three investigations "was predicated exclusively on its invalid findings that private prices were distorted", and that "[a]ccordingly, all of [the USDOC's] benefit calculations relying on those alternative benchmarks likewise are invalid".[451]

10.3 Also concerning these inputs, China notes that the alleged unlawfulness of the distortion findings and consequential rejection of Chinese private prices "makes it unnecessary for the Panel to inquire whether each alternative benchmark [...] satisfied the requirements set forth in Article 14(d)".[452]

10.4 Second, China alleges, in respect of government provision of land-use rights in the LWS and OTR investigations, that the USDOC unlawfully presumed that private prices for land-use in China were distorted due to the significant government role in the market, and that it thus acted inconsistently with Article 14(d) of the SCM Agreement when it rejected those prices as benchmarks and resorted instead to benchmarks based on out-of-country prices. i.e., it failed to determine the adequacy of remuneration for land-use rights in relation to prevailing market conditions in China.[453]

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[448] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

[449] Paragraphs B.1(d)(i) and B.1(e)(i)-(iii) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (b) and (e)-(g); second written submission, para. 315 (c) and (f)-(h).

[450] Both sourced directly from SOEs and purchased from trading companies. (China first written submission, para. 129).

[451] *See*, generally, China first written submission, paras. 113-130.

[452] Id., paras. 129-130.

[453] China first written submission, paras. 302-306.

10.5 Third, also in connection with land-use rights, China alleges that the USDOC failed to satisfy the requirements of Article 14(d) in respect of the particular benchmark that it used (certain land prices in Bangkok, Thailand), because Thai land prices (and foreign land prices more generally) do not relate or refer to prevailing market conditions for land-use rights in China.[454]

10.6 Fourth, China alleges, in respect of SOCB loans denominated in RMB, the USDOC's rejection in the OTR, CWP and LWS investigations of Chinese RMB interest rates as benchmarks was inconsistent with Article 14(b), as only Chinese RMB-denominated loans are "comparable commercial" loans that the borrowers "could actually obtain" in a lending market in which they were able to borrow in that currency.[455]

10.7 Fifth, also concerning SOCB loans denominated in RMB, China argues that the USDOC's 33-country regression analysis used in the OTR, CWP and LWS investigations to generate the benchmark interest rates did not represent "comparable commercial loans" that the borrower could "actually obtain on the market", as the fictitious loans were not denominated in the same currency and, being fictitious, no borrower could "actually obtain" these loans in any commercial market.[456]

10.8 Sixth, concerning SOCB loans denominated in U.S. dollars, China alleges that by using as a benchmark in the OTR investigation an average annual LIBOR rate, the USDOC used a benchmark that was inconsistent with Article 14(b), as it did not reflect what the tire producer at issue (GTC) "would pay on a commercial loan" that it "could actually obtain on the market". That is, GTC would not have paid an average annual LIBOR rate, but rather the correct daily LIBOR rates for a dollar-denominated loan of the same maturity and the same interest rate terms as the SOCB loans.[457]

B. APPLICABLE PROVISIONS OF THE COVERED AGREEMENTS

10.9 China's request for the establishment of the Panel included claims under both Article 14 of the SCM Agreement as well as under Section 15, paragraphs (b) and (c), of China's Protocol of Accession. Section 15(b) of China's Protocol of Accession contains rules pertaining to the determination of the existence and amount of benefit in countervailing duty investigations on Chinese products.[458] Section 15(c) imposes upon importing Members the obligation to notify, *inter alia*, the methodologies that it uses pursuant to Section 15(b).

10.10 In its submissions to the Panel, China requested that the Panel only make findings with respect to the WTO-consistency of the USDOC benefit determinations at issue under the provisions of Article 14 of the SCM Agreement.[459, 460] China reserved its right to present arguments under Sections 15(b) and (c) of its Protocol in the event that the United States invoked the disciplines

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[454] China first written submission, paras. 307-319.

[455] *See, e.g.*, China first written submission, paras. 233 and 238-239.

[456] Id., para. 245.

[457] Id., para. 242.

[458] *See* Section VII.B, *supra*.

[459] The main provision of the SCM Agreement cited by China is Article 14. China's claims under Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 are consequential to its claims under Article 14.

[460] China first written submission, paras. 29-30 and footnote 8; response to Panel question 25 (first meeting). Essentially, China considers that in the investigations at issue, the USDOC did not rely upon Section 15(b) as a rationale for its use of non-Chinese benchmarks, or that the USDOC considered that the conditions for resorting to out-of country benchmarks under Section 15(b) do not differ from those that apply under Article of the SCM Agreement. China argues that, as a consequence, the United States may not seek to defend its use of non-Chinese benchmarks on a basis other than Article 14 of the SCM Agreement. (Id.) China further notes that the USDOC did not use a methodology notified to the WTO as would have been required under Section 15(c) of the Protocol. (China first written submission, footnote 10).

contained therein.[461] The United States indicated that, in its view, the Panel did not need to make findings under Section 15(b) of the Protocol of Accession.[462]

10.11 In response to a specific question from the Panel on the issue, the United States confirmed that even if we were to find that the determinations at issue are inconsistent with its obligations under Article 14(b) and (d), we would not, in the view of the United States, have to evaluate whether the USDOC determinations nevertheless were justified under China's Protocol of Accession. Conversely, China indicated that it is not seeking findings from the Panel under its Protocol of Accession in the event that we find that the USDOC determinations are consistent with the obligations of the United States under Article 14 SCM Agreement.[463]

10.12 In sum, neither China nor the United States is invoking the specific provisions contained in Section 15(b) of China's Protocol of Accession pertaining to the application of the disciplines set forth under the SCM Agreement and Article VI of the GATT in countervailing duty investigations on imports from China. In addition, the application of Section 15(b) of China's Protocol of Accession in specific factual circumstances raises a number of interpretative issues that have yet to be considered by a panel or by the Appellate Body, and the parties have only provided us with limited argumentation as to how, in their view, the terms of this provision should be interpreted. In light of these considerations, we consider it appropriate to limit our analysis of the consistency with the covered agreements of the USDOC's benefit determinations to the provisions of the SCM Agreement invoked by China, primarily Article 14 thereof.[464]

C. ORDER OF ANALYSIS OF CLAIMS

10.13 As indicated in the above summary, the issues raised by China in respect of benchmarks fall into two broad categories. The first category concerns the USDOC's rejection of internal Chinese input prices, land-use prices, and interest rates as the benchmarks used to measure the amount of the benefit from SOE-produced inputs, government-provided land-use rights, and SOCB loans, respectively. The second category concerns the benchmarks actually used by the USDOC to measure the benefits from land-use rights and SOCB loans. (As indicated, China makes no allegations concerning the benchmarks actually used in respect of inputs).

10.14 Because the two broad categories are conceptually distinct, and because we address *infra* our doubts as to whether the second category of issues is covered by our terms of reference, we first analyze all of the issues related to the rejection of Chinese input prices, land-use prices and interest rates, in the light of the requirements of Articles 14(d) and 14(b) of the SCM Agreement, respectively, before turning to the issues related to the benchmarks actually used by the USDOC in the three investigations at issue.

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[461] China first written submission, para. 31. Later, China confirmed its understanding that the United States was not invoking Section 15. (China response to Panel question 25 (first meeting); second written submission, para. 53).

[462] In essence, the United States argues that its determinations were consistent with Article 14 of the SCM Agreement. We note, however, that the United States also argued that it was neither necessary nor appropriate for the USDOC to seek to justify its determinations on other bases than U.S. law. (*See, e.g.*, United States response to Panel questions 25-27 and 29 (first meeting); second written submission, para. 67). Later, the United States argued that China had "abandoned" its claims under Section 15 of its Protocol of Accession, having made no arguments in this respect. (United States response to Panel questions 25-26 and 31 (first meeting)).

[463] United States and China responses to Panel question 10 (second meeting).

[464] To be clear, while we mention, in our summary of its position on the interpretation of Article 14(d) below, the United States' arguments referencing China's Protocol of Accession (see *infra*, paras. 10.26 and 10.70), we do not take these arguments into account in our analysis of China's claims on benchmarks.

10.15 Before doing so, however, we note that there have been two past, closely related disputes in which both of these categories of issues were addressed. We consider that these disputes provide useful background for the analyses that we are called upon to make, and we therefore start by summarizing the pertinent parts of those findings.

D. REJECTION OF IN-COUNTRY BENCHMARKS AND RESORT TO ALTERNATIVES – THE *SOFTWOOD LUMBER* DISPUTES

10.16 The questions of whether it is possible to reject private benchmarks from within the country allegedly providing a subsidy, and to resort to alternative benchmarks, including out-of-country benchmarks, first arose in the context of government provision of goods in the disputes concerning the United States' countervailing duty investigations and measures on imports of softwood lumber from Canada. In those investigations, the United States had found that private Canadian stumpage[465] prices were distorted by virtue of the fact that the government was the predominant owner of the forested land, and provider of stumpage contracts, in Canada. On this basis, the United States rejected private stumpage prices in Canada as the benchmark to compare with government stumpage prices, and instead used certain U.S. stumpage prices as the benchmark. On that basis, the USDOC found that Canada provided stumpage for less than adequate remuneration. Canada challenged this approach on the grounds that it was inconsistent with the language in Article 14(d) of the SCM Agreement that adequacy of remuneration is to be determined in relation to prevailing market conditions for the good in question "in the country of provision" of that good. The panels in the disputes concerning both the USDOC's preliminary and final investigations and determinations agreed with Canada, finding that Article 14(d) of the SCM Agreement (calculation of the benefit, *inter alia*, from government provision of goods) did not permit the rejection of in-country private prices, because of the language requiring that the adequacy of remuneration be determined in relation to the prevailing market conditions "in the country of provision" of the good in question.

10.17 The United States appealed this panel ruling in the dispute concerning the final investigation and determination[466], and the Appellate Body reversed that panel on this point. First, concerning whether any benchmark other than private prices in the country of provision of the good in question can be used, the Appellate Body found that Article 14(d) does not require in all cases the use of private prices in the country of provision; rather, it found that the requirement in that provision is that any benchmark used must "relate or refer to, or be connected with" the prevailing market conditions in that country.

10.18 Second, concerning the "very limited" circumstances under which a benchmark other than private prices in the country of provision can be used, the Appellate Body found that such an alternative benchmark can be used "when it has been established that the private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods".[467] This was the sole issue on appeal on this point. In particular, the question as framed by the United States, to which the Appellate Body thus limited its analysis, concerned the situation in which "the government has such a predominant role in the market as a provider of the goods that private suppliers will align their prices with those of the government-provided goods".[468]

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[465] Stumpage refers to the right to harvest standing timber.

[466] The panel report was circulated in document WT/DS257/R. There was no appeal of the panel report in respect of the preliminary investigation and determination (WT/DS236/R).

[467] Appellate Body Report on *US – Softwood Lumber IV*, para. 103.

[468] Id., para. 99. The Appellate Body stated in particular that its examination was limited to "whether an investigating authority may use a benchmark other than private prices in the country of provision in th[e] particular situation" of "government predominance in the market, as a provider of certain goods". (Id.).

10.19 We note here, however, that the panel also had found that a benchmark other than private prices in the country of provision of a good *would* be allowable in the situations where the government is the sole supplier in the country of the good in question, and where the government administratively controls all of the prices for that good in that country. In considering the issue appealed by the United States, the Appellate Body expressed "some difficulty with the Panel's approach of treating a situation in which the government is the *sole* supplier of certain goods differently from a situation in which the government is the *predominant* supplier of those goods. In terms of market distortions and effect on prices, there may be little difference between [these] situations".[469] We take this to mean that the Appellate Body did not disagree with the panel that rejection of in-country prices was allowable where the government is the sole supplier of the good in question. Furthermore, to us this statement indicates *a fortiori* that the Appellate Body had no difficulty with the panel's conclusion that rejection of in-country prices is allowed where the government administratively controls all of the prices for the good in question.

10.20 Concerning the sole issue on appeal in *US – Softwood Lumber IV* on this point, i.e., "the situation of government predominance in the market, as a provider of certain goods", the Appellate Body distinguished the situations where the government is a "significant" supplier from that where it is "the predominant" supplier, noting that "an allegation that the government is a *significant* supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision".[470] Rather, the Appellate Body found, "[t]he determination of whether private prices are distorted because of the government's *predominant* role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts" of each investigation.[471]

10.21 Third, concerning the alternative benchmarks that could be available in such situations, the Appellate Body agreed with the participants and third participants in the dispute that "alternative methods for determining the adequacy of remuneration could include proxies that take into account prices for similar goods quoted on world markets, or proxies constructed on the basis of production costs".[472] The Appellate Body emphasized that in proceeding in this manner, an investigating authority "is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)".[473] The Appellate Body noted that it was not called upon in that appeal to suggest particular alternative methods, nor to assess the consistency with Article 14(d) of all alternative methods suggested by the participants and third participants in the appeal, as such an assessment would depend on how a given method was applied in a particular case, and could not be performed in the abstract.[474]

10.22 Finally, concerning the specific alternative method used by the USDOC, which was to use certain stumpage prices in the United States as the benchmark, although the Appellate Body emphasized the need for considerable caution when resorting to an out-of-country benchmark, it did not find that the benchmark used by the United States was inconsistent with Article 14(d) by virtue of being an out-of-country benchmark (or on any other basis). Concerning the use of out-of-country benchmarks in general, the Appellate Body warned that:

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[469] Appellate Body Report on *US – Softwood Lumber IV*, para. 100. (emphasis added).
[470] Id., para. 102. (emphasis added).
[471] Id. (emphasis added).
[472] Id., para. 106.
[473] Id.
[474] Id.

> "prices in the market of a WTO Member would be expected to reflect prevailing market conditions in that Member; they are unlikely to reflect conditions prevailing in another Member. Therefore, it cannot be presumed that market conditions prevailing in one Member [...] relate or refer to, or are connected with, market conditions prevailing in another Member [...]. Indeed, it seems to us that it would be difficult, from a practical point of view, for investigating authorities to replicate reliably market conditions prevailing in one country on the basis of market conditions prevailing in another country. First, there are numerous factors to be taken into account in making adjustments to market conditions prevailing in one country so as to replicate those prevailing in another country; secondly, it would be difficult to ensure that all necessary adjustments are made to prices in one country in order to develop a benchmark that relates or refers to, or is connected with, prevailing market conditions in another country, so as to reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale in that other country".[475] (footnote omitted)

The Appellate Body then noted that different factors can result in one country having a comparative advantage over another with respect to the provision of certain goods, and that necessary adjustments would need to be made to any out-of-country benchmark to ensure that any resulting countervailing duties were used only for the purpose of offsetting a subsidy, and not for offsetting the difference in comparative advantages between the countries involved.[476]

10.23 The Appellate Body made no finding in respect of the USDOC's particular finding of market distortion due to the predominant role of the government as the supplier of stumpage, because the panel had not reached that issue, but instead had stopped its analysis once it concluded that Article 14(d) did not allow use of any benchmark other than private prices in the country of provision of the good.

E. CHINA'S CLAIMS UNDER ARTICLE 14(D) OF THE SCM AGREEMENT – SOE-PRODUCED INPUTS

1. Claim of China

10.24 China claims that the USDOC's determinations to reject private prices in China for HRS inputs in the CWP and LWS countervailing duty investigations, and for BOPP in the LWS countervailing duty investigation, were inconsistent with Article 14(d) of the SCM Agreement, as interpreted by the Appellate Body in *US – Softwood Lumber IV*.[477, 478]

2. Main arguments of the Parties

(a) China

10.25 China argues that the prices at which private suppliers in China sold the same inputs alleged to be provided by SOEs should have been used as the "primary benchmark" in order to determine the adequacy of remuneration under Article 14(d) of the SCM Agreement.[479] In addition, China submits that the USDOC's rejection of Chinese private prices for HRS and BOPP was inconsistent with

[475] Appellate Body Report on *US – Softwood Lumber IV*, para. 108.
[476] Id., para. 109.
[477] China first written submission, para. 123; opening oral statement at the first meeting of the Panel, para. 42.
[478] As indicated at para. 10.1, *supra*, China also raises consequential claims pursuant to Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.
[479] China first written submission, para. 124, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 90.

Article 14(d). Specifically, China argues that the USDOC did not establish that such prices were distorted, but, rather, used a *per se* rule under which it relied exclusively on the purported predominance of SOEs as suppliers of the inputs concerned to determine that private prices in China for HRS and BOPP were distorted.[480] This, in China's view, disregards the Appellate Body's decision, in *US – Softwood Lumber IV*, that distortion cannot be "presumed" but rather must be "established" through a factual inquiry.[481] China submits that the Appellate Body in that case established unequivocally that the predominant role of a government in the market does not, in any circumstances, suffice to establish distortion.[482] Accordingly, China argues that investigating authorities are obliged to establish that the predominant role of the government in a market has, in fact, caused private suppliers to "align their prices" with those of the government such that "the government effectively acts as a 'price-setter'" and private suppliers as "price-takers".[483] To this end, China submits that investigating authorities must conduct an analysis of the relevant market, and establish the conditions under which prices were established in that market.[484] China asserts that the USDOC, however, disregarded the evidence on the record that would have established that private prices of HRS and BOPP in China were not distorted.[485]

(b) United States

10.26 The United States rejects China's claims and submits that the USDOC's benefit determinations are consistent with Article 14(d) of the SCM Agreement. In particular, the United States argues that the Appellate Body has recognized that Article 14 provides flexibility and permits the use of out-of-country benchmarks in certain situations.[486] In addition, the United States observes that Section 15(b) of China's Protocol of Accession and paragraph 150 of the Working Party

[480] China first written submission, para. 124; second written submission, para. 48. For instance, China notes that in the CWP and LWR investigations, the USDOC rejected China's arguments – that it had an obligation to "look beyond the degree of state-ownership" and consider the actual nature and structure of the HRS industry – *solely* on the basis that "the government accounts for a significant portion of production" of the HRS market. China also submits that the USDOC's determination that it would have found private prices of HRS to be distorted even if it would have relied on China's data rather than on facts available further indicates that the "level of government ownership" was the dispositive factor in the USDOC's distortion analysis. (*See, e.g.*, China opening oral statement at the first meeting of the Panel, paras. 37-38; response to Panel Question 13 (second meeting)).

[481] China opening oral statement at the first meeting of the Panel, para. 40. According to China, the United States has effectively conceded that it resorted to out-of-country benchmarks without conducting any price distortion analysis. (China second written submission, paras. 48, 54 and 61).

[482] China cites in this regard the Appellate Body's statement that "an allegation that a government is a significant supplier would not, on its own, prove distortion and allow and investigating authority to choose a benchmark other than private prices in the country of provision", but rather, "[t]he determination of whether private prices are distorted because of the government's predominant role in the market", must be made on a "case-by-case basis". (emphasis omitted) (*See, e.g.*, China first written submission, para. 128; second written submission, paras. 55-58, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 102).

[483] China second written submission, para. 59, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 99.

[484] Id. China argues that in *US – Softwood Lumber IV*, the Appellate Body declined to complete the analysis, though the undisputed facts demonstrated that a single government supplier in each of the Canadian provinces set prices administratively and held market shares for the good in question ranging from 83 to 99 per cent. (Id., para. 60, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 115 and footnote 141).

[485] China points, in particular, to the evidence it provided with respect to the structure and operation of the HRS and BOPP markets in China. (China first written submission, paras. 125-127).

[486] United States first written submission, paras. 182, 184-185, 189-190 and 193; response to Panel question 30 (first meeting), citing to Appellate Body Reports on *Japan – DRAMs (Korea)*, para. 191 and *US – Softwood Lumber IV*, paras. 92-95, 100.

Report confirm the permissibility of using out-of-country benchmarks to measure any benefit in countervailing duty investigations involving imports from China.[487]

10.27 The United States argues that, based on *all* of the evidence on the record, the USDOC determined that China had a predominant role in the HRS and BOPP markets, and therefore, resorted to out-of-country benchmarks to measure the benefits at issue. Thus, the United States disagrees with China's assertion that the USDOC determined that private prices in China were distorted by applying a *per se* rule that only considered the degree of government ownership in the input markets at issue.[488] In respect of the LWR and CWP investigations, the United States submits that China failed to provide necessary information regarding its control of the HRS market and that, as a result, the USDOC determined on the basis of facts available that over 96 per cent of HRS production in China was accounted for by SOEs. In addition, the USDOC found that the private prices of HRS in China (i.e., four per cent of the HRS market) reflected the predominant role of the government in the HRS market. The USDOC also considered the role played by imports in the market, but determined that they were small relative to the state-owned production of HRS, representing only three per cent of the total Chinese HRS production. On that basis, the USDOC concluded that the Government of China had a predominant role in the market of HRS.[489] Similarly, in the LWS investigation, the United States submits that the USDOC's analysis was impaired by China's failure to supply requested information on the percentage of government production of BOPP. The USDOC therefore relied on facts available to determine that one government-owned producer accounted for 90 per cent of the petrochemical industry and, as a result, the USDOC concluded that the Government of China played a predominant role in the BOPP market.[490]

10.28 The United States further submits that, contrary to China's assertions, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber IV* requires Members to perform a separate "price distortion" analysis before resorting to out-of-country benchmarks. In *US – Softwood Lumber IV*, according to the United States, the Appellate Body did not find that the Agreement requires a "price distortion" analysis, but, instead, held that where the participation of the government in the market is "so predominant", "it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular", and therefore, investigating authorities do not act inconsistently with Article 14(d) by using out-of-country benchmarks where they have determined that a government plays such a role.[491] The

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[487] *See, e.g.*, United States first written submission, para.195.

[488] *See, e.g.*, United States first written submission, para. 201-202; second written submission, 84, 88-89; response to Panel question 37 (first meeting). To illustrate its point, the United States also submits that in the OTR countervailing duty investigation, although China owned a significant portion of the natural and synthetic rubber produced domestically, the USDOC relied upon the investigated producers' import prices and domestic purchase prices as a benchmarks. Similarly, in the CWP investigation, the USDOC relied on import prices of HRS in addition to world market prices. (*See, e.g.*, United States response to Panel question 16 (second meeting); opening statement at the first meeting of the Panel, para. 33).

[489] United States first written submission, paras. 215-219; second written submission, para. 84-85; response to Panel question, 37 (first meeting); response to Panel question 14 (second meeting).

[490] *See, e.g.*, United States first written submission, paras. 221-223; second written submission, paras. 84, 86, 89. The United States further indicates that the USDOC could not assess the viability of the private BOPP sector in China because China failed to provide requested information on the size of the private sector. Moreover, there was no basis upon which the USDOC could assess import data with respect to BOPP. The applicable Chinese tariff code for BOPP also covered another petrochemical product, and therefore, China could not provide imports figures for BOPP. Likewise, China was unable to provide domestic consumption figures for BOPP. (United States response to Panel question 37 (first meeting); response to Panel question 14 (second meeting).

[491] *See, e.g.*, United States second written submission, paras. 75-76, 79; response to Panel question 36 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 93. The United States further argues that the analysis of the Appellate Body reflects the so-called "Dominant Firm Model" according to which price distortion is the "result" of the predominant role of a dominant firm(s) that holds a dominant

United States asserts that the USDOC's determinations in the underlying investigations were consistent with the reasoning of the Appellate Body in *US – Softwood Lumber IV*. That is, the USDOC determined that private prices in China were not "sufficiently free" from the effects of the government's distortions, and therefore, could not be considered as appropriate benchmarks.[492] The United States further emphasizes that while China improperly conflates the terms "significant" and "predominant", the USDOC's determinations were based on the Government of China's "predominant" rather than "significant" role in the markets at issue.[493]

10.29 Finally, the United States argues that, although China alleges that the USDOC applied a *per se* rule, China has cited no evidence on the record contradicting the USDOC's findings that the government of China owns 96 per cent of the production of HRS and 90 per cent of the production of BOPP. Nor, it contends, has China explained what other factors should have been taken into consideration to determine whether the government has a predominant role and which record evidence was not assessed to that effect. Instead, the United States argues, China restates the arguments it made during the investigations, without addressing the USDOC's determinations that these arguments have no bearing on whether the government played a predominant role in the markets at issue.[494]

3. Main arguments of the Third Parties

(a) Australia

10.30 Australia recalls the Appellate Body's findings in *US – Softwood Lumber IV* that Members have some flexibility in the use of methodologies for calculating benefit, provided that such methodologies conform with the "mandatory" guidelines provided for in Article 14. In this regard, Australia further considers that the panel's statement in *EC – Countervailing Measures on DRAM Chips* that "the investigating authority is entitled to considerable leeway in adopting a reasonable methodology" is limited to the specific circumstances where, in the absence of a comparable market benchmark, the text of Article 14 provides no guidance on how to determine the benefit (e.g., Article 14(b)). With respect to Article 14(d), Australia notes that this provision permits the use of out-of-country benchmarks so long as investigating authorities calculate the benefit "'in relation to'" the prevailing market conditions in the country of provision.[495]

(b) Canada

10.31 Canada considers that the United States' reading of the Appellate Body's decision in *US – Softwood Lumber IV* is erroneous. In particular, Canada considers that according to the interpretation of Article 14(d) of the Appellate Body in that dispute, the predominance of the government as a provider of goods in the market is not sufficient, in and of itself, to establish that private prices are distorted and therefore unusable as benchmarks. In Canada's view, distortion must actually be demonstrated. In this respect, Canada considers that in the CWP and LWR investigations, the USDOC's determinations to reject private prices in China do not satisfy the requirement, under *US –*

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position in a market. (United States second written submission, para. 78; response to Panel question 12 (second meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 101).

[492] *See, e.g.*, United States second written submission, para. 80.

[493] United States second written submission, footnote 100; response to Panel question 12 (second meeting).

[494] United States second written submission, para. 87. For instance, the United States notes that while the Government of China asserted that private producers of HRS and BOPP could set their own prices, the USDOC did not determine that the Government of China sets a country-wide price for HRS and BOPP, but rather, that the government's predominant role in these markets distorted prices for HRS and BOPP. (United States first written submission, paras. 209-210, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 101).

[495] Australia third-party oral statement, paras. 19-20; third-party response to Panel question 6.

Softwood Lumber IV, to establish that government predominance has actually distorted private prices in the market of the country of provision. Canada considers that the USDOC's determinations were nevertheless consistent with Section 15(b) of China's Protocol of Accession.[496]

(c) European Communities

10.32 The European Communities agrees with the panel statement in *Korea – Commercial Vessels* that public bodies "do not constitute a reliable market benchmark with which to asses the existence of benefit". Accordingly, the European Communities considers that prices set by public bodies may not be considered as a relevant market benchmark as those bodies are also involved as players in the market concerned. The European Communities also considers that the observations of the Appellate Body in *US – Softwood Lumber IV* are pertinent to the present dispute. In particular, the European Communities is of the view that the fact that the government plays a predominant role in the market as a supplier of certain goods is likely to be a determining factor in ascertaining whether private prices can be used as benchmarks. In the investigations at issue, the European Communities understands that the USDOC's rationale to use an external benchmark was primarily based on the preponderant share of SOEs in China. The European Communities considers that if it is demonstrated that private prices are almost fully determined by SOEs representing public bodies and that such prices are highly distorted, then an investigating authority would have sufficient grounds to depart from the general rule of prices in the country of provision. The European Communities also notes that Section 15(b) of China's Protocol of Accession provides an additional set of rules which permit the use of a benchmark outside China in certain circumstances and subject to certain conditions.[497]

(d) India

10.33 India considers that the United States' use of external benchmarks must be assessed in light of the limitations on the use of such benchmarks expressed by the Appellate Body in *US – Softwood Lumber IV*, notably the Appellate Body's indications that the circumstances in which a Member may use benchmarks other than the private prices in the country of provision are "very limited" and that the price distortion analysis "must be made on a case-by-case basis, according to the facts underlying each countervailing duty investigation".[498]

(e) Japan

10.34 Japan considers that, consistently with the findings of the Appellate Body in *US – Softwood Lumber IV*, the question before the Panel is whether the USDOC had sufficient evidence (including adverse inferences) to arrive at the conclusions that private prices of inputs in China were distorted and thus unavailable as benchmarks under Article 14(d). Japan is of the view that where the evidence on the record shows such distortion, the investigating authority has a certain discretion to find a reasonable methodology but that, as indicated by the Appellate Body, this discretion is not unlimited – Article 14 establishes mandatory guidelines within which a benefit must be calculated. Japan therefore submits that the USDOC was required to find benchmarks that "related or referred to, or were connected with" prevailing market conditions in China. In this regard, Japan further considers that requiring investigating authorities to replicate such market conditions "at a level practically too high to comply" would ignore the balance that Part V of the SCM Agreement seeks to strike – between the right to impose countervailing duties to offset injurious subsidization, and the obligations that Members must respect in order to do so. Finally, Japan is of the view that although the Appellate Body has determined that "Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit", the Appellate Body has also acknowledged that the terms

[496] Canada third-party submission, paras. 22, 27 and 29-41.
[497] European Communities third-party submission, paras. 19-24.
[498] India third-party oral statement. (this statement contains no paragraph numbering).

of Article 14 do not become completely inapplicable. For Japan, whether investigating authorities may deviate from the parameters set forth in Article 14 depends on the facts underlying the case under consideration and the Panel's task is to determine whether the evidence on the record supports the "reasonableness" of the benchmarks selected by the USDOC in light of the latitude given to investigating authorities under Article 14.[499]

(f) Mexico

10.35 Mexico considers that a benefit determination must be consistent with the guidelines set forth in Article 14, regardless of whether the benchmark used is internal or external to the country allegedly granting the subsidy. Mexico agrees with the standard provided by the Appellate Body in *US – Softwood Lumber IV* according to which an investigating authority can resort to the use of out-of-country benchmarks where private prices are distorted because of the government's predominant role in the relevant market. Thus, Mexico considers that in determining whether the benchmarks used by the USDOC are WTO-consistent, the essential factor to be analyzed is the presence or absence of distortions caused by the role of the Government of China. In this regard, Mexico considers that China's arguments do not address the standard provided by the Appellate Body in *US – Softwood Lumber IV* and that the Panel should confirm the USDOC's use of external benchmarks, provided that there was evidence that the role of the Government of China in the markets in question was "predominant". Mexico does not however opine as to whether the alternative benchmarks used by the USDOC meet the requirements set out by the Appellate Body in that case.[500]

(g) Saudi Arabia

10.36 Saudi Arabia considers that, according to the Appellate Body report in *US – Softwood Lumber IV*, Article 14(d) only permits the use of out-of-country benchmarks in very exceptional circumstances (i.e., when private market prices are distorted by the government's predominant role as a provider) and only after actual distortion of the domestic market has been established according to the facts of the investigation. According to Saudi Arabia, presumptions based on indirect evidence or on theoretical economic deductions, including presumptions of distortion based on the mere fact that the government is a significant supplier or has a major presence in the market, are insufficient to meet this requirement. Saudi Arabia also considers that, consistent with the Appellate Body report in that case, the investigating authority's discretion to choose a benchmark is limited by the mandatory parameters set forth in Article 14, and that therefore the benchmark used still must "relate or refer to, or be connected with" the prevailing market conditions in the country of provision and must not be used to "offset differences in comparative advantages between countries". Saudi Arabia further notes that while the Appellate Body indicated that external benchmarks are theoretically alternative benchmarks under Article 14(d), "in practice", their application in a manner consistent with the requirements of this provision is virtually impossible, because of the nature and extent of the adjustments that would be required for the external benchmark to reflect in-country market conditions. Thus, Saudi Arabia considers that benchmarks based on the domestic cost of production of the goods or services in question are the most appropriate alternative benchmark where private prices have been found to be distorted, and that these benchmarks have been endorsed by the Appellate Body in *US – Softwood Lumber IV* and in *Canada – Dairy (Article 21.5 – New Zealand and US)*.[501]

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[499] Japan third-party submission, paras. 27-31; third-party oral statement, paras. 7-9; third-party response to Panel questions 6 and 7.

[500] Mexico third-party submission, paras. 57-60; third-party oral statement, paras. 19-20; third-party response to Panel question 6.

[501] Saudi Arabia third-party submission, paras. 65-71 and 73-75; third-party response to Panel question 6; third-party oral statement, paras. 14-15.

(h) Turkey

10.37 Turkey agrees with the findings of the Appellate Body in *US – Softwood Lumber IV* that investigating authorities may use out-of-country benchmarks where they have established that private prices on the exporting country are distorted because of the predominant role of the government. In Turkey's view, by accepting the terms and conditions in the Protocol of Accession, China has confirmed its predominant role in the Chinese economy. In this regard, Turkey notes that the findings of the Appellate Body on the use of external benchmarks related to cases in market economy conditions, and considers it obvious that an investigating authority may apply external benchmarks when dealing with non-market economy conditions.[502]

4. Assessment by the Panel

(a) Can evidence of government predominance alone suffice to establish market distortion?

10.38 The central legal question raised by this set of claims is whether record evidence 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. In this regard, given the findings of the Appellate Body in *US – Softwood Lumber IV* to the effect that market distortion due to government predominance must be established on a case-by-case basis for in-country private prices to be rejected, would some evidence in addition to the government's share of the market for the good in question always be required before in-country private prices could be rejected?

10.39 We note that China takes the latter position. China argues that for rejection of in-country private prices to be valid, the investigating authority must have determined that the government's predominant role in a market has, in fact, caused private suppliers to "align their prices" with those of the government-provided goods "such that the government effectively acts as a price-setter and private suppliers as price takers".[503] According to China, before an investigating authority could make findings in this respect, it would have to conduct an analysis of the relevant market, and evaluate conditions under which prices were established in that market.[504]

10.40 For a number of reasons, we read the Appellate Body report in *US – Softwood Lumber IV* differently from China. We wish to emphasize at the outset, however, that we share China's view that that report does not envisage or countenance the application of a "*per se*" rule, whereby in every case and regardless of any other evidence, the fact that a government was the predominant supplier of a particular good would be a sufficient basis for rejecting private in-country prices as the benchmark.

10.41 That said, we consider that the Appellate Body report makes clear that evidence of government predominance as a supplier is the principal evidence relevant to this question. We note in this regard, in particular, the Appellate Body's indication that it sees no material difference between the situations where the government is the predominant as opposed to the sole supplier of a good, and its implicit endorsement in that context of the panel's finding that the latter situation, without more, would justify looking elsewhere than private in-country prices for a benchmark (as such prices would not exist).

10.42 Concerning the issue of government as the predominant supplier of the input, we note that the analytical justification for the possibility to reject private in-country prices in that situation is identical for the other two cases of government involvement that were identified in *US – Softwood Lumber IV*,

[502] Turkey third-party submission, paras. 33-35; third-party oral statement, para. 12.
[503] China second written submission, para. 59.
[504] Id.

and indeed applies *a fortiori* to both, i.e., where the government administratively controls all of the prices for the good in the country; and where the government is the sole supplier of the good in the country. In particular, the Appellate Body's analysis was that to require that private prices in the country be used as the benchmark whenever they exist could give rise to situations in which there is no way of telling whether the recipient is "better off" than it otherwise would be, absent the government financial contribution. That is, the Appellate Body said, where "the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, [...] *the comparison contemplated by Article 14 would become circular*".[505]

10.43 By the same token, where the government is the *sole* supplier, i.e., where there are no private in-country suppliers and no or negligible imports[506], there would be no private prices at all, and thus nothing to compare with the government prices for purposes of calculating benefits. Similarly, where the government administratively controls all of the prices, the private suppliers' prices would not reflect in any way their own pricing decisions, but instead would be those established and mandated by the government, such that again, effectively, there would be no "private" prices to compare with the government prices.

10.44 Returning to the situation where the government is the predominant supplier (the situation that the USDOC found to exist in the investigations at issue before us), the Appellate Body emphasized that to require an effectively circular price comparison in such a situation is not supported by the objective of Article 14 which, as indicated by its title, deals with the calculation of the amount of a subsidy in terms of the benefit to the recipient. The Appellate Body recalled its statement in *Canada – Aircraft* that "there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".[507] The circular comparison that would result if Article 14(d) required in-country private prices even where the government was the predominant supplier of the good would, in the words of the Appellate Body, "frustrate the purpose of Article 14", as well as, "[m]ore generally, [...] the object and purpose of the SCM Agreement, which includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies".[508] The Appellate Body noted here that if the calculation of the benefit yielded a result that was artificially low or even zero, as could be the case from an overly-restrictive interpretation of Article 14(d), then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the SCM Agreement.[509]

10.45 Thus, we view the Appellate Body's report as underscoring the many reasons why, where the government is the predominant supplier of a good, being forced nevertheless always to use private prices in the country of provision of the good as the benchmark would "frustrate the purpose" of both Article 14 and the SCM Agreement more generally. In our view, this indicates that the evidence of the government's predominance as supplier of the good is the central fact that must be established for a decision to depart from private in-country prices to be valid. While this is of course not to the exclusion of other evidence that may be relevant to the question of whether the government's predominance as a supplier would lead to a circular price comparison in a particular investigation, we see the Appellate Body's report as indicating that evidence of predominance is the *sine qua non* for any such decision by an investigating authority. Similarly, we see nothing in that report that would

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[505] Appellate Body Report on *US – Softwood Lumber IV*, para. 93. (emphasis added).

[506] This is the scenario evoked by the panel in *US – Softwood Lumber IV*. (Panel Report on *US – Softwood Lumber IV*, footnote 135).

[507] Appellate Body Report on *US – Softwood Lumber IV*, para. 93 (quoting Appellate Body Report on *Canada – Aircraft*, para. 157).

[508] Id., para. 95 (quoting Appellate Body Report on *US – Carbon Steel*, paras. 73-74).

[509] Id.

prohibit, *a priori*, a finding of market distortion, and a decision to depart from in-country private prices, where the only relevant evidence was that the government is the predominant supplier of the good.

10.46 In this regard, we disagree with China that the Appellate Body used the terms "predominant" and "significant" interchangeably. In our view, these are distinct concepts and we read the Appellate Body's report as treating them as such.[510] In particular, "*a* significant" supplier, in our view, refers to something smaller than "*the* predominant" supplier. Furthermore, to us it is clear that being the largest or even the only *domestic* supplier in the country in question is not at all the same as being "the predominant" supplier of the good in question in the country. In particular, the concept of "predominance" is in relation to the domestic market as a whole for the good in question, including imports. Obviously, the larger the share of imports, the lower the possibility to find that a government is "the predominant" supplier of the good in the country in question.

10.47 Ultimately, as the Appellate Body stated, the decision to reject in-country prices as the benchmark due to the role of the government in the market for the good in question can only be made on a case-by-case basis, in accordance with the relevant evidence in the particular investigation, rather than in the abstract. We thus now turn to the facts of the investigations before us.

(b) USDOC determination with respect to HRS inputs (CWP and LWR investigations)

10.48 The USDOC's determinations of market distortion due to government predominance as a supplier of HRS in the CWP and LWR investigations are identical. We thus conduct a single, joint analysis of both.

10.49 In its final determinations in these investigations, the USDOC determined that because of the Government of China's "overwhelming" involvement in the HRS market, private prices of HRS in China were not an appropriate basis of comparison for determining whether a benefit existed. In particular, the USDOC relied on facts available and drew adverse inferences, on which basis it established that 96.1 per cent of Chinese HRS production was from SOEs.[511]

10.50 The final determinations recall that in the preliminary determinations in both investigations, the USDOC had not relied on observed HRS prices in China because the Government of China had failed to provide any requested information with regard to the HRS industry as a whole.[512] Instead, relying on "adverse facts available", the USDOC had used world market prices from a private publication, "Steel Benchmarker", to preliminarily determine whether HRS from SOEs was provided for less than adequate remuneration.[513] The final determinations indicate that following the

[510] In particular, the Appellate Body contrasts an allegation that a government is a "*significant*" supplier (which would not be sufficient to establish distortion) to a finding of distortion based on the government's "*predominant*" role. (Appellate Body Report on *US – Softwood Lumber IV*, para. 102). (emphasis added).

[511] Exhibits CHI-1, p. 11 and CHI-2, p. 4. The USDOC considered that the Government of China had failed to properly disclose information as regards the ownership of CISA (China Iron and Steel Association) members, and therefore considered that the Government of China did not act to the best of its ability. As a result, the USDOC drew adverse inferences with respect to the ownership of HRS producers in China. (Id.). We note that in the present dispute, China does not challenge the USDOC's reliance on facts available and adverse inferences to establish this percentage of government ownership of HRS producers. Rather, as discussed in Section XVI, *infra*, China's facts available claim is limited to the USDOC's reliance on the same percentage to estimate the amount of the HRS purchased from trading companies by CWP and LWR producers that had been produced by SOEs.

[512] Exhibits CHI-1, p. 64 and CHI-2, p. 35.

[513] Exhibits CHI-1, pp. 11-12 and 64; and CHI-2, p. 37. In both investigations, the USDOC used Steel Benchmarker prices of "hot-rolled band" which is a type of HRS that is 5 mm thick x 1200-1500 mm wide. In the LWR investigation the USDOC used these prices even though it acknowledged that hot-rolled band could

preliminary determinations, the Government of China provided some information concerning the ownership structure of the Chinese HRS industry, so that the USDOC did not simply reject in-country prices, but instead examined record evidence regarding "all potential benchmark prices" to determine the appropriate one under the hierarchy in the U.S. law (including whether it could use in-country private prices).[514]

10.51 The final determinations indicate that the parties on both sides of the investigation presented arguments to the USDOC as to whether private prices could and should be used as the benchmarks. The applicants presented, and made arguments based on, record evidence, to the effect that the government's dominant position in the HRS market distorted private prices. In particular, in the CWP investigation, the petitioners referred to the high level of government ownership of the industry, and the market power of SOEs, as well as record evidence that the Government of China successfully carried out policies to suppress domestic prices, and the existence of industrial policies aimed at enhancing the output of downstream steel-using industries. The applicants also argued that "substantial" record evidence indicated that Chinese prices were distorted because SOEs had significant market power. In this regard, they argued that verified record evidence supported a private ownership share of only 2.5 per cent of the industry, meaning that the state could act as a monopolist; that documentation from government agencies[515] indicated that the state controlled sectors it deemed important to national economic performance, including the steel industry, and that record evidence for specific companies demonstrated the government's "significant influence" over the operations of private producers.[516] In the LWR investigation, the final determination indicates that the applicants argued that they had submitted evidence that made clear that there was not a usable market-determined price for HRS in China.[517]

10.52 In both investigations, the Government of China and the respondent companies urged the USDOC to look beyond government ownership and consider the actual nature and structure of the HRS market. The Government of China argued in particular that certain aspects of the market demonstrated that government involvement did not distort the market. In this regard, the Government of China argued that: (i) there was no single or uniform government-set price for HRS in China, and that SOE producers competed with one another; (ii) the HRS industry was highly fragmented (i.e., the 44 large-and medium-sized steel producers that reported their production data to the China Iron and Steel Association, together accounted for only 52 per cent of HRS production in China; the single largest producer only accounted for 9.6 per cent; and the five largest producers combined accounted for less than 30 per cent of total production and one of the five largest producers was privately-owned); (iii) the major SOE producers operated on the basis of the same laws as private producers, and thus had the duty to protect their shareholders and maximize profits (noting that some SOEs had

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not be used to produce LWR (i.e., the wall thickness of hot-rolled band was 5 mm thick, while the wall thickness for LWR was less than 4 mm). While it noted that it was not able to find another world market price for HRS that could be used to produce LWR, the USDOC nevertheless considered that "additional rolling would be required to produce the thinner HRS used in LWR production and, therefore, the market price for thinner HRS would presumably be higher". Therefore, relying on facts available, the USDOC determined that Steel Benchmarker prices were appropriate to measure the adequacy of remuneration for state-owned HRS. (Exhibit CHI-2, p. 37).

[514] Exhibits CHI-1, p. 64 and CHI-2, p. 35. U.S. law specifies a hierarchy of "market-determined" benchmarks in this regard: "(1) market prices from actual transactions within the country under investigation (e.g., actual sales, actual imports or competitively run government auctions) ('tier one'); (2) world market prices that would be available to purchasers in the country under investigation ('tier two'); or (3) an assessment of whether the government price is consistent with market principles ('tier three')". (Exhibits CHI-1, p. 63 and CHI-2, p. 35).

[515] The determination indicates that the applicants referred in particular to the National Development and Reform Commission (the "NDRC"), and the SASAC. (Exhibit CHI-1, p. 60).

[516] Id., pp. 56-57 and 59-61.

[517] Exhibit CHI-2, p. 34.

significant shares of private ownership); (iv) the HRS industry had increasing levels of private investment and encompassed significant private producers; (v) the SOEs were profitable, and thus were unlikely to be selling for less than adequate remuneration; and (vi) a functioning HRS market existed in China, as evidenced by prices fluctuating from day to day, and varying across regions, with no clear pattern of higher or lower prices being charged by private or SOE producers.[518] The Government of China also argued that available private pricing demonstrated that there was a functioning market, such that private prices for HRS were not distorted and could be used as a benchmark.[519] China also urged the USDOC, if it found that private prices could not be used, to assess whether the prices charged by SOEs were consistent with "'market principles'" as *per* the U.S. domestic legislation.[520]

10.53 In both determinations, the USDOC considered and rejected as unpersuasive these arguments by the respondents. First, the USDOC considered that the Government of China's "assertions" that there was no single or uniform government-set price; that the HRS industry was highly fragmented; that the SOEs behaved like private producers; that private investment in the industry was growing; and that a functioning market existed, as prices fluctuated from day to day and varied across regions, did not mitigate the fact that the government accounted for 96.1 per cent of Chinese HRS production. The USDOC stated that "in such instances, it is reasonable to conclude that domestic prices for comparable goods provided from privates sources are effectively determined by the government provided prices".[521] Second, the USDOC found, the profitability of state-owned HRS producers was irrelevant for determining whether HRS was provided for less than adequate remuneration.[522]

10.54 Thus, in its final determinations the USDOC, as it did in the preliminary determinations, rejected private prices in China (both from domestic producers and from imports into China) as benchmarks. In this regard, the final determinations refer first to the 96.1 per cent share of the HRS produced in China that was produced by SOEs (which the USDOC characterized as "the government's overwhelming involvement" in the HRS market in China).[523] The determinations indicate that because of this, using private producer prices in China "would be akin to comparing the benchmark to itself, (i.e., such a benchmark would reflect the distortions of the government presence)".[524] The determinations also indicate that trade statistics showed that the import quantities of HRS were small relative to the Chinese domestic production, such that unit values of imports into China were not sufficient to serve as reliable benchmarks.[525] The USDOC considered that where the government accounts for a significant portion of production, private prices for comparable goods effectively align with those set by the government. The USDOC's assessment in respect of the government's 96.1 per cent share, as noted above, was that "in such instances, it is reasonable to conclude that domestic prices for comparable goods provided from private sources are effectively determined by the government provided prices".[526] Overall, the USDOC thus concluded that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of

[518] Exhibits CHI-1,pp. 58-59 and CHI-2, pp. 32-33.
[519] Exhibits CHI-1, p. 58 and CHI-2, p. 33.
[520] Exhibits CHI-1, pp. 58-59 and CHI-2, p. 33.
[521] Exhibits CHI-1, p. 65 and CHI-2, p. 36.
[522] Id.
[523] Exhibits CHI-1, pp. 64-65 and CHI-2, p. 36.
[524] Exhibits CHI-1, p. 64 and CHI-2, p. 36. In this context, in both determinations the USDOC cited its determination in its investigation of *Canadian Lumber*, where it had noted that "[w]here the market for a particular good [...] is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price. It is impossible to test the government price using another price that is entirely, or almost entirely, dependent upon it. The analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect". (Id.).
[525] Exhibits CHI-1, footnote 212 and CHI-2, p. 36.
[526] Exhibits CHI-1, p. 65 and CHI-2, p. 36.

the [Government of China's] actions, and therefore cannot be considered to meet the statutory and regulatory requirement [under U.S. law] for the use of market-determined prices to measure the adequacy of remuneration".[527]

10.55 We recall that China's legal argument, essentially, is that in these investigations the USDOC applied an unlawful "*per se*" rule whereby evidence that the government was the majority supplier of a good led *ipso facto* to the determinations that the Chinese market prices for HRS were distorted such that they were not suitable as benchmarks. On the basis of the determinations, as just summarized, we do not view the USDOC's determinations in the same way. To the contrary, given the extensive summaries and discussion contained in the determinations, it is clear that the USDOC received from parties on both sides of the investigation, and considered, arguments and evidence relevant to the role of the government in the Chinese HRS market. In this regard, we note that because China did not provide complete, verifiable information regarding the amount of domestically-produced HRS that was accounted for by SOEs, the USDOC relied on "facts available" and drew adverse inferences in establishing this fact. China does not argue before us, and there is no indication in the record, that the Government of China provided during the investigation any information that demonstrated that the government was *not* the predominant supplier, and indeed the various arguments raised by the Government of China (which the USDOC characterized as based on "assertions" rather than evidence) were found by the USDOC not to be relevant to the question of the government's predominance as a supplier or its ability effectively to set the prices for HRS in China.

10.56 In this regard, we disagree with China's interpretation of a statement in a footnote in these determinations, to the effect that even if the (unverifiable) figure of approximately 71 per cent advanced by China as the share of Chinese HRS produced by SOEs were accepted, the USDOC still would have found that lower figure to be a reasonable basis on which to conclude that private prices in China were distorted and thus unusable as benchmarks. For China, this statement confirms that the USDOC applied a "*per se*" rule. To us, however, this is simply an indication that the USDOC would have considered this percentage to be a level that *could* give rise to distortion. We see nothing in the USDOC's determinations that indicates that the USDOC's analysis would have stopped at that point. Indeed, the determinations indicate the contrary in that, although the government's share as a domestic supplier actually found in the investigations was much higher than 71 per cent, the record shows that the USDOC obtained and analyzed a range of other information, including information gathered on its own initiative (such as that on the volume and market share of imports). The fact that the USDOC ultimately did not find that that other information led to the conclusion that government predominance did not distort the market provides no indication, in our view, that a "*per se*" rule was applied in these investigations.

10.57 Finally, we consider that the USDOC's analysis and conclusions in the OTR investigation provide strong circumstantial evidence that the USDOC's general approach to predominance is not a mechanical, *per se* test under which, any time the government is "a significant" supplier, the USDOC mechanically concludes that private in-country prices are unusable as benchmarks. Rather, this investigation was clearly based on a case-by-case analysis of the particular facts of the investigation, on the basis of which the USDOC found that the domestic prices were *not* distorted, in spite of SOEs being major producers of the rubber inputs in question.

10.58 In particular, in the OTR investigation, the USDOC found that SOE producers accounted for a significant portion of Chinese production of natural and synthetic rubber inputs. Nevertheless, the USDOC decided to use as benchmarks, for the tire producers' purchases of rubber from SOEs, both prices of their rubber purchases from private Chinese producers, and prices that they paid for

[527] Id. We note in this regard that according to the USDOC's determination, under U.S. law, "market prices from actual transactions" include prices from "actual sales, actual imports or competitively run government auctions". (Exhibits CHI-1, p. 63 and CHI-2, p. 35).

imported rubber. In other words, the USDOC considered that market prices (including import prices) within China constituted suitable benchmarks. The basis for this conclusion was the record evidence demonstrating the high import penetration of the Chinese markets for the relevant goods (50 per cent for natural rubber and 75 per cent for synthetic rubber), and the absence of any other evidence demonstrating government control or distortion of these markets.[528]

10.59 The USDOC found that while SOE producers accounted for "a significant portion" of the domestic production of both categories of rubber:

> "imports of natural rubber exceed the total domestic production of natural rubber as a percentage of natural rubber consumption in the PRC. Imports of synthetic rubber exceed the total domestic production of synthetic rubber as a percentage of synthetic rubber consumption in the PRC. Thus, given the large penetration of imports of natural rubber and synthetic rubber in the PRC rubber markets and the lack of other evidence on the record to show that SOEs or government agencies through other methods had control of, or otherwise distorted, these markets during the POI, we do not find government distortion of the PRC rubber markets".[529] (footnote omitted)

10.60 Thus, to relate this finding back to the reasoning of the Appellate Body in *US – Softwood Lumber IV*, it is clear based on the import penetration figures in the OTR determination that there was no evidence that the government was "the predominant supplier" or otherwise controlled prices. The USDOC's determination recognized this and thus relied on the observed prices (of private suppliers and imports) in China as benchmarks.

10.61 For the foregoing reasons, we find that China has not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for HRS in either the CWP or the LWR investigations.[530]

(c) USDOC determination with respect to BOPP inputs (LWS investigation)

10.62 In the LWS investigation, the USDOC determined that SOE involvement in the petrochemical industry distorted the market, and that therefore it would be inappropriate to rely on private domestic input prices in China as a benchmark.[531] We note that these conclusions were the result of the USDOC's application of facts available and adverse inferences because the Government of China did not provide the requested information necessary for determining whether domestic prices could be used as benchmarks, and did not act to the best of its ability.[532]

10.63 In particular, the USDOC found on this basis that SOEs accounted for 90 per cent of the BOPP production in China and distorted the market. The final determination indicates in this regard that in spite of repeated requests to the Government of China, including at verification, to provide information concerning the ownership of Chinese BOPP producers, no such information was provided. The USDOC therefore stated that "because the [Government of China] failed to provide us with the necessary information, we are unable to gauge the extent of government involvement in the petrochemical industry which produces these three inputs. Without such information, the Department is unable to analyze the nature and structure of the market in order to determine whether the level of

[528] Exhibit CHI-4, pp. 79-80.
[529] Id., p. 11.
[530] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.
[531] Exhibit CHI-3, p. 19.
[532] Id.

government ownership significantly distorts the prices for these inputs in the PRC".[533] In this regard, the USDOC stated that because the Government of China had failed to provide the requested information:

> "we have no record evidence to contravene petitioners' allegation that SOES such as China Petroleum and Chemical Corporation (Sinopec), which was alleged to control 90 percent of the Chinese petrochemical industry and produces [...] BOPP, distort the market. As such, we determine in this final determination that domestic private prices for these inputs are distorted and not usable as benchmarks".[534]

10.64 On the basis of this determination, the USDOC concluded that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the [Government of China's] distortions" to be used as benchmarks.[535] The USDOC noted that this approach was consistent with its decision in the CWP investigation, where it had determined that because of the government's overwhelming involvement in the market for the inputs, the use of private producer prices in China would be akin to comparing the benchmark to itself (i.e., such a benchmark would reflect the distortions of the government presence).[536] The USDOC also cited its regulations as providing that "where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to" sources other than in-country private prices for benchmarks. The USDOC also noted that there were no actual, company-specific import transactions that it could consider using as benchmarks, as Aifudi had not imported BOPP.[537]

10.65 We note that here again, China's claim is that the USDOC unlawfully based its decision to reject private in-country prices as the benchmark for BOPP on a *per se* test based on the government's share as a producer of the product. We disagree with this characterization. It is clear from the record of the investigation that China did not cooperate with the USDOC in respect of the information regarding the Chinese industry producing BOPP. Indeed, the USDOC found that the Government of China provided none of the requested information in this regard, and before us China makes no representation to the contrary. In the words of the USDOC, this left it in the situation where it had before it "no record evidence to contravene" the allegations of applicants that the SOE petrochemical producers accounted for 90 per cent of domestic production of BOPP *and* distorted the market. In other words, the applicants had made these allegations, and the USDOC had requested from the Government of China but had not received, information on the structure and operation of the Chinese petrochemical industry. The USDOC thus had no evidence to rebut the allegations that had been made and in addition found that the Government of China had not cooperated such that the drawing of adverse inferences (concerning both the government's share of production, and government distortion of the market) was justified. We do not consider that this set of facts can be construed as the mechanical application of a *per se* test, given that it was based on the failure by the Government of China and the respondent companies to provide requested or other evidence to rebut the allegations as to both government ownership and market distortion. Instead we consider that this conclusion is one which the USDOC could lawfully reach on the circumstances of the case.

[533] Exhibit CHI-3, pp. 69-70.
[534] Id., pp. 19-20.
[535] Id., p. 72.
[536] Id., pp. 20.
[537] Id., pp. 20 and 72.

10.66 For the foregoing reasons, we find that China has not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for BOPP in the LWS investigation.[538]

F. CHINA'S CLAIMS UNDER ARTICLE 14(D) OF THE SCM AGREEMENT – GOVERNMENT-PROVIDED LAND-USE RIGHTS

1. Claim of China

10.67 We now take up China's challenge to the USDOC's decision to reject in-country prices as the benchmark to use for the adequate remuneration determination with respect to subsidies in the form of the provision of land-use rights.[539] China's claim is that the USDOC's decisions to reject land prices in China as the appropriate benchmark to determine benefit in the LWS and OTR countervailing duty investigations was inconsistent with Article 14(d) of the SCM Agreement.[540, 541]

2. Main arguments of the Parties

(a) China

10.68 China argues that the USDOC's decisions to reject land prices in China as the appropriate benchmark disregarded the plain language of Article 14(d), as interpreted by the Appellate Body in *US – Softwood Lumber IV*.[542]

10.69 In particular, China submits that, although the USDOC acknowledged that there are secondary markets for land-use rights in China, the USDOC rejected these private prices on two grounds: (i) the application of a *per se* rule based on its finding that the government is the ultimate owner of all land in China; and (ii) its finding that property rights in China "remain poorly defined and weakly enforced".[543] Concerning what it considers to be the USDOC's application of a *per se* rule, China argues that in *US – Softwood Lumber IV* the Appellate Body rejected the notion that a presumption of distortion could provide a sufficient basis for resorting to out-of-country benchmarks.[544] With regard to the USDOC's characterization of the legal status of property rights in China, China alleges that there is no basis in Article 14(d) to reject "prevailing market conditions" merely because they do not accord with an investigating authority's conception of how markets should be structured and regulated, or because they are insufficiently "pure".[545] China emphasizes that the term "prevailing market conditions" in the country of provision, as interpreted by the Appellate Body in *US – Softwood Lumber IV*, does not refer to a "pure market", a "market undistorted by government

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[538] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

[539] China's related challenge, in respect of the benchmark actually used, is addressed in Section X.I, *infra*.

[540] *See, e.g.*, China first written submission, para. 304.

[541] As indicated at para. 10.1, *supra*, China also raises consequential claims pursuant to Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

[542] *See, e.g.*, China second written submission, para. 64.

[543] China first written submission, paras. 303 and 305; response to Panel question 34 (first meeting).

[544] *See, e.g.*, China second written submission, para. 49; response to Panel question 34 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 102.

[545] *See, e.g.*, China response to Panel questions 34 and 43 (first meeting). China also argues that the sources relied upon by the USDOC for its Thai benchmark prices provide no indication that prices in China are distorted or that China is a "special case" in this respect, and that these sources rather contradict the USDOC's finding that all land prices in China are distorted. China notes that the reports relied on by the USDOC to this effect illustrate the wide variations for land prices within China, thus, confirming that China has a functioning market for land-use rights. (China response to Panel question 34 (first meeting)).

intervention", or to a "fair market value".[546] Moreover, China submits that the Appellate Body limited the possibility of using benchmarks other than in-country private prices to a single situation, that where distortion exists due to the "government's predominant role in the market as provider of the same or similar goods".[547] Thus, China argues, investigating authorities do not have *carte blanche* to reject private prices whenever they consider "prevailing market conditions" not quite "market enough".[548]

(b) United States

10.70 The United States argues that China's claim is unsupported by the text of the SCM Agreement and China's Protocol of Accession, and therefore, should be rejected. In particular, the United States submits that nothing in the text of Article 14(d) suggests that land-use rights are exceptional, or that they should be treated differently than other goods with respect to the use of external benchmarks.[549] The United States also argues that China's position is contradicted by the "flexibility" of Article 14, which the Appellate Body has explained permits the use of out-of-country benchmarks, and by the terms of Section 15(b) of China's Protocol of Accession, which provides no basis to exclude government-provided land-use rights, but rather confirms the permissibility of using out-of-country benchmarks in countervailing duty investigations concerning imports from China.[550] In addition, the United States submits that China's restrictive interpretation, if accepted, would eliminate the possibility of countervailing the subsidized provision of land-use rights, contrary to the object and purpose of the SCM Agreement.[551]

10.71 The United States submits that the USDOC's determination to use an out-of-country benchmark is consistent with Article 14(d), as interpreted by the Appellate Body in *US – Softwood Lumber IV*. Specifically, the United States argues that, based on all the evidence on the record, the USDOC determined that due to China's predominant role in the land market, it was necessary to use an out-of-country benchmark to measure the benefits at issue.[552] Furthermore, the United States submits that the USDOC did not limit its distortion analysis to the mere fact that the Chinese government owns all the land in China. Rather, the United States argues that the USDOC also found that China retains and exercises significant control over the supply side of the entire land market in China, including land-use rights for private industrial use, so as to distort prices in the primary and

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[546] China response to Panel questions 34 and 43 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 87.

[547] In China's view, the Appellate Body did not even suggest that other situations, such as government intervention in markets generally, could justify the rejection of private prices. (*See, e.g.*, China response to Panel question 32 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, paras. 93 and 106).

[548] China opening statement at the first meeting of the Panel, para. 46.

[549] United States first written submission, paras. 272-273. The United States emphasizes that it is not necessary that goods be tradable across borders for them to be covered by the Agreement, arguing that in *US – Softwood Lumber IV* the Appellate Body noted that excluding non-tradable goods would permit the circumvention of the WTO's subsidies disciplines. (Id., para. 274, citing to Appellate Body Report on *US – Softwood Lumber IV*, paras. 57, 67, 64).

[550] *See, e.g.* United States first written submission, para. 276; opening statement at the first meeting of the Panel, para. 32, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 103.

[551] United States first written submission, para. 275. For instance, the United States argues, China's position would prevent Members from measuring the benefit of land-use rights provided by the government since the comparison of this financial contribution to the benchmark would become circular, i.e., prices for government-provided land would be compared to itself. (United States opening statement at the first meeting of the Panel, para. 31, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 93).

[552] The United States argues that in *US – Softwood Lumber IV* the Appellate Body considered that the government's predominant role in the market suffices to distort private prices and to justify the use of out-of-country benchmarks. (*See, e.g.*, United States second written submission, para. 80; response to Panel question 44 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 93).

secondary markets.[553] Thus the United States submits that contrary to China's assertions, the USDOC's determination was not based on a finding that market conditions were insufficiently "pure", but rather on a finding that the land market in China had significant distortions from the government's predominant role in the market.[554] In addition, the United States rejects China's argument that, because there is a differentiation in pricing for land-use rights in China, it has an undistorted "functioning market". The United States submits that uniform pricing in China was not a basis for the USDOC's findings that China had a predominant role in the land market.[555]

3. Main arguments of the Third Parties

(a) Australia

10.72 Australia considers that nothing in the SCM Agreement supports the argument that the provision of land should be treated differently from the provision of other goods under Article 14(d). Consistently with the interpretation of the Appellate Body in *US – Softwood Lumber IV*, Australia notes that the term "goods" has been given a broad meaning under Article 1.1(a)(1)(iii) of the Agreement to include immovable property.[556]

(b) European Communities

10.73 The European Communities recalls that, consistent with the observations of the Appellate Body in *US – Softwood Lumber IV*, investigating authorities may use out-of-country benchmarks if they find that prices in the relevant market are distorted.[557]

(c) Mexico

10.74 Mexico recalls that the Appellate Body found in *US – Softwood Lumber IV* that resorting to out-of-country benchmarks in the case of the provision of land is consistent with Article 14(d) provided that benchmark used "relates or refers to, or is connected with" prevailing market conditions of the country of provision.[558]

(d) Saudi Arabia

10.75 Saudi Arabia agrees with China that the use of external benchmarks is especially inappropriate with respect to financial contributions in the form of the provision of land, *inter alia*, because the value of land is determined not only by its physical characteristics, but also by the legal system in which the land exists.[559]

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[553] *See, e.g.*, United States second written submission, paras. 105-106; response to Panel question 42(b) (first meeting).

[554] The United States also disagrees with China's assertion that factors other than the government's predominant role in the market cannot justify rejecting in-country prices as benchmarks. The United States submits that the Appellate Body in *US – Softwood Lumber IV* did not address and, therefore, did not exclude the possibility that other types of government intervention would also distort the market so as to render private prices unreliable. (*See, e.g.*, United States second written submission, paras. 81-82 and 107).

[555] The United States adds that the fact that prices differ is not dispositive of whether the government has a predominant role in the market. (United States second written submission, para. 108).

[556] Australia third-party oral statement, para. 21.

[557] European Communities third-party submission, para. 47.

[558] Mexico third-party response to Panel question 6.

[559] Saudi Arabia third-party submission, para. 77.

4. Assessment by the Panel

10.76 In the LWS and OTR investigations, the USDOC determined that China's provision of land-use rights to investigated producers (Aifudi and Starbright) for less than adequate remuneration constituted a countervailable subsidy. In this context, the USDOC determined that it could not use an in-country benchmark for government-provided land-use rights because Chinese land prices were distorted by the significant government role in the market that prohibited private land ownership in China and resulted in all land being owned by some level of government. The USDOC indicated in this regard that it had verified that all urban land was state-owned (owned by the national government), and that all rural land was collectively-owned (owned by the local government), i.e., that the government, either at the national or local level, was the ultimate owner of all land in China.[560]

10.77 We note here that, on the basis of the reasoning of the panel and the Appellate Body in *US – Softwood Lumber IV*, the USDOC's finding that the government was the *sole* supplier of the good in question might have been sufficient for a conclusion by the USDOC that it could not use in-country prices for land as the benchmark. We do not consider, however, that in fact the USDOC based any conclusion as to the availability of in-country benchmarks directly on the government's degree of ownership of the land or the general fact that it was significantly involved in the market as a provider of land-use rights, as such. To the contrary, these were cited as facts describing the nature of the government's significant involvement in the land-use market, which then was further analyzed.

10.78 In particular, the USDOC did not stop with these statements but instead continued its analysis, gathering, assessing and verifying a wide variety of information as to land-use pricing in China, aimed at determining "whether the […] [G]overnment [of China] exercises control over the supply side of the land market in China as a whole so as to distort prices in the primary and secondary markets".[561] In this regard, the USDOC found that government authorities controlled, albeit on a decentralized basis, the supply and allocation of land that could be used by non-state-owned enterprises for non-agricultural purposes, and that the restrictions imposed extended the control by the government to the secondary in addition to the primary market. The USDOC further found that this control significantly distorted the price paid for the granted land-use rights in both primary and secondary markets, and that land-use prices in China were not set in accordance with market principles.[562]

10.79 In this connection, the USDOC found that notwithstanding the legal reforms implemented by China, agricultural land-use rights remained limited in scope and were poorly defined and weakly enforced, such that land-use rights of farmers in China still were not secure and their right to alienate their land was severely restricted. Local governments had often exercised broad and unrestricted powers to expropriate land from farmers and had given them only partial compensation for such expropriation. Further, agricultural land could be sold for non-agricultural use only if its legal status was first changed from "collective land" to "state-owned land", and the power to effect that conversion rested solely with local governments.[563] The supply of land for non-agricultural use in the

[560] Exhibits CHI-3, p. 58 and CHI-50, pp. 71368-71369.
[561] *See, e.g.*, Exhibit CHI-3, p. 58.
[562] Id., pp. 15-17 and 58-59; and Exhibit CHI-50, p. 71369.
[563] Exhibits CHI-34 p. 67907 and CHI-50, p. 71369. In the *Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China* (the "Lined Paper investigation"), the USDOC noted that the status of agricultural land could only be changed after it had been expropriated. Therefore, local governments acted in the dual roles of owners of the agricultural land and as representatives of the state, and as such, could expropriate land from farmers, convert it into state-owned land, and thereafter sell the land-use rights to private enterprises. (*Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China ("China") – China's status as a non-market economy ("NME")*, Exhibit US-69, p. 42).

primary and secondary markets further depended, in part, on the "allocated" land-use rights which were provided to SOEs on a purely administrative basis: the government allocated land-use rights to SOEs for a nominal one-time charge and annual fee. "Allocated" land-use rights were transferable for commercial purposes only if they were first converted into "granted" land-use rights. The power to convert "allocated" land-use rights into "granted" land use rights (and therefore, the land available to private enterprises for commercial use) rested solely with the government.[564] The USDOC also found that some SOEs illegally (without first converting their land-use rights as required) had used their allocated land-use rights in order to attract foreign investments. Consequently, the USDOC found, the conversion of land from "allocated" to "granted" was not a *pro forma* process.[565]

10.80 The USDOC further determined that China's government control of the land market distorted the prices of "granted" land-use rights in both the primary and secondary markets.[566] Although noting that the Government of China had implemented certain land reforms in order to increase transparency and competitive market conditions, the USDOC determined that these reforms had not been fully implemented – i.e., that there was a wide divergence between the *de jure* reforms and their *de facto* implementation.[567] Specifically, it found that land-use rights were still transferred via "closed-door" negotiations and not via public auctions, tenders or listings as required by law. Therefore, the USDOC determined that the Government of China retained a predominant role in the land market and that this control distorted the supply and pricing of land-use rights in China, such that private prices in China were not an appropriate basis of comparison for determining whether a benefit existed.[568]

10.81 Given all of these findings, we also disagree with China that the USDOC's determinations were based simply on a finding that land-use rights were limited in scope and weakly enforced. While this was among the USDOC's characterizations of certain aspects of the land-use market in China, it is by no means the entirety of the USDOC's analysis or determinations. To the contrary, we are satisfied that the USDOC conducted an extensive analysis of the land-use market in China. Before us, the only specific record evidence that China points to is the "existence" of a secondary market, which it argues the USDOC "rejected" as a source for benchmarks.[569] We note, however, as indicated, that the USDOC's inquiry was not whether there was a secondary market, but whether the evidence showed that prices in that market were distorted. The USDOC found that the evidence indicated that those prices were distorted, and before us China points to no record evidence to the contrary.

10.82 For the foregoing reasons, we find that China has not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting in-country land-use prices in China as benchmarks for government-provided land-use rights in the LWS and OTR investigations.[570]

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[564] Further, the USDOC noted that enterprises could also purchase "granted" land-use rights directly from the government, and therefore determined that such purchases were government-controlled. (Exhibit CHI-34, p. 67907).

[565] Exhibit CHI-34, p. 67907.

[566] As an example, the USDOC noted that if farmer land-use rights were well-defined and effectively enforced, there would be less land available for non-agricultural use and therefore higher prices for granted land-use rights. (Id.).

[567] Exhibits CHI 3, p. 16 and CHI-50, pp. 71368-71369.

[568] Exhibits CHI-3, pp. 16 and 59; CHI-34, pp. 67907-67908; CHI-50 p. 71369.

[569] China response to Panel question 34 (first meeting).

[570] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

G. CHINA'S CLAIMS UNDER ARTICLE 14(B) OF THE SCM AGREEMENT – GOVERNMENT PROVISION OF PREFERENTIAL LENDING

1. Claims of China

10.83 In the CWP, LWS and OTR investigations, the USDOC determined that China provided subsidies to producers of the investigated products in the form of RMB-denominated loans by SOCBs. In addition, in the OTR investigation, the USDOC determined that one of the investigated producers, GTC, received subsidies in the form of U.S. dollar-denominated loans from SOCBs.

10.84 In the three investigations at issue, the USDOC found that lending rates in China were significantly distorted, and therefore unsuitable as market benchmarks.[571] For this reason, the USDOC resorted to external benchmarks to determine whether loans from SOCBs conferred a benefit.[572] According to the USDOC, the use of external benchmarks was consistent with its past practice.[573]

10.85 Before us, China challenges, as inconsistent with Article 14(b) of the SCM Agreement, the USDOC's decision to reject Chinese in-country interest rates, and to resort to external benchmarks, for calculating the existence and amount of any benefit from SOCB-provided loans denominated in RMB.[574] China makes no such claim in respect of the USDOC's decision to reject Chinese in-country interest rates and resort to external benchmarks for calculating the existence and amount of any benefit from SOCB loans denominated in U.S. dollars. In respect of both RMB- and U.S. dollar-denominated loans, China also challenges the specific benchmarks used by the USDOC. The issues concerning the specific loan benchmarks are discussed in Sections X.J and X.K, *infra*.

2. Main arguments of the Parties

(a) China

10.86 China argues that the USDOC's decision to reject interest rates in China as benchmarks for the RMB loans was inconsistent with the requirements in Article 14(b) of the SCM Agreement. In particular, China alleges that under Article 14(b) the benchmark for determining whether a loan provided by the government confers a benefit is a "comparable commercial loan that the firm could actually obtain on the market", and that a benchmark can meet these criteria only if it is denominated in the same currency as the government-provided loan.[575] China argues that because interest rates differ by currency, loans denominated in different currencies cannot be "comparable". According to China, a comparison involving loans in different currencies will necessarily measure the "factors that cause interest rates to be different in different currencies", rather than the extent to which the recipient of the government-provided loan is "better off" as required by Article 14(b).[576] In addition, China considers that the "market" in which a firm can "actually obtain" a "comparable" loan will depend

[571] Exhibits CHI-1,p. 6; CHI-3,pp. 11 and 83; CHI-4, pp. 7 and 104.
[572] Exhibits CHI-1, pp. 6-7; CHI-3, p. 83; CHI-4, pp. 104-105.
[573] The USDOC cited its previous findings in *Softwood Lumber from Canada*; *CFS from the PRC*; and *CFS from Indonesia*, where it had resorted to out-of-country benchmarks. (*See, e.g.*, Exhibits CHI-1, p. 7; CHI-3, p. 83; and CHI-4, pp. 7 and 104-105).
[574] As indicated at para. 10.1, *supra*, China also raises consequential claims pursuant to Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.
[575] China first written submission, para. 233; oral statement at the first meeting of the Panel, paras. 50-51; second written submission, para. 77.
[576] China, second written submission, paras. 76-77, citing to Appellate Body Report on *Canada – Aircraft*, para. 157.

upon the characteristics of the loan, including the currency in which it is denominated.[577] Thus, China submits that because the RMB can only be borrowed in the Chinese market, the USDOC was required to identify "comparable commercial loans" as benchmarks within this market.[578] China argues that despite the existence of such loans in the Chinese market, the USDOC unlawfully rejected them on the ground that China's "predominant role in the banking sector results in significant distortions that render lending rates in [China] unsuitable as market benchmarks".[579]

10.87 China disagrees with the United States that the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV* is relevant to the question of interest rates under Article 14(b). Even accepting *arguendo* that the concept of "distortion" as discussed by the Appellate Body in that case had some relevance in the context of interest rates under Article 14(b), China submits that, consistently with the Appellate Body's finding, the benchmark selected under Article 14(b) would still need to be based on "a comparable commercial loan which the firm could actually obtain on the market".[580] China also submits that none of the factors of government control and intervention on which the United States seems to base its distortion rationale (i.e., government ownership of banks, government regulation of deposit and lending rates, and government actions to influence the direction of interest rates) can plausibly support the USDOC's disregard of the requirements of Article 14(b).[581]

10.88 China argues, first, that interest rates are a direct consequence of the monetary policies pursued by governments, and that as a consequence, the interest rates set by governments affect the commercial interest rates charged by all banks, regardless of their level of state ownership.[582] In fact, China argues, the record evidence demonstrates that all interest rates in China, including those charged by non-state owned banks, are affected by the efforts of the central bank to curb monetary expansion through the setting of interest rates, rather than by the extent of the government's ownership of banks.[583] Thus, in light of the direct relationship between interest rates and national monetary

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[577] China second written submission, para. 83; response to Panel question 18 (second meeting). In support of its position, China relies on the Appellate Body's finding in *US – Upland Cotton* that the geographic scope of the relevant "market" will "depend on the product itself and its ability to be traded across distances". Consistently with this interpretation, China adds that factors such as the currency in which a loan is denominated, the borrower's creditworthiness, and the regulatory factors affecting the ability of borrowers and banks to operate across national borders are all relevant to determine the geographic "market" under Article 14(b). China therefore disagrees with the United States that there is a "world market" for lending, and adds that neither the United States, nor the USDOC have provided any evidence that the relevant "market" for RMB-denominated loans is anything "other" than China's lending market. (*See, e.g.,* China first written submission, paras. 237-239; comments on the United States' response to Panel question 17 (second meeting), citing to Appellate Body Report on *US – Upland Cotton*, para. 405).

[578] China first written submission, para. 239. China further submits that, as also acknowledged by the USDOC, the mere fact that a bank is wholly or partially owned by a government does not mean that loans by that bank are not "commercial". That is, a benchmark loan is "commercial" if it is made by a bank in the ordinary course of commerce. (Id, para. 235).

[579] *See, e.g.*, China oral statement at the first meeting of the Panel, para. 51.

[580] China first written submission, paras. 247-248; second written submission, paras. 88-92.

[581] *See, e.g.*, China first written submission, paras. 249, 264, 273.

[582] Id., paras. 255-256, 261; second written submission, paras. 98-102; oral statement at the first meeting of the Panel, para. 54. China refers in this context to an expert report (which was prepared for and submitted in the CVD investigation), stating that government intervention in credit markets to affect the level of interest rates is a widespread tool of monetary policy, (China first written submission, para. 256, referring to Exhibit, CHI-81, para. 7).

[583] China explains that the main tool used by its central bank (the PBOC) to direct commercial interest rates is a system of benchmark rates under which all commercial banks in China may not extend loans at less than 90 per cent of the prevailing benchmark rate applicable to the loan in question, and that as the PBOC raises or lowers the benchmark rates, it affects the rates at which commercial banks lend to borrowers. (China first written submission, para. 261).

policies, China submits that the United States' implicit analogy that government ownership of financial institutions is akin to the "'role of the government in the market as a provider of the same or similar goods'" is unfounded.[584] Moreover, China alleges that the USDOC's presumption that all loans by state-owned commercial banks in China are made on non-commercial terms, merely by virtue of state ownership, contradicts the USDOC finding of specificity in respect of the alleged subsidy. In particular, China submits that by rejecting all SOCB loans as benchmarks, the USDOC has implicitly found that "all" such loans were "made on non-commercial terms", and that therefore the alleged subsidy could not be specific because it would benefit every borrower in China.[585]

10.89 Second, China disagrees with the United States' assertions that China's banking regulatory system, particularly the fact that China maintains a deposit rate cap and a lending rate floor, distorts lending rates or that it is different from what are considered "traditional" regulatory controls. China submits that these are ordinary features of bank regulatory systems and that the United States does not dispute this. In addition, China argues that nothing in Article 14(b) allows investigating authorities to disregard the applicable benchmark set forth therein based on the subjective understanding that a banking regulation system is "traditional" or "untraditional", or to second-guess the correctness of banking regulations imposed by Members.[586]

10.90 Third, in regard to the government intervention in setting interest rates, China submits that it is undisputed that governments all over the world set interest rates for their currencies, and that therefore the whole premise of the USDOC's rationale for rejecting Chinese interest rates as "distorted" is invalid. For China, there are no interest rates that are "undistorted" by government "control" and "intervention", and as such, government "distortion" of interest rates cannot provide a basis for disregarding the requirements of Article 14(b), even if there were any lawful basis to do so.[587]

10.91 China disagrees with the United States' argument that given the lack of commercial loans in China the USDOC would have been unable to measure the benefit at issue had it applied Article 14(b) *verbatim*. China submits that, according to the record evidence, there are plenty of "comparable commercial loans" in China that provide an appropriate benchmark as required by Article 14(b).[588] In addition, China considers that because prevailing interest rates are determined by government action, the problem of circularity referred to by the Appellate Body in *US – Softwood Lumber IV* does not arise in the case of interest rates. Specifically, China argues that, unlike the situation in *US – Softwood Lumber IV*, it is the government's role "as a government" – rather than as a provider of the financial contribution – that affects prevailing interest rates and therefore the applicable benchmark

[584] China first written submission, paras. 263-264; second written submission, para. 102. China argues that even if such analogy had any basis, the United States' ownership argument would amount to the same *per se* test for "distortion" that the Appellate Body has already rejected in respect of Article 14(d). China adds that such a *per se* test is even more inappropriate in the context of Article 14(b), since the government's role as a provider of a financial contribution is unrelated to the factors that determine interest rates, and the USDOC in fact identified no evidence indicating that state ownership in commercial banks had any bearing upon the direction of interest rates. (Id., paras. 270-271; second written submission, para. 102).

[585] China first written submission, footnote 223.

[586] Id., para. 272; second written submission, paras. 105-106, 110; response to Panel question 41 (first meeting).

[587] China second written submission, paras. 111-112.

[588] Id., para. 115. For instance, China argues that the "big four" SOCBs are among the largest commercial banks in the world, are traded on international stock exchanges, and have attracted strategic investments from major international financial institutions. China adds that other commercial banks in China, which have either minority state ownership or no state ownership, are also traded on stock exchanges and have domestic and overseas investors. (Id., paras. 116-117).

under Article 14(b).[589] Therefore, China submits, when an investigating authority compares the interest rate of a government-provided loan to prevailing national interest rates, it is not comparing the government-provided loan to itself, but rather, to the interest rate conditions that affect all commercial lenders in that market. China also argues that this comparison is consistent with the notion of benefit under Articles 1 and 14 of the SCM Agreement. That is, a borrower would be "better off" only if it obtains an interest rate on a government-provided loan that is lower than the interest rate that it would have paid on a comparable commercial loan under prevailing interest rate conditions.[590] Thus, according to China, it was entirely possible to apply Article 14(b) to government-provided loans in China in order to determine whether the recipient was better off as a result of the financial contribution at issue.[591]

10.92 China rejects the "access to credit" argument advanced by the United States during the proceedings in this dispute. China argues that the United States' argument – that the "benefit" of the alleged "policy lending" subsidy is the mere "access to credit", even if the credit is provided at prevailing interest rates – amounts to an impermissible *ex post* rationalization, since it bears no relationship with the "benefit" that the USDOC actually purported to measure, i.e., the difference between interest rates in China and the benchmarking interest rates.[592] In any event, China submits that "access to credit", on its own, does not confer a benefit under Article 14(b). For China, "access to credit" at ordinary commercial interest rates could provide a benefit only if the firm receiving the government-provided loan could not "actually obtain" a comparable loan from a commercial bank because of its credit status. The record evidence does not indicate that companies in China could not "actually obtain" loans from non-SOCBs in the absence of the alleged "policy loans".[593]

10.93 Finally, China points to the broader systemic implications of the issue before the Panel. According to China, the rationale used by the USDOC to reject interest rates in China as benchmarks could open the way for WTO Members, through their countervailing duty laws, to judge other Members' sovereign monetary policy.[594]

(b) United States

10.94 The United States rejects China's arguments and submits that the USDOC's determination to use out-of-country interest rates was consistent with Article 14(b) of the SCM Agreement. In particular, the United States argues that, based on all of the evidence on the record, the USDOC determined that not only did China have a predominant role in the lending market as an owner of the

[589] China notes that in *US – Softwood Lumber IV* the Appellate Body was concerned with the situation in which "the government's role *in providing the financial contribution* is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular". (emphasis as added by China) (China response to Panel question 34 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 93).

[590] China second written submission, para. 100; citing to Appellate Body Report on *Canada – Aircraft*, para. 157; response to Panel question 34 (first meeting).

[591] China second written submission, paras. 120-121. In particular, China submits that it is consistent with Article 14(b) to compare the interest rate on a government-provided loan in China to the PBOC benchmark rate. In China's view, there is nothing "circular" in this comparison, as it is a comparison of the interest rate on the government-provided loan to the interest rate conditions that affect all borrowers of comparable commercial loans in the same market. (Id.).

[592] Id., para. 122; oral statement at the first meeting of the Panel, paras. 11-12, citing to the Appellate Body Report on *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 93.

[593] China second written submission, paras. 125-130.

[594] China first written submission, paras. 273-275; oral statement at the second meeting of the Panel, para. 47.

majority of banks in China, it also directly controlled interest rates through its regulations of the market, thereby distorting loan rates in China.[595]

10.95 The United States disagrees with China's argument that "[a]ll interest rates are distorted by government intervention", arguing that China's intervention in the lending market is significantly different from that of most other governments. For the United States, the mechanism of having both a floor on lending rates and a cap on deposit rates renders China's regulation different from a typical government lending market regulation, and ensures that banks in China earn considerable profits through lending at or near the floor rate.[596] Accordingly, the United States argues, the USDOC's determination to reject in-country interest rates as a benchmark was not based only on China's intervention in the banking sector, but also on the extent and nature of its intervention and the resulting distortion in the lending market.[597] The United States therefore rejects China's assertions that the USDOC rejected Chinese loan rates because they were not "fully" market-based, or that the USDOC presumed that all loans by SOBCs were made on non-commercial terms, merely by virtue of state ownership.[598]

10.96 Likewise, the United States maintains that the USDOC's concern was not to judge China's monetary policies and/or to determine whether China's direct control over interest rates was traditional. Rather, the United States submits, the USDOC determined, consistently with the reasoning of the Appellate Body in *US – Softwood Lumber IV*, whether such control created distortion in the Chinese lending market.[599] In fact, the United States argues, the USDOC evaluated the extent to which China's invasive control over interest rates distorted the lending market, such that it was inappropriate to rely upon any in-country interest rates as benchmarks.[600] The United States also

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[595] United States first written submission, para. 230; second written submission, paras. 80-81; opening statement at the second meeting of the Panel, para. 29. The United States notes that in determining that the lending rates in China were unsuitable as market benchmarks, the USDOC relied on the reasoning it had applied in the previous investigation of *CFS Paper*, where the USDOC concluded that China's intervention in the lending market distorted that market. The USDOC's findings relied largely upon three major factors: (i) China's banking sector remained almost entirely state-owned; (ii) there was extensive government regulation of interest rates; and (iii) foreign bank lending in China was subjected to the same distortions as domestic bank lending. (United States first written submission, para. 236). The United States observes that China does not contest the facts upon which the USDOC relied, e.g., the fact that it owns the majority of the banking sector or the fact the Chinese banks are still operating on non-commercial basis. (United States second written submission, para. 91).

[596] United States first written submission, para. 240; second written submission, para. 92. The United States indicates that China ensures that its banks earn a profit on "each" loan by (i) capping the deposit rate below the interest rate floor and (ii) preventing competition among banks for savers' capital. The United States adds that China's policies further provide savers' few investment options beyond depositing their savings with the banking system. (United States second written submission, para. 92).

[597] The United States observes that while China does not contest the USDOC's factual findings regarding its regulations in the lending market, its indication that "most commercial borrowers in China obtain interest rates of loans [...] that fall somewhere between the interest floor and the benchmark itself" confirms the distortion provoked by these regulations in the lending market. For the United States, the marginal difference between such interest rates is due to the fact that banks can lend at the floor rate and are still ensured a profit, and therefore, the interest rates are not at the level they otherwise would be absent these controls. (Id., para. 93).

[598] United States first written submission, paras. 201-202, 235.

[599] United States second written submission, para. 96, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 101; response to Panel question 41 (first meeting). The United States indicates that in the OTR investigation the USDOC refrained from judging China's monetary policies as it rejected arguments made by domestic producers that "China had monetary policies that distorted the inflation rate and, therefore, Commerce should not adjust for inflation in its lending benchmark." (*See, e.g.*, United States second written submission, footnote 161).

[600] Id., para. 96. The United States rejects China's argument that the Appellate Body's recognition of the possibility of resorting to out-of-country benchmarks is limited to Article 14(d), arguing that the "Dominant Firm" theory applies equally to the lending market. (Id., para. 95).

submits that China's position would require the use of loans distorted by the government's intervention as benchmarks and that this position is at odds with prior panel and Appellate Body findings.[601]

10.97 The United States also disagrees with China that the terms "comparable" and "actually obtain on the market" in Article 14(b) require that the benchmark be denominated in the currency of the government-provided loan. The United States submits that nothing in Article 14(b) requires the use of a benchmark loan denominated in any particular currency, and that such an outcome would be incongruous with the flexible nature of Article 14 of the Agreement which, as the Appellate Body has explained, permits the use of out-of-country benchmarks.[602] The United States adds that while this flexibility is confirmed by China's Protocol of Accession, China's interpretation would exclude all RMB lending from the scope of that provision, and there is no basis in the text of the Accession Protocol for such an exclusion.[603] According to the United States, China's interpretation is also inconsistent with the object and purpose of the SCM Agreement, since it would prevent Members from fully offsetting the effects of a subsidy.[604]

10.98 The United States submits that the term "market" is not qualified in Article 14(b), and that the context of Article 14 suggests that the relevant "market" is not limited to the country of provision. In this regard, the United States observes that while Articles 14(a) and (d) refer to a geographical indicator, no geographic specification is reflected in Article 14(b). The United States also notes that although Article 14(d) contains a geographical indicator, the Appellate Body found that Article 14(d) does not bind investigating authorities to select only in-country benchmarks when the government has a predominant role in the market. Therefore, the United States submits, there is no basis for interpreting Article 14(b) as imposing a more restrictive "geographical limitation" than Article 14(d).[605] Nor does the term "market" in Article 14(b) require or exclude the possibility of a national market or a world market for lending.[606]

10.99 Finally, the United States submits that the term "market" in Article 14(b) must not be read in such a way as to require the use of benchmark loans distorted by government predominance and other interventions, as such an interpretation would effectively eliminate the word "commercial" from the term "comparable commercial loan", and would in some cases imply a circular benefit comparison. In addition, the United Sates argues that in *EC – Countervailing Measures on DRAM Chips* the panel recognized the difficulties that investigating authorities face in measuring the benefit of government-provided loans, finding that investigating authorities are "entitled to considerable leeway" in adopting reasonable methodologies to calculate the benefit.[607]

3. Main arguments of the Third Parties

(a) Australia

10.100 Australia considers that there is no basis in Article 14(b) for the benchmark used to "relate or refer to, or be connected" with the conditions prevailing in the market of the country of provision. Australia notes in this respect that loans are available on an international financial market that is subject to international influences. Furthermore, Australia considers that there is no basis in the text

[601] United States response to Panel question 41 (first meeting), citing to, *inter alia*, Appellate Body Report on *US – Softwood Lumber IV*, para. 103.
[602] United States first written submission, paras. 249-253; opening statement at the first meeting of the Panel, para. 32.
[603] United States first written submission, para. 254.
[604] Id., para. 252.
[605] *See, e.g.*, United States response to Panel question 17 (second meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 103.
[606] Id., citing to Appellate Body Report on *US – Upland Cotton*, para. 406.
[607] Id., citing to Panel Report on *EC – Countervailing Measures on DRAM Chips*, para. 7.213.

of Article 14(b) to limit the permissible benchmark to loans in the same currency as that of the loans being investigated given that loans obtained in one currency can be used to purchase any currency at rates determined by international markets.[608]

(b) European Communities

10.101 The European Communities considers that the interpretation of Article 14(d) by the Appellate Body in *US – Softwood Lumber IV* is relevant for clarifying the meaning of Article 14(b). The European Communities notes that the Appellate Body based its interpretation on the objective of Article 14 of the SCM Agreement ("Calculation of the amount of a subsidy in terms of the benefit to the recipient"). The European Communities is of the view that in light of this objective, once it has been established that the relevant market conditions are distorted, the comparison contemplated by Article 14 would become useless. The European Communities considers that if it has been shown that the "comparable commercial loan which the firm could actually obtain on the market" is also distorted because of the government intervention, then having recourse to alternative benchmarks could be possible on a reasonable basis, and such other benchmarks might correspond to a "comparable commercial loan" as provided for by Article 14(b), which has no express territorial limitation.[609]

(c) Japan

10.102 Japan considers that, consistent with the findings of the Appellate Body in *Japan – DRAMs (Korea)*, where the government dominates the relevant financial market, an investigating authority has "some latitude as to the method it chooses to calculate the amount of benefit", although it still has to identify a "comparable" and "commercial loan" as a benchmark. Therefore, Japan considers that the question before the Panel is whether sufficient evidence supports the USDOC's conclusion that there was no benchmark within China that could be used, and should the Panel find that there were no such benchmarks, it should then examine the consistency with Article 14(b) of the benchmark selected by the USDOC.[610]

(d) Mexico

10.103 Mexico disagrees with China that the USDOC relied on China's monetary policy in order to reject the interest rates in China as a benchmark. In Mexico's view, the USDOC's determinations were based on other considerations, which included the predominant position of public bodies in the commercial banking sector and the extent to which this situation distorted the interest rates fixed by China's central bank.[611]

(e) Saudi Arabia

10.104 Saudi Arabia considers that a benchmark loan must comply with the "cumulative" criteria set forth in Article 14(b) of the Agreement. In this regard, Saudi Arabia is of the view that the term "comparable" suggests that the benchmark loan should be a loan denominated in the same currency, and subject to the same generally applicable financial regulations of the country providing the government loan. In addition, the word "commercial" refers to any transaction that is made in the ordinary course of commerce, while the phrase "which the firm could actually obtain on the market" imposes a requirement that the benchmark be based on the actual borrowing experience of the recipient firm. Saudi Arabia argues that the use of constructed benchmarks based on loans that are

[608] Australia third-party submission paras. 37-40; third-party response to Panel question 7.
[609] European Communities third-party submission, paras. 39-40; third-party response to Panel question 7.
[610] Japan third-party submission, paras. 33-37.
[611] Mexico third-party response to Panel question 7.

not actually available, but rather represent an average of a set of loans gathered in a discretionary manner to represent the "average commercial loan" are inconsistent with Article 14(b). Saudi Arabia takes issue with the United States' argument that the reasoning of the Appellate Body in *US – Softwood Lumber IV*, although decided under Article 14(d), is "equally applicable" under Article 14(b). Saudi Arabia argues, *inter alia*, that nothing in the Appellate Body's report indicates its application to Articles 14 (a), (b), and (c), nor to the "entirety of Article 14". However, assuming *arguendo* that the reasoning of the Appellate Body in that case applies to Article 14(b), Saudi Arabia considers that the clear admonitions made by the Appellate Body on the use of out-of-country benchmarks would apply as well.[612]

4. Assessment by the Panel

(a) Whether Article 14(b) permits rejection of in-country interest rates as benchmarks, and if so, under what circumstances

10.105 The central question of legal interpretation raised by this claim is whether, and if so under what circumstances, Article 14(b) of the SCM Agreement permits the rejection of in-country interest rates as benchmarks for government-provided loans. We recall here that China's claim and arguments in this regard are limited to SOCB loans denominated in RMB, and in particular that RMB loans can only be obtained in China, and that to be "comparable" in the words of Article 14(b), a benchmark loan must be denominated in the same currency as the one under investigation. We note that China does not challenge the rejection of in-country interest rates as benchmarks in respect of SOCB U.S. dollar-denominated loans.[613] That said, the USDOC's determinations in the investigations at issue made no distinction on the basis of the currency of the loans as to whether or not in-country interest rates could be used. To the contrary, the USDOC's analysis and conclusions were in respect of the Chinese banking sector, and lending market, in general. Thus, our analysis under Article 14(b) focuses on the general question of whether, and if so when, rejection of in-country interest rates is permissible.

10.106 We turn first to the text of Article 14 of the SCM Agreement:

> "*Article 14*
>
> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as

[612] Saudi Arabia third-party submission, paras. 91-99.

[613] In fact, China appears to agree in principle with the USDOC's choice of benchmark for these loans, citing the USDOC's use in the OTR investigation of a LIBOR-based benchmark for U.S. dollar-denominated loans as indicative of the USDOC's "recognition" that a "comparable" loan must be denominated in the same currency as the loan under investigation, and that this is consistent with a proper understanding of what it means for a loan to be "comparable". (China first written submission, para. 234).

> inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
>
> (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
>
> (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
>
> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".

10.107 As discussed in Section XI.E.3, *infra*, the chapeau of Article 14 indicates that the provisions set forth in sub-paragraphs (a)-(d) of this provision are "guidelines", and that while investigating authorities must respect these guidelines in calculating the benefits from the particular kinds of financial contributions identified in the respective sub-paragraphs, they have flexibility as to the precise methodology that they use, so as to be able to take into account the particular facts of a given investigation.

10.108 Concerning the specific provision at issue, Article 14(b) of the SCM Agreement provides that the relevant comparison for determining whether a government loan confers a benefit is with "a comparable commercial loan that the firm could actually obtain in the market". In our view, the key concept in this phrase is the word "commercial". In particular, the basic task in calculating a benefit from a government loan is to determine whether, when an investigated entity borrows from the government, the terms are better-than-commercial, i.e., better than a commercial lender would charge for the same loan.

10.109 This view of Article 14(b) is in keeping with the general interpretation of the concept of benefit as an advantage that makes the recipient better off, by virtue of the government's provision of the financial contribution in question, than the recipient would be if it obtained the same financial contribution from the market (i.e., commercially).[614] Indeed, in broad terms this is the comparison *required* by all of the subparagraphs of Article 14, namely, to compare the terms of the government financial contribution with the terms that would be offered through the commercial market for the same financial contribution.

10.110 Furthermore, we consider that the chapeau of Article 14 establishes this comparison with commercial market terms as the general principle for the determination of the amount of benefit from

[614] *See, e.g.*, Panel Report on *Canada – Aircraft*, para. 9.113.

any kind of government financial contribution (including those not specifically referred to in the sub-paragraphs of Article 14), via its generally worded requirement that "any method used [...] to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 [...] be consistent with the guidelines" in the sub-paragraphs.[615] Our view in this regard is essentially the same as the general characterization of Article 14 by the panel in *Canada – Aircraft*, namely that the guidelines in Article 14 "employ a *commercial* benchmark, whereby a financial contribution 'shall not be considered as conferring a benefit' unless that financial contribution is made on terms that are more advantageous than would have been available to the recipient on the *commercial* market".[616]

10.111 Thus, pursuant to Article 14(b) of the SCM Agreement, the comparator to be used to determine the existence and amount of any benefit from a government loan must be, first and foremost, "commercial". One possible interpretation of this term could be that any loan made by a government would, *ipso facto*, not be "commercial", because to require otherwise would involve the comparison of the terms of one financial contribution by a government to those of another. We are not, however, called upon in this dispute to definitively rule on this question, because in fact the USDOC did not reach its determination that interest rates in China could not be used as benchmarks on the basis that the government was the predominant supplier of credit in China, but instead looked at a number of other factors as well, as discussed in Section X.J, *infra*.

10.112 Second, Article 14(b) indicates that the benchmark loan must be "comparable". That is, Article 14(b) indicates that not any "commercial" loan can be used as a benchmark, but instead the particular benchmark loan selected must be "comparable" to the investigated government loan. We view the term "comparable" to mean, in general terms, that the benchmark loan should have been established around the same time, should have the same structure as (fixed or floating interests rates) and similar maturity to the government loan, should be about the same size, and should be denominated in the same currency, as these are the fundamental elements used to describe loans, and thus the elements on the basis of which different loans can be compared.

10.113 Finally, the benchmark loan should be one that the borrower "could actually obtain on the market". We see this as a reference first and foremost to the individual characteristics of that particular borrower (essentially, its risk profile). In other words, how would a commercial lender evaluate that borrower in deciding whether to make the investigated loan? Most importantly, what interest rate would the commercial lender charge, and what repayment terms, collateral, etc., would it require, for a loan of the same structure and maturity as the government loan, based on its evaluation of the borrower's likelihood of defaulting?

10.114 The guidelines thus would prevent, for instance, the amount paid on a one-year floating rate government loan from being directly compared to the amount that would be paid on a 10-year fixed rate commercial loan. Similarly, the guidelines would prevent the amount paid on a government loan to a AAA-rated borrower from being compared with the amount that would be paid on a commercial loan to a B-rated borrower. Furthermore, they would prevent the amount paid on a government loan denominated in Canadian dollars from being directly compared to the amount that would be paid on a commercial loan denominated in Japanese yen, and so forth. Ultimately, therefore, the guidelines of Article 14(b) provide that the benchmark interest rate used to determine the existence and amount of

[615] For example, in the case of grants, which are not listed in Article 14, the comparison with the market would give the result that the benefit amount is the full amount of the grant because grants are in essence gifts, and it is clear that the market does not give gifts. Similarly, the amount of the benefit from a tax exemption or similar tax measure also would be the full amount of the taxes not paid, as the tax exemption or reduction also would be in essence a gift from the government to the recipient.

[616] Panel Report on *Canada – Aircraft*, para. 9.113. (emphasis added) We recall that in *Canada – Aircraft*, the Appellate Body upheld the panel's analysis and interpretation of the term "benefit" in Article 1.1(b) of the SCM Agreement, including its reliance on Article 14 as relevant context. (Appellate Body Report on *Canada – Aircraft*, paras. 155 and 161).

benefit from a government loan reflect not only the basic features of the government loan, but also reflect the risk level of the borrower.

10.115 On the basis of this analysis, it is clear that the "ideal" benchmark in terms of Article 14(b) of the SCM Agreement 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. It also is clear, however, that in practice the existence of such an ideal benchmark loan will be extremely rare. The commercial loans actually held by a given borrower will almost inevitably have certain differences, whether in timing, size, maturity, structure, and/or currency from the investigated government loan, that would make them not perfectly comparable, or even not comparable at all, to that government loan. As one example, in a given country there may be no commercial market for long-terms loans – all such loans may be government-provided. In such a situation, the only commercial loans in existence in that country would be short-term. Similarly, a given borrower may have on its books a commercial loan that is essentially identical to the government loan except for its origination date, and there may have been a very large generalized movement in interest rates during the interval that would make these loans not directly comparable.

10.116 The question then becomes how Article 14(b) addresses such situations, which will arise frequently, indeed probably in the large majority of cases. In particular, where there are differences in existing commercial loans held by the borrower such that in the strict sense of the term they are not "comparable" with the investigated government loan, does Article 14(b) require an investigating authority to conclude that there simply is no benchmark, and that as a result no benefit amount can be determined (which would mean, in effect, that the benefit amount is zero)? In our view, this is not the case.

10.117 We note, first, the phrase "the amount the firm *would* pay on a comparable commercial loan that which the firm *could* actually obtain on the market". In our view, the use of the conditional mode here, in conjunction with the reference to the individual borrower's situation, is an indication that where loans are concerned, the very individualized nature of borrowing, as discussed above, often will limit an investigating authority's ability to identify a fully comparable existing commercial loan held by the investigated borrower to use as a benchmark for the investigated government loan, meaning that some degree of approximation will be inevitable. Often this approximation can be accomplished by making adjustments to a loan that is not comparable in every respect, such that, following the adjustments, the resulting adjusted loan's terms have been made comparable. In this sense, an adjusted non-comparable loan would be a proxy for a theoretical "comparable commercial loan" that the borrower "could actually obtain on the market". We thus see that 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. The same terms, however ("comparable" and "could actually obtain on the market"), also require that, where adjustments and/or proxies are necessary due to the absence of an existing commercial loan that is comparable in every respect, the resulting benchmarks must be appropriate.[617]

10.118 In this regard, we view the identification of a loan benchmark pursuant to Article 14(b) as a series of concentric circles. The first best option, as noted, is to find a commercial loan to the same borrower that is identical or nearly identical to the investigated loan (in terms of timing, structure, maturity, size and currency). If that borrower has no such loan, then the next place to look logically would be the borrower's other existing commercial loans, to see if any of them is sufficiently similar that its terms could be adjusted to reflect the basic characteristics of the government loan. Such

[617] Of course, the SCM Agreement does not require the imposition of countervailing measures, meaning that an investigating authority always has the option not to apply a countervailing measure in respect of a given subsidy. In this sense, if an investigating authority had difficulty in identifying a suitable benchmark for a given government financial contribution, it could choose not to perform a benefit calculation, and thus to omit the particular financial contribution from its overall calculation of subsidization of the investigated product.

adjustments might reflect, for example, different dates of origination of the loans (to account for interest rate fluctuations that may have taken place in the market during the interval), different sizes, different maturities, different currencies, different structures, changes in the borrower's credit risk (e.g., if a loan on the borrower's books was originated at a time when the borrower had a high credit rating, but the rating had been downgraded by the time the government loan was made), etc. There are many possible examples, and we do not mean here to rule on all potential situations that might arise or to pronounce in any way as to what particular kinds of adjustments might or might not be acceptable under Article 14(b) in the circumstances of a given investigation. These are questions that could only be resolved on a case-by-case basis, and our point here is, simply, that in many or most cases, certain adjustments will need to be made to ensure that ultimately the amount of the benefit that is calculated is based on the amount that "would" be paid on a "comparable commercial loan" that the borrower "could" actually have obtained on the market.

10.119 There may be circumstances, however, where the actual differences between any of the commercial loans on a borrower's books and the investigated government loan are so significant that it is not realistically possible to address them through adjustments; or the investigated government loan might be the only loan on the borrower's books; or the borrower's only other loans might also be from the government. In these circumstances, the investigating authority would need to look beyond actual loans held by the investigated borrower, and use other sources of information. One possibility in this regard could be a similar commercial loan granted to another borrower with a similar credit risk profile as the investigated borrower (if such a loan could be identified). If no appropriate commercial loan benchmark can be identified, then the authority could construct a benchmark loan proxy. While Article 14(b) contains no specific guidance as to how this would need to be done, we see no *a priori* restriction to any geographical market (as exists, for example, in Articles 14(a) and 14(d)), or any prohibition of any particular approach to constructing a proxy. Rather, the fundamental rule in Article 14(b) is that the measurement of the benefit be based on what "would" have been paid on a comparable commercial loan that "could" actually have been obtained by the investigated borrower, even if no such loan exists.

10.120 We note in this regard that China invokes the particular case of RMB-denominated loans as a situation in which it is impossible to use any interest rate other than one found inside China as a benchmark, due to the impossibility of borrowing RMB anywhere outside China. We acknowledge 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. That said, in our view, currency differences do not necessarily pose the insurmountable hurdle that China posits. In particular, there are means to determine the equivalence of loans expressed in different currencies, notably the various forms of swap transactions that are routinely used in international financial markets, whereby borrowers in different currencies swap principal amounts and/or interest payment streams on their respective loans. By definition, these exchanges between willing partners express the equivalence of the values of the dissimilar things being exchanged. We note that swap transactions of this type were originally developed to circumvent restrictions and limitations on borrowing in foreign currencies.[618] Thus, unlike China, we do not consider that the geographic restriction of lending in a particular currency precludes, as a matter of law, a comparison with a benchmark loan expressed in a different currency from that of the government loan. Rather, this is a feature of a loan that can, at least in certain circumstances, be made to be "comparable", in the sense of Article 14(b), to the investigated government loan.

[618] *See http://www.sjsu.edu/faculty/watkins/swaps.htm*. We further note that in 2005, the People's Bank of China reportedly allowed banks for the first time to engage in cross-currency swaps for forward foreign exchange contracts (although not interest). (Risk magazine, "China opens up renminbi swaps market", 1 September 2005).

10.121 More generally, we see China's interpretation of the terms of Article 14(b) as excessively formalistic, in that it would effectively limit an investigating authority's ability to identify an appropriate benchmark, forcing it instead to fall back on a choice from among inappropriate benchmarks. In particular, in our view, 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, so long as the second loan was made in the "ordinary course of commerce"[619] (a term for which China offers no explanation).[620] In our view such a comparison would be entirely circular given that the point of the exercise under Article 14(b) is to compare the government loan in question to something that is *not* a government loan. Similarly, we consider that pursuant to China's argument, if a loan were made in a particular currency which was only lent in the country subject to the investigation, then even if all of the loans in that currency were government-provided loans, the fact of the currency restriction again would force the investigating authority to identify the benchmark from among the same-currency government loans, in spite of the circularity of the resulting comparison. To us, this is directly counter to the directives of Article 14 in general and Article 14(b) in particular, which are aimed at a meaningful comparison with the commercial market.

10.122 In this respect, we see the logic of the Appellate Body's reasoning in *US – Softwood Lumber IV* in regard to Article 14(d) of the SCM Agreement to be equally applicable to Article 14(b), and indeed to Article 14 in its entirety. Here we recall in particular the Appellate Body's analysis of the terms "in relation to prevailing market conditions [...] in the country of provision" in Article 14(d). The Appellate Body reversed the panel's interpretation that this required the use of in-country prices as the benchmark even if distorted by the government's predominance as a supplier of the good. The Appellate Body found that instead any benchmark, to be "in relation to" those market conditions, had to "relate or refer to, or be connected with" them. In this regard, the Appellate Body specifically indicated that where in-country benchmarks were not available, "proxies" could be used so long as these related or referred to, or were connected with, the "prevailing market conditions in the country of provision".

10.123 We recall in this context that the problem where in-country benchmarks cannot be used to determine adequacy of remuneration for goods is that the prevailing, observed conditions of purchase or sale in the country of provision of the good reflect the government's role as predominant supplier or as controller of the prices. As such, it is clear that the appropriateness of any selected proxy in such a situation (in terms of how well it reflects the "prevailing market conditions" for the good in that country) cannot be verified directly. We thus understand the Appellate Body, in these statements, to indicate that while proxies can be used in place of the directly observed prices in certain circumstances, those proxies must be carefully selected and adjusted as necessary to as closely as possible represent the market conditions that would prevail if the government was not the predominant supplier or did not control the prices. Furthermore, given that the Appellate Body has found that the language in Article 14(d) referring to the "country of provision" does not limit, in a formalistic way, the selection of a benchmark from among the observed prices in that country, we consider that the same is equally true where, as in Article 14(b), the term "market" is not geographically modified in any way.

10.124 We note China's argument that its approach would not result in a circular comparison. In particular, China views the United States' approach as based on a misplaced analogy between the Appellate Body's reasoning in *US – Softwood Lumber IV* in respect of the "role of the government in

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[619] *See, e.g.*, China first written submission, para. 235.

[620] China only provides a dictionary definition of the term "commercial" and cites a paragraph of the Panel Report on *China – Intellectual Property Rights* and a paragraph of the Panel Report on *Canada – Wheat Exports and Grain Imports* in which the dictionary definition of the term "commercial" appears. China provides no definition and/or explanation of its own phrase "ordinary course of commerce".

the market as a provider of the same or similar goods" under Article 14(d), and government ownership of financial institutions. China states that implicit in this argument is the suggestion that government ownership of financial institutions somehow "distorts" the interest rates charged by all financial institutions within a country, such that national interest rates are "unreliable" or "unsuitable" as a benchmark under Article 14(b). China disagrees because, it argues, central banks set interest rates as a tool of monetary policy, which rates in turn affect the interest rates on commercial loans charged by all banks, whether or not the latter are government-owned. According to China, there is nothing "circular" about comparing the interest rate on a government-provided loan to the interest rate conditions that affect all borrowers in the same currency, regardless of the source of the loan, because the effect that governments have on interest rates does not result from whatever role they play in the market for commercial lending, i.e., from their "role in providing the financial contribution". Rather, it arises from their role *as a government* in guiding monetary policy.[621]

10.125 We do not consider that this argument by China resolves, or even squarely addresses, the legal issue before us. In particular, China's argument presumes that all government control or regulation of or intervention in lending markets, of whatever kind and degree, must be treated as the simple implementation of general monetary policy, which by definition cannot give rise to distortion of lending rates so as to make the observed interest rates within the country unusable as benchmarks (even if all of those observed interest rates happened to be for government-provided loans). We see no such rule in Article 14(b) or anywhere else. Indeed, we recall that the overall purpose of the SCM Agreement includes, precisely, to discipline certain forms of market interventions by governments. We can see no logic, given this, to considering that a particular class of government market interventions (relating to interest rates) must be accepted "as is" as the underlying "market" condition, particularly where the question to be resolved is exactly whether on a given loan transaction the interest rate charged by that same government is "below-market".

10.126 Furthermore, we see no requirement that observed interest rates in the particular country or geographical market must simply be accepted as the "commercial" rates against which to measure the investigated government loan, even if the government's interventions of whatever kind (as opposed to the operation of market forces) effectively dictate the levels of those interest rates. Here, we see a clear distinction between, on the one hand, the government as the setter and implementer of the general monetary policy of a country; and, on the other hand, the government participating as a lender and/or otherwise intervening in the lending market as such, in a way and to an extent that effectively it is the government, and not the market, that establishes the lending rates.

10.127 We acknowledge, as China points out, that government influence over interest rates is an important feature of monetary policy. Indeed, adjusting their own lending rates up or down is one of the principal tools by which central banks influence the money supply. It also is true that interest rate movements at the central bank level ripple through the commercial lending market such that the different sorts of commercial lending rates (short- and long-term, fixed and floating, for borrowers of different risk levels, etc.) tend to move in parallel with the central bank rates. This indeed is generally the goal of such central bank actions, as the loosening or tightening of commercial credit directly increases or decreases the money supply.

10.128 This is a very different matter, however, from a hypothetical situation in which, for example, the government is the only lender in a country. In such a situation, whatever its underlying monetary policy, the government itself would directly set all of the lending rates to all of the firms in the country. Thus, there would be no commercial benchmark interest rate in that country to which the interest rate on any government loan could be compared in the sense of Article 14(b). Any in-country comparison would be inherently circular.

[621] China second written submission, paras. 98-100; response to Panel question 34 (first meeting).

10.129 It also is very different from a hypothetical situation in which the government simply dictated the lending rates to be charged by "commercial" banks. That is, even if the government itself was not a lender, and even if the banks were not government-owned, and regardless of the underlying monetary policy, it would be the government, not market forces, that set the lending rates for commercial borrowers, by fiat. Thus, here again there would be no commercial benchmark rate to which the interest rate on a government loan could be compared in the sense of Article 14(b). Again, any in-country comparison would be inherently circular.

10.130 Similarly, some combination of a large government role as a lender to commercial borrowers, and significant direct control over lending and interest rates to commercial borrowers, also could result in a situation in which the interest rates to commercial borrowers do not reflect the operation of market forces, but instead are distorted in the sense that they are effectively established by the government. In this situation as well, we consider that comparing the interest rate on a government loan to another loan in the same country would be a circular exercise. We view such a situation as analogous to that analyzed by the Appellate Body in *US – Softwood Lumber IV* (government predominance as a supplier of a good), and as discussed we consider that inherent in Article 14(b), as in Article 14(d), is sufficient flexibility to permit the use of a proxy in place of observed rates in the country in question where no "commercial" benchmark can be found.

(b) The USDOC determinations not to rely on interest rates in China as benchmarks for SOCB loans

10.131 In the three investigations at issue, the USDOC stated that the benefit from a government-provided loan normally is measured by comparison to a "loan that the recipient could actually obtain on the market" and therefore "the benchmark should be a market-based rate". In these investigations, however, the USDOC determined that there was not a functioning market for loans within China[622], and that therefore none of the sources of Chinese interest rates could be used as benchmarks, as follows:

- SOCBs loans, which were found to be made under the "Government Policy Lending" program, could not used as benchmarks since these loans were the very loans for which suitable benchmarks were needed[623];

- Chinese national interest rates were not reliable as benchmarks because of the pervasiveness of China's intervention in the banking sector – i.e., loans provided by Chinese banks reflected significant government intervention and did not reflect the rates that would be found in a functioning market[624]; and

[622] Exhibits CHI-1, p. 6; CHI-3, p. 11; and CHI-4, p. 7. The USDOC considered that while benchmarks must be comparable commercial loans – i.e., they must be from a commercial lending institution, and similar in structure to government loans with respect to whether they are fixed or variable, the date of maturity, and the currency in which they are granted – interest rates are unusable to measure the benefit from government loans where they are found to be distorted. In the LWS and OTR investigations, citing to its previous findings in the *CFS Paper* investigation, the USDOC further determined that these market distortions could not be adjusted. It noted that for an adjustment to be practical, an underlying market-based rate must exist; however, in China (where no underlying market-based rate exists), determining what the necessary adjustments would be in order to form a market-determined interest rate would be highly complex, speculative, and impracticable. (Exhibits CHI-3, p. 83; CHI-4, p. 104; and CHI-93, p. 70).

[623] The USDOC noted that it does not treat comparable commercial loans, which it normally uses for benchmarking purposes, as commercial loans where they were provided pursuant to a government programme. (Exhibits CHI-1, p. 6; CHI-3, p. 11 and CHI-4, p. 7).

[624] Exhibits CHI-1, p. 6; CHI-4, pp. 7 and 104; and CHI-34, p. 67900.

- Foreign bank lending in China was unsuitable as a benchmark since China's involvement in the banking sector created significant distortions, restricting and influencing foreign banks operating within China.[625]

10.132 The USDOC's assessment and conclusions in the three investigations that Chinese interest rates were distorted and did not reflect the rates that would be established by a functioning market were based on its previous findings in the *CFS Paper* investigation. In that investigation, the USDOC had reviewed the role of the Government of China in the banking sector and concluded that China's intervention in the lending market distorted the market.[626] In the three investigations at issue before us, the USDOC determined that the respondents had not demonstrated that these findings no longer held. The USDOC's determinations in the three investigations thus are based on, and cross-reference extensively, its determination in *CFS Paper*. Given this, before we examine the USDOC's specific findings in the three investigations, we summarize the relevant portions of the *CFS Paper* determination.

(i) The CFS Paper determination relied upon by the USDOC in the OTR, CWP and LWS investigations

10.133 In *CFS Paper*, China and investigated producers had generally argued that:

- There was not a program in place to provide preferential lending: The Government of China and Chinese producers argued that "policy banks" and "policy lending" no longer existed as such in China. They noted that the importance of both had decreased since the year 2000 when the need for policy lending (and thus, for policy banks) declined. Since that time, the lending from policy banks had shifted from policy loans to commercial loans. The respondents argued that record evidence – statements by the PBOC and the China Bank Regulatory Commission (the "CBRC") – demonstrated that both SOCBs and policy banks functioned essentially as commercial banks, independent from government influence, and that industrial policy was only one of the factors that such banks considered in analyzing risk. Thus, they argued, these banks' decisions were based on commercial considerations.[627]

- SOCBs and Policy Banks operated on a commercial basis: The respondents also argued that other characteristics of the banking system demonstrated that SOCBs as well as policy banks operated on a commercial basis and acted independently from the government: (i) the loan application and approval processes were similar to those in the United States and other countries, and the government was not involved in such processes (as demonstrated at verification); (ii) banks in China had adopted and implemented risk analysis systems based on best practices, the implementation of which was monitored by the CBRC (the effect of the adoption of these risk analysis systems was that the number of non-performing loans was declining); (iii) the refusal of loans to some of the companies under investigation proved that they did not enjoy preferential lending from SOCBs; and (iv) according to record evidence (verification), banks competed regarding interest rates and customers were able to shop around for the best rates.[628]

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[625] Exhibits CHI-1, p. 6; CHI-4, p. 105; and CHI-34, p. 67900.

[626] In its previous anti-dumping duty investigation in *Lined Paper*, (in which, consistent with its practice, it treated China as a non-market economy), the USDOC determined that the banking sector in China did not operate on a commercial basis and that it was subject to significant distortions because of the continued dominant role of the government in the banking sector. This finding was further elaborated in *CFS Paper*, where the USDOC found that the government of China continued to dominate the domestic banking sector and to prevent banks from operating on a fully commercial basis. (Exhibits CHI-1, p. 7 and CHI-34, p. 67900).

[627] Exhibit CHI-93, pp. 42-43.

[628] Id., p. 44.

- The role of the government was similar to that of any other government: The respondents submitted that the role of the government in China was similar to that of any other government in allocating credit to specific industries: (i) the main role of the PBOC, which was macroeconomic analysis and monetary policy (including issues such as interest rates and inflation), did not indicate that it was able to ensure that banks' lending decisions and credit allocations conformed to government policies; (ii) the provisions of the Commercial Banking Law were not internally-inconsistent (some provisions prohibited government interference in the banks while others encouraged lending consistent with State industrial policy). Taken together, they provided that lending should take into consideration government policy and its effect on the borrower/project to be financed; (iii) banking reforms in China had been implemented, thus, the assumption that banks based their lending decisions on industrial policy was entirely based on "policy statements"; (iv) there was no evidence that bank officials appointed by the government were required to implement government industrial policies; (v) there was no "direct" record evidence to support the proposition that lending and credit allocation in China was directed (i.e., the studies referred to by the applicants contained outdated data (before 2005) and were subject to an opposite interpretation from that of petitioners)[629]; and (vi) numerous studies, which showed that a significant amount of capital flowed into and out of China, demonstrated that the Government of China could not constrain Chinese capital markets.[630]

- Internal benchmark in China: The respondents argued that there were appropriate benchmarks in China that the USDOC should use in its benefit calculation.[631] Interest rates in China were like those in a functioning market since, although in the past there had been government intervention, there had not been in the recent past and during the period of investigation, and there had been a gradual liberalization of the financial markets.[632] Interest rates for foreign currency loans[633] and interest rates on loans received by investigated producers from privately-owned Chinese banks (which were fully verified) were the rates that should be used for benchmarking purposes.[634]

10.134 The USDOC rejected these arguments. The USDOC stated that government influence was still present in the lending sector and that China's banking reforms had not been fully implemented. Specifically, the USDOC determined that:

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[629] Respondents further argued that where information from secondary sources (e.g., articles, and commentaries) is in conflict with primary source information, the USDOC should rely on the latter. They noted that evidence from primary sources on the record indicated that SOCBs and policy banks functioned as commercial banks – i.e., statements by bank officials, bank loan approval documents, bank project guidelines as well as banking regulations and policies indicated that banks evaluated loans on a commercial basis and that government industrial policies were a minor factor in the lending decision making process. (Exhibit CHI-93, p. 45).

[630] Id., p. 44-45.

[631] Id., p. 62.

[632] Similar to its arguments in the present dispute, the Government of China argued that its interventions on interest rates were not that different from those carried out by other countries around the world, and that the mechanisms applied by the government did not distort interest rates, rather it actually kept them too high (and not too low as asserted by petitioners). (Id., p. 63).

[633] They argued that in fact, the USDOC found government control only of RMB-denominated lending and deposit rates, and not of foreign-currency lending in China. Further, the USDOC did not determine that the Government of China controlled foreign-currency lending practices. (Id., pp. 63-64).

[634] Id., p. 64. The Government of China and Chinese investigated producers also made a number of arguments with respect to the out-of-country benchmark calculated by the USDOC: they, *inter alia*, challenged the USDOC's reliance on gross national income (GNI) to determine the proper basket of comparison countries (challenged as an outdated World Bank categorization), and argued that the rate of inflation should also be considered in determining the real cost of a loan. (Id.).

- China's banking system was still under state-control: The USDOC found that China's banking system remained under state control and continued to suffer from legacies related to the longstanding pursuit of government policy objectives, undermining the SOCBs' ability to act on a commercial basis.[635] While the scope and extent of government control over SOCBs was changing and evidence on the record with respect to such control was mixed, the central government had been very cautious on completely reforming the banking system; as a result, and since banks in China had never operated on a commercial basis, the government was still very involved in the sector.[636] Further, the USDOC found that while banking reforms in China might be starting to take effect, the evidence on the record indicated that they had not yet been fully implemented and that the influence from the government remained a significant factor in the operation of China's banking sector.[637] The USDOC noted that although the largest SOCBs had undergone some reorganization to become corporate entities (limited initial public offerings had been conducted and minority stakes in SOCBs were sold to foreign banks) their primary shareholder remained the Chinese government. Foreign investment in Chinese banks was tightly constrained, with total foreign ownership limited to 25 per cent in SOCBs.[638]

- China's banking system still operated in accordance with governmental planning-policies: The USDOC found that (i) the government ownership of the banking sector in China was "one" factor in the legacy effects of government control of the banking sector; (ii) the legal framework of China's banking sector contradicted the argument that SOCBs operated independently from the government[639]; (iii) the Government of China had not demonstrated

[635] The USDOC relied on statements from various reports as follows: (i) the OECD Report stated that "chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their choice"; (ii) the 2005 IMF Staff Report stated that "[r]ooting out the legacy of government directed lending, and training banks to make lending decisions based on purely commercial considerations … remains a major reform challenge"; (iii) the 2005 PBOC Annual Report stated that "[a]s the economic reform was not completed yet, investment was still orchestrated to a large extent by government […]"; (iv) the 2004 PBOC Annual Report stated that "some local governments still seek to promote economic growth by expanding investment"; (v) the 2004 China Monetary Policy Report stated that "[i]n 2004 the PBC under the guidance of the central government […] strengthening its window guidance and credit policy advice for commercial banks to follow the State industrial policy constrain credit to overheated industries and those inconsistent with the State industrial policy and to increase financial support for development of agriculture small and medium-sized enterprises consumption employment education and non-state sector guided"; and (vi) the 2005 Monetary Policy Report stated that "[t]he PBC implemented […] the macroeconomic strategy mapped out by the central government which called for differentiated treatment to different sectors by timely conveying to financial institutions the governments policy intentions so as to guide the commercial banks in taking forward-looking approach to respond to changes of economic cycles and industrial development and to improve the credit structure". (Exhibit CHI-93, pp. 55-57).

[636] The USDOC noted that this view was, at varying degrees, confirmed by independent experts. (Id., pp. 56-57).

[637] Id., p. 58.

[638] Id., p. 67. As we have noted, footnote 244, *supra*, China acknowledges that at the end of 2006, government ownership of the Big Four was as follows: 75 per cent in the ICBC; 74 per cent in the CCB; 68 per cent in the BOC; and 100 per cent in the ABC. (China first written submission, para. 165).

[639] The USDOC noted that while the Chinese Commercial Banking Law states that "commercial banks are responsible for their own profits and losses, must protect the interests of their depositors, and are protected from government influence", it further requires banks to "carry out their loan business upon the needs of national economy and the social development and under the guidance of State industrial policies". Similarly, the Bank of China Global Offering stated that "Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions. [They] are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies". At verification, officials from the People's Bank of China stated that "it may be necessary for banks to heed industrial policies; banks may be taking on great risk if their customers use loans in a way that is inconsistent with industrial policies". Further, the 2006 Report from State Council revealed that the reforms on

how or to what extent industrial policy was considered in the loan approval process, although it had argued that industrial policies were only one of the factors considered in this process; (iv) while SOCBs were improving their risk management capacities, they still lacked adequate risk management[640]; (v) despite several requests, the USDOC had not been provided with sufficient evidence to examine the complete loan-approval process, or with evidence necessary to show that the loans were made on a commercial basis[641]; and (vi) since the Chinese legal banking framework required banks to take into consideration government macroeconomic policies in making lending decisions, China's excess liquidity (or high volumes of loans) did not indicate that the Government of China could not have control over the SOCBs and guide their loan portfolios.[642]

- Interest rates regulated by the government: The USDOC found that the continued dominance of the State in Chinese banks as well as China's long history of using the banks to carry out its policy objectives, made uncertain the reliability of interest rates in China and their suitability as commercial benchmarks. Although the CBRC had been established in 2003, it was supervised by the PBOC until 2004. Thus, it was improbable that it could have revolutionized the operations of the banking sector only one year after taking on its supervisory role.[643] Furthermore, while banks were improving their risk management capacities, the way that interest rate formation was regulated in China both distorted lending rates and proved that SOCBs were not fully able to price their loans on a commercial basis. China maintained a system of both deposit rate caps and lending floor rates in such as way to guarantee the banks a considerable profit margin on their loans.[644] The lending rate floor was set so as to prevent the banks from pricing their loans at unsustainably low levels. In fact, interest rates remained generally undifferentiated – interest rates were quite close to the PBOC-set benchmark. On the other hand, the cap on deposit rates was set at a level slightly higher than inflation. Therefore, savers in China, beyond being restricted by the government to access alternative forms of investment, were prevented (by law) from receiving more than a negligible real return on their savings. As such, banks in China did not compete on deposit rates and almost had an unlimited access to the savers' capital at very little cost.[645]

"implementing a system that grants independence in investment coupled with responsibility for risk" were an ongoing process and were not complete in 2005. (Exhibit CHI-93, p. 58).

[640] According to the USDOC, this was partially demonstrated by the fact that interest rates in China remained generally undifferentiated. At verification, an official from the PBOC explained that interest rates spreads were close to the PBOC-set benchmark rate because "the Big Four attract the largest borrowers [which] are creditworthy [...] and have long-term relationship with the banks". (Id., pp. 59, 68-70). The USDOC further noted that the risk analysis system of most of these banks was not fully implemented: the PBOC stated that the ceiling on the deposit rate had been put in place "in order to afford banks time to restructure and a floor on lending rates to maintain order in the market [...] these restrictions will eventually be eliminated when banks have fully developed risk management and cost controls"; the CBRC stated that it "ha[d] [...] established a framework for achieving an international level of risk management" but at the same time acknowledged that "[such a] framework does not necessarily indicate a high level of risk management in practice"; and the BOC stated that its risk management implementation "is an on-going process [and that] there was not a comprehensive risk management system fully established in 2005". (Exhibit CHI-93, pp. 59-60).

[641] Id., p. 60.

[642] Id.

[643] Id., p. 68.

[644] The USDOC noted that at verification "the PBOC conceded that this floor and cap system sets China apart from other countries and that it is necessary because the banks have not yet fully implemented risk control". (Id., p. 68).

[645] The USDOC noted that the cap on deposit rates was both binding in 2005 and set at a level that was barely higher than inflation. Thus, according to the USDOC, savers were prevented from receiving more than a negligible real return on their savings and banks in China "do not compete on deposit rates and have access to savers' capital at very little cost". Thus, given that the government directs China's savings to the banking sector, that only a low return on deposits is allowed, and that banks cannot compete on deposit rates, the USDOC

Furthermore, the interest rates of the "issuance of commercial paper" or "corporate bills" – the equivalents for lending rates in China that were not regulated by the government – were not market-based and therefore not useable as a benchmark.[646]

- Foreign-owned banks in China were subject to the same restrictions as SOCBs: The USDOC determined that foreign-owned banks operated in the same distorted environment as the Chinese banks. It further found that these banks' share of financial assets and lending activity was negligible compared with those of SOCBs. While their participation in the domestic banking sector had increased, they provided only a very small share of credit in China and still operated mostly in niche markets. They did not compete directly with SOCBs.[647]

- Foreign currency lending rates in China for measuring the benefit of loans issued in RMB: While the rates for foreign-currency loans in China might follow international trends to some extent – being influenced by the monetary policies of the foreign country's central bank – foreign currency lending in China formed a very small portion of the overall financial sector.[648] Further, these rates did not provide any basis for a benchmark of what RMB rate would prevail in a market situation (as China's dominance of and intervention in the banking sector meant that such a benchmark did not exist in China).[649]

10.135 As noted, in each of the investigations at issue in the present claim, the USDOC relied on these findings. It determined that the market distortions it had found in the *CFS Paper* case were still present and that the Government of China and interested parties had not demonstrated that the Chinese banking sector had significantly changed such that reconsideration of the *CFS Paper* decision was warranted.[650] As a result, the USDOC determined in each of the investigations at issue that interest rates in China did not provide a suitable basis for assessing whether the loans provided to investigated producers conferred a benefit.

10.136 The specific arguments of the respondents and the findings of the USDOC in these three investigations were as follows:

(ii) OTR Investigation

10.137 In the OTR investigation, the Government of China argued that according to the evidence on the record, banks in China operated on market principles, and that the government five-year plans and other policy documents did not instruct banks to provide preferential financing to the OTR tire

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determined that "the concern about the banks driving interest rates down on their own to unsustainable levels [was] not surprising". (Id., pp. 69-70).

[646] The USDOC found that even though the Drazen Report (submitted by the Government of China to the USDOC) was correct in stating that these instruments were similar to bank loans and that they constituted an exception to the usual regulatory framework on lending, this lending regulatory framework – which served to keep rates higher than they would be otherwise – made the rates of these financial instruments to be lower than that of standard bank loans. The USDOC considered that this was not a genuine market outcome since these instruments constituted only a limited exception within the market. It noted that, in fact, it was the PBOC's maintenance of lending rate floors – in order to avoid lending rates going down to a level that could endanger the whole financial system – that allowed these alternative financial instruments to constitute only a limited exception. The USDOC noted in this respect that bank loans accounted for over 90 per cent of total financing in China in 2004, such that the alternative financial instruments proposed in the Drazen Report accounted for a very small share of total financing in China. (Exhibit CHI-93, p. 69).

[647] Id., p. 70. The USDOC's determination relied on the OECD Report.

[648] For example, CCB foreign currency loans only accounted for 5 per cent of their total loans. (Id., p. 70).

[649] Id.

[650] Exhibits CHI-1, p. 7; CHI-4, p. 105; and CHI-34, p. 67900.

industry. Further, the Government of China claimed that government influence over the operations of the SOCBs was little and that state ownership of banks was diminishing and the state was not influencing competition among banks or influencing their lending decisions.[651] The Government of China noted that it had eliminated control of inter-bank lending, liberalized the ability of banks to determine lending and deposit rates, and provided greater latitude to the banks in paying interest on consumer deposits by only setting a ceiling on deposit interest rates. The Government of China argued that therefore domestic interest rates in China should have been used as a benchmark.[652] An investigated producer argued that interest rates from foreign banks operating within China should have been considered as the internal benchmark since foreign banks were not controlled by the government and provided loans on commercial terms.[653]

10.138 In its determination in the OTR investigation, the USDOC stated that the government's predominant role in the banking sector resulted in significant distortions that rendered the lending rates in the country unsuitable as benchmarks, cross-referencing its findings to this effect in *CFS Paper*. The USDOC noted that pursuant to U.S. domestic law, benchmarks must be comparable commercial loans, i.e., they must come from a commercial lending institution, they must be similar in structure (variable or fixed rate), date of maturity, and currency. Because of the distortion of the interest rates in China, however, these interest rates were unusable to measure the benefit from government loans, and it was not possible to adjust for those distortions, as such an endeavour would be "highly complex, speculative, and impracticable".[654]

10.139 The USDOC found that the government's intervention in the banking sector created significant distortions, restricting and influencing even foreign banks within China, such that the interest rates of neither Chinese nor foreign banks could be used as benchmarks. Concerning the government involvement in the banking sector, the USDOC found that while there had been some positive developments in SOCBs' lending practices in respect of increased credit risk analysis and other scrutiny measures before making lending decisions, the government continued to play a predominant role with significant distortions in its commercial banking sector.[655] In this regard, the USDOC noted that it had been denied access to many loan documents that it needed for its analysis. The USDOC further found that parties in the investigation had not demonstrated that conditions within the banking sector had changed since its determination in *CFS Paper* that the Chinese credit market was distorted. Although the period of investigation in the OTR investigation was one year later than that in the *CFS Paper* investigation, the respondents had not pointed to specific changes that had occurred between those periods that would warrant a reconsideration of the determination that the credit market was distorted. The USDOC noted that the government's guidance in assisting reform, and in moving the banking system toward a commercial footing, did not mean that the credit market was not distorted through the government's ownership and control of banks. It also noted that

[651] Exhibit CHI-4, p. 101. The Government of China noted that banks in China, including the four largest SOCBs, made their lending decisions according to commercial considerations and had in place written procedures for risk analysis and loan approval similar to those of United States' banks and other market economies. At verification, BOC officials informed the USDOC that it considered all relevant factors when evaluating loan applications (including the company's operation and management, financial performance, competitive position, industrial risks, future prospects, the development cycle of the industry, changes in that cycle, information on the particular industry, and the structure of competition in the industry) and that its lending practices followed very detailed internal credit risk analysis guidelines. (Id., p. 102).

[652] Exhibit CHI-4, p. 102.

[653] Id., p. 104.

[654] Id.

[655] The USDOC's determination was based on the fact that it was denied access to many of the loan documents that it deemed critical for its analysis. In addition, the USDOC noted that the parties did not point to any specific changes that occurred between 2005 (the period of investigation in the *CFS Paper* investigation) and 2006 (the period of investigation in the OTR investigation) that would have warranted a reconsideration of the determination in *CFS Paper* that the credit market in China was distorted. (Id. p. 105).

although SOCBs were moving toward a more solid commercial focus, this did not preclude them from serving as the implementing arm of government policy lending.[656]

(iii) CWP Investigation

10.140 In the CWP investigation, the Government of China argued that the record evidence demonstrated that: (i) China had a commercially-oriented lending market; (ii) loan pricing was determined by market forces, with banks making lending decisions based upon commercial considerations, including proper risk assessment; and (iii) governmental industrial policy had a very limited role in lending decisions, and was only one factor that a bank might take into account in examining risk.[657]

10.141 The USDOC rejected the Government of China's arguments. It recalled that in the *Lined Paper* investigation it had found that China's banking sector did not operate on commercial basis and was subject to significant distortions, primarily arising out of the continued dominant role of the government in the sector. It also recalled its determination in *CFS Paper* that the government still dominated the domestic Chinese banking sector and prevented banks from operating on a fully commercial basis. In the CWP investigation, the USDOC found that these distortions were still present in the Chinese banking sector, and that therefore the interest rates of the domestic Chinese banking sector did not provide a suitable basis for benchmarking the loans in question.[658] Also recalling the *CFS Paper* determination, the USDOC found that foreign-owned banks operating in China were subject to the same restrictions as the SOCBs, and that their share of assets and lending was negligible compared with those of the SOCBs. Therefore, for the same reasons discussed in the *CFS Paper* investigation, the USDOC determined that foreign bank lending did not provide a suitable benchmark.[659]

(iv) LWS Investigation

10.142 During the LWS investigation, the Government of China argued that the USDOC had committed a legal error in the preliminary determination when it used an out of country benchmark to determine whether the government loans at issue conferred benefits. The Government of China argued that under U.S. domestic law, the benchmark must be a comparable commercial loan that the borrower could actually obtain on the market, and that the world-wide interest rates used did not represent loans that a recipient could obtain in China.[660]

10.143 For its final determination in the LWS investigation, the USDOC relied on its preliminary determination as well as its previous findings in CWP and *CFS Paper* to determine that interest rates in China were distorted and thus unusable as benchmarks to measure the benefit from government loans. The USDOC also had found that while foreign-owned banks operated in China, they were subject to the same restrictions as the SOCBs and their share of assets and lending was negligible compared with those banks.[661] The USDOC stated in this regard that no new information had been submitted subsequent to the preliminary determination to give a reason to revisit that determination as

[656] Exhibit CHI-4, pp. 104-105.
[657] China did not identify any specific evidence on the record. (Exhibit CHI-1, p. 72).
[658] Id., p. 7. In its overall benchmarking determination, the USDOC noted that "there is not a functioning market for loans within the PRC. Therefore, because of the special difficulties inherent in using a Chinese benchmark for loans, the Department is selecting [an out-of-country benchmark]". (Id., p. 6).
[659] Id.
[660] Exhibit CHI-3, p. 82.
[661] Id., p. 11 and CHI-34, p. 67901.

to the benchmark issue. The USDOC also noted that it was not possible to adjust for the market distortions it had found, because to do so would be too complex, speculative and impracticable.[662]

(c) Assessment by the Panel

10.144 Having reached the legal conclusion that, where lending rates in a given market are distorted due to government involvement such that no commercial benchmark can be found, Article14(b) of the SCM Agreement permits resort to alternative sources for benchmarks, we now analyze the USDOC's determinations not to rely on Chinese interest rates as benchmarks. In particular, we consider whether, based on the evidence before the USDOC, a reasonable and objective investigating authority could have reached the conclusion reached by the USDOC, namely that rates in China were distorted by government involvement in and control over the lending market such that there were no commercial interest rates that could be used as benchmarks.

10.145 We note that although the analysis as presented in the determinations in the investigations before us in this claim is relatively brief, in each case there is a cross-reference to the determination in the *CFS Paper* investigation. That determination thus formed the principal substantive basis for the USDOC's determinations, in the three investigations before us, that Chinese interest rates were unusable as benchmarks. We note, further, that the descriptions in the determinations in the CWP, LWS and OTR investigations appear to indicate that little new evidence in respect of the government's role in the banking sector was adduced by respondent parties beyond what had been relied upon in the *CFS Paper* investigation, and that what was submitted did not lead the USDOC to change its assessment of the government's role in the banking sector. Before us, China makes little reference to any new record evidence of this type having been submitted, instead raising legal issues as to the permissibility of disregarding the interest rates in China. In other words, before us China does not argue that, contrary to the USDOC's determination, there had been a major change in the government's role in the banking sector between the determination in the *CFS Paper* investigation and those in the CWP, LWS and OTR investigations.

10.146 We thus now turn to the analysis and conclusions from the determination in the *CFS Paper* investigation. Here we note that the *CFS Paper* determination makes extensive reference to publications by outside institutions (OECD and IMF) as well as internal documents including published reports of Chinese banks, laws, etc. in support of its basic finding that the Chinese government played a predominant role in the Chinese banking sector and distorted interest rates. The USDOC also conducted extensive verification at which various officials made statements indicating the same role and influence of the Chinese government. Furthermore, there was extensive discussion in the *CFS Paper* determination to the effect that lending rates were largely undifferentiated, with most loans being made at rates close to the government-set benchmark rate. While before us, China refers to this as evidence of interest rate competition, and the operation of market forces, we consider that the USDOC was not unjustified in concluding that this was rather evidence that market forces were not operating, in particular, that banks still lacked adequate risk management and analysis skills.[663] We also note that China does not dispute the USDOC's factual findings that the foreign banks in China were subject to the same government controls as domestic banks, and that privately-owned Chinese banks accounted for a very small percentage of total lending.

10.147 In sum, on the basis of the record evidence before the USDOC, we find that a reasonable and objective investigating authority could have concluded that the government played a predominant role in the Chinese commercial lending market as both a lender and in terms of controlling the operation of

[662] Exhibit CHI-3, p. 83. From the record evidence before the Panel, it appears that the Government of China did not present arguments and/or evidence on the question of governmental control of the banking sector in the LWS investigation.

[663] Exhibit CHI-93, p. 59-60.

this market, and thus distorted interest rates, such that the observed rates were not suitable as benchmarks. We also note the statements by the USDOC in the LWS and OTR investigations that it would not be possible to make the necessary adjustments to the observed rates to convert them into usable benchmarks. It is not the role of a Panel to conduct a *de novo* review of the evidence, and China has not objected to this conclusion of the USDOC. We thus find no basis in the evidence before us to question this judgement by the USDOC.

10.148 For the foregoing reasons we therefore find that China has not established that the USDOC's decision not to rely on Chinese interest rates as benchmarks for SOCB loans denominated in RMB was inconsistent with the obligations of the United States under Article 14(b) of the SCM Agreement.[664]

H. PANEL'S TERMS OF REFERENCE – BENCHMARKS ACTUALLY USED BY THE USDOC

1. Introduction

10.149 WTO dispute settlement panels are under a duty to address and dispose of certain issues of a fundamental nature on their own motion if the parties to the dispute remain silent on those issues. No doubt, the vesting of jurisdiction on a panel through its terms of reference constitutes such an issue of a fundamental nature.[665] Because we wanted to ascertain the scope of our terms of reference in respect of China's claims under Article 14 of the SCM Agreement, at the second meeting of the Panel with the parties, we asked the parties' views on whether the text of China's request for the establishment of the Panel – in particular paragraph B.1(d)(i) thereof – provides a sufficient basis for China's claims in respect of the benchmarks actually used by the USDOC in its benefit determinations in respect of land-use rights and loans.[666] The issue does not arise with respect to subsidies in the form of inputs because for these, China does not challenge the benchmarks that were actually used by the USDOC.[667]

2. Main arguments of the Parties

(a) China[668]

10.150 China argues that the language of paragraph B.1(d)(i) of its panel request provides a sufficient basis for its claims in respect of the benchmarks actually used by the USDOC for land use rights and loans. China first argues, in this respect, that paragraph B.1(d)(i) necessarily encompasses the use of benchmarks that are not based on prevailing terms and conditions in China. Second, China submits that the USDOC's out-of-country benchmarks for land-use rights and loans are the embodiment of its decision to reject market conditions in China as the basis for determining the existence and amount of the benefits in question. Third, China argues that it was only through the use of these benchmarks that the USDOC, in fact, rejected market conditions in China as the basis for identifying the relevant benchmark under Article 14 of the SCM Agreement.

10.151 China further argues that it listed the articles that it alleged to have been violated (including Article 14 of the SCM Agreement), and that this, by itself, is sufficient to encompass its claims against the benchmarks that the USDOC actually used for land-use rights and loans. China notes that panel requests have sometimes done nothing more than list the articles that are alleged to have been

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[664] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

[665] Appellate Body Reports on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36 and *US – Carbon Steel*, para. 123.

[666] Panel question 5 to the Parties (second meeting).

[667] China response to Panel question 35 (first meeting).

[668] China response to Panel question 5 (second meeting).

violated. Even in those instances, the Appellate Body has found that the panel request satisfied the requirements of Article 6.2 of the DSU.

10.152 Finally, China notes that there is no indication that the United States harboured any misunderstanding as to the scope of China's claims or suffered any prejudice as a result of how China phrased its panel request. (China notes that by contrast, the United States requested a preliminary ruling with respect to the measure challenged as part of China's "as such" claims on double remedies.) Thus, even if there were some ambiguity in paragraph B.1(d)(i) of the panel request, China argues, it is clear from the course of the Panel proceedings that there has been no misunderstanding concerning China's claims against the benchmarks that the USDOC actually used for loans and land-use rights.

(b) United States[669]

10.153 The United States notes that the claim identified in China's request is directed at the "rejection of prevailing terms and conditions in China [...]" and that nowhere in paragraph B.1(d)(i) or elsewhere in China's request for the establishment of the Panel, does China refer to the "benchmarks actually used" by the USDOC for land-use rights or loans.

10.154 The United States notes that the panel request specifies that China's claim relates only to "the following obligations of the United States" and lists certain aspects of the USDOC determinations in connection with Article 14 of the SCM Agreement, indicating that this is the extent of China's claims with respect to the use of benchmarks. Thus, the United States argues, to the extent that China is bringing a different claim, this claim would be outside the scope of its panel request. In this regard, the United States notes that the *China – Publications and Audiovisual Products* panel found that by listing certain specific requirements under the Chinese measures at issue, the United States had only notified China of a claim in respect of these specific requirements to the exclusion of other requirements contained in the measures at issue.

10.155 The United States disagrees with China that the language in paragraph B.1(d)(i) of its panel request "necessarily encompasses the use of a benchmark that is not based on prevailing terms and conditions in China". The United States considers that the USDOC's rejection of prevailing terms and conditions in China and its selection of benchmarks actually used are separate determinations.

10.156 Likewise, the United States notes that China has discussed these issues separately throughout its submissions in this dispute, showing that in China's view, the consistency with the covered agreements of the USDOC's determination to "reject prevailing terms and conditions in China" and the benchmark "actually used" are distinct analytical questions. That said, the United States considers it irrelevant whether China made it clear in its submissions to the Panel that it was challenging the benchmarks actually used by the USDOC for land-use rights and loans: The question is whether a claim against the benchmarks "actually used" was included in China's request for the establishment of the Panel. Finally, the United States considers it irrelevant that it did not raise any objection to China's claims before the Panel posed a question on the issue, noting that WTO panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues.

3. Assessment by the Panel

10.157 Article 6.2 of the DSU sets out the requirements pertaining to a complaining party's request for the establishment of a panel. It provides as follows:

[669] United States response to Panel question 5 (second meeting); comments on China's response to Panel question 5 (second meeting).

> "The request for establishment of the panel [...] shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

10.158 The requirement, in Article 6.2 of the DSU, to identify the measures at issue in a dispute and to provide a brief summary of the legal basis of the complaint has been linked to the dual necessity of establishing the Panel's terms of reference and the due process objective of notifying the responding party (and third parties) of the case it has to answer:

> "The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the due process objective of notifying the parties and third parties of the nature of a complainant's case [...]".[670] (footnote omitted)

10.159 Compliance with Article 6.2 must be demonstrated on the face of the request for the establishment of a panel, and reading the panel request "as a whole".[671] We agree with the *Japan – DRAMs (Korea)* panel's reasoning that the principles embodied in Article 6.2 of the DSU may only properly be upheld if panels apply that provision on the basis of the text of the panel request, i.e., without regard to whether or not the responding party suffered a prejudice by considering what happened during the course of the panel proceedings.[672]

10.160 In raising with the parties the question of our terms of reference, we sought to ascertain our jurisdiction by identifying the precise claims at issue in the present dispute. Specifically, we sought to ascertain whether the terms of China's panel request were sufficiently broad to cover both aspects of China's "benchmarks" claims in respect of land-use rights and loans, i.e., concerning not only the USDOC's rejection of land-use prices and interest rates in China as benchmarks, but also the consistency with Article 14 of the benchmarks actually used by the USDOC in each instance.

10.161 The relevant part of China's panel request, section B.1.(d)(i), reads as follows:

> "B. Legal Basis of the Complaint
>
> [...]
>
> 1. As Applied Claims
>
> China considers that the CWP, OTR, LWRP, and LWS anti-dumping and countervailing duty investigations, determinations and orders, the definitive anti-dumping and countervailing duties imposed pursuant thereto, as well as the combined effect of the anti-dumping and countervailing duty determinations, orders, and duties in each such investigation, are inconsistent, at a minimum, with the following obligations of the United States under the covered agreements

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[670] Appellate Body Report on *US – Carbon Steel*, para. 126.

[671] Appellate Body Report, *US – Carbon Steel*, para. 127, cited with approval in, *inter alia*, Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 169.

[672] Panel Report on *Japan – DRAMs (Korea)*, paras. 7.5-7.10. The panel, in its analysis, attached great importance to comments made by the Appellate Body in para. 126 of its Report in *US – Carbon Steel*. The panel also noted the approach taken by the *Canada – Wheat Exports and Grain Imports* panel. Given that the United States did not raise the issue we discuss here on its own initiative, we might in any case be hard pressed to conclude that the United States was prejudiced by any defect in China's panel request.

[...]

(d) in connection with each instance in which the US authorities resorted to a benchmark outside of China for the purpose of determining the existence and amount of any alleged subsidy benefit –

(i) the US authorities' rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, subject producers received a subsidy benefit under the methodologies set forth in Article 14 of the SCM Agreement;".

10.162 We are satisfied that read in its totality, China's panel request provides a sufficient basis for China's claims in respect of the benchmarks actually used by the USDOC. We note in particular that the introductory sentence to paragraph B.1.(d) refers to the instances in which the USDOC relied on "benchmarks outside of China". This, in our view, is a sufficient indication of China's intent to challenge before the Panel not only the consistency with Article 14 of the SCM Agreement of the USDOC's decision to reject terms and conditions prevailing in China, but also the consistency with the same provision of the external benchmarks that the USDOC actually relied upon.

10.163 For the foregoing reasons, we find that China's claims in respect of the benchmarks actually used by the USDOC with respect to loans and land-use rights fall within our terms of reference. Given this finding, we now turn to an assessment of these claims of China.

I. CONSISTENCY WITH ARTICLE 14(D) OF THE SCM AGREEMENT OF THE BENCHMARKS ACTUALLY USED BY THE USDOC – LAND-USE RIGHTS

1. Claim of China

10.164 China claims that the benchmark relied upon by the USDOC in the LWS and OTR investigations to determine the existence and amount of benefit conferred by the provision of land-use rights on, respectively, Aifudi and Starbright, was inconsistent with Article 14(d) of the SCM Agreement.[673, 674]

2. Factual background

10.165 In the LWS and OTR investigations, the USDOC determined the existence and amount of benefit conferred by the provision of land-use rights by comparing the price paid by the investigated producers to prices for certain industrial property in Bangkok and adjacent provinces in Thailand.[675, 676] The USDOC considered Thailand to be comparable to China in terms of its "prevailing market

[673] *See*, generally, China first written submission, paras. 302-319.

[674] As indicated at para. 10.1, *supra*, China also raises consequential claims pursuant to Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

[675] Exhibits CHI-3, p. 17; CHI-34, p. 67909; and CHI-50, p. 71369.

[676] The USDOC also considered, and rejected, two additional benchmarks: First, the USDOC rejected the possibility of using world market prices as benchmark because there is no "world market" for land (the USDOC reasoned that land being an *in situ* property, it could not simultaneously be "available to an in-country purchaser" while located and sold out-of-country on the world market). The USDOC also examined whether land prices in China were determined in accordance with market principles. The USDOC found that they were not, due to the government's involvement in the land-use rights market as well as the widespread and documented deviation from the authorized methods of pricing and allocating land. In this context, the USDOC also rejected an argument of the Government of China that it should have applied the price discrimination test provided for in its "market-principles analysis"; the Government of China had argued that Chinese land-use rights prices were consistent with market-principles analysis because (i) the investigated producer at issue did

conditions", taking into consideration certain economic and demographic factors. Specifically, the USDOC found that (i) China and Thailand had similar *per capita* gross national income ("GNI") at $2,010 and $2,990, respectively and that (ii) population density in China and Thailand were roughly comparable at 141 persons/km^2 in China and 127 persons/km^2 in Thailand.[677] The USDOC also found that producers consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China.[678] In the LWS investigation, the USDOC further took into consideration that population density was higher than national averages in both Shandong province (where the investigated producer was located) and in Zone 1 in Thailand (the benchmark used), at 562/km^2 and 908/ km^2, respectively and that Shandong province had a *per capita* GNI of approximately $2900, i.e., closer to that of Thailand than China's overall GNI.[679]

10.166 In its price-comparison analysis, the USDOC relied on Thai land prices reported in independent real estate market reports. In the LWS investigation, in which the land-use rights at issue were "granted" land-use rights (rights which required a large up-front fee but no annual fees aside from taxes), the USDOC used a one-time purchase benchmark in order to measure the benefit at issue. For this purpose, the USDOC selected industrial land prices in one of three industrial promotion zones in Thailand (comprising Bangkok and adjacent provinces) as reported in the market reports.[680]

10.167 In the OTR investigation, in which the land-use rights also included "allocated" rights (land-use rights provided to SOEs for a nominal one-time charge and an annual land-use fee), the USDOC determined that these more closely resembled a lease or rental arrangement rather than a one-time purchase.[681] The USDOC therefore looked for an appropriate "property yield" for commercial land in Thailand, i.e., the annual cash flow from rent that a land owner in Thailand could expect to earn, and to that effect used dividend yields from real estate investment trusts ("REITs"), as reported in market reports prepared by the same source that compiled the reports on which it relied to determine the industrial land prices.[682]

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not benefit from any price discrimination in acquiring its land-use rights; and (ii) the government's price covered its own costs and made profits for managing and selling land-use rights. (Exhibits CHI-3, pp. 15-16 and 59; CHI-34, p. 67908; and CHI-50, p. 71369).

[677] Exhibits CHI-34, p. 67909 and CHI-50, p. 71369.

[678] The USDOC considered that the same producers could compare prices across borders when deciding what land to buy. It noted that the market reports from which it obtained its benchmark prices compared real estate prices in China with other prices in Asia (including Thailand). Further, the USDOC noted that studies by the Japan External Trade Organization (JETRO) comparing Asian alternative investment destinations beyond China reported that "Thailand got the highest score as the best location for establishing a production base over the next five to 10 years" and that "Thailand ranks as the second-best choice after China as a location for expanding both high and mid to low end production". Finally, the USDOC took into consideration a statement contained in a market report that "[m]any foreign companies believe that Thailand is still a strategic choice for a Southeast Asian production base". (Exhibits CHI-34, p. 67909 and CHI-50, p. 71369).

[679] Exhibit CHI-34, p. 67909.

[680] Id., p. 67909 and CHI-50, p. 71369.

[681] Exhibit CHI-50, pp. 71369-70.

[682] REITs "are trusts that are dedicated to owning and/or operating income-producing real estate" and their dividends "are based on the income, often rent, generated from the real estate holdings". The USDOC noted that REITs portfolios in Thailand held not only industrial but also non-industrial real estate and that there was a wide range of returns. The USDOC considered that nothing on the record indicated that industrial land would yield a higher or lower income than other types of real estate in Thailand and on that basis concluded that dividend yields from REITs were a reasonable proxy for assessing the market-value annual rent for industrial land in Thailand. In order to calculate an annual rent, the USDOC calculated an annual yield percentage (i.e., the average dividend yield of the REITs in Thailand in the period contemporaneous with the one-time purchase benchmark established in the LWS determination), which it multiplied by the up-front purchase price per square foot established in the LWS determination. (Id., pp. 71369-70).

3. Main arguments of the Parties

(a) China

10.168 China submits that the benchmark actually used by the USDOC in the investigations at issue, i.e., land prices in Bangkok, Thailand, is inconsistent with Article 14(d) of the SCM Agreement, as interpreted by the Appellate Body in *US – Softwood Lumber IV*.[683]

10.169 China argues that land prices in Thailand (or any other country) do not "relate or refer to" the prevailing market conditions for land in China, and that the Thai benchmark, 3000 km away, bears no relationship to prevailing market conditions in China.[684] China adds that the factors affecting the value of land (its physical and legal characteristics) are unique to a particular country and even often significantly vary within a country[685] and questions whether it would ever be possible to make what the Appellate Body referred to as "all necessary adjustments" to undertake that sort of comparison with respect to land-use rights.[686] In addition, China argues that the USDOC did not explain how the factors it considered relevant for choosing land prices in Thailand (e.g. the similar levels of *per capita* GNI) have any connection to prevailing market conditions for land in a particular country or location.[687] China also notes the admission by the United States that the USDOC made no adjustments to its Thai benchmark to ensure that it would "relate or refer to, or be connected with" prices prevailing on the Chinese land-use rights market.[688]

10.170 Further, China argues that the USDOC could have used alternative benchmarks other than land prices in another country: China argues that the USDOC has in the past resorted to methods, other than the use of external benchmarks for evaluating the existence and amount of benefit in the case of land. In particular, China notes that the USDOC has for instance, in the past, looked at whether land prices are determined in accordance with market principles.[689] This, in China's view,

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[683] *See, e.g.*, China second written submission, para. 64; response to Panel question 43 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, paras. 103 and 108.

[684] China first written submission, para. 324.

[685] Id., paras. 310 and 313-314. According to China, land is a non-tradable good and its value is inherently locational, that is, the value of land cannot be separated from its physical and legal characteristics, for instance, topography, transportation infrastructure, taxes, land-use restrictions, labour and environmental laws. (Id., para. 308) China submits that the sources relied upon by the USDOC for its Thai land price data confirm that national and local property factors affect the value of land and therefore that land values significantly vary among different countries, regions, and even within a single country. (Id., paras. 311-313).

[686] Id., paras. 307 *et seq.* China argues in this respect that while Article 14(d) makes clear that availability, marketability, and transportation form part of the "prevailing market conditions" for the good in question, land is an unmovable good so that it is impossible to "replicate reliably" the prevailing market conditions for land in China by referring to land prices in Thailand. (*See, e.g.*, China first written submission, paras. 314-315, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 108).

[687] Id., para. 318.

[688] China second written submission, para. 50; opening statement at the first meeting of the Panel, para. 49.

[689] China argues that in previous investigations where the government was found to be the sole provider of the land in question, the USDOC determined the existence of the benefit by evaluating whether there was price discrimination among the users of such land, a method which China argues, the Preamble to the USDOC's countervailing duty regulations recognizes. (China response to Panel Question 34 (first meeting) (quoting from comments made by the USDOC in the CWP investigation and USDOC determinations in *Steel Wire Rod from Trinidad and Tobago* (Exhibit CHI-149) and *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea* (Exhibit CHI-150)). China argues that, had the USDOC applied a similar approach in the LWS investigation, there would have been no subsidy to the investigated producer concerned (Aifudi). China also adds that in all three of these instances, the USDOC recognized that land values are unique to particular locations, and therefore that any benchmark must be drawn from the same general location and take into account specific factors that affect land values at that location. (Id.).

belies the United States' argument that it would be impossible to calculate the benefit at all in certain circumstances if China's position were accepted.[690]

10.171 Finally, China does not consider sufficient the United States' defence of the benchmarks on the ground that "[t]here is not always a perfect set of data upon which to rely" and that it may consequently not always be possible to make all the adjustments required by Article 14(d) of the SCM Agreement. China argues that the mandatory language of the Agreement cannot be disregarded on the ground that it was too difficult a standard to apply. China also adds that the fact that it would be impractical to adjust for all the factors in Article 14(d) was precisely why the Appellate Body, in *US – Softwood Lumber IV*, seriously questioned whether out-of country benchmarks could ever lawfully be used. China also highlights the warning of the Appellate Body, in *US – Softwood Lumber IV*, that even in the limited circumstance in which out-of-country benchmarks may be used, the benchmark must – without exception – "relate or refer to, or be connected with" the *prevailing*, i.e., existing market conditions in the country of provision.[691]

(b) United States

10.172 The United States defends the consistency with Article 14(d) of the Thai benchmark used by the USDOC in the LWS and OTR investigations.

10.173 The United States argues that nothing in the text of Article 14(d) suggests that land-use rights are exceptional, or that they should be treated differently than other goods with respect to the use of external benchmarks.[692] The United States considers that China's restrictive interpretation, if accepted, would eliminate the possibility of countervailing the subsidized provision of land-use rights, contrary to the object and purpose of the SCM Agreement.[693]

10.174 The United States submits that by selecting land prices in a country with a comparable *per capita* GNI and population density and by using prices for comparable types of land (e.g., industrial zones, allocated versus granted land-use rights), the benchmark used by the USDOC reasonably reflected the "prevailing market conditions for the good in question".

10.175 Specifically, the United States argues that the Thai prices used accounted for the prevailing market conditions, consistent with Article 14(d) of the SCM Agreement. The United States notes the factors that the USDOC took into consideration in selecting Thai prices as the benchmark (*per capita* GNI, population density, and types of land transactions) to ensure that these prices would "relate or refer to or be connected with" China's prevailing market conditions. The United States submits that

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[690] China response to Panel question 34 (first meeting).

[691] *See, e.g.*, China opening statement at the first meeting of the Panel, para. 49; first written submission, para. 309.

[692] The United States notes that in *US – Softwood Lumber IV*, the Appellate Body rejected an argument similar to China's argument that land use-use rights should be treated differently under Article 14(d): the Appellate Body rejected an argument of Canada that standing timber is attached to the land and incapable of being traded across borders. The Appellate Body explained that excluding non-tradable goods would permit the circumvention of the WTO's subsidies disciplines. (United States first written submission, paras. 273-274, referring to Appellate Body Report on *US – Softwood Lumber IV*, paras. 57, 64 and 67).

[693] Id., para. 275. In addition to its arguments based on Article 14(d) of the SCM Agreement, the United States also argues that China's position is contradicted by the terms of Section 15(b) of China's Protocol of Accession, which provides no basis to exclude government-provided land use rights, and which confirms the permissibility of using out-of-country benchmarks in countervailing duty investigations concerning imports from China. (Id., para. 276). Because, as explained in Section X.B, *supra*, the United States has clarified to the Panel that it is not relying on the Protocol of Accession in defending this or any of China's claims pursuant to Article 14 of the SCM Agreement, we do not take these arguments of the United States into account in our analysis.

Article 14(d) of the SCM Agreement lists several factors in relation to which the adequacy of remuneration should be determined, including price, quality, availability, marketability, transportation and other conditions of purchase or sale. The United States considers that demand is typically the primary determinant of the price for urban land (because supply is considered to be fixed) and that demand in turn is a function of population density and the level of economic development, as measured by *per capita* GNI. The United States also submits that quality and marketability of land-use rights prices in China were taken into consideration by the fact that producers, in general, consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China. Moreover, the USDOC used prices for land in industrial zones, as the land-use rights in China were also located in industrial zones; the United States argues that use of similar types of land (i.e., land in industrial zones) would account for the quality and marketability of the land. The USDOC also took into account whether the transaction involved allocated or granted land-use rights, which would impact the marketability of the land-use rights. Availability was accounted for by selecting benchmark prices from an urban area, Bangkok, where population densities were higher than on average for Thailand, because the land-use rights at issue in the OTR and LWS investigations were also from urban areas of China.[694] Thus, the United States argues, the Thai prices selected by the USDOC reasonably reflected the "prevailing market conditions" for the land-use rights in China.[695]

10.176 The United States notes that China argues that the USDOC should have taken into account other factors such as capital control measures limiting foreign ownership of companies in Thailand or various incentives that governments provide to companies, but does not point to any relevant information on the record that would have allowed the USDOC to make any such adjustments. The United States submits that investigating authorities are restrained in their ability to adjust prices because of the limited information before them so that it may not always be possible to adjust for all of the items listed in Article 14(d), but that this should not preclude a Member from selecting a comparison price.[696] The United States also argues that if the bar for selecting the out-of-country benchmark is set so high that it requires the use of unavailable data, investigating authorities will be required to use in-country prices even where they contain the very subsidy that they are trying to measure, and that such measurement, in turn, would not capture properly the benefit of the subsidy due to the predominant role of the government.[697] The United States also argues that China's position ignores the inherent "flexibility" in the guidelines under Article 14 of the SCM Agreement.[698]

10.177 In response to arguments of China, the United States argues that it considers benchmarks used in other USDOC investigations to be irrelevant to this dispute and that the other cases cited by China are not analogous to the land-use rights market in China as the USDOC did not find in any of these cases that the land markets were distorted by the government's predominant role.[699] The United States also argues that in the investigations at issue, the USDOC did in fact perform a "market principles analysis" and found that land-use rights in China are not priced in accordance with market principles. The United States adds that China's argument that a "price discrimination" analysis could have been

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[694] United States first written submission, para. 278-284; second written submission, paras. 115-119. The United States also argues that transportation is not a factor in valuing land as land is not transported

[695] *See, e.g.*, United States first written submission, para. 293.

[696] Id., para. 286.

[697] United States response to Panel question 46 (first meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 93.

[698] *See, e.g.*, United States first written submission, para. 286, citing to Panel Report on *EC – Countervailing Measures on DRAM Chips*, para. 7.213; response to Panel question 46 (first meeting).

[699] United States second written submission, paras. 110-112. The United States submits that China misrepresents the USDOC's practice since the USDOC consistently relies on out-of-country benchmarks when it determines that the government plays a predominant role in the market. In addition, the United States submits that one of the cases cited by China did not even concern the provision of land, but, instead, pertained to an analysis of "revenue forgone" by the USDOC. (Id.).

applied is misleading because such an analysis is part of the "market principles" analysis that the USDOC performed.[700]

4. Main arguments of the Third Parties

(a) European Communities

10.178 The European Communities considers that the mere fact that a piece of land is located 3000 km away is not a sufficient reason alone to conclude that a market benchmark is unreasonable. The European Communities also argues that any comparison must be adjusted in order to replicate the prevailing terms and conditions which would have existed absent price distortion.[701]

(b) Saudi Arabia

10.179 Saudi Arabia argues that the use of external benchmarks is especially inappropriate with respect to financial contributions in the form of the provision of land and that, as a result, the adjustments required under Article 14(d) (as acknowledged by the Appellate Body in *US – Softwood Lumber IV*) apply *a fortiori* when the benchmarks concerns the provision of land.[702]

5. Assessment by the Panel

10.180 We recall our finding above that China has not established that the USDOC's decision not to rely on Chinese prices for land-use rights as benchmarks was inconsistent with Article 14(d) of the SCM Agreement. The remaining question before us thus is whether China has established that the actual benchmarks used by the USDOC are inconsistent with Article 14(d) of the SCM Agreement.

10.181 We recall that under the terms of Article 14(d) of the SCM Agreement, the adequacy of remuneration for the government-provision of goods "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)". We further recall that the Appellate Body, in *US – Softwood Lumber IV*, cautioned that:

> "[w]hen an investigating authority resorts [...] to a benchmark other than private prices in the country of provision, the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)".[703]

10.182 The Appellate Body indicated that a range of factors would have to be taken into account when making adjustments to replicate conditions that would prevail in the country of provision (in the absence of the distortion caused by the government's role that led to the conclusion that in-country prices could not be used as benchmarks). In the particular situation of reliance on prices in another country as a proxy for the prices that would prevail in the country of provision of a good or service, the Appellate Body noted that "it would be difficult, from a practical point of view, for investigating authorities to replicate reliably market conditions prevailing in one country on the basis of market

[700] The United States explains that, according to the Preamble to the USDOC's regulations, the USDOC "will assess whether the government price was in accordance with 'market principles'" in situations where the government is the only source available to consumers in the country, and that, one factor which the USDOC "may" rely upon in that assessment, is "possible price discrimination". (Id., paras. 113-114).

[701] European Communities third-party submission, para. 47.

[702] Saudi Arabia third-party submission, para. 77.

[703] Appellate Body Report on *US – Softwood Lumber IV*, para. 103.

conditions prevailing in another country", and that appropriate adjustments would need to be made to avoid in particular the countervailing of comparative advantages.[704]

10.183 Concerning the implications of these findings by the Appellate Body for the use of cross-border benchmarks for land-use rights, China argues first that because land is by definition not traded across borders and because its value is significantly determined by its location and by the applicable legal regime, it is impossible to replicate reliably the prevailing market conditions for land in one country by referring to land values in another country, which has its own physical, social, political and economic environment.[705]

10.184 In our view, the considerations identified by China certainly mean that ensuring that any benchmark (especially any out-of-country benchmark) used for land-use rights "relate[s], refer[s] or is connected with" prevailing market conditions in the country of provision of the land is a difficult exercise. Yet, we do not consider that the terms of Article 14(d) exclude, *a priori*, the possibility of determining the existence and amount of benefit for subsidies in the form of provision of land on the basis of land prices in another country. Further, accepting that it would never be permissible to resort to land prices in other countries as benchmarks in situations such as were found to exist in the LWS and OTR investigations would mean that precisely because the land market in the country of provision is distorted, it would become impossible for the investigating authority to determine the existence and amount of any benefit. Such a result – that countervailing certain forms of subsidies would become impossible in certain situations[706] – would, in our view, undermine the object and purpose of the SCM Agreement, "which 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".[707]

10.185 The other principal argument of China focuses on what it perceives as a requirement under Article 14(d) of the SCM Agreement for the investigating authority to make adjustments, in all cases, to any alternative benchmark that may be selected, to ensure that that benchmark approximates prevailing conditions in the country of provision. In other words, we see China as arguing that without "adjustments", any proxy benchmark will be, *ipso facto*, inconsistent with Article 14(d). In this regard, China argues, and the United States does not contest, that in the investigations at issue, the USDOC performed no adjustments to the Thai land-use prices it used as benchmarks. The United States' response to this argument of China is that the USDOC ensured that it met the requirements of Article 14(d) through its selection of the benchmark, such that it was not necessary to perform further adjustments.

10.186 We recall that the ultimate goal in selecting a benchmark is to ensure the comparability of that benchmark with the relevant market conditions, and this is particularly true where proxies are used

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[704] Appellate Body Report on *US – Softwood Lumber IV*, paras. 108-109.

[705] China first written submission, paras. 310 and 315.

[706] The claims before us are limited to the benchmarks actually used by the USDOC. Hence, we do not have to consider what benchmarks other than land-use prices in China or land-use prices in other countries the USDOC could possibly have resorted to. Yet, we note China's arguments that in other instances in which it considered domestic land prices to be distorted, the USDOC relied on benchmarks such as whether the price paid for the land was consistent with market principles or the price paid by the investigated producer was different than that paid by other entities (price discrimination). (China response to Panel question 34 (first meeting)). The United States responds that those other cases did not involve situations where the market was found to be distorted, and that in the investigations at issue in this dispute, in fact the USDOC did conduct a market principles examination, of which the price discrimination analysis is a part. In our view, the facts of the investigations at issue underscore the inherent difficulties that would arise from the use of benchmarks focusing on market distortions in a situation in which it has been found that the entire land-use rights market in the country of provision is distorted.

[707] Appellate Body Report on *US – Softwood Lumber IV*, para. 64.

due to the unavailability of in-country prices. In turn, comparability can be achieved either through the selection of the particular benchmark to be used, or through application of adjustments to a price on which the benchmark price will be based, or through some combination of selection and adjustment. This is how we read the Appellate Body's discussion in *US – Softwood Lumber IV* about the need to ensure that *all necessary* adjustments are made.[708] That is, rather than establishing a litmus test that in every case, "adjustments" must be made no matter how inherently comparable the selected benchmark is to the market conditions that it is being used to approximate, we see the Appellate Body as highlighting the elements of comparability that must be reflected in the benchmark ultimately applied. That is, the inquiry under Article 14(d) is whether the benchmark as actually used is one that "relates or refers to, or is connected with" the prevailing market conditions in the country of provision, in particular as to "price, quality, availability, marketability, transportation and other conditions of purchase or sale".[709]

10.187 While this is a demanding standard, we recall that the use of a benchmark other than private prices in the country of provision is, in the first place, made necessary by the fact that the (land-use) market in the country of provision is distorted. It would in our view be incongruous to interpret Article 14(d) so as to effectively require the investigating authority, confronted with such a situation, nevertheless to choose between not performing the benefit calculation or calculating it on the basis of a benchmark based on distorted market conditions. In sum, in such a situation, we see Article 14(d) as requiring an investigating authority to do its best to identify a benchmark that approximates the market conditions that *would* prevail in the absence of the distortion. While inherently such a benchmark cannot be perfect as it will never be possible to take into account all of the myriad factors that establish market conditions, and it will never be possible to know with certainty the market conditions that would prevail in the absence of the government-caused distortion, the authority must conduct a reasoned analysis based on factual information, selected and adjusted as necessary to be as comparable as possible to such market conditions. In other words, whatever benchmark is selected and whatever methodology is used must be ones that a reasonable and objective investigating authority could use for that purpose.

10.188 Turning now to the approach taken by the USDOC in selecting its land-use benchmarks in the LWS and OTR investigations, we are satisfied that the method adopted by the USDOC meets these requirements. We note in particular that when selecting the benchmark to use for Chinese land-use prices, the USDOC took into consideration a number of factors such as *per capita* GNI, population density (in the case of the LWS investigation, both for the countries and the provinces at issue), the types of land transactions, and the type of land at issue (land in industrial zones), with a view to approximating what the market conditions would be for the land-use rights at issue in China but for the market distortions. We recall that we have determined that China has not demonstrated that the USDOC was not justified in resorting to a benchmark other than land-use prices in China in the first place. This being the case, the USDOC was faced with a situation in which it had to construct a benchmark to approach what essentially would be a counterfactual situation – what prices for land-use rights in China would be in the absence of distortion.

10.189 Before us, China identifies various factors that, in its view, may affect the value of land, such as the tax incentives that may be provided to investors or the quality of infrastructure (availability of schools, hospitals, public transportation, etc.).[710] In China's view, the USDOC's methodology was flawed, *inter alia*, because the USDOC did not "even attempt to account for these factors" in its comparison of land prices in Bangkok to land prices in the Chinese industrial parks at issue. Before us, as before the USDOC in the investigations at issue, the arguments of the Government of China and the other respondents have primarily focused on the permissibility as such of using out-of-country

[708] Appellate Body Report on *US – Softwood Lumber IV*, para. 108.
[709] Id., para. 103.
[710] China first written submission, paras. 313-314.

prices for land-use rights and on whether Thai prices could at all provide an appropriate proxy for Chinese land market prices, rather than on identifying *specific* adjustments which the USDOC ought to have made to ensure the consistency of its benchmarks with Article 14(d) of the SCM Agreement.[711] We might add that while there can be no question that the Thai land prices and constructed annual rents relied upon by the USDOC do not provide a perfect picture of what prices for land-use rights would be in China in the absence of the distortions that the USDOC found to exist, it nevertheless is not clear that the fact of adjusting those benchmarks, as such, would ensure a closer approximation of the counterfactual situation (an undistorted land use rights market in China). In any case, China has not demonstrated that the USDOC failed to make any specific adjustment which it was required to make or which the Government of China or interested parties had identified, before the USDOC or before us.

10.190 Finally**,** we note that China's argument in respect of the USDOC's use of the Thai benchmark in the OTR investigation is limited to a footnote to its first written submission, in which it refers to its argument in respect of the USDOC's LWS determination.[712] For this reason, our examination of the USDOC's Thai benchmarks in the OTR investigations is limited to the general arguments presented by China in respect of the USDOC's LWS determination.

10.191 For the foregoing reasons, we find that China has not established that the benchmarks relied upon by the USDOC for land-use rights in the LWS and OTR investigations were inconsistent with the obligations of the United States under Article 14(d) of the SCM Agreement. In making this finding, we note that we are limiting ourselves to the questions raised by China in connection with this claim.[713]

J. CONSISTENCY WITH ARTICLE 14(B) OF THE SCM AGREEMENT OF THE LOAN BENCHMARKS ACTUALLY USED BY THE USDOC – RMB-DENOMINATED LOANS

1. Claim of China

10.192 China claims, in respect of SOCB loans denominated in RMB, that the benchmarks used by the USDOC in its benefit calculations in the OTR, CWP and LWS investigations were inconsistent with Article 14(b) of the SCM Agreement.[714]

2. Factual background

10.193 In the CWP, LWS and OTR investigations, having determined that it could not use interest rates in China as benchmarks for RMB-denominated loans from SOCBs, due to the distortion of the Chinese lending market as a whole, the USDOC constructed a proxy interest rate using a regression analysis of inflation-adjusted interest rates in 33 lower-middle-income countries[715], on the basis of a "broad inverse relationship" that it had found between income levels and lending rates.[716] According to the USDOC, the inflation adjustments served as a proxy for the adjustment for exchange rate expectations necessary when comparing interest rates across currencies. The USDOC stated that a

[711] While in the OTR investigation GTC argued that the USDOC should make adjustments to reflect market conditions in Guizhou Province – i.e. account for the fact that Guizhou Province is one of China's most impoverished provinces – ultimately, the USDOC did not countervail the provision of land-use rights to GTC and to TUTRIC. (Exhibit CHI-4, pp. 187, 191).

[712] China first written submission, footnote 237.

[713] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

[714] *See, e.g.*, China first written submission, para. 273.

[715] As identified by the World Bank's classification of countries. (*See, e.g.*, Exhibit CHI-1, p. 8).

[716] The USDOC cited its findings to this effect from the *CFS Paper* investigation based on its analysis of IMF data. (Exhibits CHI-1, pp. 7-8; CHI-3, p. 12; CHI-4, p. 8; and CHI-93, p. 71).

cross-country comparison of "real" interest rates is a rough proxy for a comparison of exchange rate-adjusted nominal rates because of the general link between inflation and (nominal) exchange rate expectations. The regression analysis also took into account the "quality of a country's institutions" (including political stability, government effectiveness and rule of law) which, the USDOC stated "is not directly tied to state-imposed significant distortions in the banking sector". The USDOC stated that the governance factors facilitated cross-country comparisons because they incorporated other important factors that can influence interest rate formation, in particular because differences in these factors will give rise to differences in perceived risk associated with the particular country which will be reflected in a country's overall level of interest rates.[717]

3. Main arguments of the Parties

(a) China

10.194 China claims that the interest rates derived from the USDOC's 33-country regression analysis are inconsistent with Article 14(b) of the SCM Agreement. In particular, China submits that these interest rates do not reflect "comparable commercial loans" that a borrower could "actually obtain in the market".[718]

10.195 China argues that the benchmark loans are not denominated in the same currency as the RMB-denominated loans under investigation and are therefore not comparable. China rejects the United States' assertion that its benchmark loan was "comparable" because it was "based upon lending rates from countries with similar [*per capita* gross national incomes] and institutional quality as measured by World Bank governance indicators". China asserts that neither the USDOC nor the United States has provided any coherent explanation as to why these factors (i.e., *per capita* GNI and institutional quality) somehow relate to whether loans are "comparable" within the meaning of Article 14(b).[719] Moreover, China argues that the United States' notion of "comparability" fails to give any legally operative meaning to the term "comparable" in Article 14(b), contrary to the fundamental principle of effectiveness in treaty interpretation.[720]

10.196 China also alleges that no borrower could "actually obtain" the USDOC's benchmark loans in "any" commercial lending market – whether in China or elsewhere. For China, fictitious, non-existent loans cannot be obtained by anyone.[721] China disagrees with the United States' assertion that the regression analysis it used was "tailored to approximate" a comparable loan that a firm could "actually obtain on the market". According to China, the USDOC's loan benchmark does not "approximate" a comparable commercial loan in China, nor is "tailored to approximate" the applicable standard under Article 14(b). Rather, China argues, Article 14 establishes mandatory parameters with which any methodology used by investigating authorities must comply.[722] China also rejects the argument

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[717] Exhibits CHI-1, pp. 7-8 and 78; CHI-3, pp. 12-13; and CHI-4, p. 8 and 109-110.

[718] *See, e.g.*, China first written submission, para. 244. According to China, whatever "flexibility" exists in the application of Article 14(b), any methodology used by investigating authorities must refer to a "comparable commercial loan which the firm could actually obtain on the market". (China response to Panel question 30 (first meeting)).

[719] China first written submission, para. 245; second written submission, paras. 74 and 81. China adds that the USDOC provided no explanation of how "governance indicators" such as government effectiveness, regulatory quality and political stability had any bearing upon the process of interest formation or the policy choices of monetary authorities as regards the direction of monetary conditions and interest rates. (China first written submission, para. 266).

[720] China second written submission, para. 82.

[721] China first written submission, para. 245; second written submission, para. 84; oral statement at the first meeting of the Panel, para. 52.

[722] China second written submission, para. 85, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 92.

advanced by the United States that the benchmark loans were "from the market" because they were "based on a regression of actual average lending rates reported by each country". China argues that there was no evidence that respondent borrowers could "actually obtain" loans in any of these lending markets, and no amount of regressing could overcome the lack of such evidence.[723]

(b) United States

10.197 The United States argues that, due to the government's predominant role in the banking sector and other government interventions, the USDOC found that the lending "market" in China was so distorted that there were no comparable "commercial" loans for benchmark purposes. Therefore, the USDOC selected a benchmark lending rate that was both "commercial" and "comparable", as required by Article 14(b) of the SCM Agreement.[724]

10.198 The United States argues that the USDOC used an out-of-country benchmark derived from interest rates from a group of countries rather than a single country, because various factors can affect national interest rates.[725] The United States also submits that the USDOC controlled for the most significant factors affecting interest rates by selecting inflation-adjusted rates in countries with *per capita* GNI similar to that of China, and then performed a regression of those rates, the GNI data and a range of World Bank governance indicators to determine a yearly comparison interest rate. Countries in the same GNI category (lower middle income) as China that were found to be anomalously high or low in terms of their interest rates, or were non-market economies, were excluded from the regression analysis.[726]

10.199 The United States indicates that the USDOC adjusted the interest rates of the included countries for inflation, because of the general link between inflation and exchange rate expectations. In addition, the United States argues that the factors related to the quality of the countries' institutions were included because banks take these into account when assessing risk of lending to businesses in a particular country, and because the Federal Reserve Board had found a correlation between higher quality of institutions and lower real interest rates. The United States further submits that the benchmark used took account of the maturity of the loans and matched lending during the same time periods. Thus, the benchmark was "tailored to approximate a 'comparable commercial loan which the firm could actually obtain on the market'".[727]

10.200 The United States rejects China's contention that the benchmark in Article 14(b) must be an actual interest rate available to a borrower in China, arguing that the regression analysis was, in fact, based on a regression of actual interest rates available to borrowers in China.[728] The United States

[723] China second written submission, para. 86.

[724] *See, e.g.*, United States response to Panel question 17 (second meeting). The United States argues that investigating authorities are entitled to considerable leeway in adopting reasonable methodologies, including the use of out-of-country benchmarks where alternatives are inappropriate. (United States response to Panel question 39 (first meeting)).

[725] The United States submits that the USDOC could have chosen an out-of-country benchmark from one particular country, but that such an approach could have sacrificed comparability. That is, each country's lending rates may be affected by a variety of economic factors for which there may be insufficient information to permit an adjustment, and therefore, those rates individually would not provide sufficient comparability. (United States response to Panel question 17 (second meeting)).

[726] United States first written submission, paras. 244-246; second written submission, para. 99.

[727] United States first written submission, paras. 247-248; second written submission, paras. 99 and 102.

[728] *See, e.g.*, United States second written submission, para. 101. The United States adds that a regression analysis is essentially an average of interest rates that takes more factors into account than a simple average, and that China has not objected the USDOC's use of average prices in other instances (e.g. the USDOC's use of average world market prices for HRS and BOPP). Furthermore, the United States argues that

also disagrees with China that a benchmark loan can meet the criteria of Article 14(b) only if it is denominated in the same currency as the government-provided loan. The United States submits that although the use of such a benchmark may be preferable, Article 14(b) contains no obligation to do so, and that China's restriction of its currency from international lending markets cannot be interpreted as to require Members to use a lending benchmark within China's distorted banking market.[729]

4. Main arguments of the Third Parties

(a) Australia

10.201 Australia considers that there is no basis in Article 14(b) for the benchmark used to "relate or refer to, or be connected with" the conditions prevailing in the market of the country of provision. Australia notes in this respect that loans are available on an international financial market that is subject to international influences. Furthermore, Australia considers that there is no basis in the text of Article 14(b) to limit the permissible benchmark to loans in the same currency as that of the loans being investigated given that loans obtained in one currency can be used to purchase any currency at rates determined by international markets.[730]

(b) Saudi Arabia

10.202 Saudi Arabia considers that a benchmark loan must comply with the "cumulative" criteria set forth in Article 14(b) of the Agreement. In this regard, Saudi Arabia is of the view that the term "comparable" suggests that the benchmark loan should be a loan denominated in the same currency, and subject to the same generally applicable financial regulations of the country providing the government loan. In addition, the word "commercial" refers to any transaction that is made in the ordinary course of commerce, while the phrase "which the firm could actually obtain on the market" imposes a requirement that the benchmark be based on the actual borrowing experience of the recipient firm. Saudi Arabia argues that the use of constructed benchmarks based on loans that are not actually available, but rather represent an average of a set of loans gathered in a discretionary manner to represent the "average commercial loan" are inconsistent with Article 14(b). Saudi Arabia takes issue with the United States' argument that the reasoning of the Appellate Body in *US-Softwood Lumber IV*, although decided under Article 14(d), is "equally applicable" under Article 14(b). Saudi Arabia argues, *inter alia*, that nothing in the Appellate Body's report indicates its application to Articles 14 (a), (b), and (c), nor to the "entirety of Article 14". However, assuming *arguendo* that the reasoning of the Appellate Body in that case applies to Article 14(b), Saudi Arabia considers that the clear admonitions made by the Appellate Body on the use of out-of-country benchmarks would apply as well.[731]

5. Assessment by the Panel

10.203 We have found above that where lending rates in a country are distorted by the government's role in the lending market it is permissible under Article 14(b) of the SCM Agreement to rely on sources other than in-country interest rates as benchmarks. We have further found that in such cases it is permissible to use constructed proxies for what a borrower "would pay" on a comparable commercial loan that it "could actually obtain on the market". In other words, we have concluded that the terms "would pay" and "could actually obtain on the market" accommodate the use of proxies, and

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Article 14(b) does not state a preference for the use of one interest rate rather than an average of interest rates. (Id.).

[729] United States second written submission, para. 100. Moreover, the United States recalls that the USDOC adjusted for inflation as a proxy for an adjustment for currency exchange rate expectations. (Id.).

[730] Australia third-party submission paras. 39-40; third-party response to Panel question 7.

[731] Saudi Arabia third-party submission, paras. 91-99.

do not mean that where an actual benchmark loan is not available, the investigating authority is forced to conclude that it is impossible to calculate a benefit (effectively meaning a benefit of zero). We also recall our finding that China has not established that the USDOC's determination that interest rates in China could not be used as benchmarks because of the distortion of the lending market due to the government's role was inconsistent with Article 14(b). The remaining question before us thus is whether China has established that the actual benchmark used by the USDOC is inconsistent with Article 14(b) of the SCM Agreement.

10.204 In our view, the legal question in this regard is whether the constructed proxy used as a benchmark by the USDOC sufficiently approximates what "would" have been paid on a comparable commercial loan that "could actually" have been obtained on the market, in the particular circumstances of the CWP, LWS and OTR investigations, where it was found not only that no such specific loans existed, but that in fact it was not possible to identify any interest rates in China that could even be adjusted to approximate what would be paid on such a commercial loan. In this regard, we recall that the USDOC did consider the possibility of adjusting the observed interest rates to try to approximate what the commercial rates would be, but decided not do so because this would have been a highly complex, speculative, and impracticable exercise.[732] We further note that before us China makes no arguments as to any such adjustments that should have been made, as its position is that the observed interest rates in China should have been used as benchmarks.

10.205 We thus must determine on what basis to evaluate the proxy benchmark actually used. In our view, the appropriate approach is to consider whether the methodology applied by the USDOC is one that a reasonable and objective investigating authority could use, in the particular situation found to exist in the CWP, LWS and OTR investigations, to generate a proxy for the interest rate that "would" have been paid on a commercial RMB loan that the borrower "could actually" have obtained if the Chinese lending market were not distorted. We consider this approach appropriate because, in view of the USDOC's finding that there were no undistorted RMB interest rates in China that could be used as benchmarks, there is no point of reference in the record evidence on the basis of which we could judge the absolute value of the benchmark used. We also note in this context that China makes no arguments as to specific flaws in the USDOC's methodology that could and should have been corrected[733], as indeed its argument is that no such proxy methodology based on other countries' interest rates is permissible as a matter of law, a proposition that we have rejected.

10.206 Given that constructing such a proxy is an exercise in estimation and approximation, in considering whether the USDOC's methodology is aimed at generating, in an unbiased and objective way, a proxy for commercial RMB interest rates that would exist (and thus "could" be obtained) in an undistorted market, we consider that our task is to evaluate the internal logic of the methodology employed, and the soundness and appropriateness of the data relied upon by the USDOC, in constructing the proxy.

10.207 In this light, we first consider the USDOC's use of a basket of other countries' currencies as the basic source for its proxy interest rate. Under the circumstances in the investigations, we find that this approach was permissible. Further, the reliance on the World Bank grouping of countries in the same income category as China based on GNI *per capita* also seems to us not unreasonable, as this is a pre-existing grouping, not one created for the investigations. This appears to us to introduce a certain element of macroeconomic similarity among these "benchmark" countries, reflecting the

[732] Exhibits CHI-3, p. 83 and CHI-4, p.104. China makes no argument that this is what the USDOC should have done. Rather, China's argument is that the USDOC should simply have used observed interest rates in China, directly, as the benchmarks.

[733] For example, China makes no argument that the wrong countries were included in or excluded from the basket of countries, or that the inflation adjustments were incorrect or should not have been applied at all, or any other arguments as to any specific aspects of the methodology.

USDOC's identification of a broad inverse relationship between real interest rates and income levels. We accept that the USDOC's exclusion of countries whose interest rates it found to be anomalous, and of NME countries, enhances this macroeconomic similarity. The adjustment for inflation also seems appropriate, *inter alia*, as a way of accounting at least partially for exchange rate expectations, which are influenced by inflation, as noted by the USDOC. Finally, we do not consider the USDOC's inclusion of factors related to the quality of the countries' institutions to be unreasonable, as factors such as political stability, government effectiveness and rule of law are taken into account by lenders when assessing the riskiness of lending to borrowers in a given country. Nor has China argued that there was a mismatch in terms of either maturities or dates of the benchmark interest rates and the investigated government loans. We thus do not find the methodology used by the USDOC to be unreasonable under the circumstances of the three investigations at issue.

10.208 In reaching this conclusion, we emphasize that the benchmark established by the USDOC was not perfect and could not literally represent the situation that would have been faced by any given borrower in China in the absence of the distortions that were found to exist. However, our conclusion reflects our view that the methodology seems to be based on a reasoned and even-handed approach to the unusual situation with which the USDOC was confronted, rather than appearing arbitrary, or biased. In particular, as noted, the USDOC had the right under Article 14(b) of the SCM Agreement to approximate on a reasonable basis the RMB interest rate that would have been available on "comparable commercial loans" that borrowers in China could "actually" have obtained if an undistorted market for such loans existed in China. We consider that a reasonable and objective investigating authority could have used the methodology used by the USDOC, and relied on the data that it did, to make such an approximation.[734]

10.209 For the foregoing reasons, we thus find that China has not established that the benchmark actually used by the USDOC to calculate the benefit from RMB-denominated SOCB loans was inconsistent with the obligations of the United States under Article 14(b) of the SCM Agreement.[735]

K. CONSISTENCY WITH ARTICLE 14(B) OF THE SCM AGREEMENT OF THE LOAN BENCHMARK ACTUALLY USED BY THE USDOC – U.S. DOLLAR-DENOMINATED LOANS

1. Claim of China

10.210 China claims that in the OTR investigation the USDOC acted inconsistently with Article 14(b) of the SCM Agreement when it applied as a benchmark an annual average LIBOR-based

[734] In making our findings related to SOCB lending, while we are mindful of the uniqueness of the situation in the investigations at issue, we do not consider that the findings imply that all lending in China *ipso facto* confers subsidies covered by the SCM Agreement. In particular, our findings are confined to the particular facts of the investigations at issue in this dispute. In this regard, first, we do not mean to imply by our findings that all lending in China is a "financial contribution" in the sense of Article 1.1 of the SCM Agreement (i.e., that it is by the government, or a public body, or is made pursuant to government entrustment or direction of a private body). Second, we do not mean to imply that all lending in China is made pursuant to the economic planning documents on the basis of which the USDOC found specificity. Third, concerning the existence of a benefit, while record evidence indicated that the lending rates were in a narrow range during the period of investigation, there was some, albeit limited, differentiation of interest rates. Finally, while we have not found that the benchmark used by the USDOC was inconsistent with the provisions cited in China's claim, this certainly does not imply that this is the only possible benchmark that could have been or could be used, and another benchmark may have led to a different outcome in the investigations.

[735] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

interest rate, instead of the applicable daily rates, to U.S. dollar-denominated SOCB loans to GTC.[736, 737]

2. Main arguments of the Parties

(a) China

10.211 China argues that the USDOC's benchmark methodology for U.S. dollar-denominated loans was not based on a comparison of like terms. Specifically, China argues that GTC's U.S. dollar-denominated loans were short-term (generally between 90 and 120 days) fixed-rate loans, with interest rates based on the applicable U.S. dollar interest rates in effect on the days that GTC received the loans. China argues that because LIBOR is a rate that changes daily, the interest rate benchmark applied to each loan also should have varied according to the date on which the loan was received. Thus, according to China, the correct method of determining the existence and amount of the benefit at issue was to compare the interest rate on the allegedly government-provided loan to the corresponding benchmark rate in effect on the same date. China argues that the annual average benchmark rate used does not represent what would be paid by GTC on a comparable commercial loan because GTC would not have paid an average annual LIBOR rate, something that can only be determined in retrospect given that LIBOR fluctuates on a daily basis. China submits that, alternatively, the USDOC could have applied an average-to-average comparison, i.e., compare an average annual LIBOR rate to GTC's average interest rate on its dollar-denominated loans for the same year.[738] China alleges that the USDOC, however, compared the actual interest rate on each loan to a retrospectively-determined average annual LIBOR rate, and that, as a result, it found "benefits" where, in fact, none existed.[739]

10.212 China disagrees with the United States' argument that nothing in Article 14(b) requires the use of daily rates over annual average rates. China submits that Article 14(b) requires the use of "comparable" commercial loans as benchmarks, and that LIBOR interest rates change daily throughout the year, such that a loan taken out at one point in the year is not "comparable" to a loan taken out at another point in the year. China adds that the USDOC's comparison did not measure whether the recipient of a government-provided loan was "better off", but only the extent to which interest rates varied throughout the year.[740] China also rejects the United States' argument that no party provided the relevant information (i.e., daily interest rate data) to the USDOC, arguing that it is the investigating authorities' obligation – not that of the interested parties – to identify and collect the "information which the authorities require" to ensure that the imposition of countervailing duties is consistent with the requirements of the Agreement.[741]

10.213 Finally, China submits that had the USDOC made a proper comparison, it would have found unequivocally that GTC did not obtain a benefit on its U.S. dollar-denominated loans; and that although this argument was not raised during the investigation at issue, the Appellate Body has

[736] *See*, generally, China first written submission, paras. 240-243.

[737] As indicated at para. 10.1, *supra*, China also raises consequential claims pursuant to Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

[738] *See, e.g.*, China response to Panel question 25 (second meeting). According to China, the USDOC had the data on the record to undertake such comparison. (Id.).

[739] Id.

[740] China second written submission, para. 132.

[741] Id., para. 134, citing Articles 10 and 12.1 of the SCM Agreement. China further notes that daily LIBOR data are publicly available on the Internet. (Id.).

established that a WTO Member "is not confined merely to rehearsing arguments that were made [...] during the domestic investigation".[742]

(b) United States

10.214 The United States argues that the benchmark developed by the USDOC for the U.S. dollar-denominated loans was consistent with Article 14(b) of the SCM Agreement. The United States explains that the USDOC used the one-year average of the daily interest rates for LIBOR, and that in order to adjust the LIBOR rate to one that a private company could receive, the USDOC determined the average spread between the LIBOR rate and the one-year U.S. corporate bond rates for companies with a BB rating. The USDOC then added this average spread to the LIBOR rate to measure the benefit at issue.[743]

10.215 The United States submits that this benchmark interest rate was constructed on the same basis as GTC's loans, which were also based on LIBOR plus a spread. The United States submits that the benchmark also matched the duration and currency denomination of the underlying loans, and that therefore, it represented a "comparable commercial loan". In addition, the United States argues that the benchmark was from the "market" because it was based on an average of actual LIBOR interest rates.[744]

10.216 The United States disagrees with China's argument that the USDOC was required to use daily rather than annual averages rates. The United States submits that daily LIBOR rates were not on the record of the investigation and that no party argued that the USDOC should depart from its usual practice of using annual rates.[745] Furthermore, the United States argues that Article 14(b) contains no preference for daily over yearly average rates, and that in using an annual interest rate, the USDOC was within the flexibility afforded by Article 14(b).[746]

3. Assessment by the Panel

10.217 This claim raises a single legal issue: the comparability of loans due to, in essence, differences in timing. In particular, the issue raised by China is whether, to be comparable to the government loans provided to GTC, the commercial benchmarks should have reflected the rates prevailing on the particular days on which those loans were taken out.

10.218 We recall our discussion, *supra*, of the characteristics that make a loan comparable in the sense of Article 14(b) of the SCM Agreement. Among these are the date, i.e., to be comparable, a benchmark loan should be established around the same date as the government loan. In this regard, as China points out, LIBOR changes on a daily basis. While we agree with the United States that Article 14(b) affords certain flexibility to investigating authorities in the identification and/or construction of suitable benchmarks, particularly where no strictly comparable commercial loans are available, we do not consider that this is the situation before us. In particular, there seems to be no dispute between the parties as to the basic suitability of comparing the interest rate on GTC's U.S.

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[742] China second written submission, para. 134, citing to Appellate Body Reports on *US – Lamb*, para. 113; *US – Corrosion-Resistant Steel Sunset Review*, para. 131; and Panel Report on *Japan – DRAMs (Korea)*, para. 7.304.

[743] *See, e.g.,* United States first written submission, paras. 257-258.

[744] United States response to Panel question 39 (first meeting).

[745] The United States explains that the USDOC's regulations generally provides for the use of annual averages to determine the benefit from government-provided loans.

[746] United States first written submission, paras. 260-261, citing to Panel Reports on *EC – Countervailing Measures on DRAM Chips*, para. 7.213 and *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, paras. 7.121-7.122.

dollar-denominated fixed-rate loans to the LIBOR-based rates used by the USDOC.[747] Thus, the availability of a suitable benchmark rate is not in question. Nor is there any dispute between the parties that daily LIBOR rates are publicly and easily available. Given that over the course of a year, LIBOR, like any interest rate, can and does fluctuate, sometimes considerably, we consider that by not making any attempt to match the LIBOR interest rate benchmarks to the actual origination dates of GTC's U.S. dollar-denominated loans (which were the dates on which their respective interest rates were fixed), the USDOC did not sufficiently ensure that its benchmarks were "comparable" to the investigated loans, in the sense of Article 14(b) of the SCM Agreement.

10.219 For the foregoing reasons, we find that China has established that the USDOC acted inconsistently with the obligations of the United States under Article 14(b) of the SCM Agreement by using average annual interest rates as benchmarks for GTC's U.S. dollar-denominated loans from SOCBs in the OTR investigation.[748]

XI. CHINA'S CLAIM PERTAINING TO "CREDIT" OR "OFFSET" FOR UNSUBSIDIZED TRANSACTIONS

A. CLAIMS OF CHINA

11.1 China claims that the USDOC's inclusion, in the OTR investigation, of only positive "benefits" (and its corresponding exclusion of negative "benefits") in its benefit calculations with respect to the provision of rubber inputs by SOE rubber producers was an arbitrary methodology inconsistent with Articles 10, 14, 19.1, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.[749]

B. MAIN ARGUMENTS OF THE PARTIES

1. China

11.2 Based on the use of the word "product" in Article VI:3 of the GATT and Articles 10, 19.3 and 19.4 of the SCM Agreement, China submits that the SCM Agreement establishes that a countervailing duty is to be imposed in respect of the "product" under investigation. Therefore, subsidization, like dumping, is to be defined in relation to a "product *as a whole*", and "margins of subsidization", like "margins of dumping", can only be calculated for the product under investigation "as a whole".[750] Thus, China submits, paraphrasing the Appellate Body's findings on zeroing in the anti-dumping context, while the USDOC could choose to undertake multiple comparisons at an intermediate stage to establish the margin of subsidization, it could only establish the margin of subsidization for each producer on the basis of aggregating all these "intermediate values". China adds that the Appellate Body's findings on zeroing in the anti-dumping context apply with even greater force in the countervailing duty context given that subsidization is not investigated on an individual transaction basis but instead necessarily involves an aggregated inquiry focusing on the "manufacture" or "production" of a product over the entire period of investigation. In particular, China submits, the

[747] As noted *supra*, China appears to consider the USDOC's choice of a LIBOR-based benchmark to have been appropriate. (China first written submission, para. 234).

[748] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

[749] Paragraph B.1(a)(vi) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (c); second written submission, para. 315 (d).

[750] China refers to the Appellate Body Reports on *US – Softwood Lumber V*, paras. 93 and 96, *US – Zeroing (EC)*, para. 126 and *US – Zeroing (Japan)*, para. 115. (China first written submission, paras. 146-150).

principal policy justification advanced by the proponents of zeroing in the anti-dumping context – targeted dumping – does not arise in the countervailing duty context.[751]

11.3 Further, China argues, when goods are purchased frequently over the period of investigation, determining whether remuneration was "adequate" necessarily requires an aggregate analysis that takes into account all purchases over that entire period. China adds that because of the lack of perfect information and frequent fluctuations in market conditions, buyers and sellers never know with certainty what the market price is on any given day. As a consequence, the USDOC's approach implies that government suppliers would have to sell at or above a retroactively-established benchmark price in every transaction to avoid a finding of subsidization. China submits that no market actor could ever meet this test, and that the drafters of the SCM Agreement could not have had such an outcome in mind when they created the "*adequate* remuneration" standard in Article 14.[752]

11.4 China argues that the use of the singular terms "a benefit" and "the good" in Article 14(d) of the SCM Agreement limit an investigating authority's discretion in selecting benefit calculation methodologies and mandate that for alleged subsidies in the form of the provision of inputs, adequacy of remuneration be determined on an aggregated basis for that "good" over the entire period of investigation.[753] China submits that under the plain text of Article 14(d), where the same good is purchased on multiple occasions over the period of investigation, the only way for "a subsidy" to exist in the form of the provision of "the good" for less than adequate remuneration is if the individual transactions are considered in the aggregate. China considers that its interpretation of Article 14(d) is the only one compatible with the definition of a subsidy in Article 1.1 as interpreted by the Appellate Body in past jurisprudence: a producer is not "better off" over a period of investigation if it ends up paying, on average, *more* than the market price for any "good" that it purchases from the government.[754]

11.5 In this regard, China indicates that, contrary to the United States' characterization, it is not arguing that the SCM Agreement requires that credit be provided across different types of subsidies or across different types of inputs: if more than one input is provided, Article 14(d) requires a separate adequate remuneration analysis for each such "good". China submits, however, that in the investigation at issue, the USDOC defined the programme under investigation as the provision of a single good – rubber – by the Chinese government for less than adequate remuneration, notwithstanding the fact that rubber was purchased in various forms.[755] China states that the USDOC then calculated a single, period-wide subsidy margin for rubber, regardless of the form in which it was purchased, rather than calculating five different period-wide subsidy margins for each separate type of input.[756]

11.6 Concerning the other provisions of which it alleges a violation, China argues that within the legal framework of Article VI:3, it is neither logical nor lawful to consider adequacy of remuneration on an individual transaction-by-transaction basis in the circumstance where multiple inputs are purchased over the period of investigation, since that provision makes clear that subsidization is to be investigated on an aggregate basis (i.e., on the "manufacture" or "production" of a product, the investigation, in turn, leads to the calculation of a *single* subsidy margin for an *entire* period of

[751] China first written submission, para. 148.
[752] Id., para. 151.
[753] China response to Panel question 51 (first meeting); second written submission, paras. 141-144.
[754] China second written submission, para. 145, citing to Appellate Body Reports on *Canada – Aircraft*, para. 157 and *US – Softwood Lumber IV*, para. 93.
[755] China response to Panel question 51 (first meeting).
[756] China second written submission, para. 144 and footnote 120. China refers to the USDOC's description of the alleged subsidy programme as the "Government Provision of Rubber for Less than Adequate Remuneration", OTR Countervailing Duty I&D Memo, Exhibit CHI-4, pp. 9 and 69.

investigation).[757] China submits that the Appellate Body, in *US – Softwood Lumber IV*, noted that the requirements of Article VI:3 of the GATT 1994 and of Articles 10 and 32.1 of the SCM Agreement "apply on a cumulative basis" and that, any inconsistency with Article VI:3 would necessarily also render the countervailing measures inconsistent with Articles 10 and 32.1 of the SCM Agreement. China also relies on the Appellate Body Reports in *US – Countervailing Measures on Certain EC Products* and *US – Softwood Lumber IV* as support for the propositions that to comply with the overarching obligations that these provisions impose, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of subsidy, and that to carry out this obligation in an original investigation, Article 19.1 of the SCM Agreement, read in conjunction with Article 1, requires the investigating authority to make a determination of the existence of a benefit *before* countervailing measures can be imposed.[758] China also argues (relying on the panel report in *US – Lead Bismuth II*) that Article VI of the GATT, and Articles 19.1 and 19.4 of the SCM Agreement collectively "establish[] a clear nexus between the imposition of a countervailing duty, and the existence of a (countervailable) subsidy", and are all based on the premise that no countervailing duty may be imposed absent (countervailable) subsidization.[759] Concerning the United States' argument that Article 19.4 of the SCM Agreement does not apply to original investigations, China replies that panels and the Appellate Body have determined that Article 19.4 of the SCM Agreement and Article VI:3 of GATT 1994 *do* impose obligations on the USDOC during original investigations under the United States' retrospective system.[760]

11.7 In response to a question from the Panel concerning Canada's third party argument that depending on the facts of a given case (for example, where there is an on-going contractual relationship) it may be necessary to examine more than one input transaction to determine whether government provision of a good is made for adequate remuneration[761], China considers that aggregation in countervailing duty investigations is inevitable, and that the question therefore is not whether but how an investigating authority should aggregate when calculating benefit under Article 14(d).[762] China argues in particular in this regard that subsidies are identified, investigated, and measured on a programme-specific basis in the first instance, and where the "programme" is the alleged provision of a "good" for less than adequate remuneration, and there are multiple transactions during the period of investigation involving the purchase of that "good", the investigating authority necessarily has to perform an aggregation in order to arrive at a single, period-wide subsidy benefit amount for that programme. For China, therefore, because the benefit from such a "less than adequate remuneration" programme is ultimately determined on a period-wide basis, aggregation is simply the natural and inevitable by-product of the Article 14(d) "benefit to the recipient" evaluation. Only where there was a single transaction for the good in question during the period would aggregation not occur. [763]

11.8 Regarding the specific example cited by Canada of an "on-going contractual relationship", China agrees that in such an instance the adequate remuneration inquiry would be legally required to examine all of the transactions during the period of investigation. China considers, however, that it is not the nature of the contractual relationship between buyer and seller that compels that outcome, but instead the plain language of Article 14(d), the Appellate Body's interpretation in *Canada – Aircraft* and in *US – Softwood Lumber IV* of the circumstances in which a "benefit" may be deemed to exist,

[757] China second written submission, paras. 146-147.

[758] Id., paras. 156-157, citing to Appellate Body Reports on *US – Countervailing Measures on Certain EC Products*, paras. 139 and 147; and *US – Softwood Lumber IV*, paras. 134, 138 and 154 (quoting Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 7.44).

[759] Id., para. 159, citing to Panel Report on *US – Lead Bismuth II*, paras. 6.52-6.53 and 6.56.

[760] China response to Panel question 52 (first meeting).

[761] *See* para. 11.28, *infra*.

[762] China response to Panel question 6 (second meeting).

[763] Id.

and the requirement in Article VI:3 of the GATT 1994 that countervailing duties be imposed to offset subsidies bestowed on the "manufacture" or "production" of "the product" over the entire period of investigation.[764] China argues in this regard that if a producer of subject merchandise purchases ten units of an input during the period of investigation, and pays on average at or above the market price for those inputs, it has not received the "good" for less than adequate remuneration, it is not "better off" for having made purchases from the government, and the "manufacture" and "production" of its merchandise can in no objective sense be considered subsidized. For China, this is the case whether the ten purchases of inputs were made from the same government supplier as part of an "on-going contractual relationship", or from ten different government suppliers in one-time only transactions.[765]

11.9 Finally, China argues that the USDOC used "aggregate" monthly benchmarks, which it compared to individual transactions in performing its benefit analysis and, in some instances, used benchmark prices that were not contemporaneous to the input transactions, such that the USDOC did not perform an "apples-to-apples" comparison. In response to a question from the Panel as to the relationship between this apples-to-apples argument and its claim that the USDOC was required to include both positive and negative results from its "less-than adequate remuneration" calculations concerning rubber inputs, China asserts first that it is not raising a new issue, but showing that the USDOC used aggregations in its calculations, such that the issue in the dispute was whether the method of aggregation used by the USDOC was consistent with the covered agreements.[766]

11.10 China notes that the USDOC, in calculating benchmarks where there was more than one transaction per month, aggregated by calculating a single, weighted-average monthly benchmark based on all of the transactions in that month. China argues that the USDOC then aggregated the individual transactions involving the "good" that it was investigating – rubber – over the period of investigation whenever the purchase price was lower than the benchmark price to determine a single, period-wide benefit for that subcategory of rubber. Finally, the USDOC conducted a further aggregation when it added each of the "benefits" for these subcategories together into a single, period-wide benefit for the overall programme entitled "provision of rubber for less than adequate remuneration".[767]

11.11 China argues that this method of aggregation, in which the USDOC included in its aggregate benefit calculation the 18 instances in which the two respondents paid less than the benchmark price for rubber inputs, but ignored the 55 transactions in which they paid more than the benchmark price, cannot plausibly be considered consistent with the covered agreements. In particular, China submits that the USDOC's aggregation methodology in the OTR investigation cannot pass the "basic reasonableness test" Article 14 imposes[768], but instead produces manifestly arbitrary and punitive results, not reasonable ones. China argues that the United States has not offered a single justification for its methodology based on market conditions, business practices, commercial considerations or anything else.[769]

11.12 China indicates that its second reason for referring to the USDOC's use of benchmark prices that were not contemporaneous to the transactions alleged to have been made for less than adequate remuneration was to underscore why China's legal arguments regarding the proper interpretation of Article 14(d) and the unreasonableness of the USDOC's methodology must be correct.[770]

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[764] China response to Panel question 6 (second meeting).
[765] Id.
[766] China response to Panel question 7 (second meeting).
[767] Id.
[768] Id., referring to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213.
[769] Id.
[770] Id.

11.13 China argues that for GTC's purchases of butadiene rubber ("BR"), one of the subcategories of rubber examined, the USDOC used a single import transaction for the month of May 2006 as the benchmark for GTC's purchases of BR in January through May. China states that during that period, prices for BR in China steadily increased. China asserts that more than 90 per cent of the purported benefit that GTC obtained from its purchases of BR during the period of investigation was due to the USDOC's use of the single May import transaction as a benchmark for GTC's January to April purchases.[771]

11.14 According to China, a similar situation occurred for the other respondent, TUTRIC, where the USDOC used a single import transaction involving one category of synthetic rubber – SBR – as the benchmark for all of TUTRIC's purchases during the entire period of investigation, not only of SBR, but of BR as well. China states that the only instances in which TUTRIC's purchase price for any category of rubber was found to be below the benchmark resulted from this comparison of its actual purchase price to a single import price.[772]

11.15 According to China, the limitations in the benchmarks that the USDOC developed, and their lack of contemporaneity with the transactions being investigated, underscore why the USDOC was legally required to aggregate the results of all of the comparisons during the period of investigation – not just those that yielded positive "benefits". China asserts that doing so was the only means consistent with the Article 14(d) for determining if GTC and TUTRIC paid less than adequate remuneration for their purchases of the "good" the USDOC was investigating. Only by aggregating all of the comparisons could the USDOC know whether GTC and TUTRIC were "better off" for having made purchases from SOEs, and whether the manufacture or production of their tires during the period of investigation benefited from subsidies.[773]

2. United States

11.16 The United States argues that the USDOC was not required to provide a credit in the calculations for instances in which SOEs provided rubber inputs for adequate remuneration. The United States submits, first, that Article 14 of the SCM Agreement affords Members a great deal of flexibility in calculating benefit in countervailing duty investigations.[774] Recalling the panel report in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, the United States argues that Article 14 does not prescribe any particular level of aggregation at which the benefit calculation must be conducted, but instead permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided.[775] The United States also argues that Article 14 contains no obligation to consider instances in which a government provides no benefit or to provide a credit for such instances when calculating the benefit conferred by a subsidy; the concept of "benefit" relates only to situations in which a firm received an

[771] China response to Panel question 7 (second meeting).
[772] Id.
[773] Id.
[774] The United States refers, *inter alia*, to the Appellate Body Report on *US – Softwood Lumber IV*, para. 95. (United States first written submission, para. 291).
[775] The United States notes that the panel in *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)* found that it was consistent with the SCM Agreement for an investigating authority to segment a share offering into four categories of transactions in order to evaluate whether the change in ownership effected through the offering extinguished the benefit of prior subsidies, and that in particular, the panel found that there was no legal basis to require the investigating authority to conduct its analysis on either a segmented or a non-segmented basis, as long as the authority's methodology was transparent and "not unreasonable", adding that it could find no legal basis "to require the USDOC to conduct its analysis in a particular manner". (Id., para. 292, citing to Panel Report on *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.121).

advantage.[776] The United States considers in this respect that China's argument cannot be reconciled with the definition of a subsidy under Article 1 of the SCM Agreement: any time a government provides a financial contribution and a benefit is thereby conferred, a subsidy is "deemed to exist". In the present case, each time China provided a rubber input for less than adequate remuneration, a benefit was conferred, and a subsidy was deemed to exist. The fact that at other times, China may have provided rubber inputs to the investigated producer for adequate remuneration, and therefore that no subsidy existed in those instances, is irrelevant. These non-subsidies could not eliminate or diminish the benefits conferred when China provided rubber inputs for less than adequate remuneration.[777]

11.17 Overall, with respect to the various claims of inconsistencies put forward by China, the United States submits that:[778] (i) China has failed to establish that the United States acted inconsistently with Article 14 of the SCM Agreement; (ii) it is not clear whether China is making a claim under Article 1 of the *SCM Agreement*, because although China makes an assertion that the United States acted inconsistently with that provision in the relevant section of its first written submission, it makes no request for panel finding in this respect; (iii) China provides no explanation in support of its claims that the United States acted inconsistently with the other provisions it cites (Articles 10, 19.1, 19.4, 32.1 of the SCM Agreement, Article VI:3 of the GATT 1994). With respect to the latter, the United States notes that China merely points to the use of the term "product" in Articles 10 and 19.4 of the SCM Agreement and Article VI:3 but does not otherwise explain how the United States acted inconsistently with these provisions; and that China makes no reference whatsoever to Articles 19.1 and 32.1 of the SCM Agreement in its arguments. Finally, the United States submits that Articles VI:3 of the GATT 1994 and 19.4 of the SCM Agreement do not impose obligations with respect to countervailing duty investigations as they both pertain to the *levying* of countervailing duties, i.e., the definitive or final legal assessment or collection of a duty or tax which, in the United States' retrospective system, only occurs after the conclusion of administrative reviews.

11.18 The United States further argues that China's reliance on the Appellate Body reports with respect to "zeroing" is misplaced as the legal provision on which those decisions are based applies solely to anti-dumping determinations. The United States also states that neither the term "margins of subsidization" used by China in its first written submission, nor the term "margin", appears in the SCM Agreement. The United States submits that accepting China's argument would mean that the mere use of the term "product" in certain provisions of the SCM Agreement or the GATT 1994 would override the flexibility afforded to investigating authorities under Article 14.[779] The United States also submits that a necessary implication of China's argument is that the obligation to provide a credit would apply to all of Article 14, such that an investigating authority would have to provide a credit whenever it found that a financial contribution did not provide a benefit, including across different types of input products and even different types of subsidies.[780] The United States notes in this respect that in the investigation at issue, the USDOC investigated the provision of five different types of rubber inputs by SOEs, i.e., the provision of five different goods and that, for one company, China only arrives at an overall "negative benefit" by offsetting the positive benefits in respect of one of the input products with negative benefits in respect of another input product.[781]

11.19 The United States also rejects China's argument based on the use of the term "good" (in the singular) in Article 14(d). The United States considers it unlikely that the drafters of the SCM

[776] United States first written submission, para. 294.
[777] Id., paras. 300-301.
[778] Id., paras. 310-315.
[779] United States first written submission, para. 299.
[780] Id., paras. 302-304.
[781] Id., para. 305.

Agreement would have sought, through the mere use of that term, to establish an obligation to aggregate the benefits of all transactions during the entire period of investigation involving the provision of a good; and an obligation to provide credit in such an aggregate benefit calculation for transactions in which the good was sold for more than the established benchmark; while also limiting these obligations to the unique situation of government-provided goods or services.[782] For the United States, the term "good" in the second sentence of Article 14(d) is in the singular, and associated with the terms "in question", because, while a government may provide a variety of goods and services, the adequacy of remuneration for a particular good provided by the government must be determined at the "prevailing terms and conditions" for *that* good. The United States notes that the investigating authority must look at the terms and conditions prevailing at the time of the sale of the good, "including price, quality, availability, marketability, transportation and other conditions of purchase or sale": such terms and conditions would be expected to vary over time and in many cases would be unique to each given transaction. Hence, for the United States, the text of Article 14(d) supports the conclusion that the adequacy of remuneration, and the benefit, may be determined on a transaction-specific basis.[783]

11.20 According to the United States, the different types of inputs at issue in the OTR investigation constituted different types of goods. The United States notes that the respondents in the OTR investigation reported that SOEs provided them with several distinct types of rubber, and that China itself, in its first written submission referred to "five separate types of rubber inputs".[784]

11.21 The United States submits that under the SCM Agreement, investigating authorities are permitted to apply methodologies that account for different factual situations, including the conditions under which the subsidy was provided. In all cases, benefit determinations are made on a case-by-case basis and depend on the particular facts of a given situation.[785]

11.22 Indeed, the United States argues, the context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. The SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction-by-transaction basis.[786] Moreover, the United States asserts, even if an authority were to choose to conduct an analysis at a particular level of aggregation in certain circumstances, nothing in the SCM Agreement requires an authority to provide a credit for those transactions that do not provide a benefit when performing such an analysis.[787]

11.23 Concerning China's "apples-to-apples" argument, the United States argues that it is not clear how this criticism of the USDOC methodology relates to China's countervailing duty credit/offset argument. Additionally, the United States notes that this argument appears to be a reversal of China's prior position that it was within the USDOC's discretion under the covered agreements to compare financial contributions and benchmarks on a monthly basis.[788]

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[782] United States second written submission, para. 127. The United States notes, *inter alia* that, by contrast, in paragraph 6 to Annex IV of the SCM Agreement (concerning the calculation of the overall rate of subsidization under Article 6.1 of the Agreement) the drafters used the term "aggregated": "In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated". (United States first written submission, footnote 227).

[783] United States second written submission, para. 128.

[784] Id., para. 133.

[785] United States response to Panel question 6 (second meeting).

[786] United States second written submission, paras. 129-131.

[787] United States response to Panel question 6 (second meeting).

[788] United States response to Panel question 7 (second meeting).

11.24 In any event, the United States argues, China's arguments misrepresent the facts. The comparison the USDOC performed in evaluating the benefit conferred by the provision of rubber was an "apples-to-apples" comparison fully consistent with Article 14 of the SCM Agreement. In the OTR investigation, the USDOC requested that the investigated producers report their purchases of each kind of rubber input by providing the "monthly, weighted-average price paid [...] to each of your suppliers".[789] The USDOC calculated benefits for the provision of rubber for less than adequate remuneration by comparing the monthly price of each government-sourced input to a monthly benchmark based on the average price in a given month that the investigated producer paid to private input suppliers (i.e., private Chinese producers and/or the price of the input imported from outside China).[790]

11.25 The United States argues that in most instances, the USDOC compared the monthly benchmark to *one* monthly price for the government-sourced input as reported by the investigated Chinese producers. However, in a number of instances, investigated producers reported two or three prices in a given month.[791] Where this was the case, the USDOC accepted the data in the manner provided by the investigated producers and compared the monthly benchmark to each price reported for purchases of the rubber inputs in question. In addition, the United States argues, in most instances the monthly benchmarks were based on private prices *from the same month* in which the investigated producers reported purchases of the government produced input. However, for some rubber inputs, the USDOC employed monthly data from a proximate month because the investigated producer did not have private purchases of the input in the given month.[792]

11.26 The United States submits that the USDOC complied with the guidelines in Article 14(d) by employing benchmarks based on the investigated producers' actual purchases of inputs from private suppliers during the period of investigation. According to the United States, this provision does not require that an investigating authority measure the benefit on any particular temporal basis (i.e., daily, monthly, annually). Thus, the USDOC's comparison of the monthly government-sourced prices reported by the investigated producers to a monthly benchmark – whether it was one, two or three reported government prices in a given month – was not inconsistent with Article 14(d). Nor, according to the United States, does this provision require that benchmarks be exactly contemporaneous with the purchase of goods, i.e., from the same month, same week or same day. Introducing such a requirement could make benefit calculations almost impossible in many situations. Thus, in the view of the United States, the USDOC's use of benchmark data from a proximate month when data for the month of purchase was unavailable is not inconsistent with the obligations of t he United States.[793]

11.27 The United States considers that if China's argument were accepted, authorities would effectively be required, in all cases, to compare the average price paid in all transactions during the period of investigation against a single average benchmark for the same period. Nothing in the text of Article 14(d) of the SCM Agreement supports China's view, and China's reading would have the perverse effect of prohibiting authorities from taking into account the market conditions that in fact prevailed at the time of each individual purchase when determining the adequacy of remuneration for the good in question.[794]

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[789] United States response to Panel question 7 (second meeting).
[790] Id.
[791] Id.
[792] Id.
[793] Id.
[794] United States comments on China's response to Panel question 6 (second meeting).

C. MAIN ARGUMENTS OF THE THIRD PARTIES

1. Canada

11.28 Canada sees no basis for extending the Appellate Body's reasoning in the "zeroing" disputes to the interpretation of the SCM Agreement. Specifically, Canada notes that in a dumping context, the calculation of a dumping margin is made by examining various transactions that involve the product under investigation. In a subsidy context, although the focus of the investigation is on a product that is allegedly subsidized and causing injury, the calculation of the amount of benefit does not necessarily involve directly that product under investigation. More generally, Canada considers that there is no provision in the SCM Agreement that specifically requires the offsetting argued for by China. However, under certain circumstances, the examination of whether the provision of a good through one or more transactions is made for adequate remuneration may require that other transactions be examined; in particular, Canada considers that where there is an on-going contractual relationship between a government supplier and a purchaser, it may be appropriate to take into account a range of transactions between the same parties concerning the same goods in order to determine whether one or more transactions were made for adequate remuneration.[795]

2. European Communities

11.29 The European Communities does not view the issue of "offsets" raised by China as comparable to the "zeroing" issue arising under the AD Agreement: (i) the AD Agreement contains specific provisions, which are not present in the SCM Agreement, and which when taken together preclude a dumping determination on a transaction-specific basis; and (ii) the calculation of benefit under the SCM Agreement is not conceptually comparable to the calculation of a dumping margin. Generally, in comparing a particular price with a benchmark under the SCM Agreement, the guiding principle is that like must be compared with like, due adjustment being made where necessary, unless there is a justification for doing otherwise, and on a case-by-case basis. If that is done, then the prevailing market conditions will take into account the normal fluctuations or variations in the price of the product in question within the selected period of time.[796] On the other hand, the European Communities considers that injurious subsidisation is not investigated on an individual transaction basis; rather, Article VI:3 of the GATT and various provisions of the SCM Agreement refer to "merchandise", "product" or "product under investigation". Thus, the calculation of the total amount of subsidisation granted to a particular product allows for the aggregation of "all" subsidies found to have been granted to that product during the period of investigation. As to whether a similar aggregation can be done when calculating the amount of subsidisation in a particular subsidy scheme, the European Communities is of the view that when calculating the amount of subsidisation in a given case, the question is what amount of benefit has been given to a particular product through the specific subsidy scheme during the period of investigation, and in that exercise, great importance should be given to how the investigating authority defines the relevant subsidy scheme and the period of investigation. Once the subsidy scheme has been defined and the period selected, the investigating authority must be "coherent" with its own selection throughout the investigation when calculating the "overall" benefit granted to the product concerned through that subsidy practice in the selected period.[797]

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[795] Canada third-party response to the United States' question to Canada; third-party oral statement, paras. 22-23.

[796] The European Communities gives as example the issue of whether the terms of the transaction are determined *ex ante* (at the time of the contract) or *ex post* (at the time of the order) – the benchmark used must then correspond to prevailing market conditions either as of the date of contract or as of the date of the order.

[797] European Communities third-party submission, paras. 29-34; response to Panel questions 8 and 9.

3. India

11.30 India submits that benefit must be calculated on the basis of an *aggregate analysis* of all transactions during the period of investigation, and not by reference to isolated transactions or merely of those transactions which confer benefit, disregarding other transactions.[798]

4. Japan

11.31 Japan considers that the benefit should be examined on a subsidy-specific basis without zeroing and that China's argument on "zeroing" may have certain merit. Japan notes that a countervailing duty may be imposed to offset the amount of a subsidy, and that the question before the investigating authority (and this Panel) is to define the scope of "*a* subsidy".[799] As regards benefit, Japan considers that the benchmark under Article 14(d) must be the prevailing market price for the sale of the goods at issue under comparable terms available at the time that the financial contribution was granted. Whether normal fluctuations or variations in the price of a good or service should be reflected or taken into account to determine the benchmark would depend on the terms of the financial contribution. For example, a government might sell input materials under certain terms and conditions for a certain period of time through multiple shipments. Japan considers that in such a case, the entire series of shipments could be considered to be a financial contribution and the calculation of the amount of the subsidy should be based on the total value of all shipments – rather than the assessment of the benefit for an individual shipment based on the value of its shipment. Japan adds that it also may not be reasonable to pick certain transactions and disregard other transactions to assess the amount of benefit conferred by the financial contribution.[800]

5. Norway

11.32 Norway considers that two elements support China's claim that the use of "zeroing" in the benefit calculations to create a countervailable subsidy where none would otherwise exist is inconsistent with Article VI:3 of the GATT. First, Article VI:3 makes clear that a countervailing measure is to be levied on *a* product, and any duty shall not be in excess of the benefit granted on the manufacture, production or export of "such" product. For Norway, the use of the singular form makes clear that the calculation of benefit from inputs received from SOEs must be for all input transactions during the period of investigation; the reasoning that led the Appellate Body, in its "zeroing" jurisprudence, to find that similar words in Article VI:2 of the GATT precluded a finding of dumping for individual transactions applies with equal force to the calculation of benefits derived from single input transactions viewed separately. Second, Norway states that the United States resorted to monthly external benchmarks, and thus that the "benefit" determination was not based on a calculation of the product cost for the SOEs providing the five types of rubber, and took no account of factors that could have explained cyclical differences in product types of these enterprises as compared to the monthly variations in the benchmark prices. Using monthly benchmark prices in such a situation, and "zeroing" monthly results which showed "no benefit" made a finding of benefit almost certain from the outset. Norway considers that the application of a methodology that is almost certain to lead to a conclusion of benefit in all cases, based on single transactions compared to a

[798] India third-party oral statement (this statement contains no paragraph numbering). India cites a number of provisions (Articles VI:3 of the GATT, Articles 19.2 and 19.4 of the SCM Agreement) in making its arguments with respect to "offset", but does not directly link these provisions to the obligation to take all transactions into consideration which it puts forward.

[799] Japan notes that Article 1.1(a)(1) and 2.1(c) refer to the existence and specificity of "*a* subsidy".

[800] Japan third-party submission, paras. 40-44; response to Panel questions 8 and 9.

benchmark set by the investigating authorities, cannot be said to comply with the requirements of Article 14(d) of the SCM Agreement and Article VI:3 of the GATT.[801]

D. FACTUAL BACKGROUND

11.33 In the OTR investigation, the USDOC calculated benefits to each investigated tire producer from its purchases of rubber inputs from SOEs) as follows.[802] For each month in which rubber was purchased by a tire producer from an SOE, the USDOC calculated, for each type of rubber input purchased (natural rubber, butadiene rubber (BR), styrene butadiene rubber ("SBR"), neoprene), whether a benefit was provided during that month, by comparing the purchase price of the rubber input in question to a monthly benchmark price for that type of rubber. The benchmark prices were constructed from the price paid by the tire producer in question for imported rubber of the same type and, where available, for domestically-produced rubber from private producers.[803] For any monthly comparison in which the purchase price for a given rubber input sourced from an SOE was less than the benchmark price, the USDOC calculated a monthly "benefit" in the amount of the difference. For any month in which the purchase price was greater than the benchmark price, the USDOC concluded that no benefit had been provided.

11.34 For each type of rubber input, the USDOC then aggregated all of the positive monthly "benefit" amounts, to arrive at a total benefit for that input for the entire period of investigation. These total amounts then were further aggregated to arrive at an overall benefit amount for the tire producer from its purchases from SOEs of all types of rubber inputs combined. In other words, for each tire producer, the USDOC aggregated all positive monthly comparisons for each type of rubber input, and then aggregated all of the resulting input-specific sub-totals to arrive at the total benefit amount for rubber inputs. For two of the three producers (GTC and TUTRIC), the USDOC determined that there were positive overall benefit amounts.[804] For the third producer (Starbright) the USDOC determined that there was no benefit from purchases of rubber inputs from SOEs.[805] Therefore, the remainder of our discussion focuses only on GTC and TUTRIC.

11.35 The following table illustrates the approach taken by the USDOC to calculate the benefits from government provision of rubber inputs, and the approach that China argues should have been taken instead. Here we note that the numbers in the table are fictitious and are used simply to illustrate the two approaches:

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[801] Norway third-party submission, paras. 34-37.

[802] *See*, *Final Calculation Memorandum for Guizhou Tire Company Limited (GTC)* (the "USDOC Calculation Memorandum for GTC"), Exhibit CHI-56; *Final Calculation Memorandum for Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC)* (the "USDOC Calculation Memorandum for TUTRIC"), Exhibit CHI-57; China's Calculations with Offsets, Exhibit CHI-58; and CHI-4, p. 92.

[803] The USDOC requested, and the investigated producers reported, information on rubber purchases separately by type of rubber, on a monthly basis. (*Attachment to the Supplemental Questionnaire Concerning the Countervailing Duty Investigation of New Pneumatic Off-The-Road Tires from the People's Republic of China – Government of the People's Republic of China*, Exhibit US-107, part III(c)). In some instances, an investigated producer reported a single volume and value of a given type of rubber input purchased from a given SOE during a particular month, in other instances the producer reported more than one volume and value of a given type of rubber purchased from a given SOE during a particular month. The USDOC made comparisons to the monthly benchmarks on whatever basis the investigated producer reported their input purchases. (United States first written submission, footnote 477).

[804] Exhibit CHI-4, p. 12.

[805] Id.

Month	SBR Bench-mark	SBR Price	SBR Benefit	BR Bench-mark	BR Price	BR Benefit	Neoprene Bench-mark	Neoprene Price	Neoprene Benefit	Natural Rubber Bench-mark	Natural Rubber Price	Natural Rubber Benefit
USDOC approach												
1	10	8	2	11	10	1	6	5	1	8	9	0
2	9	9	0	11	11	0	5	6	0	8	9	0
3	11	12	0	13	14	0	7	5	2	7	8	0
4	10	9	1	12	11	1	8	9	0	9	12	0
POI total			**3**			**2**			**3**			**0**
POI total all rubber						**8**						

Month	SBR Bench-mark	SBR Price	SBR Benefit	BR Bench-mark	BR Price	BR Benefit	Neoprene Bench-mark	Neoprene Price	Neoprene Benefit	Natural Rubber Bench-mark	Natural Rubber Price	Natural Rubber Benefit
China approach												
1	10	8	2	11	10	1	6	5	1	8	9	-1
2	9	9	0	11	11	0	5	6	-1	8	9	-1
3	11	12	-1	13	14	-1	7	5	2	7	8	-1
4	10	9	1	12	11	1	8	9	-1	9	12	-3
POI total			**2**			**1**			**1**			**-6**
POI total all rubber						**-2**						

11.36 We recall that, as illustrated above, China is challenging the fact that the USDOC did not "offset" the positive benefit amounts it found in certain months for certain types of rubber inputs with negative amounts in the other months, and for the other types of rubber. In other words, in China's view, the USDOC was required by Article 14(d) of the SCM Agreement, Article VI:3 of the GATT 1994, and the other provisions cited in this claim, to have summed these positive and negative amounts over the entire period of investigation and – the USDOC having defined the good at issue as "rubber" – all four kinds of rubber inputs. In particular, China argues that the references to "product" in Article VI:3 of the GATT 1994, and Articles 10, 19.3 and 19.4 of the SCM Agreement require an aggregate analysis of the inputs in question over the entire period of investigation.[806] Furthermore, specifically in regard to Article 14(d) of the SCM Agreement, China argues that "in the context of a case like OTR, where the alleged government-provided goods were purchased frequently over the period of investigation, determining whether remuneration was 'adequate' [in the sense of Article 14(d)] necessarily required an *aggregate* analysis that took into account *all* of the respondents' purchases over the *entire* period of investigation".[807] For China, if the net effect of these transactions over the course of a year is that the average price charged by the government supplier equals or exceeds the average "market price" benchmark, it would be nonsensical to suggest that the government received insufficient remuneration for the goods it sold.[808] China further argues that if a purchaser of inputs pays on average at or above the market price for those inputs, it has not received the "good" for less than adequate remuneration, it is not "better off" for having made purchases from the government, and the "manufacture" and "production" of its merchandise can in no objective sense be considered subsidized.[809] China's view is that there is a legal obligation under the covered agreements, at least in some circumstances, to use a method of aggregation that takes into account the

[806] China first written submission, paras. 145-149.
[807] Id., para. 149.
[808] Id., para. 151.
[809] China response to Panel question 6 (second meeting).

full range of transactions that occurred during the period of investigation, not just some of them.[810] In sum, China argues, the USDOC was obligated to conduct an *aggregate* analysis of *all* transactions involving the purchase of rubber inputs over the period, including those that were made for more than the benchmark price, and not merely those that were made for less than the benchmark price.[811]

11.37 The record shows that, as described above, the USDOC calculated monthly benchmarks for each of four kinds of rubber inputs (SBR, BR[812], natural rubber, and neoprene), and compared these with the monthly average unit values of the corresponding kinds of rubber purchased by the tire producers from SOE suppliers. We note here that China is not challenging the benchmarks that were applied[813], but rather the fact that the USDOC did not calculate the amount of benefit on an average, net basis, aggregating positive and negative amounts from all transactions, for all types of rubber inputs combined, across the entire period of investigation.

E. ASSESSMENT BY THE PANEL

11.38 We recall that China's claim cites a number of provisions of the SCM Agreement, as well as Article VI:3 of the GATT 1994, and that China based its initial arguments principally on this latter provision, in particular the word "product" in Article VI:3 of the GATT 1994. This word is the basis for China's argument drawing on an analogy with the Appellate Body's findings in the anti-dumping "zeroing" disputes. We address that argument *infra*.

11.39 China's explanation, in response to an argument advanced by the United States, of the legal basis of this claim, however, focuses in detail on Article 14(d) as a source of the substantive obligations it asserts.[814] China then explains that the USDOC's benefit calculations relating to rubber inputs also were inconsistent with Article VI:3 of the GATT 1994 and Article 10, as well as Articles 19.1 and 19.4 of the SCM Agreement because the USDOC used a benefit methodology that resulted in an inflated benefit amount, or produced a purported benefit where none existed.[815] On the basis of this explanation, we understand that the alleged violations of Article VI:3 of the GATT 1994 and of Articles 10, 19.1 and 19.4 of the SCM Agreement in the context of this particular argument are consequential to the alleged substantive violation of Article 14(d). We thus begin our analysis with a consideration of Article 14(d) of the SCM Agreement.

11.40 There is no disagreement between the parties that Article 14(d) of the SCM Agreement directly pertains to the calculation of benefit from government provision of goods. This provision reads:

> "Article 14
>
> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and

[810] China response to Panel question 6 (second meeting).
[811] China first written submission, para. 152.
[812] SBR and BR are collectively referred in some of the record documents as "synthetic rubber".
[813] China response to Panel question 35 (first meeting).
[814] China second written submission, paras. 137-152.
[815] Id., paras. 153-160.

> adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> [...]
>
> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".

11.41 The precise question before us is whether the methodology used by the USDOC to determine that the provision of rubber inputs by SOEs conferred benefits on OTR tire producers was inconsistent with Article 14(d). We recall that China's argument based on the text is that because Article 14(d) refers to "the good [...] in question", and to "a benefit", in the singular, and the USDOC identified the "good" in question as "rubber", the calculation regarding the adequacy of remuneration must be conducted on an aggregate basis in respect of all of the rubber inputs, combined. China also argues that where a given good is purchased on multiple occasions over a period of investigation, Article 14(d) requires that those individual transactions be considered in the aggregate to determine whether a producer is "better off" over a period of investigation. In China's view, the producer is not better off if it ends up paying, on average, *more* than the market price for any "good" that it purchases from the government over that period. China further considers that pursuant to Article 14(d) some aggregation is inevitable, such that the question becomes not whether, but how, to aggregate in a WTO-consistent manner.

11.42 We further recall China's argument that in the OTR investigation, the USDOC identified as a "programme" the provision of rubber inputs by the government for less than adequate remuneration. China argues that the USDOC thus was required to aggregate all of the different types of rubber (as "the good" in question) in performing its benefit calculations.

11.43 We thus see two main components to China's argument based on Article 14(d): temporal (the period of investigation as a whole); and regarding the meaning of "good" in this provision (how the input "programme" is defined by the investigating authority).

1. Period of investigation

11.44 Starting with the temporal element, we note that there is no direct reference to time in Article 14(d), or elsewhere in Article 14 of the SCM Agreement. In fact, the only way in which Article 14(d) refers to time, albeit indirectly, is through its reference to "prevailing market conditions", which we understand to mean the conditions in the market prevailing at the time of the purchase of the good or service in question from the government. But this is a different issue from the one raised by China.

11.45 From the practical point of view, we agree with China that countervailing duty investigations inherently have a temporal component, as alleged subsidies must be analyzed in relation to a particular period to ultimately arrive at an overall amount of subsidization of the investigated product,

ad valorem and/or *per* unit, as provided for in Articles 11.9 and 19.4 of the SCM Agreement.[816] For this reason, an investigating authority will define a period of investigation and typically will need to perform a certain amount of aggregation and/or disaggregation of benefit amounts from different investigated subsidies to determine the total amount of subsidization of the product during that period.

11.46 This observation, which is shared by China, that benefit amounts from different subsidies need somehow to be aggregated over the period of investigation in order to arrive at the total amount of subsidization of the investigated product, does not however address the temporal issue raised by China. In particular, China is arguing that Article 14(d) (via its references to a "good" and "a benefit" in the singular) requires that the determination of whether purchases of inputs from government sources were for less than adequate remuneration must be calculated on an overall, net basis for the entire period of investigation for the good in question, using for each transaction the benchmark price identified by the investigating authority as the yardstick. In other words, China's argument is that if some purchases during the period of investigation are made for a higher-than-benchmark, or above-market, price, the full amount of these "negative" benefit amounts, as measured against the benchmark price, must, as a matter of law, be offset against the "positive" benefit amounts, over the full period of investigation.

11.47 In assessing this argument, we note first that Article 14(d) of the SCM Agreement contains no reference to any notion of offsetting, or "negative benefits" or of averaging across the period of investigation, for a particular good. Indeed, in our view, the language of the provision – especially the statement that "the provision of goods or services or purchase of goods by a government *shall not be considered as conferring a benefit unless* the provision is made for *less* than adequate remuneration" – if anything suggests both a disaggregated analysis and a focus on instances where benefits are found to exist. We note in particular the negative terms in which this sentence is drafted – a benefit "shall not" be conferred "unless" – which could be restated as there being *no* benefit, i.e., a benefit of *zero*, where the remuneration is at least "adequate".

11.48 The fact that the comparison required by Article 14(d) is with "prevailing market conditions", in our view, also cuts against China's argument that if on average over the period of investigation a purchaser of a good has not paid a below-market price, there is no benefit. In particular, given that "prevailing market conditions" can and do change over time, an investigating authority would need to ensure that its benchmark price was updated as necessary to reflect any such changes that might occur during the period of investigation. This suggests that rather than viewing the period of investigation monolithically, an investigating authority should be seeking to match the transactions under examination to contemporaneous benchmarks, and that the existence or absence of a benefit in respect of one transaction or group of transactions is independent of the existence or absence of a benefit in other transactions.

11.49 We also note that the approach advocated by China has a significant internal inconsistency which is most easily seen in a hypothetical situation where all of the purchases of a given good from a government are for prices above "prevailing market conditions". Under China's methodology, the benefit calculations would generate "negative benefits", both individually and overall. China argues that it sees no requirement under the SCM Agreement to offset any such net negative benefits from provision of goods against positive benefits from any other kinds of subsidies. Yet, we can find no basis in China's argument on which such a distinction could be made between positive and negative benefit amounts from one given kind of subsidy and positive and negative benefit amounts across different kinds of subsidies. We see no such requirement in the SCM Agreement, and to the contrary

[816] Article 11.9 of the SCM Agreement establishes that subsidization of less than 1 per cent *ad valorem* is *de minimis* and must result in termination of an investigation. Article 19.4 of the SCM Agreement refers to calculation of "the amount of the subsidy found to exist [...] in terms of subsidization per unit of the subsidized and exported product".

consider that the Agreement – starting with the basic definition in Article 1 – instead provides that each subsidy must be analyzed and assessed independently.[817] China's proposed methodology is inconsistent with this principle.

11.50 For the foregoing reasons, we find no requirement in Article 14(d) of the SCM Agreement that, as such, positive and "negative" benefits from government provision of a good must be offset over the period of investigation.

2. "Good" in the sense of Article 14(d) of the SCM Agreement

11.51 The second aspect of China's aggregation argument is that the USDOC should have treated all rubber inputs as a single "good" in the sense of Article 14(d), and that an overall net benefit amount (positive or negative) should have been calculated for "rubber" of all types together, for each tire producer. China bases this argument on the fact that the USDOC notionally treated provision of "rubber inputs" for less than adequate remuneration as a "programme" in its investigation.

11.52 While this argument of China would at first sight appear to be a purely factual one, it raises a legal question, that of the breadth of the term "good" in Article 14(d), and the extent to which what is considered to be a "good" for the benefit determination pursuant to Article 14(d) should be determined by the way in which the investigating authority groups various alleged subsidies in the investigation.

11.53 We consider that the text of Article 14(d) must be understood to refer to the intrinsic characteristics of the good itself, i.e., that the existence of a benefit must be determined based on how, in practice, the specific good in question is sold. In particular, this is the purpose of the language in that provision referring to "prevailing market conditions" as "including price, quality, availability, marketability, transportation, and other conditions of purchase or sale". This means that any benchmark identified as representing the "prevailing market conditions" for the good provided by a government must reflect the price for that same good as it would be or is sold by private sources at that time and on comparable terms and conditions. This language thus requires a careful matching of the transactions being examined with appropriate benchmarks, and militates against an aggregated, averaged approach across different kinds of goods.

11.54 We thus consider that, like the temporal question, Article 14(d) of the SCM Agreement points more to a disaggregated than an aggregate analysis of the pricing of a government-provided "good" for purposes of benefit calculation. Given this, we see no requirement in the text that simply because an investigating authority may refer to the provision of certain goods as a "programme" for purposes of its analysis, all of those goods must be treated as a bloc, on the basis of their average unit value, in the benefit calculations. To the contrary, we see a clear requirement that the benchmark must in fact reflect the actual market conditions, starting with price, for any given good at issue.

3. Degree of flexibility for investigating authorities under Article 14 of the SCM Agreement

11.55 We note that while China argues that the methodology it advances is required in all cases, the United States counters that Article 14 provides investigating authorities with considerable leeway to perform benefit calculations, within the general framework mandated by Article 14 of the SCM Agreement. We thus now turn to this question. In this regard, we note first that the chapeau of Article 14 explicitly characterizes the rules set forth in the four subparagraphs of Article 14 as

[817] For example, Article 1 of the SCM Agreement refers to "a subsidy", "a financial contribution", and "a benefit"; and "countervailing duty" is defined in footnote 36 as a special duty to offset "any subsidy" bestowed upon the manufacture, production or export of any merchandise.

"guidelines". In this respect, we agree with the findings of past panels and the Appellate Body that as such, these "guidelines" establish the basic framework for the calculation of benefits from the kinds of financial contributions referred to in the various subparagraphs, but that they leave a considerable amount of leeway to investigating authorities as to precisely how those calculations are to be undertaken in any given case, depending on the specific facts under investigation. We note in particular the following statements of the Appellate Body in *US – Softwood Lumber IV*:

> "[...] The chapeau of Article 14 requires that '*any*' method used by investigating authorities to calculate the benefit to the recipient shall be provided for in a WTO Member's legislation or regulations, and it requires that its application be transparent and adequately explained. The reference to '*any*' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient. [...]
>
> "[T]he term 'guidelines' suggests that Article 14 provides the 'framework within which this calculation is to be performed', although the 'precise detailed method of calculation is not determined'. [...] [T]hese terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, [...] the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'".[818] (emphasis original)

We further note the Appellate Body's similar statement in *Japan – DRAMs (Korea)*:

> "The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations".[819]

11.56 We recall that we have found, above, no requirement in Article 14(d) for either the temporal or the product "offsetting" advocated by China. The above findings of the Appellate Body support this view, by indicating that no one specific methodology (whether that put forward by China or any other) is required by Article 14(d) of the SCM Agreement. We also have found that the language of Article 14(d) suggests more a disaggregated than an aggregate approach, both temporally and in respect of a "good" in the sense of that provision. That said, as discussed above, we consider that the basic requirement of Article 14(d), as expressed by the phrase "prevailing market conditions for the good [...] in question [...] (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)", is that the benchmark used must correspond to the particular good at issue, as it is actually sold, at the time of the transaction being analyzed (i.e., it must reflect the factual situation found to exist in respect of the government-provided good). It is within this basic "guideline" that an investigating authority can exercise the methodological flexibility accorded to it under Article 14 so as to appropriately take into account the specific facts of the investigation.

11.57 Finally, we recall China's initial argument, based on an analogy with certain dispute settlement findings on the issue of "zeroing" in the context of anti-dumping, that Article VI:3 of the GATT 1994 as well as Articles 10, 19.3 and 19.4 of the SCM Agreement establish that a countervailing duty is to be imposed in respect of the "product" under investigation, and that therefore

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[818] Appellate Body Report on *US – Softwood Lumber IV*, paras. 91-92.
[819] Appellate Body Report on *Japan – DRAMs (Korea)*, para. 191.

subsidization, like dumping, is to be defined in relation to a "product *as a whole*", and that "margins of subsidization", like "margins of dumping", can only be calculated for the product under investigation "as a whole". China submits therefore that while the USDOC could choose to undertake multiple comparisons at an intermediate stage to establish the "margin of subsidization", it could only establish that "margin" for each producer on the basis of aggregating all these "intermediate values", and that the Appellate Body's findings on zeroing in the anti-dumping context apply with even greater force in the countervailing duty context given that subsidization is not investigated on an individual transaction basis but, rather, necessarily involves an aggregated inquiry focusing on the "manufacture" or "production" of a product over the entire period of investigation.

11.58 As we have discussed above, we consider that a countervailing duty analysis does inherently involve a certain amount of aggregation, of benefits from distinct subsidies benefiting the manufacture, production or export of an investigated product, and of those benefits over the course of the period being investigated. In our view, however, such aggregation of benefits to the investigated product from different subsidies is unrelated to China's contention that "negative" benefit amounts must offset "positive" benefit amounts in calculations pertaining to the government provision of a given good (one among several possible subsidies affecting a given investigated product).[820] We recall here that in any case, China itself argues (and we agree) that offsets of "positive" and "negative" benefit amounts across different subsidy programmes are not required, by Article 14 of the SCM Agreement or any other provision of the WTO Agreement. We thus do not find China's zeroing analogy to be apposite to this claim.

11.59 For these reasons, we do not find that, as a matter of law, Article 14(d) or any of the other provisions cited in China's claim requires the methodology advanced by China, or any specific methodology, to be applied in calculating benefits from the government provision of a good.[821] We have instead found that Article 14(d), the directly applicable provision, requires that benefit be determined in a way that reflects the actual facts of the investigation. We do not here exclude, *a priori*, the possibility that a given set of factual circumstances (perhaps a hypothetical scenario along the lines referred to in Canada's third party arguments) might dictate the methodology advocated by China in a specific case. That said, the question remains whether the OTR investigation presented such a situation.

4. The USDOC benefit determination in respect of rubber inputs

11.60 Having considered the legal issues under Article 14(d) of the SCM Agreement and the other provisions cited by China, we now turn to the USDOC's analysis and determination of benefit from the government provision of rubber inputs to OTR tire producers. In particular, we consider whether the particular facts of the OTR investigation necessitated the methodology advocated by China.

11.61 The record demonstrates that in the OTR investigation, the USDOC referred to the subsidy at issue as the provision of "rubber" for less than adequate remuneration.[822] In its calculations,

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[820] We note further that the term "margin of subsidization" does not appear in the SCM Agreement.

[821] Nor do we consider that China has established the existence of a "basic reasonableness test" under Article 14 that would impart particular obligations that do not appear on the face of that provision. Indeed, China provides no discussion of what it means by the term "basic reasonableness test", instead simply citing a paragraph of the report of the panel in *EC – Countervailing Measures on DRAM Chips* in which that term appears.

[822] *See, inter alia*, Exhibit CHI-4 pp. 9 and 69 (title of the programme "determined to be countervailable" is the "Government Provision of Rubber for Less than Adequate Remuneration"); Exhibit CHI-50, p. 71372-71374, ("Provision of Natural and Synthetic Rubber by SOEs for Less than Adequate remuneration"); Exhibit CHI-51 p. 40484, item D ("Government Provision of Rubber for Less than Adequate Remuneration"); Exhibits CHI-56 and CHI-57 (Final Calculation Memoranda for GTC and TUTRIC ("Government Provision of Rubber for Less than Adequate Remuneration")).

consistent with the basis on which the information was reported by investigated producers, the USDOC performed a separate calculation for each of the rubber inputs.[823] GTC and TUTRIC both reported to the USDOC their purchases of rubber inputs from SOEs by month (sometimes reporting more than one transaction during a given month), separately for each of the types of rubber. There is no indication in the record of the investigation or before us that this was at odds with how the tire producers maintained the records of their rubber purchases.

11.62 The USDOC calculated monthly market benchmark prices for each type of rubber, based on the tire producers' actual purchases of rubber from private sources, and used these monthly benchmarks to determine on a monthly basis whether a benefit had been conferred. For each tire producer, the USDOC summed the positive benefit amounts thus calculated for each type of rubber, to arrive at a total benefit for the period of investigation to that tire producer from that type of rubber. These input-product-specific benefit totals then were added together to arrive at the total benefit to the tire producer from government provision of rubber inputs of all kinds during the period of investigation.

11.63 We note first that China does not contend that all of the different types of rubber were sold for a single, undifferentiated price. Nor does the record evidence indicate that this was the case. To the contrary, the record evidence shows that each type of rubber was sold as a specific, separate product with its own pricing, and that the tire producers maintained their purchase records separately for each type.[824] Furthermore, we recall that China raises no claim in respect of the benchmarks used by the USDOC in these benefit calculations, or the matching of any particular benchmark to any particular rubber purchase. In other words, China does not claim that the benchmarks used by the USDOC failed to reflect "prevailing market conditions" either temporally or in terms of the characteristics or terms and conditions of sale of the particular kinds of rubber at issue.

11.64 Instead, what China contends is that in spite of their differentiated pricing, all of the different rubber inputs were legally required to be treated as a single "good" in the sense of Article 14(d) because the USDOC treated the government provision of rubber inputs to the OTR tire producers as a "programme".

11.65 In our view, China's characterization of the USDOC's description of the measure places undue weight upon the title given by the USDOC to the programme at issue, and we are not convinced that the USDOC sought to define the "good" at issue as "rubber" in the aggregate, without distinction between various types of rubber inputs. But in any case, even if we were to agree with China's characterization of the USDOC's description of the subsidy or good at issue, we find no basis in the SCM Agreement for China's arguments, nor do we consider that aggregating all "rubber" inputs, as China suggests was required, would reflect any market reality. Indeed, we note that there would be a considerable margin for inaccuracy if investigating authorities were legally required to ignore the actual pricing of a given good in favour of an average value across a range of goods with differentiated pricing. Furthermore, we consider that the guidelines of Article 14(d) mean that the level of aggregation or disaggregation of the analysis of a given "good" must correspond to how that good is marketed in reality. Given the facts of the case before us, we thus consider it appropriate for the USDOC to have separately calculated benefit amounts for the different kinds of rubber purchased by the tire producers.

11.66 Turning to the USDOC's approach of analyzing the rubber transactions on a monthly basis and taking into account only the positive monthly amounts, we recall that China contends that the USDOC should instead have calculated the overall positive or negative net benefit for the period of investigation as a whole, i.e., that it should have compared the average price paid for all forms of

[823] *See* Exhibits CHI-56 and CHI-57 (Final Calculation Memoranda for GTC and TUTRIC).
[824] Exhibits CHI-56 and CHI-57.

rubber over that period with the average benchmark.[825] We consider that there could be certain situations in which some sort of grouping or averaging of transactions might be necessary in order to arrive at a determination of the amount of the benefit. Examples might include where a given set of transactions was made pursuant to a contract, or possibly where the actual prices paid to the government fluctuated slightly around the market benchmark(s) over the entire period of investigation. In the OTR investigation, however, the positive benefits calculated by the USDOC were clustered in particular months of the period of investigation and generally were sizeable, rather than being small amounts above and below the benchmarks spread uniformly over that period. This fact pattern, to us, does not mandate the kind of temporal averaging advanced by China. We thus consider that the USDOC acted within the limits of the flexibility accorded to it by Article 14(d) of the SCM Agreement in performing as it did the benefit calculations on a monthly basis.

11.67 Finally, we consider China's argument that the fact that the USDOC compared "aggregate" monthly benchmarks to individual transactions in performing its benefit analysis, and in some instances used benchmark prices that were not contemporaneous to the input transactions, resulted in comparisons that were not "apples-to-apples". We note that China reiterates, in making this argument, that it is not raising any new issues pertaining to non-contemporaneous (or non-like) benchmarks. We consider, however, that the benchmarks used by the USDOC are in fact the precise focus of this argument, which we see as a different issue from the "offset" issue that is the subject of China's claim as set forth in its request for establishment of the Panel. We thus do not find this argument germane to our consideration of that claim.

5. Conclusions

11.68 For the foregoing reasons, we find that China has not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by not "offsetting" positive benefit amounts with "negative" benefit amounts, either across different kinds of rubber or across different months of the period of investigation, nor that the United States also thereby acted inconsistently with its obligations under Articles 10, 19.1, 19.4 or 32.1 of the SCM Agreement, or Article VI:3 of the GATT 1994.

11.69 We recall that we are called upon by this claim, as by all others before us, to determine whether the United States has acted inconsistently with its obligations on the basis alleged by China. In finding that China has not established its claim we thus are not making a judgement as to the overall consistency or inconsistency of the USDOC's benefit calculations in respect of rubber inputs with the United States' obligations, under the cited provisions or any other provisions.

XII. CHINA'S CLAIMS PERTAINING TO THE PROVISION OF SOE-PRODUCED INPUTS BY PRIVATE TRADING COMPANIES

A. CLAIMS BY CHINA

12.1 China submits that even if the USDOC's finding that SOE input producers were public bodies were valid, in the CWP, LWR and OTR investigations the USDOC acted inconsistently with Article 1.1 of the SCM Agreement (and as a consequence with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994) by finding subsidies where inputs produced by SOEs were purchased from private trading companies by the producers of the investigated products, as the

[825] *See* para.11.36, *supra*. This is another way used by China to express its argument that the positive and negative subsidy amounts should have been "offset".

USDOC made no finding that the trading companies were "entrusted" or "directed" in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement to provide the goods.[826]

12.2 China further submits that if the Panel were to conclude that the USDOC was not obligated to make a finding that the trading companies themselves provided a financial contribution, the benefit analysis in respect of the sale of inputs was nonetheless flawed because it was predicated on an unlawful presumption that the trading companies received, and passed-through to the producers of the investigated products, countervailable benefits from their purchases of the inputs from SOEs.[827]

12.3 Concerning the first issue (the entrustment or direction issue), the relevant portion of China's request for establishment of the Panel (paragraph B.1(a)(iii)) reads as follows:

> "(iii) even assuming a valid determination that certain SOEs are public bodies, the US authorities' failure to make a determination that SOEs "entrust or direct" trading companies to provide goods to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;" (footnote omitted)

12.4 Concerning the second issue (the pass-through issue), which China raises in the alternative to the financial contribution issue discussed *supra*, China, in response to a question from the Panel, identifies paragraphs B.1(a)(iv) and B.1(a)(v) of its request for establishment of the Panel as setting forth its claim(s) relative to the pass-through issue.[828] These paragraphs read:

> "(iv) the US authorities' determination that the sale of goods by trading companies to producers of subject merchandise confers a countervailable subsidy within the meaning of Article 1 of the SCM Agreement and a benefit under the guidelines set forth in Article 14(d) of the SCM Agreement;
>
> (v) the US authorities' failure to determine whether the alleged benefit received by trading companies was passed through to producers of subject merchandise, in violation of Article VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement".

B. MAIN ARGUMENTS OF THE PARTIES

1. China

12.5 China argues that the USDOC had no basis to conclude that the respondents obtained "government-provided goods" when they purchased inputs from the trading companies, since the USDOC made no findings that the private trading companies themselves had made a financial contribution when selling SOE produced inputs, i.e., that they had been "entrusted or directed" to "provide goods" within the meaning of Article 1.1. For China, this necessarily means that the subsidies at issues were countervailed unlawfully.[829]

12.6 China alleges that even if the Panel were to disagree with this conclusion, the USDOC's findings with respect to trading companies would still be unlawful, because they are based on an erroneous benefit analysis as well. In particular, China submits that the USDOC never established that the private trading companies themselves received subsidies, in particular that it did not examine

[826] Paragraphs B.1(a)(iii) and B.1(e)(i)-(iii) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 132; second written submission, paras. 44 and 315 (b).

[827] China first written submission, paras. 133-138.

[828] China response to Panel question 34 (second meeting).

[829] *See, e.g.*, China first written submission, para. 132.

the price paid by the trading companies for the inputs they purchased from SOEs in any of the investigations. Rather, according to China, the USDOC "presumed, without any investigation or analysis, that the purported financial contribution to the trading companies – the provision of [inputs] by SOEs – conferred a benefit on the trading companies". By presuming, rather than actually determining, whether and to what extent a benefit was conferred in the transaction between the SOEs and the trading companies, the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement.[830]

12.7 China further argues that without a valid finding that the trading companies themselves had received a benefit, the USDOC had no legitimate basis to conclude that "all or some portion of the benefit" they purportedly received was "conferred on the […] producers who purchase the [inputs] from the trading company suppliers". In other words, China submits, the USDOC presumed the "pass through" of a benefit that had not been found to exist. According to China, the USDOC analysed the purchase of inputs from trading companies as if they were "indirect" subsidies, and although the USDOC did not expressly characterize it as such, its rationale for concluding that the investigated producers received a benefit was based on an assumption that some or all the subsidy conferred to the trading companies "passed through" to the investigated producers when they purchased inputs from the trading companies.[831] In China's view, the USDOC's approach cannot be reconciled with the Appellate Body's jurisprudence on "pass through": the USDOC could not lawfully establish that the SOEs had conveyed an indirect subsidy upon the investigated producers "via" their purchases from the trading companies unless it had first established that the trading companies themselves were the direct recipients of a subsidy. China argues that the USDOC had to examine both the transactions between the SOEs and the private trading companies and the transactions between the private trading companies and the investigated producers. By examining only the latter of these transactions, the USDOC's benefit determinations with respect to the trading companies transactions were inconsistent with Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT.[832]

2. United States

12.8 With respect to sales through trading companies, the United States argues that the USDOC properly applied the SCM Agreement when it determined that the public bodies (the SOEs) made financial contributions to the trading companies, and that these financial contributions conferred benefits to the producers of investigated products.[833]

12.9 Concerning the financial contribution issue, the United States argues that no entrustment or direction analysis was required, and that China has not substantiated its claim that the USDOC's analysis was improper. According to the United States, the USDOC found that "'the [Government of China's] financial contribution (provision of a good [by an SOE]) is made to the trading company suppliers that purchase the [good], while all or some portion of the benefit is conferred on the OTR tire producers who purchase rubber from the trading companies'", and explained that the producer is the key link in the sales chain, such that when the producer is state-owned, there is a financial

[830] China first written submission, para. 133-135; response to Panel question 34 (second meeting).

[831] China explains that under the USDOC's approach, the "full difference" between its benchmark price and the price paid by investigated producers to trading companies would presumptively be considered a countervailable "benefit". However, China argues, there is no basis for such a presumption: there are a number of reasons (unrelated to subsidization) why the price between the trading companies and the investigated producers may be lower that the (unlawfully presumed) subsidized price at which the trading companies originally purchased from SOEs. For example, China notes, the market price for the inputs in question could have been lower at the time the trading company resold the inputs than when it purchased them from SOEs. (China first written submission, para. 136; response to Panel question 34 (second meeting)).

[832] China response to Panel question 34 (second meeting), citing to Appellate Body Report on *US – Softwood Lumber IV*, paras. 129 and 140-146.

[833] United States first written submission, para. 147.

contribution by a public body.[834] The United States argues that there is no indication in Article 1.1(a) of the SCM Agreement of who must receive a financial contribution, as that provision only addresses who grants a financial contribution.[835]

12.10 In this regard, the United States submits that, although the financial contribution must confer a benefit, Article 1.1(b) does not specify upon whom the benefit must be conferred. The United States quotes the finding of the Appellate Body that "the 'benefit' of a financial contribution [...] [does not necessarily have to] be 'received and enjoyed' by the *same* person, or put differently, there is nothing indicating that the 'benefit' cannot be 'received and enjoyed' by two or more distinct persons".[836] The United States recalls that in *Mexico – Olive Oil,* the panel interpreted the Appellate Body's findings as meaning that "a benefit might be received by different recipients, that the recipient of the benefit might be different from the recipient of the financial contribution, and that a subsidy can be bestowed directly or indirectly, and in respect of production, manufacture or export of a product".[837]

12.11 According to the United States, China's claim that the USDOC "presumed" a financial contribution *from* the trading companies misses the point, as the USDOC instead found a financial contribution *to* the trading companies. For the United States, this argument by China assumes that Article 1.1 of the SCM Agreement requires there to be only one recipient, which must receive both the financial contribution and the entire amount of the benefit, an assumption for which China has offered no support.[838]

12.12 The United States argues that in the investigations at issue, the financial contribution occurred with the sale of goods by the SOE to the "intermediary" trading company, and that this government provision of goods then conferred benefits upon the respondent producers of investigated products, when the trading companies sold the goods to those producers. According to the United States, although the trading companies received "perhaps some benefit" this did not preclude the producers of the investigated products from receiving a benefit, which existed to the extent that the prices paid by those producers for the goods were less than the corresponding benchmark prices.[839]

12.13 Concerning the pass-through issue, the United States disagrees that the USDOC presumed the pass-through of a benefit that had not been found to exist. According to the United States, to the extent that a trading company received a benefit from the financial contribution provided by an SOE in the form of provision of goods, and some portion of that benefit in effect passed through the trading company to a producer of subject merchandise, the USDOC accounted for this and properly calculated the benefit conferred upon the producer of the investigated product. To do so, the United States submits, the USDOC compared the price the producer of the investigated product paid for the goods in question with an appropriate benchmark price.[840] The United States cites the Appellate Body and the *Olive Oil* panel for the propositions that a pass-through analysis is not required every time there is an arms'-length transaction between unrelated companies in the chain of

[834] United States first written submission, paras. 148 and 156.
[835] Id., para. 150.
[836] Id., para. 152, citing to Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 110. (emphasis original).
[837] Id., para. 154, citing to Panel Report on *Mexico – Olive Oil*, para. 7.152.
[838] Id., paras. 155-156.
[839] Id., para. 157.
[840] Id., para. 320.

production of an investigated product, and that the recipient of a benefit may be different from the recipient of the financial contribution.[841]

12.14 The United States further argues that in the transactions at issue, the USDOC accurately measured the benefit by comparing the price paid by the producer of the investigated product for the input with an appropriate benchmark price. In particular, any difference between the price paid by the trading company to the SOE for the input and the price paid to the trading company by the producer of the investigated product, e.g., the mark-up added by the trading company, was reflected in the benefit calculations. Put another way, the United States argues, even if the USDOC had first determined the difference between the benchmark and the price paid by a trading company to an SOE for a government-provided good, and then also determined the difference between the benchmark and the price paid by the producer of the investigated product to the trading company for the good, the resulting determination of benefit would be the same.[842] The United States concludes that whether the trading company sells the goods for the price it paid for them or with a mark-up, the benefit calculation properly determines the benefit conferred on the last buyer, the producer of the investigated product.[843]

C. MAIN ARGUMENTS OF THE THIRD PARTIES

1. Australia

12.15 Australia considers that when trading companies are mere intermediaries in a transaction, a complete pass-through analysis may not be necessary, and that this approach is consistent with the findings of the Appellate Body in *US – Countervailing Measures on Certain EC Products* and *US – Softwood Lumber IV*. Australia further notes that where intermediaries do not change the nature of the input, the benefit is most accurately calculated at the level of the exporters concerned. Australia suggests that the Panel examine what could constitute a pass-through analysis, which could include establishing the existence of a subsidy to an input product, and the price paid by the producer of the investigated product for the input compared with an appropriate benchmark.[844]

2. Canada

12.16 Canada argues that to impose a valid countervailing duty on a product as a result of the successive sales at issue, the USDOC had to determine that the sales of inputs by the SOEs to the trading companies constituted a financial contribution that conferred a benefit both directly upon the trading companies and indirectly upon the respondent producers, recalling that pursuant to Appellate Body findings, no separate financial contribution determination would be required for the sale of inputs to those producers. Concerning benefit, Canada submits that where the direct recipient purchases goods from a government or public body, and resells them without further processing them, the difference between the resale price paid by the indirect recipient and the benchmark price reflects the extent to which the benefit has passed through.[845]

3. European Communities

12.17 The European Communities considers that provision of goods by trading companies is a mere intermediate act, that does not change the nature of the financial contribution (i.e., the fact that the

[841] *See, e.g.*, United States first written submission, para. 321; citing to Panel Report on *Mexico – Olive Oil*, paras. 7.143 and 7.152 (quoting Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, paras. 110-113).
[842] United States first written submission, paras. 323-324.
[843] Id., para. 324.
[844] Australia third-party submission, para. 24; third-party oral statement paras. 16-18.
[845] Canada third-party oral statement, paras. 8-12 and 17.

suppliers of the goods are SOEs), and in such cases, where there is no transformation of the product concerned, it would be unnecessary for the USDOC to have shown pass-through.[846]

4. Mexico

12.18 Mexico recalls the Appellate Body finding that a financial contribution may be granted to a company indirectly. In the present dispute, because the private trading companies were only the vehicle through which the financial contribution reached the companies under investigation, the investigated companies received the contribution indirectly, and thus it was not necessary to make a finding of benefit to the trading companies. Concerning pass-through, such an analysis is only needed when the subsidies are given for the production of a good that is an input for the product under investigation (in other words, upstream), which was not the case in the investigations at issue.[847]

5. Saudi Arabia

12.19 Saudi Arabia argues that in case of alleged subsidized inputs, a pass-through analysis should be conducted to determine if the downstream producer has received a benefit. Saudi Arabia argues that a two steps analysis must be undertaken each time the investigated product did not directly receive a subsidy from the government. The investigating authority must first determine whether a subsidy (financial contribution and benefit) was provided to the original recipient; second, it must determine whether all or part of the benefit from the original subsidy passed through to the exporter of the investigated product by the sale of the input product.[848]

6. Turkey

12.20 Turkey, referring to the report of the panel in *Mexico – Olive Oil*, considers that the SCM Agreement does not require the recipients of a benefit and a financial contribution to be the same. Acceptance of the opposite proposition would lead to the circumvention of the disciplines on subsidization simply by including a private party in the distribution chain.[849]

D. ASSESSMENT BY THE PANEL

12.21 We find a certain lack of clarity as to the exact nature and basis of China's claims concerning the provision of SOE-produced inputs by private trading companies. In respect of the first issue raised by China (the entrustment or direction issue), the relevant portion of China's request for establishment of the Panel (paragraph B.1(a)(iii)) reads as follows:

> "(iii) even assuming a valid determination that certain SOEs are public bodies, the US authorities' failure to make a determination that SOEs "entrust or direct" trading companies to provide goods to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement". (footnote omitted)

This formulation indicates that the inconsistency alleged by China in its request for establishment focuses not only on the USDOC's failure to have made a determination that trading companies were entrusted or directed to provide goods to producers of the investigated product, but also that in the view of China that determination, to be valid, should have been in respect of the SOE input producers (presumably as the public bodies that would have had to so entrust or direct the trading companies).

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[846] European Communities third-party submission, para. 27.

[847] Mexico third-party oral statement, para. 18; third-party submission, paras. 54-56.

[848] Saudi Arabia third-party submission, paras. 106-108, citing Appellate Body Report on *US – Softwood Lumber IV*.

[849] Turkey third-party submission paras. 36-40; third-party oral statement, para. 14.

12.22 In its first written submission, China again argued that the USDOC erred by not finding that the trading companies made financial contributions, i.e., that the USDOC made no finding that the trading companies were entrusted or directed to provide goods. China makes no reference in the context of this argument to the role of the SOEs as entrusters or directors.[850] In the same submission, China makes a generally-worded request for findings in respect of the issue of financial contributions connected to the provision of goods, in particular that the Panel find the USDOC's determination of financial contributions in respect of the alleged provision of goods to be inconsistent with the provisions referred to in paragraph 12.1, *supra*. There is no specific request for findings in respect of the transactions involving trading companies.[851]

12.23 In its second written submission, China argues that in the absence of a finding of entrustment or direction of the trading companies, the USDOC had no basis for its conclusion that the producers of the investigated products purchased "government-provided" as opposed to "government-produced" goods, so that the USDOC's failure to make a finding that the trading companies provided financial contributions rendered its subsidy findings in respect of those transactions inconsistent with Article 1.1 of the SCM Agreement.[852] In the same submission, however, the finding requested by China in respect of this claim is that the USDOC's "findings [...] that private trading companies provided financial contributions [...]" was the source of the inconsistency with the cited provisions.[853] Thus while the argument refers to the failure to make the finding as the legal error, the ruling requested of the Panel identifies as the source of the legal error findings that were made to the effect that private trading companies provided financial contributions.

12.24 China's oral statements make no reference to this issue.

12.25 In short, the arguments and requests for findings made by China during the course of the present dispute in respect of the financial contribution issue do not exactly match the claim as set forth in its request for establishment of the Panel.

12.26 Concerning the second issue (the pass-through issue), which China raises in the alternative to the financial contribution issue discussed *supra*, there also is a lack of clarity as to China's claims. In the first place, it is not entirely clear on the face of the request for establishment of the Panel whether only paragraph B.1(a)(v) pertains to this claim, or whether paragraph B.1(a)(iv) also is relevant to this issue. We note that China, in responding to a question from the Panel, identifies both of these paragraphs as setting forth the claim(s) relative to the pass-through issue. These paragraphs read:

> "(iv) the US authorities' determination that the sale of goods by trading companies to producers of subject merchandise confers a countervailable subsidy within the meaning of Article 1 of the SCM Agreement and a benefit under the guidelines set forth in Article 14(d) of the SCM Agreement;
>
> (v) the US authorities' failure to determine whether the alleged benefit received by trading companies was passed through to producers of subject merchandise, in violation of Article VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement".

12.27 In its first submission, China argues in regard to the pass-through issue that the USDOC never established that the trading companies received subsidies when they purchased inputs from SOEs.

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[850] China first written submission, paras. 103-110.
[851] Id., para. 468(a).
[852] China second written submission, para. 44.
[853] Id., para. 315(b).

Instead, according to China, although the USDOC found that the trading companies received financial contributions when they purchased inputs from the SOEs, it never investigated whether the trading companies also received benefits therefrom. Without a valid finding of benefit, China argues, there was no legitimate basis for the USDOC to conclude that benefits were conferred on the producers of the investigated products when they purchased inputs from the trading companies; that is the USDOC presumed the pass-through of a benefit that had not been found to exist.

12.28 We note that this argument in the first submission makes no reference to any alleged violation of any provision, nor does it contain any cross-reference to any part of the request for establishment of the Panel. Furthermore, in the list of requested findings contained in the first submission, China asks the Panel to make the generally-worded finding that the USDOC's benefit determinations in respect of the provision of goods are inconsistent with Article 14 and, as a consequence, with Articles 10 and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994. There is no request for a finding that the benefit determination in respect of the provision of goods was inconsistent with Article 1 of the SCM Agreement. We note that China's second written submission contains no arguments related to the pass-through issue, and China makes no specific request for findings on this issue in that submission. Nor do China's oral statements refer to this issue.

12.29 In response to a question from the Panel at the second substantive meeting as to what, in particular, China was asking the Panel to do in respect of the pass-through issue as referred to in its first written submission, China stated that this issue corresponded to the claims in paragraphs B.1(a)(iv) and (v) of its request for establishment of the Panel, quoted above. China argues that the USDOC presumed a pass-through of benefits by trading companies (an indirect subsidy) without first finding that the trading companies had received benefits (a direct subsidy). According to China, this result cannot be reconciled with the Appellate Body's findings relating to pass-through of a subsidy from one transaction to another. According to China, under the Appellate Body's reasoning in *US – Softwood Lumber IV*[854], the USDOC could not lawfully establish that the SOEs had conveyed an indirect subsidy upon the producers of the subject goods via their purchases from trading companies without first establishing that the trading companies were themselves the direct recipients of a subsidy via their purchases from SOEs. According to China, the only way for the USDOC lawfully to find an indirect subsidy would be to examine both the transactions between the SOEs and the private trading companies, and those between the private trading companies and the investigated tire producers. China argues that a number of reasons having nothing to do with subsidization might cause the price between the trading company and the subject producer to be lower than the (unlawfully presumed) subsidized price at which the trading companies originally purchased from the SOE. China cites as a possible example a situation where the market price of the input declines between the time the trading company purchases and resells that input, which might occur where the trading company holds inventory. China argues that presuming rather than determining a benefit in the transactions between SOEs and trading companies was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, and that examining only the second transaction (between the trading companies and the producers of investigated products) in making the benefit determination for these purchases was inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement.

[854] Here, China argues that the Appellate Body found that a pass-through analysis is required where "a subsidy is received directly by an entity *other* than a producer of subject products, and that entity subsequently sells inputs to producers of subject products. [...] In other words, it cannot be assumed that some or all of the indirect subsidy has passed through". (China response to Panel question 34 (second meeting), citing Appellate Body Report on *US – Softwood Lumber IV*, para. 129. (emphasis original)) We note, however, that this passage does not reflect a statement of opinion or reasoning by the Appellate Body, but rather summarizes an argument by the United States.

12.30 We note that this set of arguments explaining the legal basis of this claim does not exactly match the claim as set forth in the request for establishment of the Panel. In particular, while the claim in paragraph B.1(a)(iv) of that request identifies the transactions between the trading companies and the tire producers as the source of the alleged inconsistencies with Articles 1 and 14(d), in the arguments presented in support of this claim the source of these alleged inconsistencies are the transactions between the SOEs and the trading companies.

12.31 As outlined above, we find a certain lack of clarity concerning this set of claims, due to the somewhat variable way in which China characterized the issues in its submissions, and due to the inconsistencies between the statement of the claims in China's request for establishment of the Panel and China's descriptions of them in its submissions. We thus have some doubts as to whether these claims are properly before us. That said, we note that the United States has raised no objection in this regard. To the contrary, not only does the United States appear to understand the claims, it has presented full and substantive rebuttals to China's arguments, in spite of noting (at least in its first submission) that China's first submission makes no reference, in respect of the pass-through issue, to any alleged inconsistency with any provision of the WTO Agreement. Thus, we have decided to analyze the substance of these claims in spite of our doubts.

1. Financial contribution

12.32 China's claim regarding the financial contribution issue, as expressed in the arguments in its submissions, is that because the USDOC made no findings, in the CWP, LWR and OTR investigations, that the trading companies that supplied SOE-produced inputs were entrusted or directed to, in turn, make a financial contribution to the producers of the investigated product in the form of the inputs, the USDOC's finding that these transactions conferred subsidies on those producers was inconsistent with SCM Article 1.1 of the SCM Agreement.

12.33 Article 1 of the SCM Agreement requires that, for a subsidy to exist, there must be a financial contribution, as defined, and a benefit conferred thereby. That provision does not, however, specify who must be the recipient of the financial contribution and the benefit. In particular, it does not indicate that for a subsidy to exist, a single entity must receive both the financial contribution and the benefit.

12.34 This point was made by the Appellate Body in *US – Countervailing Measures on Certain EC Products*, and by the panel in *Mexico – Olive Oil*. Furthermore, the analyses by both the panel and the Appellate Body in *US – Softwood Lumber IV* reflected the same understanding. In particular, the issue in *US – Softwood Lumber IV* was whether the initial recipient of a subsidy (i.e., a financial contribution conferring a benefit) retained all of the benefits when it sold an input to a producer of the investigated product, or instead whether some or all of the benefits from the subsidy were passed along to the producer of the investigated product. That analysis thus was not premised on a series of government financial contributions at each successive transaction (i.e., an initial financial contribution by the government itself, followed in each later transaction by a passing along of the financial contribution via entrustment or direction in the sense of Article 1.1(a)(1)(iv) of the SCM Agreement). To the contrary, the initial financial contribution, to the initial recipient, was sufficient for there to have been, for the purposes of the SCM Agreement, a financial contribution by a government. (The issue of benefit was treated as a separate question).

12.35 In all of the investigations at issue pursuant to this claim (CWP, LWR and OTR), the USDOC found that there was a financial contribution by the government to the trading companies in the form of the provision of goods (the inputs in question) by SOE input producers. The USDOC then found, as a separate matter, that the benefits from those financial contributions were conferred in whole or in

part on the producers of the investigated products when those producers purchased the inputs for less than the applicable benchmark prices.[855]

12.36 While the factual situations in the prior disputes just discussed were somewhat different from that before us, we consider that the basic principles from those disputes apply here. First, the recipient of the financial contribution can be someone other than the recipient of the benefit. Second, where an initial government financial contribution has been made (under any of the subparagraphs of Article 1.1(a)(1)), the SCM Agreement does not require, for a valid finding of the existence of a subsidy, that in any ensuing transactions involving the proceeds of the financial contribution the government has entrusted or directed the initial recipient of the financial contribution itself to make a financial contribution. In other words, if the government makes a financial contribution in the form of a loan to a goods producer, the SCM Agreement does not require, for a valid finding of the existence of a subsidy to be possible, that the sale of goods produced with the proceeds of that loan be the result of government entrustment or direction. Again, the question of benefit is separate, and where the purported recipient of the benefit is someone other than the recipient of the financial contribution, the recipient of the benefit must be connected somehow to the matter at issue (whether in a countervailing duty investigation or a subsidy dispute pursuant to the SCM Agreement's multilateral disciplines), but again, the issue of benefit requires a separate analysis.

12.37 We consider that if, instead, a chain of entrustment or direction by a government were required for every subsequent transaction involving the proceeds of a financial contribution, in order for a valid finding of the existence of a subsidy to be possible, the disciplines of the SCM Agreement could be easily circumvented. This is particularly evident in the case of government provision of goods.

12.38 For these reasons, we find that China has not established that by not determining in the CWP, LWR and OTR investigations that the trading companies were entrusted or directed by the government to make financial contributions (in the form of provision of goods) to the producers of the investigated products, the USDOC acted inconsistently with the obligations of the United States under Article 1.1 of the SCM Agreement.[856]

2. Pass-through of benefits

12.39 China's claim in respect of the pass-through issue, as expressed in its arguments, is an argument in the alternative. In particular, China makes this claim in the event that the Panel finds that the USDOC was not required by Article 1.1 of the SCM Agreement to determine that the trading companies were entrusted or directed by the government to make financial contributions in the form of provision of goods to the producers of the investigated products in the CWP, LWR and OTR investigations. Having made this finding, we now take up China's pass-through claim.

12.40 In this regard, we note first that we find, *infra*, that in the CWP and LWR investigations, the United States acted inconsistently with its obligations under Article 12.7 of the SCM Agreement by resorting to facts available in determining the amount of HRS produced by SOEs that was purchased by CWP and LWR producers. Given this finding, there is no need for us to reach the pass-through issue in respect of the CWP and LWR investigations. Our analysis and findings in respect of this claim thus are confined to the OTR investigation.

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[855] We recall here that we have found no inconsistency in the USDOC's determination that the SOE input producers were public bodies, and as a consequence, no inconsistency in the USDOC's determination that the sales of inputs by the SOE producers to trading companies constituted financial contributions by the government in the form of government provision of goods. See Section VIII, *supra*.

[856] Concerning China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with this claim see Section XIII, *infra*.

12.41 Unlike in the CWP and LWR investigations, in the OTR investigation, GTC and TUTRIC (the tire producers found to have received subsidies in the form of government provision of goods)[857], reported the full details of their rubber purchases, by producer, source and supplier (i.e., seller). The USDOC thus based its analysis of rubber inputs (those sold directly by SOEs and those produced by SOEs and sold by trading companies) on verified information gathered in the investigation, and not on facts available.

12.42 This brings us to the substance of China's claims related to the pass-through issue, in respect of which we note that China presents no specific legal argumentation concerning the provisions it cites, or of how precisely it considers that these provisions apply in this dispute. For its claims under Articles 1.1 and 14(d) of the SCM Agreement, China's legal reasoning seems to be, in essence, that no benefit, and thus no subsidy, to the trading companies was found to exist in the first place, meaning that Articles 1.1(b) and 14(d) of the Agreement were violated.

12.43 Concerning the remaining provisions cited, China says only that because the USDOC's examination was limited to the transactions between the trading companies and the producers of investigated products, and did not also include an analysis of the transactions between the SOEs and the trading companies, the USDOC's benefit determinations in respect of the purchases of inputs from trading companies were inconsistent with Articles VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4 and 32.1 of the SCM Agreement. China's apparent legal basis for this set of alleged violations is the Appellate Body's reasoning in *US – Softwood Lumber IV*, as China simply asserts that the USDOC's analytical approach cannot be reconciled with that reasoning.

12.44 Turning in more detail to the particular provisions cited by China, starting with Articles 19.1 and 19.4 of the SCM Agreement, we recall that neither the panel nor the Appellate Body in the *US – Softwood Lumber IV* dispute – the only prior dispute cited by China in support of its claims related to pass-through – made findings under any of these provisions, as the panel exercised judicial economy in respect of those claims. Given that China has provided no legal reasoning in support of its claims under these provisions, nor even identified any prior dispute settlement findings concerning those provisions[858], we find that China has not established that the USDOC's determination in respect of the provision of SOE-produced rubber inputs by private trading companies is inconsistent with the obligations of the United States under Article 19.1 or 19.4 of the SCM Agreement.

12.45 Concerning China's citation of Article 14 of the SCM Agreement in this context, it is not clear to us whether this second citation is in addition to the inconsistency alleged due to the absence of a finding that trading companies *received* a benefit described in paragraph 12.42, *supra*. To the extent that that allegation is the basis for this second reference to Article 14, we consider that argument by China, although brief, to be reasonably clear. To the extent, however, that China is making a second, different claim of violation of Article 14, in particular in connection with the issue of pass-through of benefits as such, it has made no argument whatsoever as to the legal basis for this claim, nor did either the panel or the Appellate Body in *US – Softwood Lumber IV* make any finding under Article 14 of the SCM Agreement in the context of pass-through, as Canada raised no such claim. Therefore, to the extent that China is asserting that the absence of a finding by the USDOC that benefits received by trading companies selling rubber were passed through (as such) to producers of tires was inconsistent with Article 14 of the SCM Agreement, we find that China has not established this claim.

[857] We recall that the USDOC found that Starbright received no benefits from its purchases of rubber inputs from SOE producers.

[858] We do not here mean to imply that citing prior dispute settlement findings by itself would have been sufficient in terms of legal argumentation. We simply wish to emphasize the entire absence of any legal basis, in China's representations to the Panel, for its claims under Articles 19.1 and 19.4 of the SCM Agreement.

12.46 Concerning the remaining provisions cited by China in its claims related to pass-through, (Article VI:3 of the GATT 1994, and Articles 10 and 32.1 of the SCM Agreement), we note that these provisions formed the basis of the pass-through findings of the panel and Appellate Body in *US – Softwood Lumber IV*. In particular, the substantive obligations were found in Article 10 of the SCM Agreement and Article VI:3 of the GATT 1994, with Article 32.1 of the SCM Agreement found also to have been violated as a consequence. As noted above, the only apparent legal basis for these claims advanced by China is its implication that the reasoning of the Appellate Body in that dispute directly applies to the situation at issue before us.

12.47 We recall that in *US – Softwood Lumber IV*, the panel and the Appellate Body found that the United States had impermissibly presumed that benefits from subsidies provided to input producers were passed through, in full, to producers of the investigated products when the latter purchased the inputs. The specific problem identified in that dispute was that, although the United States had calculated the amount of the subsidy benefits *provided to* the producers of inputs (raw logs), it had not examined the extent to which the input producers passed along any of the benefits when they sold the inputs to the producers of the investigated products.

12.48 The panel found in favour of Canada's claims under Article 10 of the SCM Agreement, and consequentially Article 32 of the SCM Agreement, as well as Article VI:3 of the GATT 1994, in respect of the situations where producers of logs were unrelated to the sawmills that processed the logs into primary lumber, as well as where producers of remanufactured lumber were unrelated to the lumber manufacturers (sawmills) from which the remanufacturers obtained their lumber inputs. The panel found that no pass-through analysis was required where the producer of the inputs was related to the lumber producer (i.e., where the production was vertically integrated). The panel exercised judicial economy in respect of Canada's Article 19 claim.[859]

12.49 The Appellate Body upheld the panel's findings that Article 10 of the SCM Agreement and Article VI:3 of the GATT 1994 require a pass-through analysis in circumstances in which a subsidy is received by a producer of an input product, and the investigated product is a different, downstream product produced by an unrelated producer using the subsidized input. More specifically, the Appellate Body found that:

> "Where a subsidy is conferred on input products, and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product, may not be the same. In such a case, there is a *direct recipient* of the benefit—the producer of the *input* product. When the input is subsequently processed, the producer of the *processed product* is an *indirect recipient* of the benefit—provided it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product. Where the input producers and producers of the processed products operate at *arm's length*, the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority. In the absence of such analysis, it cannot be shown that the essential elements of the subsidy definition in Article 1 are present in respect of the *processed product*".[860] (Italic emphasis in original; underline emphasis added)

12.50 We note and agree with the characterization by the panel in *Mexico – Olive Oil* that in *US – Softwood Lumber IV* the Appellate Body "emphasized that not every situation in which a subsidy is provided on the production of an input product gives rise to an obligation to conduct a pass-through analysis", and that the existence of such an obligation also depends on the relationship between the

[859] Panel Report on *US – Softwood Lumber IV*, paras. 7.81-7.99.
[860] Appellate Body Report on *US – Softwood Lumber IV*, para. 143.

producer of the input product and the producer of the imported, processed product, as well as on the scope of the investigated product. In the latter regard the Appellate Body, reversing one of the panel's pass-through findings, held that no pass-through analysis was required in respect of sales by lumber producers to unrelated lumber remanufacturers because both the lumber inputs and the remanufactured (further processed) lumber products were imported products covered by the countervailing duty investigation.[861]

12.51 In this regard, we note that the quotation that China characterizes as an opinion or reasoning of the Appellate Body in *US – Softwood Lumber IV* (quoted at footnote 854, *supra*) in fact is the summary of an argument by the United States, and that the Appellate Body's actual findings and reasoning are as quoted at paragraph 12.49, *supra*. We also note that the factual situation in the *US – Softwood Lumber IV* dispute was quite different from that before us, in that the entities from which the producers of the investigated products purchased inputs were the *producers* of those inputs, and those input *producers* were the recipients of subsidies in respect of their *production* of the inputs. The language in the Appellate Body's reasoning indeed refers only to that particular factual situation (i.e., the situation in which the immediate recipient of the subsidy is a producer of an input that is then sold to and used by a producer of an investigated product). We do not consider that a reference to a misattributed statement in the Appellate Body report from *US – Softwood Lumber IV* is sufficient to establish China's claim that the USDOC's determination in the OTR investigation is inconsistent with Article VI:3 of the GATT 1994 and Articles 10 and 32.1 of the SCM Agreement because the USDOC did not conduct an analysis to determine whether any subsidy benefits received by trading companies selling rubber inputs were passed through to the tire producers purchasing those inputs.

12.52 This leaves us with China's claims that the USDOC's failure to establish that the *trading companies* received a benefit when they purchased the rubber inputs from the SOEs meant that the determination that the *tire producers* received a benefit when they purchased the rubber inputs from the trading companies was inconsistent with Articles 1.1 and 14(d) of the SCM Agreement. While, as discussed above, the actual arguments presented by China, and its related requests for findings, are somewhat internally inconsistent; and there is an apparent discrepancy between the arguments, which focus on the existence of a benefit *to* the trading companies, and the description of the claim in the request for establishment of the Panel, which focuses on the existence of a benefit *to* the producers of the investigated products; we nevertheless consider the essential legal basis of this claim to be relatively clear. That is, China argues that the methodology used by the USDOC did not establish the *existence* of a benefit (and thus of a subsidy) consistently with the two cited provisions of the SCM Agreement.

12.53 As noted above, in the OTR investigation, GTC and TUTRIC (the tire producers found to have received subsidies in the form of government provision of goods)[862], reported the full details of their rubber purchases. This included not only the dates, quantities, prices and delivery terms for these purchases, by type of rubber, but also the details as to the identity of the producer of each purchase of rubber.[863] GTC and TUTRIC also provided details concerning which particular purchases were from trading companies and which were directly from producers. Furthermore, these companies

[861] Panel Report on *Mexico – Olive Oil*, para. 7.140 (quoting Appellate Body Report on *US – Softwood Lumber IV*, paras. 140-147, 156-159 and 163).

[862] We recall that the USDOC found that Starbright received no benefits from its purchases of rubber inputs from SOE producers.

[863] With respect to TUTRIC, see *Final Calculation Memorandum for Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC)* ("USDOC Calculation Memorandum for TUTRIC") as contained in Exhibit US-156; and *Further Detail on Reported Rubber Prices*, Exhibit US-157. As regards GTC, see *Final Calculation Memorandum for Guizhou Tire Company Limited (GTC)* ("USDOC Calculation Memorandum for GTC"), Exhibit CHI-56; and *GTC Minor Corrections and Supporting Documents, "Rubber Purchases"*, Exhibit US-155.

provided information as to which of the producers from which they purchased rubber inputs (whether directly or through trading companies) were SOEs. Thus, the record evidence shows that in respect of every purchase of each type of rubber, including from trading companies, the two tire producers at issue had full knowledge both of the identity of the producer of the rubber that they were buying, and of whether that producer was an SOE.[864]

12.54 We recall that the methodology used by the USDOC to determine the existence of a benefit to the tire producers from the rubber purchased from trading companies was to calculate the difference between the price paid by those producers to the trading companies and the applicable benchmark price. We note that the United States justifies basing its analysis exclusively at this level of transaction, and not also performing such a calculation for the sales by SOE rubber producers to the trading companies, on the basis that any portion of the initial benefit retained by the trading companies would be reflected in their selling price for the inputs. By this we understand the United States to be arguing, for example, that if the trading company received a benefit of 10 (based on the market benchmark) when it purchased rubber from an SOE, and it added a mark-up of 4 when it sold the rubber to a tire producer, the comparison of the price paid by the tire producer with the market benchmark would yield a benefit of 6 to the tire producer.

12.55 We see a certain logic in this methodological approach to the extent that it could (at least under certain circumstances) accomplish in a single step exactly the same result that otherwise would require a two-step calculation. That is, this approach would not give rise to an inflated calculation of benefits, or a finding of benefits where there were none, where the trading company acted as a simple logistical intermediary in individual transactions, for which services it charged a commission or a mark-up on the transaction (or was otherwise compensated), and did not itself purchase for and/or sell out of its own inventory, or hold title to the goods in question over an extended period. Thus, in a situation where a producer of an investigated product nominally purchases from a trading company, but the trading company in turn places a specific order for that purchase with the producer of the input, and the merchandise is then shipped to the producer of the investigated product on the basis of that particular order, in our view the methodology used by the USDOC would not give rise to an inflated calculation of the amount of the benefit, and thus would not raise any concerns under Article 1 or 14(d) of the SCM Agreement. This is because in such a situation it would be perfectly reasonable to assume that the trading company, as a simple logistical intermediary, would always collect its commission or mark-up, such that the price it charged its customer (the producer of the investigated product) would always be higher by that amount than the price it paid to the input producer.

12.56 We note, however, that this is one particular role that a trading company might play, but that trading companies in fact operate in a range of different ways. For example, some trading companies act as distributor/stockists, taking ownership and physical possession of goods and selling out of their own inventories. Others might enter into contracts to purchase in bulk (even if they never take physical possession), and then make individual sales from their bulk purchases. In these and similar circumstances, the methodology used by the United States would not be accurate. Price fluctuations in the market between the time a trading company purchased inputs (whether or not it physically inventoried them) and the time it sold them to a producer of an investigated product would inevitably give rise to situations where the benchmark price applicable to the trading company's purchase of the inputs was different from the benchmark price applicable to its sale of those inputs to the producer of the investigated product, and this would require some adjustments to the methodology, or the use of an entirely different methodology.

12.57 This brings us to the facts of the OTR investigation, where, as described, the tire producers provided full details on all of their rubber purchases, including the precise identity of the producer of

[864] Exhibits US-156-157 (TUTRIC) and CHI-56 and US-155 (GTC).

each reported purchase. This fact suggests that the trading companies involved may well have been acting purely as intermediaries, on a transaction-by-transaction basis, rather than as distributor/stockists or as bulk purchasers. This is further suggested by the "ex-works" delivery terms of a number of purchases[865], a phrase generally synonymous with "ex-factory". That said, there is no reference in the USDOC's determination in the OTR investigation to any evidence regarding the precise role played by the trading companies from which GTC and TUTRIC purchased rubber inputs, nor any indication that the USDOC made inquiries in that regard. Before us, the United States makes no arguments in this respect. We consider that, for the reasons explained above, given the methodology that the USDOC chose to use to the establish the existence and amount of the benefit to the tire producers from their purchases of inputs from trading companies, it was incumbent on the USDOC to have investigated the precise role played by the trading companies, so as to ensure that its methodology did not calculate a benefit in excess of that conferred by the government provision of SOE-produced inputs.

12.58 The record evidence presented to us does not indicate that the USDOC undertook any such inquiries. Therefore, there is nothing before us that demonstrates that, under the particular facts of the investigation, the USDOC's methodology could not and did not give rise to a calculation of benefit in excess of that conferred by the provision of the inputs. We therefore find on this basis that the USDOC acted inconsistently with the United States' obligations under Article 1.1 and Article 14 of the SCM Agreement.

XIII. CHINA'S CONSEQUENTIAL CLAIMS

13.1 We now turn to various consequential claims raised by China. In particular, at paragraph B.1(e) of its request for establishment of the Panel, China alleges consequential violations of Articles 10 and 32.1 of the SCM Agreement, and of Article VI:3 of the GATT 1994, "in connection with all countervailing duty investigations, determinations and orders specified above" (i.e., specified at paragraphs B.1(a)-(d) of the request for establishment of the Panel). China requests findings in respect of these consequential claims at paragraphs 468 (a), (b), (d), (e), (f), and (g) of its first written submission, and at paragraphs 315 (a), (b), (c), (e), (f), (g), and (h) of its second written submission. We note that China has presented no argumentation in support of these consequential claims, but simply requests findings on them in the paragraphs just identified. Particularly under these circumstances, in the light of the findings we have made *supra*, we see no need to rule on these consequential claims. We therefore apply judicial economy in respect of all of them.

13.2 We recall, however, that in respect of its other allegations pursuant to Article 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 (specifically, those raised in connection with its claims addressed at Sections XI and XII.D.2 *supra*, and Section XIV, *infra*) China did present argumentation. As set forth in the respective sections and as summarized below at Section XVII, we have examined and made findings in respect of these allegations.

XIV. CHINA'S CLAIMS PERTAINING TO "DOUBLE REMEDIES"

A. INTRODUCTION

14.1 We now consider China's claims with respect to "double remedies". China's claims in this respect arise from the concurrent imposition, by the United States, of countervailing duties and of

[865] *See* Exhibit US-156. Ex Works is defined as: "An <Incoterm> whereby the seller is responsible only for having the ordered <goods> available for pickup at the agreed place, which is usually the seller's own premises. The seller is also usually responsible for export packing to the extent that the transportation particulars are made available [...]". (A to Z of international trade, F. Reynolds (ICC Publishing S.A., 2002), p. 79).

anti-dumping duties calculated pursuant to the USDOC's NME methodology on products from China in the four sets of parallel anti-dumping and countervailing duty investigations at issue.

1. Background

14.2 In anti-dumping investigations involving products from countries it considers to be non-market economies ("NMEs"), the USDOC calculates the normal value on the basis of surrogate values taken from countries which it considers to be "market economies" rather than on the basis of the prices or costs of production actually incurred by the investigated producer.[866] Specifically, under its NME methodology, the USDOC: (i) determines the quantities of the factors of production (e.g. inputs, labour, energy) actually used by the respondent producer in producing the investigated good; (ii) multiplies those quantities by the prices of each of those factors based on a "surrogate value" from a market economy country (or, where available, the actual price paid for an input imported from a market economy country); and (iii) adds an amount for factory overhead, selling, general and administrative (SG&A) expenses, and profit, calculated on the basis of ratios of these costs to the costs of the other inputs in the surrogate country.[867]

14.3 The USDOC generally treats China as an NME in anti-dumping investigations, and did so in the anti-dumping investigations at issue in this dispute. As a result, the USDOC applied its NME methodology in calculating the normal value for the investigated Chinese producers. The normal value so constructed was then used to determine these producers' dumping margins.

14.4 As China points out, the four countervailing duty investigations at issue in this dispute mark a policy change on the part of the USDOC. The USDOC had taken the position, in 1984, that its countervailing duty legislation did not apply to imports from non-market economies: In its investigations on *Wire Rod from Poland and from Czechoslovakia*, the USDOC determined that it was impossible to identify a "bounty" or "grant" within the meaning of U.S. countervailing duty law in NMEs, because of the pervasive role played by the governments of such centrally-planned economies. This interpretation of the U.S. countervailing duty statute was affirmed by the U.S. Court of Appeals for the Federal Circuit in *Georgetown Steel*.[868] In March 2007, the United States reversed this longstanding policy of not applying U.S. countervailing duty legislation to NMEs: In the *CFS Paper* investigation, the USDOC considered that while still not a market economy, China's economy had evolved sufficiently that it was possible to identify and countervail subsidies granted by China.[869] At the same time, the USDOC maintained China's NME status for purposes of applying the U.S. anti-dumping regime.[870] Ultimately, no duties were imposed in the *CFS Paper* case. Thus, the four

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[866] Section 773(c) of the U.S. Tariff Act of 1930 (codified at 19 U.S.C. 1677b(c)), Exhibit CHI-119**.** The USDOC may, in anti-dumping investigations involving an NME country, determine that the industry being investigated operates on market principles (market-oriented industry, or "MOI"). China indicates that the USDOC has never found any industry in any country that it designates as an NME to be an MOI.

[867] United States first written submission, para. 450.

[868] *Georgetown Steel Corporation v. United States*, U.S. Court of Appeals for Federal Circuit, 18 September 1986, Exhibit CHI-90. This USDOC policy was reaffirmed in the Preamble to the USDOC's countervailing duty Regulations, *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65348, Exhibit CHI-91, p. 65360.

[869] *Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy* ("Georgetown Steel Memo"), Exhibit CHI-89, p. 5; and *Issues and Decision Memorandum for the Antidumping Investigation of Certain Pneumatic Off-the-Road Tires from the People's Republic of China* ("OTR Anti-Dumping Duty I&D Memo"), Exhibit CHI-53, pp. 5-10.

[870] In maintaining its qualification of China as an NME, the USDOC in August 2006 considered that "market forces in China are not yet sufficiently developed" to allow it to rely on Chinese costs and prices in establishing normal value. (*Final Affirmative Countervailing Duty Determination: Certain New Pneumatic Off-*

countervailing duty investigations at issue in the present dispute constitute the first instances of imposition by the USDOC of countervailing duties on imports from an NME.

14.5 China claims that this imposition by the USDOC of countervailing duties concurrently with anti-dumping duties calculated under the U.S. NME methodology results in the imposition of a "double remedy". China explains that by "double remedy" it means that the subsidies at issue are "offset" twice, once through the imposition of the countervailing duties, and once through the imposition of the anti-dumping duties, because of the manner in which the latter are calculated.

14.6 The Government of China and Chinese interested parties raised the issue of double remedies in each of the four countervailing duty investigations before us. In its determinations in three of the investigations (LWS, LWR, and OTR), the USDOC indicated that it had no authority to address the issue of double remedies in the context of countervailing duty investigations, and that if any adjustment to avoid a double remedy were possible, it would only be in the context of anti-dumping investigations.[871] Interested parties also raised the issue in the CWP and OTR anti-dumping investigations. In the CWP anti-dumping investigation, the USDOC declined to make adjustments for double remedies given that the interested party that had raised the issue had not received an individual company-specific margin. The USDOC also indicated that "Congress provided no anti-dumping adjustment for CVDs imposed to offset subsidies that are not export subsidies".[872] In the OTR anti-dumping investigation, the USDOC considered that interested parties had not established the existence of a double remedy, and in particular had not provided sufficient evidence in support of their arguments that domestic subsidies automatically lower prices or that they "pass through", *pro rata*, to domestic prices.[873] The USDOC also considered that the Chinese interested parties had not demonstrated that they were "entitled to an adjustment under US AD law to prevent a presumed double remedy from arising".[874]

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the-Road Tires from the People's Republic of China – Final Loan Benchmark and Discount Rate, Exhibit CHI-88, Attachment 2).

[871] For instance, in the LWR countervailing duty investigation, the USDOC addressed the double counting arguments presented by respondents as follows:

> "[...] The [Government of China and a respondent] have not cited to any statutory authority that would allow us to terminate this countervailing duty investigation to avoid double counting and the CVD law provides no authority to make an adjustment to the CVD calculations to prevent double counting. If any adjustment to avoid a double remedy is possible, it would only be in the context of an antidumping investigation and no party raised this claim in the companion antidumping investigation of LWR". (Exhibit CHI-2, p. 19).

The USDOC made virtually identical statements in its determinations in the LWS and OTR countervailing duty investigations. (Exhibits CHI-3, p. 40 and CHI-4, p. 53). In the CWP countervailing duty investigation, the USDOC incorporated by reference its treatment of the issue in the concurrent anti-dumping investigation. (Exhibit CHI-1, p. 101).

[872] Exhibit CHI-9, pp. 21-22.

[873] Exhibit CHI-53, pp. 13-14. The USDOC rejected the arguments that it must assume that domestic subsidies necessarily result in lower export prices and that it had recognized that domestic subsidies lower prices pro rata in both domestic or export markets, indicating that "when it has considered the issue, the Department has sometimes presumed that, whatever the effect, if any, of domestic subsidies upon the prices subsequently charged by their recipients, that effect would be the same for domestic prices and export prices". (Id., p. 14).

[874] In this respect, the USDOC stated that:

> "As we noted in [*CFS Paper*], 'despite addressing the issue of parallel AD duties and CVDs directly, and explicitly requiring that the amount of any CVDs to offset export subsidies be added to U.S. price, Congress provided no adjustment for CVDs imposed by reason of

2. Claims of China

14.7 China considers that the imposition of a "double remedy" is incompatible with the United States' obligations under the covered agreements. China makes "as such" and "as applied" claims in this respect.

(a) China's "as applied" claims

14.8 China's "as applied" claims concern the duties imposed as a result of the four sets of anti-dumping and countervailing duty investigations at issue in this dispute. China claims that in each of these four sets of determinations, the USDOC's use of its NME methodology to determine normal value in the anti-dumping determinations, concurrently with the imposition of countervailing duties on the same products, was inconsistent with Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and with Article VI of the GATT 1994.[875]

14.9 In addition, China claims that the United States acted inconsistently with Article I:1 of the GATT 1994 in each of the four sets of anti-dumping and countervailing duty determinations at issue due to the failure of the USDOC to extend to imports from China the same unconditional entitlement to the avoidance of a double remedy that it extends to like products originating in other Members.[876]

14.10 China also claims that, in the determinations at issue, the United States acted inconsistently with: (i) Article 12.1 of the SCM Agreement, due to the USDOC's failure to provide interested parties notice of the information which the USDOC required to evaluate the existence of a double remedy; (ii) Article 12.8 of the SCM Agreement, due to the USDOC's failure to inform China and interested parties of the essential facts under consideration that would "form the basis" for the USDOC's determinations in respect of the issue of "double remedy".[877]

(b) China's "as such" claims

14.11 The measure that is the subject of China's "as such" claims is an alleged omission, defined by China as the "failure of the United States to provide sufficient legal authority for Commerce to avoid the imposition of double remedies for the same alleged acts of subsidization when it imposes anti-

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> domestic subsidies in NME proceedings.' In addition, the statutory and legislative history provides no basis for adjusting for domestic subsidies, or any presumption of their effect on export prices."
>
> "[...] the Department has determined that, absent a statutory directive for an adjustment and underlying assumption similar to that regarding CVDs imposed to offset export subsidies, or evidence that domestic subsidies have lowered U.S. prices in a given case, any adjustment for an assumed or undetermined effect would be inappropriate." (Exhibit CHI-53, pp. 14-16).

[875] Paragraphs B.1(f)(i)-(iv) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (h); second written submission, para. 315 (i).

[876] Paragraph B.1(f)(vii) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (j); second written submission, para. 315 (k). In its panel request, China also made claims of violation of Articles 2.4, 9.2 and 9.3 of the AD Agreement, due to the alleged imposition of double remedies. China did not pursue these claims before the Panel.

[877] Paragraphs B.1(g)(vi)-(vii) of the "as applied" claims in China request for establishment of the Panel; China second written submission, paras. 269-270. China did not include this claim in its requests for findings. Further, China's panel request also included claims under Articles 2.4 and 6.1, as well as Annex II(1) of the AD Agreement, which China did not pursue.

dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product".[878, 879]

14.12 China contends that, as a result of this failure, U.S. law is inconsistent "as such" with (i) Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI of the GATT 1994; and (ii) Article I:1 of the GATT 1994 due to the absence of legal authority to extend to imports from China the same unconditional entitlement to the avoidance of a double remedy that the United States extends to like products originating in other Members.[880]

B. UNITED STATES REQUESTS FOR PRELIMINARY RULINGS

14.13 The United States requests that we find that the measure challenged as part of China's "as such" claims, as well as China's "as such" claims themselves, fall outside our terms of reference.[881] The United States requests that we make findings on two distinct grounds: First, the United States submits that the alleged "failure [...] to provide legal authority" was not among the measures included in China's request for consultations. Second, the United States submits that this alleged "failure" is not a "specific measure at issue" identified in China's panel request pursuant to Article 6.2 of the DSU.

14.14 China asks us to reject these requests for preliminary rulings.[882]

1. Main arguments of the Parties

(a) United States

(i) U.S. request for ruling concerning China's failure to consult on the "omission"

14.15 The United States argues that the alleged "failure [...] to provide legal authority" was not included in China's request for consultations and is therefore not within the Panel's terms of reference.[883] The United States submits that the Appellate Body has indicated that, in determining whether measures not included in the consultations request fall within a panel's terms of reference, a panel should compare the respective parameters of the consultations request and of the panel request to determine whether the addition of measures in the panel request expanded the scope or changed the essence of the dispute.[884] The United States argues that the addition, by China, of the "omission" converted the dispute from one limited to a series of "as applied" claims to one which includes a

[878] China first written submission, para. 468 (i) and (k); see also paragraph B.2 of the "as such" claims in China request for establishment of the Panel and second written submission, para. 315 (j) and (l).

[879] China proceeds under alternative hypotheses with respect to extent of the legal authority conferred on the USDOC to avoid the imposition of double remedies under U.S. law. China argues that while the USDOC's position on "double remedies is "opaque and apparently contradictory", it is possible to draw the conclusions that: (i) the USDOC has no authority to avoid the imposition of double remedies under the U.S. countervailing duty legislation; (ii) the USDOC "appears" to lack such legal authority under U.S. anti-dumping laws, "but this is unclear", and to the extent that the USDOC does possess authority under the U.S. anti-dumping laws to avoid imposing double remedies, "this legal authority whatever it might be, places the burden on respondent producers to present 'evidence' that 'subsidies pass through, *pro rata*, to U.S. prices'". (China first written submission, paras. 359-363 and footnote 1).

[880] In its panel request, China also made claims of violation under Articles 2.4, 9.2 and 9.3 of the AD Agreement. China did not pursue these claims before the Panel.

[881] United States first written submission, paras. 65-86; second written submission, paras. 5-16.

[882] China response to the U.S. request for preliminary rulings, para. 40.

[883] United States first written submission, paras. 74-86.

[884] Id., para. 87, citing to Appellate Body Report on *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 294.

"measure" challenged "as such", resulting in an expansion of the scope and a change in the essence of the dispute.[885]

14.16 The United States takes issue with the argument of China that the alleged "failure" to provide legal authority to avoid the imposition of a double remedy was evident on the face of the determinations at issue. First, the United States rejects China's suggestion that the USDOC made any broad pronouncement in those determinations as to whether it had legal authority to adjust the anti-dumping duties to avoid any double remedy.[886] The United States adds that even assuming that the alleged "absence of legal authority" were reflected in the determinations at issue, it would not follow that consulting on the specific investigations would have fulfilled the obligation to consult on the alleged "failure". The United States submits in this respect that higher-order measures such as statutes and regulations are often referenced in rulings and determinations that apply those measures; if such references were sufficient to place a responding Member on notice that they would be the subject of an "as such" challenge, consultations on "as such" claims would almost never be required.[887] Lastly, the United States reads China's argument as an admission that China was aware of the existence of the alleged measure before it requested consultations, meaning that it consciously opted not to include the measure in its consultations request.[888]

(ii) U.S. request for ruling under Article 6.2 of the DSU

14.17 The United States recalls that Article 6.2 of the DSU requires a complaining party to identify in its panel request the "specific measures" at issue in the dispute. The United States argues that the "failure" identified in China's panel request is not a "specific measure at issue" in this dispute and, as a result, is not within the Panel's terms of reference. The United States considers that China's complaint is not about the absence of any "legal authority", but about a requirement that China believes exists under U.S. law to apply anti-dumping and countervailing measures in a way that results in the "double remedy" alleged by China.[889] Thus, the United States argues, China is actually challenging a *positive act*, yet China's panel request fails to identify the specific U.S. legal provisions underlying this alleged requirement (i.e., the aspects of U.S. law allegedly requiring or authorizing the concurrent application of anti-dumping duties and countervailing duties). In fact, the United States notes, China's panel request contain no references to any U.S. legal provision.[890]

14.18 The United States further considers that an "omission" or "failure" presents a special case for purposes of dispute settlement, and may only be considered to be a "measure taken" if there is an *affirmative* obligation on a Member to take the action that it is accused of not having taken. As China fails to identify any WTO requirement for the United States to enact legislation to provide particular authority to the USDOC with respect to double remedies, and because no such WTO requirement actually exists, the United States considers that China has not established that the alleged "failure" constitutes an "omission" cognizable for purposes of WTO dispute settlement.[891]

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[885] United States first written submission, para. 85, citing to *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173; oral statement regarding the U.S. preliminary ruling request at the first meeting of the Panel, para. 9; response to Panel question 8 (first meeting).

[886] United States oral statement regarding the U.S. preliminary ruling request at the first meeting of the Panel, para. 11.

[887] United States response to Panel question 7 (first meeting).

[888] United States oral statement regarding the U.S. preliminary ruling request at the first meeting of the Panel, paras. 12-13; first written submission, para. 84.

[889] United States first written submission, paras. 65-72.

[890] Id., paras. 65-72; second written submission, paras. 11-13; responses to Panel questions 1, 2 and 3 (first meeting).

[891] United States oral statement regarding the U.S. preliminary ruling request at the first meeting of the Panel, paras. 4-5; responses to Panel questions 1 and 2 (first meeting); second written submission, para. 9.

(b) China

(i) U.S. request for ruling concerning China's failure to consult on the "omission"

14.19 China argues that it is well established in WTO jurisprudence that there need not be "a *precise and exact* identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel"; rather, the relevant question is whether the addition of a measure "expand[s] the scope of the dispute".[892] China notes that in the recent *US – Continued Zeroing* dispute, the Appellate Body, in evaluating this issue, examined whether the additional measures "relate" to the measures identified in the request for consultations, and whether the "legal basis" of the claims raised in respect of the additional measures is the same as the legal basis of the claims set forth in the consultations request".[893] China submits that the additional measure it added in its panel request easily meets both criteria as: (i) the USDOC's lack of legal authority was already evident on the face of the measures that were the subject of consultations and the panel request does nothing more than identify this absence of legal authority as a distinct measure; (ii) the measures are "related" because the USDOC specifically referred to the absence of legal authority in the underlying determinations, and even in the absence of such a specific reference, the absence of legal authority is one possible explanation for the USDOC's failure to avoid the imposition of double remedies in the investigations at issue; and (iii) the legal basis for China's claims in respect of the additional measure is identical to the legal basis for China's claims in respect of the measures that were the subject of consultations and the legal issue with respect to all these measures is the same (i.e., whether the imposition of double remedies for the same alleged acts of subsidization is inconsistent with the covered agreements).[894] China also considers that the complaining party's prior awareness of a measure has no relevance to whether that measure is sufficiently related to the measures that were consulted upon.[895]

14.20 Finally, China submits that the fact that it is challenging a measure "as such" is not relevant to whether that measure relates to the dispute that was the subject of consultations. China notes in this respect that the Appellate Body observed in *US – Continued Zeroing* that "the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement".[896]

(ii) U.S. request for ruling under Article 6.2 of the DSU

14.21 China argues that it is the United States' own conduct that is at the origin of whatever uncertainty exists as to the provisions of U.S. law – or their absence – that relate to the problem of double remedies. China considers that although the USDOC acknowledges the existence of the issue of "double remedies", the USDOC has been vague and evasive as to whether it possesses legal authority to avoid the imposition of double remedies, and under what legal framework it would analyze that issue.[897] In any case, China notes, the Appellate Body has found that the identification of a measure under Article 6.2 need be framed only with sufficient particularity as to indicate the nature of the measure and the gist of what is at issue. China considers that it has gone well beyond this minimal requirement and that it was not required to identify the entire body of U.S. trade remedy laws

[892] China response to the U.S. request for preliminary rulings, paras. 27-28, citing Appellate Body Reports on *Brazil – Aircraft*, para. 132 and *US – Upland Cotton*, para. 293.

[893] Id., para. 29, citing to Appellate Body Report on *US – Continued Zeroing*, paras. 228 and 235.

[894] China response to the U.S. request for preliminary rulings, paras. 30 *et seq.*; response to Panel question 7 (first meeting).

[895] China response to Panel question 6 (first meeting).

[896] China response to the U.S. request for preliminary rulings, para. 36, citing to Appellate Body Report on *US – Continued Zeroing*, para. 179; and Panel Report on *US – Continued Zeroing*, para. 7.46; response to Panel question 8 (first meeting).

[897] Id., paras. 3-10.

and regulations in its panel request in order to apprise the United States of the nature of this dispute.[898] China also argues that is has exhaustively documented the facts and circumstances that demonstrate the omission by the United States[899] and that the "absence of legal authority" identified in its panel request is the same omission that has been the subject of extensive consideration within the United States and that the USDOC itself identified as the explanation for its failure to avoid double remedies in the investigations at issue.[900]

14.22 In addition, China takes issue with the United States' characterization of its claims. China submits that its complaint does not relate to any provision of U.S. law requiring the USDOC to apply AD duties calculated under the NME methodology concurrently with countervailing duties. Rather, China's claim is that when the USDOC chooses to apply countervailing duties concurrently with anti-dumping duties determined in accordance with its NME methodology, a necessary consequence of that choice is the imposition of a double remedy and that this is because the USDOC lacks authority under U.S. law to account for the double remedy that arises in such circumstances. Thus, the impairment identified by China in this dispute finds its source in the fact that the USDOC lacks authority to avoid the imposition of double remedies whenever it applies anti-dumping and countervailing measures in respect of the same product from China.[901]

14.23 Finally, China notes that the Appellate Body has indicated that an examination of the sufficiency of a panel request does not entail a substantive consideration as to what types of measures are susceptible to challenge under the DSU[902], and has made clear that any act or omission can be a measure for purposes of dispute settlement.[903]

2. Assessment by the Panel

(a) U.S. request for a preliminary ruling with respect to the alleged failure to consult on the "omission"

14.24 We first consider the United States' argument that the "omission"[904] identified by China in its request for the establishment of the panel does not fall within our terms of reference because it is a measure that was not included in China's request for consultations.[905] The United States' request for a preliminary ruling in this respect raises the question of the relationship between the measures included in a complaining party's request for consultations and those included in its request for the establishment of a panel.

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[898] China response to the U.S. request for preliminary rulings, para. 24; response to Panel question 3 (first meeting).

[899] China response to the U.S. request for preliminary rulings, paras. 21-23.

[900] China response to Panel question 4 (a) (first meeting).

[901] China response to the U.S. request for preliminary rulings, paras. 15-17; response to Panel question 3 (first meeting).

[902] China response to the U.S. request for preliminary rulings, paras. 13, 20; response to Panel question 4(b) (first meeting), all citing to Appellate Body Report on *US – Continued Zeroing*, para. 169.

[903] China response to the U.S. request for preliminary rulings, para. 20, citing to Appellate Body Reports on *US – Corrosion-Resistant Steel Sunset Review*, para. 81, *EC – Selected Customs Matters*, para. 133 and *US – Continued Zeroing*, para. 176; response to Panel question 4(b) (first meeting).

[904] Our reference to the alleged "failure [...] to provide legal authority" as an "omission" or a "measure" in this section is for ease of reference only and is without prejudice to the United States' argument that China's panel request does not identify the "specific measure" at issue in the dispute in accordance with Article 6.2 of the DSU.

[905] We address the United States' request for preliminary ruling with respect to the absence of consultations on the "omission" before considering the United States' request concerning the identification of this measure in China's panel request. In our view, proceeding in this order follows the logical sequence of events that determine a panel's terms of reference.

14.25 The "measure" the inclusion of which in the panel request is challenged by the United States is the following:

> "In certain of the investigations specified above, the US Department of Commerce stated that US law provides no basis to make any adjustment to either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy for the same unfair trade practice, where such a double remedy arises from the use of the US non-market economy (NME) methodology to impose anti-dumping duties simultaneously with the imposition of countervailing duties on the same product. *The measures therefore include, as an omission, the failure of the United States to provide legal authority* for the US Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the US NME methodology simultaneously with the imposition of countervailing duties on the same product".[906] (emphasis added)

14.26 Further, China's panel request contains a section entitled "As Such Claims" which indicates, *inter alia*, that:

> "[...] The United States has not provided the Department of Commerce with any legal authority to adjust either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product. The Department of Commerce has acknowledged the absence of any such legal authority.
>
> China considers that *the absence of any legal authority* for the Department of Commerce to avoid the imposition of a double remedy *is an omission that, as such, is inconsistent* with the following obligations under the covered agreements" [follows a list of provisions of the covered agreements which, the request indicates, are contravened by the "absence of legal authority to avoid a double remedy]".[907]
>
> [...]
>
> "To the extent that US law does not permit the Department of Commerce to avoid the imposition of a double remedy for the same unfair trade practice in parallel anti-dumping and countervailing duty investigations involving imports from WTO Members that the United States has designated as non-market economies, China considers that US law is, as such, inconsistent with Article I of the GATT 1994 [...]".[908] (emphasis added)

14.27 There is no disagreement between the parties that China's request for consultations does not explicitly identify, as a "measure at issue", the omission included by China in its request for the establishment of a panel. China's request for consultations states that it "concerns definitive anti-dumping and countervailing duties imposed by the United States pursuant to the final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce" in the four sets of anti-dumping and countervailing duty investigations at issue in this dispute. The request

[906] China request for establishment of the Panel, Section A, p. 3.
[907] Id., Section B.2, p. 7.
[908] Id., Section B.2, p. 8.

concludes "China reserves the right to raise additional claims and legal matters regarding the *above-mentioned measures* during the course of the consultations".[909]

14.28 Article 4 of the DSU, governing requests for consultations, and Article 6 of the same Agreement, governing requests for the establishment of a panel, are relevant to the issue before us. Article 4.4 of the DSU provides:

> "[...] Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint".

14.29 Article 6.2 of the DSU provides:

> "The request for establishment of the panel [...] shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

14.30 A panel's terms of reference are determined by the content of the request for its establishment. Yet, "as a general matter, consultations are a prerequisite to panel proceedings"[910], and therefore to the inclusion of a measure in the request for the establishment of a panel and (by consequence) the panel's terms of reference. The Appellate Body has explained that "Articles 4 and 6 of the DSU [...] set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[911] The Appellate Body has also highlighted the importance of consultations, explaining that they "provide the parties an opportunity to define and delimit the scope of the dispute between them".[912]

14.31 Past panels and the Appellate Body have recognized a certain degree of latitude to the complaining party in terms of the correspondence between the request for consultations and the panel request: there need not be "a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for establishment of a panel".[913] Where a complainant includes, in its panel request, a measure that was not part of the consultations request, it must be asked whether the complaining party, in so doing, expands the scope of the dispute[914] or changes its essence.[915]

14.32 In answering this question, panels and the Appellate Body have, in prior disputes, focused on various aspects of the relationship between the measures included in the panel request and those identified in the consultation request. Notably, in certain disputes, they considered whether the additional measures constituted "separate and legally distinct" measures from those which had been

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[909] China request for consultations, pp. 1 and 6. (emphasis added).

[910] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58, cited with approval in Appellate Body Report on *US – Upland Cotton*, para. 284.

[911] Appellate Body Report on *Brazil – Aircraft*, para. 131, cited with approval in Appellate Body Report on *US – Upland Cotton*, para. 285.

[912] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54, cited with approval in Appellate Body Report on *US – Continued Zeroing*, para. 222.

[913] Appellate Body Report on *Brazil – Aircraft*, para. 132, (emphasis original), cited with approval in e.g., Appellate Body Reports on *US – Upland Cotton*, para. 285 and *US – Continued Zeroing*, para. 222.

[914] Appellate Body Report, *US – Upland Cotton*, para. 293, cited with approval in Appellate Body Reports on *US – Continued Zeroing*, paras. 222, 224 and 228, and *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293.

[915] Appellate Body Report on *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293 (quoting Appellate Body Report on *Mexico – Anti-Dumping Measures on Rice*, para. 137, (referring to Appellate Body Report on *Brazil – Aircraft*, para. 132)).

consulted upon, in view of the content of the measures, their legal bases, the government agencies that issued them and/or the legal linkages between them.[916] In other, more recent disputes, they found that the measures added in the panel request fell within the panel's terms of reference because they were similar or sufficiently related to those that had been consulted upon, and because the legal basis of the claims made in respect of the two different sets of measures were identical.[917]

14.33 While this prior jurisprudence offers some guidance on how to resolve the question identified above, we do not read it as establishing precise criteria that would apply in every instance, irrespective of the factual situation at issue. This understanding is consistent with the Appellate Body's indication that "whether a complaining party has 'expand[ed] the scope of the dispute' or changed the 'essence' of the dispute through the inclusion of a measure in its panel request that was not part of its consultations request must be determined on a case-by-case basis".[918]

14.34 In any event, the present dispute involves factual circumstances which have not been considered in past WTO disputes. In the present case, China's panel request added a new measure in the form of a rule or norm of general and prospective application (albeit formulated in the negative) – the "omission" – whereas the request for consultations had only included measures in the nature of individual instances of application of that rule of general application – the eight USDOC anti-dumping and countervailing duty determinations. Paralleling this expansion in the nature of the measures at issue was an expansion in the nature of the legal claims in respect of these measures which, as the United States points out, had the effect of transforming a dispute involving only "as applied" claims into one also including "as such" challenges.[919]

14.35 In its argument that the "omission" falls within our terms of reference, China, relying on the findings of the Appellate Body in *US – Continued Zeroing*, argues that the measure added in the panel request "relates" to the measures identified in the request for consultations and that the legal basis of the claims raised in respect of the additional measure is the same as the legal basis of the claims set forth in the consultations request. We consider that the examination of the nature and extent of the relationship between these two sets of measures is a tool to help us understand whether including the additional measure "expands the scope of the dispute" or "changes its essence" and, we agree with China that, in the present dispute, the additional measure is significantly related to the measures that were identified in China's request for consultations, albeit for reasons other than those put forward by

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[916] Appellate Body Report on *US – Certain EC Products*, paras. 60-82; Panel Report, *US – Customs Bond Directive*, paras. 7.173-7.204; Appellate Body Report on *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 286-295.

[917] Panel Report on *US – Continued Zeroing*, paras. 7.16-7.29; Appellate Body Report on *US – Continued Zeroing*, paras. 213-236. See also Appellate Body Report on *Brazil – Aircraft*, paras. 127-133, finding that the additional measures (regulatory instruments relating to the administration of the subsidy programme at issue) did not change the essence of the measure consulted upon. In *US – Continued Zeroing*, the Appellate Body qualified its findings in *US – Certain EC Products* (additional measure excluded on the basis that it was separate and legally distinct from the measures consulted upon), indicating that the two measures at issue in *US – Certain EC Products* were not only legally distinct, but "were entirely different and, as a consequence, the matters covered by the consultations request and the panel request were distinct". (Appellate Body on *US – Continued Zeroing*, para. 230).

[918] Appellate Body Report on *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 293. In the same case, the Appellate Body indicated that its findings (which it referred to as a "dictum") in *US – Certain EC Products* (considering whether the measures were "separate and legally distinct") were not to be treated "as creating an exclusive test or precedent". (Id., para. 295 and footnote 391).

[919] The Appellate Body has indicated that panels should limit their analysis to the request for consultations, and not whether consultations actually took place with respect to the alleged measure. (Appellate Body Report on *US – Upland Cotton*, para. 287). In consequence, in determining whether the inclusion of the "omission" in China's panel request had the effect of expanding the scope of the dispute or changing its essence, we limit our analysis to the text of China's request for consultations.

China.[920] Yet, we do not consider the "relationship" between the "omission" and the determinations identified in China's consultations request to be comparable to that which existed between the measures at issue in *US – Continued Zeroing*. In that case, the measures at issue were subsequent determinations taken in the context of the same anti-dumping orders, and "derive[d] from the same underlying legal basis".

14.36 By contrast, and as discussed above, the relationship in this dispute is between specific behaviour in the first case and the norm of general or prospective application on which that specific behaviour is allegedly based on the other. The measures identified in China's consultations request constitute specific instances of application of the measures identified in its panel request. For this reason, it comes as no surprise that the measures contained in each of these documents are closely connected. For the same reason, one would expect in such circumstances that the complaining party would allege violation of similar provisions of the covered agreements, as is the case here. Yet, this close relationship between the measures included in each of the requests and the fact that the legal claims made in respect of these measures invoke the same provisions of the covered agreements does not, in our view, outweigh the fact that the inclusion of the "omission" by China had the effect of bringing a wholly new type of measure – norms of general and prospective application – within the scope of the dispute and of adding "as such" claims to the "as applied" challenges included in the request for consultations. We consider that the addition of such new measures and claims in this case so broadens the scope of the present dispute, and changes its nature, as to place that measure outside of our terms of reference.

14.37 In reaching this conclusion, we take into consideration the recognition by panels and the Appellate Body that "as such" challenges against laws, regulations or other instruments that have general and prospective application are serious challenges that have more far-reaching implications than "as applied" challenges against individual instances of application of such norms of general and prospective application.[921, 922]

14.38 Our conclusion that the inclusion of the "omission" by China significantly expands the scope of the dispute and therefore that this measure and the claims made in its respect are outside our terms

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[920] In our view, the "relationship" between the measures set out in the panel request and those identified in the request for consultations derives from their substantive connection, not from the fact that the former may or may nor have been "evident" on the face of the latter. See paragraph 14.39, *infra*.

[921] See Appellate Body Report on US – Oil Country Tubular Goods Sunset Reviews, para. 172:

> "[...] 'as such' challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct—not only in a particular instance that has occurred, but in future situations as well—will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than 'as applied' claims".

[922] To be clear, we consider that taking into account the nature of the *claims* at issue in examining the correspondence between the *measures* listed in the request for consultations and those listed in the panel request is appropriate since they, together, determine the "matter" which is before a panel. We note that in *US – Continued Zeroing*, the Appellate Body found that the panel had properly examined both components of the "matter" before it – claims and measures – when it took into account the fact that the legal nature of the European Communities' claims regarding the additional measures "[did] not in any way differ from that of the [...] measures identified in the [...] consultations request" in reaching its conclusion that the consultations request and the panel request in that case referred to the same subject-matter, and as a result, that the additional measures fell within the panel's terms of reference. (Appellate Body Report on *US – Continued Zeroing*, para. 233).

of reference finds support in the findings of the Appellate Body in *US – Shrimp (Thailand) / US – Customs Bond* Directive. In that dispute, the Appellate Body was critical of the proposition that the inclusion, in the request for consultations, of a specific measure would suffice to bring within the scope of the dispute any legal instrument providing a general authority or legal basis for that specific measure.[923] The Appellate Body added that such an approach would imply that laws and regulations providing general authority – including constitutional provisions – would automatically be implicated in a dispute even if they were not mentioned in a consultations request".[924]

14.39 We recall China's view that there is a relationship between the determinations identified in the request for consultations and the alleged "omission" because those determinations "stated that U.S. law provides no basis to make any adjustment […] to avoid the imposition of a double remedy".[925] Leaving aside whether or not China's characterization of the determinations is correct, we do not believe that such a reference, in and of itself, establishes a relationship sufficiently close as to bring the alleged omission within the scope of this dispute. An applied measure may often refer, implicitly or explicitly, to the legal basis under which it is taken and measures of general application will often be referenced in the specific instances in which they are applied. We agree with the United States that if China's arguments were followed, consultations on "as such" claims would almost never be required since consultations on related "as applied" matters would suffice.[926] In sum, as previously explained, we consider that the addition to a dispute of "as such" claims regarding a norm of general and prospective application represents a significant expansion of the scope of the dispute, and changes its nature, even if the norm is substantively related to the individual instances of behaviour identified in the request for consultations.

14.40 Further, unlike China, we do not read the Appellate Body Report in *US – Continued Zeroing* as suggesting that the distinction between "as such" and "as applied" claims is irrelevant to a panel's consideration of its terms of reference.[927] The statement of the Appellate Body relied upon by China addresses the question of what constitutes a "measure" for purposes of WTO dispute settlement and what types of measures are susceptible to WTO challenge, substantive questions that are not to be confused with the jurisdictional issues before us. In essence, in that statement, the Appellate Body makes the narrow point that "[i]n order to be susceptible to challenge, a measure need not fit squarely within one of [the] two categories" of measures recognized in WTO jurisprudence. The Appellate Body did not, in that case or elsewhere, suggest that there is no significant difference between norms

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[923] Appellate Body Report on *US – Shrimp (Thailand) / US – Customs Bond Directive*, para. 294.

[924] Id., footnote 390. The parties debate the relevance of the panel and Appellate Body findings in *US – Shrimp (Thailand) / US – Customs Bond Directive* in light of the differences between the facts of that dispute and those of the present one. As noted above, the panel and Appellate Body reports in *US – Customs Bond Directive* do not directly address the issue before us. Consequently, we do not consider it necessary to examine in detail the factual differences between that dispute and the present one.

[925] China response to U.S. request for preliminary rulings, paras. 30-32; response to Panel question 7 (first meeting).

[926] United States response to Panel question 7 (first meeting).

[927] China relies on the following statement of the Appellate Body:

> "We share the Panel's view that the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement. This distinction has been developed in the jurisprudence as an analytical tool to facilitate the understanding of the nature of a measure at issue. This heuristic device, however useful, does not define exhaustively the types of measures that may be subject to challenge in WTO dispute settlement. In order to be susceptible to challenge, a measure need not fit squarely within one of these two categories, that is, either as a rule or norm of general and prospective application, or as an individual instance of the application of a rule or norm". (China response to the U.S. request for preliminary rulings, para. 36 (quoting Appellate Body Report on *US – Continued Zeroing*, para. 179).

of general and prospective application and individual instances of application of such norms, or that such difference is irrelevant in determining a panel's terms of reference. To the contrary, the Appellate Body has repeatedly made it clear that challenges to the former not only entail a different legal analysis on the part of the panel, but also that "as such" challenges have systemic implications that go well beyond those of "as applied" claims.[928]

14.41 Finally, the parties have debated the issue of the relevance of China's awareness of the existence of the additional measure at the time of its request for consultations.[929] Prior cases offer little guidance on whether a complaining party's prior knowledge of such an "additional" measure is a relevant consideration. In any event, given our findings above, this is an issue we need not decide in the present case.

14.42 For the reasons set out above, we find that the "omission" challenged by China in its "as such" claims falls outside our terms of reference, and consequently, that China's "as such" claims equally fall outside our terms of reference.

(b) United States request for a preliminary ruling under Article 6.2 of the DSU

14.43 Having already determined that the measure challenged by China in the context of its "as such" claims and China's "as such" claims themselves are not properly before us because China did not identify them in its request for consultations, we do not need to address the second request for preliminary ruling presented by the United States, i.e., that these measure and claims fall outside our terms of reference due to China's failure to identify the "measure at issue" in the dispute pursuant to Article 6.2 of the DSU.

C. CHINA'S "AS APPLIED" CLAIMS

1. Introduction

14.44 In the following sections, we address China's "as applied" "double remedy" claims. Specifically, we consider China's claims that:

(i) the United States imposed a "double remedy", inconsistent with Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

(ii) the USDOC's treatment of the question of "double remedy" in the investigations at issue was inconsistent with United States' obligations under Articles 12.1 and 12.8 of the SCM Agreement;

(iii) the United States denied imports from China "most-favoured nation" treatment under Article I:1 of the GATT 1994 by imposing double remedies in the investigations at issue.

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[928] In *US – Oil Country Tubular Goods Sunset Reviews* the Appellate Body recognized that the distinction between "as such" and "as applied" challenges may be relevant to issues affecting a panel's jurisdiction in making observations about the identification of "as such" claims in a *panel request*. The Appellate Body in that case found that Argentina had sufficiently identified the measure at issue pursuant to Article 6.2 of the DSU but nonetheless opined that Argentina could have been clearer in setting out it claims. It "urge[d] complaining parties to be *especially diligent* in setting out 'as such' claims in their panel requests as clearly as possible". (Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172-173). (emphasis original).

[929] We do not understand China to contest that it was aware of the existence of the alleged omission at the time it submitted its request for consultations.

14.45 Also as a preliminary remark, we consider it appropriate to emphasize that the dispute before us is limited to the consistency with the covered agreements of the USDOC's determinations in the four sets of investigations at issue; the consistency of double remedies with U.S. law is not before us.

2. General considerations with respect to the potential for "double remedies" to arise from the simultaneous imposition of countervailing duties and of anti-dumping duties calculated pursuant to the U.S. NME methodology

14.46 We first examine the parties' arguments with respect to whether the concurrent imposition of anti-dumping duties calculated under the U.S. NME methodology and of countervailing duties results in the imposition of double remedies.

(a) Main arguments of the Parties

(i) China

14.47 China argues that where anti-dumping duties calculated pursuant to a methodology that relies on surrogate, market-determined, values (NME methodology) and countervailing duties are simultaneously applied to imports of a same good, it necessarily results that any domestic subsidy bestowed upon the production of that good is offset twice, once through the calculation of the dumping margin, and once as a result of the imposition of the countervailing duties.[930]

14.48 By way of background, China notes that for a long time, the USDOC held the position that it could not apply countervailing duties to countries which it determined to be non-market economies, a position which the USDOC reversed in the *CFS Paper* case.[931] The four investigations at issue in this dispute represent the first instances in which the USDOC simultaneously imposed anti-dumping duties calculated under its NME methodology and countervailing duties.

14.49 China notes that the issue of double remedies has been the subject of extensive discussions in the United States and was acknowledged by all three branches of the Government of the United States, including the USDOC itself.[932] In addition, China argues that, more generally, the USDOC has consistently recognized that the manner in which it calculates anti-dumping duties can offset subsidies, including domestic subsidies. In particular, China argues that in numerous anti-dumping investigations of imports from market economy countries, the USDOC has recognized that by (i) adding subsidies to the producer's cost of production; (ii) deducting countervailing duties from the export price; or (iii) using a producer's reported costs, if these costs do not reflect subsidies received (or otherwise using *unsubsidized* costs) to determine constructed normal value; it would

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[930] *See, e.g.*, China first written submission, para. 326.

[931] Id., paras. 328-346. See paras. 14.2-14.4, *supra*, for the Panel's discussion of the evolution of the USDOC's position on the applicability of the U.S. countervailing duty regime to NMEs.

[932] China oral statement at the first meeting of the Panel, para. 79; first written submission, paras. 347-354; oral statement at the second meeting of the Panel, para. 60. China notably refers to a 2005 report of the U.S. Government Accountability Office (the "GAO"), in which the GAO assessed whether it would be possible for the USDOC to apply countervailing duties to imports from China; to draft legislation (which was adopted by the U.S. House of Representatives but not the U.S. Senate) to provide the USDOC with explicit authority to address the issue of double remedies, should it apply the U.S. countervailing duty legislation to NMEs; to the recent decision of the U.S. Court of International Trade in *GPX*, (discussed in more detail below); and to statements made by the USDOC in relation to the *CFS Paper* case. (Id., referring, *inter alia*, to U.S. Government Accountability Office, *U.S. – China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05-474 (June 2005) ("GAO Report"), Exhibit CHI-121; *United States Trade Rights Enforcement Act*, H.R. 3283, Exhibit CHI-122; and to *United States Court of International Trade, GPX International Tire Corporation and Hebei Starbright Tire Co., Ltd., v. United States* ("*GPX*"), Exhibit CHI-169).

effectively collect countervailing duties a second time.[933] China submits that the United States fails to explain how the double remedy that arises from the use of an NME methodology differs from these other forms of double remedies, which the USDOC has taken all necessary steps to avoid.[934]

14.50 In China's view, a double remedy arises in *all* instances of concurrent imposition of countervailing duties and of anti-dumping duties calculated pursuant to a methodology relying on surrogate values.[935] This, in China's view, results from the overlapping rationales and effects of NME methodologies and of countervailing duties: China explains that the rationale for using an NME methodology in an anti-dumping investigation subsumes the rationale for imposing countervailing duties and that these are two different approaches for remedying the fact that a producer's costs and prices were not determined by market forces. China argues that when it uses its NME methodology, the USDOC places the producer in the position of having unsubsidized, market-determined costs of production,[936] and calculates a dumping margin based on the difference between this market-determined cost of production and the producer's export price. China explains that in doing so, the USDOC necessarily captures any trade-distorting effects of alleged subsidies in the anti-dumping margin. Thus, having brought the producer's costs of production "to the market", and having calculated a duty on this basis, the USDOC's NME methodology necessarily offsets any benefit that the producer obtained by receiving financial contributions from the government on terms more favourable than those available in the market. When the USDOC simultaneously calculates the amount of subsidization in a parallel countervailing duty investigation – again by placing the producer in the position of having market-determined costs of production – it is repeating the same exercise undertaken in the anti-dumping NME calculation. Thus, China explains, the same subsidy is offset twice.

14.51 China notes the United States' arguments that the use of an NME methodology may not constitute a *complete* remedy for the subsidies. Consistent with the explanation above, China argues that the existence of a double remedy occurs entirely on the cost side of the equation. Accordingly, China rejects the United States' contention that the existence of a double remedy is a factual question and depends, in particular, on whether subsidies pass through, *pro rata*, to U.S. prices.[937] China provides a number of examples from the investigations at issue (with respect to subsidies in the form of the provision of inputs), as well as theoretical examples which it considers support its arguments in this respect.[938] China also rejects the United States' argument that the existence of a double remedy

[933] China second written submission, paras. 214 and 227, response to Panel question 74 (first meeting). China adds that in these investigations, the USDOC did not consider the existence of a double remedy to be "theoretical", required any "evidence" or "presumptions" about the effects of subsidies on a producer's costs or prices, or suggest that it had no legal obligation to avoid the double remedy that it had identified. (China second written submission, para. 215). See Section XIV.C.5, *infra*, (Panel's consideration of China's claims under Article I:1 of the GATT 1994), for a more detailed review of China's arguments in this respect.

[934] China first written submission, para. 228.

[935] Id., para. 374.

[936] China argues that in calculating a constructed normal value, the USDOC seeks to ensure that the surrogate values that it uses are, in fact, market-determined values and avoids the use of any surrogate value that may itself be subsidized. (China first written submission para. 371 and footnote 315, *inter alia* referring to Omnibus Trade and Competitiveness Act of 1988, Exhibit CHI-123).

[937] Id., paras. 330, 372 and 391-392; oral statement at the first meeting of the Panel, para. 81; second written submission, paras. 219, 233-238, response to Panel question 73 (first meeting). China considers that whether subsidies pass through, *pro rata*, to U.S. prices, is entirely irrelevant. But China argues that even assuming that the United States were correct and that the existence of a double remedy depends on the effects of subsidies on export prices, the only lawful basis on which an investigating authority could impose countervailing duties would be to presume that the subsidies had precisely that effect. (China second written submission, para. 289 *et seq.*).

[938] China first written submission, para. 395; oral statement at the first meeting of the Panel, para. 81; second written submission, paras. 222-225, response to Panel question 73 (first meeting); response to Panel question 26 (second meeting); Exhibit CHI-142 ("Further Examples of Offsetting the Same 'Subsidies' Twice");

can be ascertained from a "mathematical" comparison between the dumping and countervailing duty margins. China's response to the United States' argument in this respect is that the use of an NME methodology necessarily offsets any competitive advantage that the producer obtained from countervailable subsidies, but that this does not mean that an anti-dumping margin determined pursuant to an NME methodology is mathematically comparable to a countervailing duty margin calculated in respect of the same product, because: (i) the use of an NME methodology is meant to address a broader set of distortions (e.g. non-specific subsidies); and (ii) the dumping margin is dependent on the level of the producer's export price, a variable that plays no role in the countervailing duty calculation. Further, for China, the fact that, in a given instance, the USDOC could theoretically arrive at a zero dumping margin does not alter the fact that in using an NME methodology, it necessarily offset the benefit of any countervailable subsidies along the way.[939]

14.52 Overall, China considers that the theories put forward by the United States demonstrate that the United States does not deny the existence of double remedies but rather, considers that the existence of double remedies is solely a matter of degree that depends on certain factual circumstances.[940] Yet, China notes, in the investigations at issue, the USDOC did not take any steps to determine the extent of the double remedy that may have arisen.[941] In any event, China considers that it has demonstrated, at a minimum, that there was at least "some overlap" between the method by which the USDOC determined normal value in the anti-dumping investigations and the subsidies that were identified and countervailed by the USDOC in the parallel countervailing duty investigations.[942]

14.53 Finally, China draws the Panel's attention to the 2009 decision of the U.S. Court of International Trade ("CIT") in *GPX International Tire v. United States*, a judicial review of the determination in the OTR investigation at issue in the present dispute. In *GPX*, the CIT held that the USDOC is obligated to avoid offsetting the same subsidies twice when it uses its NME methodology in conjunction with countervailing duties.[943] China notes that the CIT observed that the USDOC addresses subsidization of NME producers "through the NME AD methodology" and that it is fundamentally incompatible with the purposes of the countervailing duty laws to offset the same subsidies twice; China also cites the CIT's conclusion that the USDOC has an obligation to investigate and to avoid double remedies. China posits that in *GPX*, the CIT rejected U.S. arguments that are similar to those the United States makes before this Panel.[944]

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and Exhibit CHI-170 (examples, in scenarios in which subsidies "pass through" or do not "pass through" to export prices).

[939] China response to Panel question 93 (a)-(b) (first meeting).

[940] *See, e.g.,* China's second written submission, para. 305. China also argues that the United States has implicitly acknowledged before the Panel the potential for at least some degree of overlap between the two remedies. In particular, China notes the United States' statements that the use of an NME methodology to determine normal value may not constitute a complete remedy for any subsidies received by the producer, and that it will "not necessarily capture the full amount" of any subsidies. China argues that these statements are consistent with the USDOC's statement, in *CFS Paper* that "a possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from NME countries and with the statement by the GAO that anti-dumping duties determined in accordance with the U.S. NME methodology "offset much of the value of both export subsidies and domestic subsidies". (China response to Panel Question 92 (first meeting)).

[941] China oral statement at the first meeting of the Panel, para. 82; second written submission, para. 305.

[942] China response to Panel question 92 (first meeting).

[943] China oral statement at the second meeting of the Panel, paras. 56-73.

[944] Id.

(ii) United States

14.54 The United States asks the Panel to reject China's argument that a double remedy results from the imposition of countervailing duties concurrently with the imposition of anti-dumping duties calculated under the U.S. NME methodology. In particular, the United States contests what in its view is an argument of China that *every* calculation of a dumping margin using the NME methodology will be artificially inflated by the *full* amount of subsidies that are remedied by countervailing duties determined and imposed simultaneously on the subject goods. The United States argues that China has not provided evidence to support its arguments in this respect.[945]

14.55 The United States proffers that the theory advanced by China suggests that surrogate values used to determine normal value under the U.S. NME methodology are the mathematical equivalent of what actual production costs would be if China were a market economy plus the precise amount of subsidization. The United States challenges what it sees as the theoretical premises and the assumptions underlying China's theory. The United States argues that it cannot be assumed that replacement of actual (subsidized) values of factor inputs with surrogate values under the NME methodology results in an increase in the normal value by an amount that is equal to or greater than the amount of the subsidy. The United States argues that it cannot be assumed that the normal value arrived at using the NME calculation is, in every instance, completely insulated from any of the effects of the countervailed subsidy. The United States posits that the subsidy could actually lower the normal value, for instance by increasing a recipient's efficiency and reducing the quantity of factors used in production, or affect the surrogate (third-country) prices and/or profit and expense ratios.[946] The United States further submits that another fundamental premise for China's arguments is that subsidies reduce costs of production, *pro rata*; the United States contends that this would be a necessary basis for arguing that normal values determined using the NME methodology are invariably inflated by an amount that fully remedies the subsidy. The United States considers it far from clear that most subsidies achieve anything close to *pro rata* reductions in cost.[947]

14.56 The United States characterizes as "self-serving" the illustrations offered by China using the investigations at issue in the current dispute, and asks the Panel not to consider that these establish that double remedies were imposed in these investigations. The United States disagrees with China's suggestion that similarities between the surrogate values used in the anti-dumping calculations and the benchmarks used in the countervailing duty investigations prove that the resulting duties remedy the same economic "distortion". In addition, the United States submits counter-examples to demonstrate that in some instances, the surrogate values used by the USDOC in its dumping margin calculation were in fact lower than both the producer's actual costs and the benchmarks used by the USDOC in its calculation of the amount of the subsidy.[948]

14.57 Further, the United States argues that China incorrectly equates the normal value with the anti-dumping *remedy*, and notes that normal values are only one side of the anti-dumping equation.[949] The United States argues that even if it is assumed that a subsidy lowers the recipient's costs of production, it may not pass-through to prices.[950]

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[945] United States first written submission, paras. 445-462; opening statement at the first meeting of the Panel, para. 56; response to Panel question 73 (first meeting).

[946] United States first written submission, paras. 451-454 and footnote 612; response to Panel question 71 (first meeting); second written submission, paras. 203-207; response to Panel question 27 (second meeting).

[947] United States first written submission, paras. 455-459.

[948] United States comments on China's response to Panel question 26 (second meeting).

[949] United States second written submission, paras. 198-202.

[950] United States response to Panel questions 71 (a) and 72 (first meeting).

14.58 The United States urges the Panel to reject the argument made by China that there are "overlapping rationales" for (i) the use of NME methodologies in anti-dumping investigations and (ii) the imposition of countervailing duties. In the view of the United States, China mischaracterizes the relevant rationales and incorrectly assumes that subsidization is among the market distortions that the NME methodology is "meant to counteract". The United States argues that under the GATT, the AD Agreement, and China's Protocol of Accession, subsidization is not relevant to the application of the NME methodology. The United States submits in this regard that the USDOC does not and cannot ensure that the NME constructed normal value is "subsidy-free", and that in some instances, including in the investigations at issue, the surrogate value exceeds the producer's actual costs.[951] The United States further submits that the *effects* of subsidies on costs or prices is not, under the covered agreements, relevant to the calculation of the amount of countervailing duties. On the contrary, under Article VI:3 of the GATT and Article 19.2 of the SCM Agreement, countervailing duties may be imposed for the *full amount* of the subsidy found to exist, irrespective of the effects these subsidies.[952]

14.59 Finally, the United States argues that even if it is accepted at face value, the GAO Report does not support China's argument that double remedies are inherent in the concurrent application of countervailing duties to offset domestic subsidies and of anti-dumping duties calculated under an NME methodology. Rather, the United States argues, "the report agrees with Commerce's stated position [that] the concurrent imposition of AD and CV duties could create some potential for overlapping rationales".[953] The United States also asks the Panel not to rely on, or consider dispositive or even persuasive, the Opinion of the CIT in the *GPX* case. The United States argues that this decision represents the Court's ruling on U.S. law and results from other considerations than those focussed on by China in the current dispute. The United States notes that the CIT concludes that some degree of double counting is likely and directs the USDOC to investigate the issue and report back to the Court. Further, the United States considers the CIT ruling to be in error and notes that it is not final as it may be appealed.[954]

(b) Main arguments of the Third Parties

(i) Argentina

14.60 Argentina argues that China incorrectly assumes that the use of an NME methodology in an anti-dumping investigation necessarily addresses any potential subsidization. On the contrary, Argentina argues, using analogue country prices and costs to mirror market economy conditions does not mean that such costs and prices have been adjusted from subsidization. Further, Argentina is of the view that the purpose of the NME methodology is to provide an alternative to obtain undistorted prices in circumstances where there are distortions in the economy, rather than to offset subsidies, and that even assuming *arguendo* that subsidies are the quintessence of distortions as China contends, they are not the only category of distortions affecting a market. As a consequence, Argentina argues, the concurrent application of anti-dumping duties calculated under a surrogate country methodology and of countervailing duties does not, in itself, imply the situation of duplication alleged by China.[955]

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[951] United States second written submission, paras. 180-190; opening statement at the second meeting of the Panel, para. 80.

[952] United States second written submission, paras. 191-195; response to Panel question 71(b) (first meeting).

[953] United States response to Panel question 80 (first meeting). The United States emphasizes that the GAO stated that "it *appears* that *some* double counting [...] *could* occur [...]". (Id.). (emphasis added by the United States).

[954] United States opening statement at the second meeting of the Panel, paras. 85-88; response to Panel Question 32 (second meeting).

[955] Argentina third-party submission, para. 33; third-party oral statement, paras. 6-9.

(ii) Australia

14.61 Australia submits that anti-dumping and countervailing duties are distinct trade remedies with different purposes and effects. Australia considers that the use of a surrogate market in an anti-dumping investigation and the calculation of an NME normal value do not relate to an assessment of whether a subsidy exists or a calculation of the amount of that subsidy, and notes that an anti-dumping investigation entails a price comparison between the normal value and the export price.[956]

(iii) Brazil

14.62 Brazil argues that the potential effects on pricing practices of subsidies to the "manufacture or production" of a product are normally much less direct than is the case for export subsidies and that it is therefore inappropriate to apply the logic behind Article VI:5 to domestic subsidies.[957]

(iv) European Communities

14.63 The European Communities expresses concern with China's allegation that there is an "inherent" double remedy in cases where normal value is established on the basis of a surrogate country and with China's apparent assumption that domestic subsidies inevitably affect prices, including export prices. The European Communities also posits that there may be cases where export subsidies have no measurable impact on export price, or have no discernable impact on prices at all.[958]

(v) Japan

14.64 Japan considers that in certain situations, the dumping margin calculation captures not only the dumping behaviour of exporters, but also the effects of governmental financial contributions; if in such a situation, the importing Member also imposes a countervailing duty, it would counteract the effects of the financial contribution by the government twice. Japan argues that a double remedy may or may not occur in situations other than situations of export subsidization, depending on the method used in the calculation of the margin of dumping in a given case. For example, if a subsidy is conferred on inputs and the final product is sold both in the home and export markets, both the home market price and the export price would be lowered by the same amount due to the effects of the subsidy, and in such a case, a double remedy may occur if the dumping margin is calculated by adjusting the home market price upward for the *per*-unit amount of the subsidy without an adjustment of the actual export price. Japan also considers that a double remedy unavoidably occurs in the case of export subsidies.[959]

(vi) Mexico

14.65 Mexico considers that China's argument that the application of a surrogate country methodology in an anti-dumping investigation yields a normal value free from distortions is without foundation. Mexico is of the view that an NME methodology does not offset the effect of subsidies granted in the exporting country. Further, Mexico argues that even assuming *arguendo* that the normal value determined on the basis of a surrogate country would reflect unsubsidized prices, these prices would be those in the surrogate country, not in China itself.[960]

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[956] Australia third-party submission, para. 42; third-party response to Panel questions 14 and 17.
[957] Brazil third-party submission, para. 17.
[958] European Communities third-party submission, paras. 53 and 56.
[959] Japan third-party submission, paras. 4-7; third-party oral statement, paras. 2-4.
[960] Mexico third-party submission, paras. 32-34; third-party oral statement paras. 6-8; response to Panel questions 21 and 23.

(vii) Norway

14.66 Norway considers that the choice of the methodology and the costs elements that go into the calculation of the normal value can have an important bearing on the issue of subsidization. Where the normal value is constructed on the basis of the producer's actual data for the inputs (i.e., subsidized input prices), the constructed normal value will be lower than for non-subsidized production. In such cases, simultaneous anti-dumping and countervailing duties may be applied. If, on the other hand, the constructed normal value is calculated not with subsidized prices, but with "non-distorted" or "benchmark" prices (including prices from a surrogate county) for the (otherwise subsidized) inputs, then the effect of any subsidy is "extinguished" in the constructed normal value calculation and applying an anti-dumping duty up to the maximum permitted by the AD Agreement will provide a remedy for the subsidization at the same time. Norway notes that China argues, and the United States does not appear to dispute, that in calculating the constructed normal value based on a third country market benchmark, the USDOC avoids the use of any surrogate value that may itself be subsidized. Thus, Norway submits, it appears that the USDOC used a market-economy cost of production free from any dumping or subsidy distortion in the dumping margin calculation. Norway submits that by applying the full anti-dumping duty up to this third-country market benchmark, all effects of the subsidization were extinguished.[961]

(c) Assessment by the Panel

14.67 As we explain in more detail in the following paragraphs, we have no difficulty accepting the general proposition that the use of an NME methodology likely provides some form of remedy against subsidisation, and therefore, that the simultaneous imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties likely results in any subsidy granted in respect of the good at issue being offset more than once.

14.68 An "NME methodology" is a methodology for the calculation of dumping margins under which the export price is compared to a normal value that is based on "surrogate" costs or prices from a third country. The rationale behind the use of such an NME methodology is that prices and costs of production in the exporting country are distorted as a result of government intervention in the economy and therefore do not reflect market economy conditions.[962] In such a situation, it is considered that neither the sales prices of the NME producer on its domestic market nor a normal value constructed on the basis of that producer's actual costs of production would offer a reliable source of comparison to calculate a margin of dumping. This is why the normal value is determined on the basis of costs or prices prevailing in a third country where market economy conditions prevail, and hence where prices and costs are regarded as "undistorted". In practice, the investigating authority typically "constructs" the normal value on the basis of costs of production in the third country market economy, an approach which the U.S. NME methodology generally follows.[963]

14.69 It follows from this description of NME methodologies that, conceptually, the dumping margin calculated under an NME methodology – i.e., the difference between the constructed normal value and the export price – reflects not only price discrimination by the investigated producer between the domestic and export markets ("dumping"), but also, in addition, the economic distortions that affect the producer's costs of production. Specific domestic subsidies granted to the producer of the good in question, in respect of that good – i.e., the same subsidies which are countervailed in the context of a countervailing duty investigation – are one of these economic distortions that are

[961] Norway third-party submission, paras. 43-47.
[962] *See* second *Ad* Note to Article VI:1; Section 15(a) of China's Protocol of Accession.
[963] *See* our description of the U.S. NME methodology, para. 14.2, *supra*.

"captured" in the NME dumping margin calculation.[964] Expressed differently, the dumping margin calculated under an NME methodology generally is higher than would be the case otherwise because it results from a comparison of the export price to market-determined, and hence *unsubsidized*, costs of production, rather than to the producer's actual, subsidized (or distorted) costs of production.[965]

14.70 To the extent that part of the dumping margin found to exist resulted from subsidies provided in respect of the exported good, the anti-dumping duties calculated under an NME methodology will remedy both dumping and subsidization. In this sense, it can be said that if countervailing duties are simultaneously applied to imports of the same good, the subsidy is likely to be "offset" more than once, i.e., once through the anti-dumping duty, and again at least partially through the countervailing duty. For this reason, we consider that the concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties creates the potential for imposition of a "double remedy", as China defines this term.

14.71 We do not understand the United States to dispute the basic notion that double remedies *may* result from the concurrent use of its anti-dumping and countervailing duty laws on imports from China. In fact, as China points out, the USDOC itself has recognized the potential for double remedies to arise in such circumstances.[966] Rather, the United States in its arguments before us focuses on whether a double remedy can be demonstrated on the facts of each specific instance of concurrent imposition.[967] One of the United States' arguments in this respect is that the existence of a "double remedy" depends on export prices (because, the United States argues, the normal value is only one half of the dumping margin equation) and in particular, on whether the subsidy leads to a reduction in the export price.[968]

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[964] That other distortions are also captured – for instance non-specific subsidies – is irrelevant; what matters is that those same distortions which are countervailed under Part V of the SCM Agreement are also captured by the NME dumping margin calculation.

[965] It is noteworthy that the U.S. NME methodology takes into account the quantities of factors of production actually used by the investigated producer in the production of the investigated good (e.g. *x* tonne of input). The USDOC then uses surrogate values (e.g. *y* dollar or renminbi/tonne of input) to calculate the costs for each of the various factors used in the production of the investigated good by that investigated producer. That the U.S. NME methodology factors in the investigated producer's actual use of factors of production does not, in our view, fundamentally alter the conclusion that using surrogate, market economy values presumptively puts the producer in the position of having unsubsidized costs of production.

[966] *See, e.g.*, the USDOC statement that:

> "Since the possibility of double counting resulting from simultaneous anti-dumping and countervailing duty investigations is dependent on the specific facts arising in such investigations, to the extent that the parties to these proceedings provide evidence on the record of these investigations, Commerce will have to respond to these concerns in the course of our investigations". (USDOC – Office of Public Affairs, "Commerce Applies Anti-Subsidy Law to China", (30 March 2007), Exhibit CHI-135).
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> We also note that in response to a question from the Panel, the United States states that the GAO Report "agrees with *Commerce's stated position [that] the concurrent imposition of AD and CV duties could create some potential for overlapping remedies*." (United States response to Panel question 80 (a) (first meeting)). (emphasis added).

[967] The USDOC seems to have taken a similar approach in the *CFS Paper* case. (*Coated Free Sheet Paper from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, CHI-137, p. 30760).

[968] We note the United States' insistence that China must demonstrate that each countervailed subsidy "passes through", in *full* (*pro rata*) to the export price, and that a double remedy for the *full* amount of the subsidy results from every instance of double imposition. The parties' arguments concerning whether a subsidy

14.72 Taking both sides of the dumping margin equation into consideration does not alter the conclusion that double remedies are likely to result from the concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties. Viewed from this perspective, the use of an NME methodology leads to an asymmetric dumping margin comparison between an *unsubsidized* normal value and a *subsidized* export price.[969] Thus, once again, the difference between the two finds its source not only in price discrimination (dumping), but also in the subsidies that were granted to the investigated producer. This was, in essence, the reasoning underlying the conclusions of the U.S. Government Accountability Office (GAO) in its 2005 report on the implications for the United States of applying countervailing duty laws to China. The GAO explained that when an anti-dumping duty is calculated under the U.S. NME methodology,

> "the normal value of the product [...] is based not on Chinese prices (which might be artificially low as a result of domestic subsidies) but on information from a country where prices are determined by free markets. Thus, when the normal value is compared with the export price, the difference will, at least in theory, reflect the price advantages that the exporting company has obtained from both export and domestic subsidies".[970]

The GAO Report concludes, on this basis, that economic theory suggests that there is a substantial potential for domestic subsidies to be "double counted" in the event that the USDOC applied countervailing duties to NME country products while continuing to use surrogate country values to calculate anti-dumping duties on those same products.[971] The decision of the U.S. Court of International Trade in *GPX* is based on a similar theoretical foundation – in fact, the Court cites to the GAO Report in support of its finding that without some type of adjustment being made, the concurrent imposition of anti-dumping duties and of countervailing duties with respect to Chinese products could very well result in a double remedy.[972]

"passes through" to the export price concerns the question whether the subsidy leads to a reduction of the export price, in totality (*pro rata*) or in part. The United States explains that a *pro rata* "pass through" of the subsidy would be where one dollar or renminbi of subsidy reduces the export price by one dollar/renminbi, or where a ten dollar/renminbi subsidy bestowed upon a producer of ten widgets and expensed in one year would lower the price of each widget by one dollar/renminbi. (United States response to Panel question 73 (first meeting), footnote 173). Because the term "pass through" of subsidies is generally understood to refer to another concept (see, for instance, Section XII.D.2, *supra*) and to better reflect the meaning of the parties' arguments, in discussing this argument, we use the concept of the reduction in the export price that results from the subsidy, rather than the terms "pass through" used by the parties. Also, we note that the United States argues that the USDOC only discussed the issue of "pass through" in its determinations in the investigations at issue because of China's arguments before the USDOC. (United States first written submission, footnote 607; response to Panel question 73 (first meeting)). Whether or not the question of the "pass through" of subsidies was first raised by China or by the USDOC, it is clear to us that the United States views this question as relevant to the existence of a double remedy.

[969] *See* Brian D. Kelly, "The Law and Economics of Simultaneous Countervailing Duty and Anti-Dumping Proceedings", *3 Global Trade and Customs Journal*, (2008), p. 41, Exhibit CHI-138, p. 48. We note that this "theory" assumes that domestic subsidies lower both domestic prices and export prices.

[970] Exhibit CHI-121, p. 28. (footnotes omitted).

[971] Id., pp. 27-28.

[972] Exhibit CHI-169, p. 17, citing to the excerpt of the GAO Report cited above. Certain statements of the USDOC in market economy anti-dumping investigations illustrate why a similar "double remedy" arises in the context of export subsidies, and why it generally does not in the context of domestic subsidies granted by market economies: in *Cold-Rolled Corrosion-Resistant Carbon Steel Flat Products from Korea* (quoted in *LEU from France*), the USDOC wrote that "domestic subsidies presumably lower the price of the subject merchandise both in the home and the U.S. markets, and therefore have no effect on the measurement of any dumping that might also occur". The USDOC contrasted this situation with that of export subsidies, which, "benefit only exported merchandise" and therefore brings about "the potential for double remedies". (*Notice of*

14.73 The United States puts forward a number of scenarios under which it is plausible that the subsidy would not have a one-for-one impact on the producer's costs of production or on export prices. The United States also points out that the imposition of countervailing duties is not conditioned upon a demonstration of the price effects of the subsidy[973]; in other words, that a Member is allowed to countervail subsidies that have no effects on the price of subsidized imports. [974]

14.74 All else being equal, one would expect a domestic subsidy to lower the recipient's production costs, allowing that producer to lower its prices in both the domestic and export markets.[975] It would, in our view, be a rare case in which a subsidy bestowed upon the producer of an exported good has *no effect at all* on either the producer's costs of production or – assuming they are relevant – export prices, such that no portion of that subsidy would be subject to a double remedy where both anti-dumping duties based on an NME methodology, and countervailing duties, were imposed on imports of a given product.

14.75 In sum, the United States' arguments raise the question of the extent of a double remedy in specific factual circumstances – whether a *complete* double remedy *necessarily* results from *all instances* of concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties. They do not, however, invalidate the general proposition that at least *some* double remedy will *likely* arise from the concurrent imposition of countervailing duties and anti-dumping duties calculated under an NME methodology. If anything, the arguments put forward by the United States reinforce the idea that ascertaining the precise extent of double remedy in specific investigations would be a complex task, a fact which is highlighted by both the GAO, in its 2005 Report, and by the CIT in *GPX*.[976]

14.76 Because in the next section of our findings, we conclude that China has not established that the imposition of "double remedies" is inconsistent with the provisions it cites, i.e., Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT, or with Article I:1 of the same Agreement, we do not need to examine further the extent to which the concurrent imposition of anti-dumping duties determined under the USDOC's NME methodology and of countervailing duties resulted in the imposition of "double remedies" in the four investigations at issue. For this reason, we do not decide whether China has conclusively established that, in the investigations at issue, double remedies resulted from the concurrent imposition of anti-dumping duties calculated under the U.S. NME methodology and of countervailing duties. We therefore also do not consider the specific

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Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France ("*LEU from France*"), Exhibit CHI-124, p. 46506). In *LEU from France*, the USDOC reached a similar conclusion, and stated in passing that "domestic subsidies are assumed not to affect dumping margins, because they lower prices in both the U.S. market and the domestic market of the exporting country equally". While the question is not before us, it would seem that a double remedy could arise in investigations involving market economy imports, depending on the costs that are used to calculate the normal value: A double remedy may arise when the normal value of a market economy producer is constructed using costs that do not reflect the subsidies that this producer received.

[973] United States second written submission, para. 192.

[974] The United States also contests the notion that surrogate values are necessarily "unsubsidized". It notes in this respect that in some instances in the investigations at issue, the surrogate value was inferior to the producers' actual costs. (United States response to Panel question 27 (second meeting); comments on China's response to Panel question 26 (second meeting). That this would be the case does not, in our view, undermine the conclusions we reach above: what we conclude is not that the totality of every dumping margin calculated under an NME methodology results from subsidization but, rather that where a margin of dumping is found to exist under such a methodology, it likely reflects not only dumping, but also subsidization.

[975] The USDOC itself seems to have made this assumption in the past. *See* footnote 972, *supra*.

[976] Exhibits CHI-121, p. 48; CHI-169, pp. 17-19. We note that the GAO indicated that the experts it consulted agreed that in theory, the double remedy would be significant. (Exhibit CHI-169, p. 28).

examples submitted by China from these investigations in order to determine whether they support its arguments.

3. Claims under Article VI of the GATT 1994 and Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement

(a) Main arguments of the Parties

(i) China

14.77 China argues that by virtue of the collective operation of Article VI:3 of the GATT and Articles 10 of the SCM Agreement, read in light of Articles 19.1, 19.3, and 19.4 of the SCM Agreement, the United States has an affirmative legal obligation to (i) ensure that it does not impose countervailing duties to offset subsidies that it simultaneously offsets through the methods by which it calculates anti-dumping duties; (ii) take "all necessary steps" to ensure that this does not occur; and (iii) ensure that investigating authorities investigate and make a determination as to the "precise amount of a subsidy attributed to the imported products under investigation", taking into account that using simultaneously an NME anti-dumping methodology has the effect of offsetting the same subsidies.[977] China submits that in the investigations at issue, the USDOC failed to investigate and avoid the imposition of double remedies, did not take any steps to determine "whether, and in what amount" the use of market-determined costs of production in the parallel anti-dumping investigations had the effect of offsetting the same subsidies that it identified in the countervailing duty investigations[978], and therefore, did not "ascertain the precise amount of a subsidy attributed to the imported products under investigation".[979]

14.78 China makes an analogy with panel and Appellate Body jurisprudence on extinction of subsidies in the context of privatization (*US – Countervailing Measures on Certain EC Products*), and on pass-through of subsidies to downstream producers (*US – Softwood Lumber IV*) and argues that, as in these cases, the calculation of a dumping margin pursuant to the U.S. NME methodology is an event that calls into question whether any subsidy remains to offset. China further considers that, like a situation of "privatization" at arm's length for fair market value, using an NME methodology to calculate anti-dumping duties places the investigated producer in a position of having market-determined costs of production, such that there remains no benefit to be countervailed.[980]

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[977] China second written submission, paras. 243-247; response to Panel question 76 (first meeting). China notes that in *US – Countervailing Measures on Certain EC Products*, the Appellate Body held that these provisions define "the obligation of Members to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority". China further argues that as with arm's-length sales of subsidized input products, the use of an anti-dumping methodology, which has the effect of offsetting subsidies, calls into question whether there remains a "subsidy" to "offset" through the imposition of countervailing duties and that in such circumstance it is the obligation of the investigating authority to "establish[] whether, and in what amount" there is still a subsidy to offset in respect of the imported product. On this, China cites to the Appellate Body Report in *US – Softwood Lumber IV*. (China response to Panel question 76 (first meeting), citing to Appellate Body Reports on *US – Countervailing Measures on Certain EC Products*, para. 139 and *US – Softwood Lumber IV*, para. 141).

[978] China second written submission, paras. 248-250.

[979] China response to Panel question 76 (first meeting); second written submission, paras. 245 and 249. China argues that given that the United States will already have offset the entire amount of the subsidy found to exist through the application of countervailing duties, the United States acts inconsistently with its obligations under the covered agreements to the extent that the simultaneous imposition of anti-dumping duties determined in accordance with its NME methodology offsets any portion of these subsidies. (China response to Panel question 92 (first meeting)).

[980] China second written submission, paras. 233-238.

14.79 China considers that the imposition of double remedies is inconsistent with Article 19.4 of the SCM Agreement because any countervailing duty imposed in addition to the anti-dumping duty is in "excess of the subsidy found to exist" given that the United States has already offset the subsidy through the NME anti-dumping methodology.[981] Further, China rejects the United States' argument that the "amount of the subsidy" in Article 19.4 is not the amount that should have been properly determined under WTO rules.[982]

14.80 China also claims that the imposition of double remedies in the investigations at issue was inconsistent with the obligation, under Article 19.3 of the SCM Agreement, to impose countervailing duties "in the appropriate amounts".[983] Citing the panel report in *EC – Salmon (Norway)*, China argues that the "appropriateness" of the amount in Article 19.3 must be determined in light of the purpose of the duty. Given that the purpose of countervailing duties is to "offset" subsidies, China argues that it is not "appropriate" to impose countervailing duties to offset subsidies that the investigating authority offsets through the method by which it calculates anti-dumping duties in respect of the same products.[984]

14.81 China also rejects the United States' suggestion that its claims under Articles 19.3 and 19.4 are about whether "the sum" of the anti-dumping and countervailing duties is in excess of the "appropriate amounts" or that anti-dumping duties are "actually CVDs in disguise" as the United States asserts. Rather, China submits, its claims are that the countervailing duties imposed by the USDOC are not "in the appropriate amounts" since they are in excess of the subsidy found to exist.[985] In addition, referring the Panel to prior decisions on the WTO-consistency of U.S. original investigations in which the panel and/or the Appellate Body made findings under Articles VI:3 of the GATT and 19.3 and 19.4 of the SCM Agreement or referred to these provisions, China rejects the United States' argument that the use of the term "levy" indicates that these provisions do not apply to U.S. original investigations determinations.[986]

14.82 China also rejects the United States' characterization of its position as being that the importing Member must choose between the use of countervailing duties and the use of an NME methodology. China considers that the United States is free to engage in the concurrent application of countervailing and anti-dumping duties determined in accordance with an NME methodology, and that the question before the Panel is not a question of "concurrent application" *per se*, but rather a question of whether the United States may impose countervailing duties without accounting for the fact that it offsets the same subsidies through the manner in which it calculates anti-dumping duties.[987] In other words, the USDOC is free to impose both remedies simultaneously, as long as it takes steps to ensure that no double remedy ensues. China adds that in *GPX*, the U.S. Court of International Trade held that the USDOC may choose either to forego the imposition of countervailing duties on products to which it applies the NME methodology, or "adopt additional policies and procedures to adapt its NME AD and

[981] China's first written submission, paras. 375-379; second written submission, paras. 255-257, citing to the Panel Report on *US – Countervailing Measures on Certain EC Products*, para. 8.1(a), and Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 161(a).

[982] China second written submission, footnote 218; response to Panel question 86 (first meeting).

[983] China first written submission, paras. 380-384.

[984] China second written submission, paras. 251-254; response to Panel question 89 (first meeting), citing to Panel Report on *EC – Salmon (Norway)*, paras. 7.704-7.705.

[985] China second written submission, paras. 253-254 and 258.

[986] China response to Panel question 52 (first meeting).

[987] China oral statement at the first meeting of the Panel, paras. 75-76; second written submission, paras. 208-209 and 212; response to Panel question 69; oral statement at the second meeting of the Panel, paras. 68-69.

CVD methodologies to account for the imposition of countervailing duty remedies on merchandise from the PRC".[988]

14.83 China also considers that the United States' position on the WTO-consistency of double remedies is based on a complete disregard for the object and purpose of the SCM Agreement. China notes that the Appellate Body has observed 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" and that Part V of the SCM Agreement, in particular, is meant to impose disciplines on the use of countervailing duties. China considers that for a Member to obtain twice the remedy to which it is entitled is no discipline at all.[989]

14.84 China rejects the United States' suggestion that the drafters of the GATT, of the SCM Agreement and of China's Protocol of Accession intended to allow the imposition of double remedies resulting from the concurrent use of NME methodologies and of countervailing duties. In this respect, China argues that the fact that Article VI:5 of the GATT 1994 addresses one particular circumstance in which a double remedy could arise does not mean that (i) there are no other circumstances in which a double remedy could arise (as the USDOC has in fact recognized), or (ii) all these other forms of double remedies are therefore permissible. Nor does China believe that the absence of an express provision in the SCM Agreement and/or the GATT relating to the imposition of double remedies in the case of domestic subsidies means that double remedies are permissible. China notes that there are many issues – e.g. the WTO jurisprudence on "privatization" (effect of a privatization of state-owned assets on previously-conferred subsidies) and "pass-through" (treatment of subsidies conferred upon upstream inputs) – relating to subsidies and countervailing duties that the covered agreements do not expressly address. This has not prevented panels and the Appellate Body from finding that the covered agreements nonetheless impose disciplines on a Member's actions in respect of those issues.

14.85 Further, China considers that the fact that Article 15 of the Tokyo Round Subsidies Code was not replicated in the SCM Agreement cannot be interpreted to mean that double remedies arising from the use of an NME methodology in conjunction with countervailing duties are permissible. China argues in this regard that the circumstances surrounding the Uruguay Round negotiations strongly suggest that issues relating to these double remedies were no longer considered relevant at the time: during the Uruguay Round, (i) no Contracting Party had a practice of applying an NME methodology concurrently with the application of countervailing duties to the same product; (ii) the United States – by far the largest user of countervailing duties – had taken a clear position at the beginning of the Uruguay Round that it would not apply countervailing duties to imports of NMEs; (iii) towards the end of the Uruguay Round, the USDOC's position was that it could apply countervailing duties to imports from NME countries, but only if it were to find that the industry in question was a "market-oriented industry"; (iv) under U.S. practice, the former Soviet bloc countries (which were in a process of transition to market economies) were subject to the NME methodology, but not countervailing duties, until the United States classified them as market economies. Against this backdrop, China considers that it is likely that the drafters of the SCM Agreement no longer considered the subject-matter of Article 15 of the Tokyo Round Subsidies Code to be relevant.[990]

(ii) United States

14.86 The United States takes the position that the covered agreements do not prohibit the imposition of double remedies in respect of domestic subsidies.

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[988] China oral statement at the second meeting of the Panel, para. 68.
[989] Id., paras. 64-65.
[990] China second written submission, para. 211; response to Panel questions 69 and 70 (first meeting).

14.87 The United States argues that anti-dumping and countervailing duties are two distinct instruments, meant to address different kinds of harm, and that where the criteria for the imposition of each remedy are satisfied, duties may be imposed up to a level prescribed by the respective agreement.[991] The sole limitation in this respect is, the United States submits, the one found in Article VI:5 of the GATT 1994, which applies only in the case of export subsidization.[992] The United States infers from the absence of any similar provision with respect to domestic subsidies that Members did not agree that any other circumstances warranted a restriction on the concurrent application of the AD and CVD instruments. The United States also attaches significance to the fact that Article 15 of the Tokyo Round Subsidies Code (which provided that, for imports from NMEs, Members could resort to either anti-dumping or to countervailing duties) was not carried forward in the SCM Agreement. The United States further reads Article 15 as an indication that the parties to the Code considered that no other provision in the GATT 1947 contained a similar requirement prohibiting the concurrent application of anti-dumping and countervailing duties to NMEs, and infers from the non-inclusion of a similar provision in the SCM Agreement that a prohibition on the concurrent use of anti-dumping and countervailing duties to NMEs no longer exists.[993] The United States, repeating an argument made by Argentina, also notes that the Tokyo Round Code contained provisions that were virtually identical to Articles 19.3 and 19.4 of the SCM Agreement; had these provisions prohibited the imposition of double remedies, as China contends, there would have been no need to include in the same Code an express prohibition on concurrent anti-dumping and countervailing duty investigations.[994] Finally, the United States submits that China's Protocol of Accession makes clear, at Section 15, that Members contemplated the concurrent application of countervailing duties and of anti-dumping measures calculated on the basis of surrogate values, without any limitation on the use of countervailing duties in such circumstances, and without any limitation on the concurrent application of both remedies.

14.88 Related to this, the United States argues that the logic of China's argument necessarily imposes upon Members a choice between imposing anti-dumping duties on the basis of an NME methodology and imposing countervailing duties; in other words, that China is in fact challenging the concurrent application of countervailing duties and of anti-dumping duties calculated using the NME methodology. The United States submits in this respect that while China suggests that the concurrent application of anti-dumping and countervailing duties would still be permissible where the investigating authority takes "steps" to ensure that the NME normal value does not offset the same subsidies twice, China also considers that the NME normal value "necessarily" fully offsets the same subsidies "in all cases".[995]

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[991] United States first written submission, paras. 389-394.

[992] United States first written submission, paras. 388 and 395-409; opening statement at the first meeting of the Panel, para. 50 and 55; second written submission, para. 208; response to Panel questions 75, 84 and 85 (first meeting). The United States also finds it notable that the inclusion in the GATT, in 1955, of the second *Ad* Note to Article VI:1 (which recognizes that, in certain cases, surrogate prices would be used to construct the normal value) was not accompanied by a broadening of Article VI:5. The United States indicates that it was an NME Contracting Party, Czechoslovakia, that proposed an amendment to the GATT 1947 which resulted in the second *Ad* Note to Article VI. The United States notes that subsidies were not mentioned as one of the reasons for the amendment; rather, the focus was on finding appropriate price comparisons where the internal prices and costs of an NME were unreliable due to the State fixing prices or to State monopolization. (United States comments on China's response to Panel question 26(b)).

[993] United States first written submission, paras. 403-409, citing to Appellate Body Report on *US – Underwear*, pp. 14-15, DSR 1997:I, at 11.

[994] United States second written submission, para. 218; response to Panel question 28 (second meeting), referring to Articles 4.2 and 4.3 of the Tokyo Round Subsidies Code.

[995] United States second written submission, paras. 177-179; opening statement at the second meeting of the Panel, paras. 51-55.

14.89 Responding to China's argument that at the time of the Uruguay Round, the concurrent application of anti-dumping and countervailing measures in respect of NMEs was no longer "relevant", the United States argues that regardless of their specific reason for doing so, the fact remains that Members did not include Article 15 of the Tokyo Round Subsidies Code in the SCM Agreement.[996] The United States further indicates that China's accession was negotiated against the backdrop of this provision, and that China's Protocol of Accession affirms Members' unqualified right to apply anti-dumping and countervailing duties in the context of domestic subsidies while treating China as an NME.[997]

14.90 Turning to China's arguments in support of its claims of violation, the United States submits that China's reliance on the privatization and pass-through jurisprudence is misplaced. The United States notes China's argument that this jurisprudence concerned situations that the SCM Agreement did not explicitly address, and that panels and the Appellate Body nevertheless recognized the applicability of GATT and SCM provisions to those situations. By contrast, the United States submits, the covered agreements are anything but silent on the issue before this Panel, that of the concurrent application of countervailing duties and of anti-dumping duties determined under an NME methodology.[998]

14.91 The United States also notes that the provisions cited by China (primarily Articles 19.3 and 19.4 of the SCM Agreement) only impose disciplines with respect to countervailing duties and that China does not claim that the countervailing duties imposed by the USDOC in the investigations at issue exceeded the amounts of the subsidies found to exist or that the USDOC did not properly calculate the subsidies amount. Rather, in the view of the United States, China's claim under Article 19.4 is that the amount of the subsidy is exceeded by the *sum* of the anti-dumping duty in each anti-dumping investigation and of the countervailing duty in each corresponding countervailing duty investigation, and as a result, China erroneously implies that an anti-dumping duty calculated under the NME methodology must be understood to constitute a countervailing duty within the meaning of the SCM Agreement, whereas those anti-dumping duties are not "levied for the purpose of offsetting any subsidy".[999] According to the United States, the fact that part of the methodology used to calculate the normal value rejects home market prices and costs due to broad distortions in a non-market economy does not somehow transform the anti-dumping duty itself into a countervailing duty.[1000]

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[996] United States opening statement at the first meeting of the Panel, para. 53; second written submission, paras. 210-211; response to Panel questions 70 and 75 (first meeting).

[997] United States opening statement at the first meeting of the Panel, para. 54; second written submission, para. 212. The United States also notes that during the period of China's accession negotiations, imports from China were the subject of 30 anti-dumping investigations conducted under the NME methodology, yet China's Protocol of Accession and Working Party Report do not reflect any concerns China may have had in respect of that methodology, and in particular, any concerns China may have had that the methodology addressed not only price discrimination, but also subsidization. The United States also infers from paragraph 151(a) of the Working Party Report that China sought to ensure that Members that had not yet developed NME methodologies would do so along the lines of the U.S. NME methodology. (United States opening statement at the second meeting of the Panel, para. 58).

[998] United States opening statement at the second meeting of the Panel, paras. 60-61.

[999] United States opening statement at the first meeting of the Panel, paras. 58 and 60-61; second written submission, paras. 216-217.

[1000] The United States also argues that if China's view that the NME methodology is designed to offset subsidization is accepted, then any anti-dumping duty calculated pursuant to the NME methodology would fall squarely within the definition of "countervailing duty" contained in footnote 36 to the SCM Agreement. Thus, the United States adds, as required by Article 10 of the SCM Agreement, such an anti-dumping duty could "only be imposed pursuant to [an] investigation[] initiated and conducted in accordance with [the SCM Agreement]", and that this would be the case whether or not a concurrent countervailing duty case were ongoing. (United States opening statement at the second meeting of the Panel, para. 77).

14.92 The United States further argues that Article 19.4 is limited to the question of whether the countervailing duties levied correspond to the amount of the subsidy found to exist by the investigating authority and does not govern whether that amount was properly determined in accordance with WTO rules (i.e., the amount that *should have been found* had the investigating authority complied with other WTO rules).[1001] For similar reasons – because China does not contest the fact that the duties imposed pursuant to the four countervailing duty investigations at issue in this dispute do not exceed the amount of the subsidy bestowed upon each exporter – the United States submits that China's claim under Article 19.3 has no merit. The United States argues that the "appropriateness" of the amounts of countervailing duties under Article 19.3 relates to the subsidization rate calculated for each "source[] found to be subsidized and causing injury" and that China does not allege that the countervailing duty amounts are not those that the USDOC found for "each source".[1002]

14.93 In addition to these arguments, the United States takes the view that the reference to "levy" in Article VI:3 of the GATT and in Articles 19.3 and 19.4 of the SCM Agreement, in conjunction with footnote 51 of the SCM Agreement, means that these provisions impose no disciplines with respect to original investigations. This is because, in the view of the United States, under the U.S. retrospective duty assessment system, duties are not actually collected until an administrative review is conducted or the deadline for such review lapses.[1003]

14.94 Finally, the United States submits that the Opinion of the U.S. Court of International Trade in *GPX* should have no bearing on the Panel's consideration of this dispute because it is an opinion of a U.S. court interpreting U.S. law, whereas this dispute concerns the interpretation of the WTO agreements, including provisions from China's Protocol of Accession, that do not appear in U.S. law. In addition, the United States notes that the Court's decision in *GPX* is still subject to appeal.[1004]

(b) Main arguments of the Third Parties

(i) Argentina

14.95 Argentina considers that Article VI:5 of the GATT 1994, the sole WTO provision expressly limiting the simultaneous imposition of both anti-dumping and countervailing duties, is limited to situations of "export subsidization", and that the concurrent application of both remedies in the case of actionable subsidies is therefore WTO-consistent. In Argentina's view, had the drafters intended to prohibit the simultaneous imposition of anti-dumping and countervailing duties for situations other than export subsidization, they would have done so explicitly, as they did in Article VI:5. Argentina also notes that China's Protocol of Accession recognizes not only the use of an NME methodology in anti-dumping investigations involving imports of Chinese origin but also that Chinese imports can be subject to countervailing duty investigations, and submits that to exempt China from the simultaneous imposition of anti-dumping and countervailing duties would give it preferential treatment compared to other Members. Argentina considers that neither of the provisions on which China bases it claims, Articles 19.3 and 19.4, address, directly or indirectly, the issue of simultaneous imposition of anti-dumping and countervailing duties or of double remedies. Argentina also notes that the wording of Articles 19.4 is identical to the wording of Article 4.2 of the Tokyo Round Subsidies Code, and that Article 19.3 is almost identical to Article 4.3 of the Tokyo Round Subsidies Code. Thus, Argentina

[1001] *See, e.g.*, United States response to Panel questions 86 and 87 (first meeting).

[1002] United States first written submission, paras. 424-427; opening statement at the second meeting of the Panel, paras. 64-65.

[1003] *See, e.g.*, United States second written submission, para. 215; response to Panel question 87 (first meeting).

[1004] *See* above, para.14.59, for the United States' argument to the effect that the *GPX* decision is in error and that, even on its own terms, it does not support the position taken by China in the present dispute.

argues, had the Tokyo Round Subsidies Code prohibited the concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties, Article 15.1 of the Tokyo Round Code would have been devoid of meaning.[1005]

(ii) Australia

14.96 Australia considers that anti-dumping and countervailing duties are two distinct trade remedies and that nothing in Article VI of the GATT or elsewhere in the WTO Agreements prevents concurrent anti-dumping and countervailing duty investigations of the same product; in fact, Australia submits, the text of Article VI:5 reinforces the right of Members to do both. In Australia's view, the calculation of the normal value in an anti-dumping investigation is an inquiry that is separate from that the determination of the existence and amount of a subsidy in a countervailing duty investigation. Australia also invites the Panel to clarify the meaning of the terms "situation of export subsidization" in Article VI:5, which it considers to be unclear. Australia argues that it cannot be assumed that these terms agreed to in 1947 can be equated with any meaning attributed to the categories of subsidies as agreed to in the SCM Agreement in 1994 and that it is therefore conceivable that the expression "situation of export subsidisation" also cover certain situations in which a domestic subsidy is provided to a good which is exported. Likewise, Australia submits that it is not clear whether the terms "same situation" of dumping or export subsidization in Article VI:5 refer to the existence of subsidization or dumping or to the injurious effects.[1006]

(iii) Brazil

14.97 Brazil argues that nothing in the AD and SCM Agreements suggests that parallel anti-dumping and countervailing measures cannot be imposed, and notes that neither agreement contains any cross-reference conditioning the imposition of one remedy on the satisfaction of requirements established in relation to the other. Brazil considers that Article VI:5 of the GATT 1994 contains the sole limitation on the concurrent application of anti-dumping and countervailing measures. Further, Brazil submits, this provision shows that Members were well aware that if they intended to impose any restrictions or conditions on the parallel application of anti-dumping and countervailing measures, they had to do so explicitly. Brazil considers that the existence of an explicit ban with respect to export subsidies can be read *contrario sensu* to allow for the concomitant application of both duties in all other situations. Brazil also considers that the fact that Article 15 of the Tokyo Round Subsides Code was not replicated in the SCM Agreement underscores the intention of its drafters not to prohibit the combined imposition of anti-dumping and countervailing duties on imports from Members, irrespective of their status as market or non-market economies. Brazil is of the view that the legal permissibility for the parallel application of anti-dumping and countervailing measures, and its underlying logic, apply indistinctly to investigations conducted in relation to market economy Members and non-market economy Members. Accepting the argument that methodological challenges arising from price comparability difficulties in non-market economy Members somehow constrain the parallel application of anti-dumping and countervailing measures in relation to them would result in discrimination against "market economy" Members.[1007]

(iv) Canada

14.98 Canada agrees with the United States that the concurrent use of the NME methodology and countervailing duties is permissible under the SCM Agreement. Canada's view is that when an imported product is both dumped and subsidized, the importing Member may impose both anti-dumping duties equal to the margin of dumping and countervailing duties equal to the amount of the

[1005] Argentina third-party submission, paras. 8-29; third-party oral statement, paras. 3-5.
[1006] Australia third-party submission, paras. 41-51; third-party response to Panel questions 19 and 23.
[1007] Brazil third-party submission, paras. 14-18; third-party oral statement, paras. 8-9.

subsidy. Canada submits that this right is confirmed – and circumscribed – by Article VI:5 of the GATT 1994, such that (read *a contrario*), this provision confirms the ability of WTO Members to impose concurrent anti-dumping and countervailing duties in circumstances other than export subsidization. Canada further argues that if WTO Members had intended to prohibit the concurrent application of anti-dumping duties calculated on the basis of subparagraph 15(a)(ii) of China's Protocol of Accession and countervailing duties, they could have stated that intention in the Protocol as they had done earlier in the Tokyo Round Subsidies Code; instead, Sections 15(a) and 15(b) of China's Protocol of Accession enable an importing WTO Member to impose anti-dumping duties calculated on the basis of out-of-country prices or costs, and countervailing duties. Finally, Canada rejects China's theory that the anti-dumping duty, by itself, compensates for both the dumping and the subsidization. Canada considers that duties in the amount of the subsidy would not violate Article 19.3 and 19.4 and that the amount of a concurrent anti-dumping duty has no bearing on the amount of a countervailing duty, except as provided for in Article VI:5 , which is not the case here.[1008]

(v) European Communities

14.99 The European Communities considers that anti-dumping and countervailing duties are two separate remedies to counter two different types of unfair trade practices under two distinct WTO agreements and that the only WTO provision expressly limiting the right of Members to impose both types of duty is Article VI:5 of GATT 1994. The European Communities agrees with the United States that by choosing not to include a provision similar to Article 15 of the Tokyo Round Subsidies Code in the SCM Agreement, WTO Members recognised Article VI:5 as the only provision limiting the simultaneous imposition of both types of remedies. The European Communities also agrees with the United States that nothing in China's Protocol of Accession expressly limits such a simultaneous imposition. Further, the European Communities considers that there can be no breach of Article 19.4 if the duty imposed does not exceed the amount of subsidy properly established under the rules of the SCM Agreement and that just because a measure taken under another agreement (in this case, an anti-dumping duty) may be alleged to in some way offset subsidisation does not create a violation of Article 19.4. The European Communities further agrees with the United States that the limited scope of Article VI:5 is explained by the fact that, where the normal value is based on sales, a neutral subsidy may reasonably be considered to press down equally on both sides of the dumping calculation, and therefore the dumping calculation would remain unaffected by the subsidy analysis. Finally, the European Communities considers that the SCM Agreement does not require the showing of any causal link between subsidies and exports and/or that subsidies have caused export prices to decrease; the inquiry is limited to the effects of the subsidised imports on prices in the importing country.[1009]

(vi) India

14.100 India considers anti-dumping and countervailing duties to be two separate remedies to counter two different types of situations of trade distortion. India considers that the provision which expressly limits the right of WTO Members to impose both types of duty is Article VI:5 of GATT 1994. India considers that the legal permissibility for the parallel application of anti-dumping and countervailing measures, and its underlying logic, apply to investigations conducted both in relation to market economy Members and non-market economy Members.[1010]

[1008] Canada third-party submission, paras. 42-56; third-party response to Panel questions 12 and 14-16.
[1009] European Communities third-party oral statement, paras. 2-10; third-party response to Panel question 15.
[1010] India third-party oral statement. (this statement contains no paragraph numbering).

(vii) Japan

14.101 Japan submits that although Article VI:5 of GATT 1994 does not prohibit the simultaneous imposition of anti-dumping and countervailing duties in situations other than "export subsidization", this provision is the expression of an underlying principle that an importing Member may not impose a double remedy against the same subsidy, a principle to which Members should give due regard. Japan submits that Article VI:5 provides no explicit requirement on the prohibition of double remedies in situations other than export subsidization because a double remedy may or may not occur, depending on the method used in the calculation of the margin of dumping in a given case. With respect to the legal bases for China's claims, Japan considers that Article 19.4 is irrelevant to how an anti-dumping duty would be determined in the separate anti-dumping investigation in accordance with the provisions of the AD Agreement. With respect to Article 19.3, Japan notes that this provision accords the importing Member the discretion to impose a countervailing duty deemed as appropriate to the extent that the duty does not exceed the amount of the subsidy found to exist, and that no further obligations are placed on the authorities' determination of the "appropriate amount".[1011]

(viii) Mexico

14.102 Mexico takes the view that when countervailing duties target domestic subsidies, the simultaneous application of anti-dumping and countervailing duties is consistent with the rules of the WTO.[1012] Mexico argues that when the negotiators of the WTO Agreements considered it necessary to prohibit the simultaneous application of different mechanisms, they did so expressly. In this respect, Mexico notes in particular that a provision similar to Article 15 of the Tokyo Round Subsidies Code was not included in the SCM Agreement. Mexico also notes that Section 15 of China's Protocol of Accession recognizes the surrogate country methodology and acknowledges that Chinese imports may be subject to countervailing duty investigations. Mexico argues that if China, in negotiating its accession, had succeeded in negotiating a prohibition on the simultaneous application of anti-dumping and countervailing duties on its products, this would have been specified in the Protocol. Mexico considers that neither Article 19.3 nor Article 19.4 of the SCM Agreement provides a basis for China's claim. Finally, Mexico argues that exempting China from the parallel imposition of anti-dumping duties and countervailing duties would give China preferential treatment relative to all other Members.[1013]

(ix) Norway

14.103 Norway considers that where the normal value is constructed on the basis of "non-distorted" or "benchmark" prices (including prices from a surrogate county) for the (otherwise subsidized) inputs, then the effect of any subsidy is "extinguished" in the constructed normal value calculation and that in such cases, applying an anti-dumping duty up to the maximum permitted under the AD Agreement will provide a remedy for the subsidization at the same time. Norway argues that applying a countervailing duty in such cases will be neither appropriate under Article 19.3 of the SCM Agreement nor permissible under Article 19.4 of the SCM Agreement.[1014]

[1011] Japan third-party submission, paras. 3-14; third-party oral statement, para. 5.

[1012] Mexico considers that it is for interested parties to explain and demonstrate the reasons why a "double remedy" could arise in contexts other than that of "export subsidies".

[1013] Mexico third-party submission, paras. 12-31; third-party oral statement, paras. 2-5; third-party response to Panel questions 19-21.

[1014] Norway third-party submission, paras. 38-47. As noted above, para.14.66, Norway argues that in the investigations at issue, the USDOC appears to have used a market-economy cost of production free from any distortion and therefore that by applying the full anti-dumping duty up to this third-country market benchmark, all effects of the subsidization would have been extinguished, such that applying a countervailing duty in such

(c) Assessment by the Panel

(i) Introduction

14.104 We understand the essence of China's argument to be that the imposition of anti-dumping duties calculated under the U.S. NME methodology in the four anti-dumping investigations at issue effectively "offset" any subsidy provided in respect of the goods concerned, such that there remained no subsidy left to countervail. Thus, China's argument goes, when the United States simultaneously imposed countervailing duties on the same products, it levied duties in excess of the amount of subsidy "found to exist", contrary to Article 19.4 of the SCM Agreement, and acted inconsistently with its obligation to levy duties "in the appropriate amounts" pursuant to Article 19.3 of the SCM Agreement. In addition, China claims that the USDOC failed to take "all necessary steps" to ensure that it imposed countervailing duties for the purpose of offsetting subsidies that continued to exist, thereby acting inconsistently with the requirements of Article VI of the GATT 1994 and of Article 10 of the SCM Agreement.

14.105 The USDOC's treatment of the issue of double remedies in the investigations at issue is not in debate. The parties agree that where interested parties raised "double remedy" arguments in the investigations at issue, the USDOC rejected them and that the USDOC did not take into consideration the anti-dumping duties imposed on the same products when it imposed countervailing duties in the four countervailing duty investigations at issue: it imposed countervailing duties corresponding to the full amount of subsidies found to have been conferred on each investigated producer.[1015]

(ii) Claim under Article 19.4 of the SCM Agreement

14.106 We first consider China's claim under Article 19.4 of the SCM Agreement. China's argument in this respect is that the United States levied countervailing duties "in excess of the amount of subsidy found to exist" as a result of each of the countervailing duty orders at issue because it had already offset the subsidies at issue as a result of the concurrent imposition of anti-dumping duties calculated under the U.S. NME methodology.

14.107 We begin our analysis by considering the text of Article 19.4 of the SCM Agreement:

> "No countervailing duty shall be levied[51] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
>
> _____
>
> [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax."

14.108 By virtue of the ordinary meaning of its text, Article 19.4 of the SCM Agreement imposes a maximum limit on the amount of duties that may be "levied", corresponding to the amount of the subsidy that is found to exist. By necessary implication, Article 19.4 also provides that no countervailing duties may be imposed on an imported product if no subsidy is found to exist given that in such a case, the amount of subsidy found to exist would be zero.[1016]

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cases will be neither appropriate under Article 19.3 of the SCM Agreement, nor permissible under Article 19.4 of the SCM Agreement.

[1015] *See* above, para.14.6, and corresponding footnotes for a summary of the USDOC's treatment of the issue of double remedy in the anti-dumping and countervailing duty investigations at issue.

[1016] Panel Report on *US – Lead and Bismuth II*, para. 6.52.

14.109 The parties disagree as to whether Article 19.4 is at all applicable to the situation before us: The United States argues that, by virtue of the use in Article 19.4 of the term "levy" and of the definition of this term in footnote 51 as "the definitive or final legal assessment or collection of duties", Article 19.4 imposes obligations only with respect to the final collection of duties. The United States notes that no such final collection of duties has taken place as a result of the investigations at issue. China rejects this interpretation. The parties also disagree as to whether the terms "found to exist" in Article 19.4 refer to the amount of subsidy calculated by the investigating authority, regardless of whether that amount was calculated consistently with the SCM Agreement. The distinction is important because China does 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 the USDOC.[1017]

14.110 But a more fundamental disagreement between the parties is whether a subsidy existed in the first place, thereby allowing the USDOC to impose countervailing duties. China argues that the USDOC's use of its NME methodology in the parallel anti-dumping investigations had the effect of offsetting subsidies, such that there remained no subsidy to "offset" through the imposition of countervailing duties.

14.111 China likens the concurrent imposition of an anti-dumping duty determined in accordance with an NME methodology to the factual situations examined in prior panel and Appellate Body reports in which it was found that a subsidy granted to a state-owned producer may be extinguished by its arm's length acquisition for a fair market value in a context of *privatization* (*US – Countervailing Measures on Certain EC Products*)[1018]; or in which it was found that the benefit of a subsidy in respect of inputs may not *"pass through"* to producers of downstream products processed from that input where the downstream producer purchases the input for a fair market value in an arms' length transaction (*US – Softwood Lumber IV*).[1019] In each case, the Appellate Body found that these situations called into question whether a subsidy had been received by the investigated producer. Consequently, the Appellate Body found that the investigating authority had an obligation to establish whether and in what amount a subsidy existed in respect of the imported product. China sees the imposition of anti-dumping duties calculated under the U.S. NME methodology as a further situation of extinction of subsidy that was not explicitly dealt with under the SCM Agreement.

14.112 On its face, the terms of Article 19.4 of the SCM Agreement establish a limit to the amount of duties that may be "levied", and this limit is dependent only upon "the amount of the subsidy found to exist". Thus, by its own terms, Article 19.4 of the SCM Agreement is oblivious to any potential concurrent imposition of anti-dumping duties. Hence, that an anti-dumping duty calculated under a methodology may have the effect of "offsetting" a subsidy in totality or in part has no effect on the existence of the subsidy which, under Article 1 of the SCM Agreement, depends on the existence of a financial contribution and of a benefit; nor would it have an effect on the amount of the subsidy which, under Article 14 of the SCM Agreement, must be determined by reference to the marketplace.[1020] In sum, the narrowly-crafted discipline contained in Article 19.4 of the SCM Agreement does not address situations of "double remedies".

[1017] China challenges the USDOC's benefit calculations, but these are separate claims of violations. *See* Section X, *supra*.

[1018] China second written submission, para. 233, citing to Appellate Body Report on *US – Countervailing Measures on Certain EC Products*, para. 102.

[1019] China response to Panel question 76, citing to Appellate Body Report on *US – Softwood Lumber IV*, para. 141.

[1020] Indeed, it is obvious that the mere issuance of an anti-dumping order cannot have the effect of changing the position of the recipient in the marketplace.

14.113 Further, we do not consider that there is a pertinent analogy to be made between the facts of the present dispute and those in the *pass-through* and *privatization* decisions cited by China. These decisions recognize that certain events related to the life of a subsidy may extinguish it or at least call into question whether it benefits the manufacture, production or export of the investigated product. By contrast, the arguments that China makes before us pertain to the effects of parallel anti-dumping duties (i.e., *remedies*) that are imposed concurrently with the countervailing duties, which effects derive from the calculations that lead to the imposition of these remedies. Again, we consider that the fact that an anti-dumping duty calculated under a methodology may have the effect of "offsetting" a subsidy in totality or in part in no way means that it extinguishes that subsidy. Likewise, China's argument that the use of an NME methodology is tantamount to a "privatization" of the producer[1021] is inapposite. China's argument concerns a calculation, more specifically, the use by an investigating authority of figures replicating the situation the producer would be in but for government distortions, in calculating a margin of dumping. This situation bears no analogy to the real world events examined in the *privatization* jurisprudence cited by China.

14.114 It further appears that through its arguments, China seeks to draw an analogy between the situation before us and a situation in which more than one countervailing duty is imposed with respect to a given subsidy or group of subsidies. It may very well be that in such a situation of multiple countervailing duty investigations on a given imported product, Article 19.4 of the SCM Agreement would preclude the cumulative levying of duties in excess of the amount of the subsidy found to exist in each of the investigations. But this is not the situation before us. By its terms, Article 19.4 only imposes disciplines with respect to the levying of *countervailing duties*, which the covered agreements define as special duties levied "for the *purpose* of offsetting" subsidies pursuant to investigations initiated and conducted in accordance with the provisions of the SCM Agreement.[1022] The facts that anti-dumping duties are calculated under an NME methodology and thus may be affected by subsidization, and/or that, as a result, the duties may effectively "offset" subsidies granted in respect of the product, change neither the *purpose*, nor the *nature* of these duties as anti-dumping, as opposed to countervailing, duties.

14.115 In sum, notwithstanding China's efforts to demonstrate otherwise, the terms of Article 19.4 of the SCM Agreement do not provide the necessary legal basis for its "double remedy" claim. Our interpretation of Article 19.4 is confirmed by the context to Article 19.4 provided by other relevant provisions of the covered agreements. This context confirms that the common intention of the parties to the SCM Agreement was not to address or prohibit, in Article 19.4, the imposition of "double remedies" in respect of domestic subsidies.

14.116 We note, first that the anti-dumping and countervailing duty instruments are provided for and addressed under two distinct agreements and are, with the notable exception of Article VI:5, addressed under distinct paragraphs of Article VI of the GATT 1994. Article VI:5, which precisely addresses the issue of double remedies, is the only provision under which any limitations are explicitly imposed on the concurrent use of the two remedies. It reads:

> "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization".

14.117 Thus, by its very terms, Article VI:5 of the GATT 1994 is limited to "situation[s] of [...] export subsidization". In our view, these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI:5 to situations involving *export subsidies*, to the exclusion of situations in which domestic subsidies are granted on exported goods. Such a narrow reading of the

[1021] *See, e.g.*, China second written submission, paras. 233-235.
[1022] Article 10 and footnote 36 of the SCM Agreement; Article VI:3 of the GATT 1994.

terms "situation of [...] export subsidization" is supported by the context to Article VI:5, and in particular by the distinction made between domestic *vs*. export subsidies in Article VI:3 of the GATT 1994, which deals with countervailing duties, and by the separate treatment accorded to export subsidies under Article XVI of the GATT 1994. These provisions demonstrate that the drafters intended to make a distinction between subsidies granted with respect to the production or manufacture of goods (i.e., domestic subsidies) and subsidies granted in respect of the export of goods (i.e., export subsidies). Further, we consider that this interpretation is confirmed by the principle of *effet utile*: since only *imported* goods are subject to anti-dumping or countervailing duties, reading Article VI:5 as encompassing situations in which domestic subsidies granted to exported goods are countervailed would effectively read the term "export" out of the relevant sentence of that provision. Finally, we note the use of terms equivalent to the expression "export subsidies" in both the French and the Spanish texts of Article VI:5.[1023]

14.118 Not only is Article VI:5 limited to potential double remedies in respect of export subsidies, but the explicit terms in which the drafters addressed the issue in that provision makes it all the more unlikely that they sought to prohibit the imposition of double remedies in respect of other types of subsidies through Article 19.4 of the SCM Agreement given, again, that Article 19.4 on its face makes no reference to that issue.[1024]

14.119 We also consider 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 methodologies in anti-dumping investigations, and of countervailing duties, in respect of imports from NMEs. Where imports from non-market economies were at issue, Article 15 of that Code imposed upon the importing Member a choice between the use of anti-dumping measures or of countervailing duties. At the very least[1025], the existence of a provision explicitly addressing the issue of the concurrent imposition of anti-dumping and countervailing duties on NME imports in the predecessor to the SCM Agreement would seem, once again, to lend support to our interpretation of Article 19.4 of the SCM Agreement as not addressing or encompassing the question of the permissibility of double remedies.[1026]

[1023] The French text reads "à une même situation résultant du dumping ou de *subventions à l'exportation*", whereas the Spanish text reads: "una misma situación resultante del dumping o de *las subvenciones a la exportación*" (our emphasis).

[1024] This is a further difference between the present dispute and the privatization and pass-through jurisprudence relied upon by China: neither of these two issues is addressed explicitly under any of the provisions of the covered agreements.

[1025] The parties have not identified any documentary evidence from the Uruguay Round negotiations that would cast light on why Article 15 of the Tokyo Round Subsidies Code was not carried forward in the SCM Agreement.

[1026] We consider it likely that the rationale for the inclusion of Article 15 of the Tokyo Round Subsidies Code was the potential for double remedies to result from the concurrent imposition of NME methodologies in calculating anti-dumping duties and of countervailing duties, or at least the recognition that the use of an NME methodology would capture price differences resulting from subsidies granted on the product subject to anti-dumping duties. Furthermore, we note the argument of Argentina, Mexico and the United States that Article 15 of the Tokyo Round Subsidies Code would have been redundant had double remedies been prohibited under the provisions of the Code imposing a limit on the amount of countervailing duties (i.e., the precursors to Articles 19.3 and 19.4 of the SCM Agreement).

14.120 In sum, these two elements from the context[1027] to Article 19.4 of the SCM Agreement suggest that the Contracting Parties to the GATT, now WTO Members, were aware of the fact that certain difficulties, e.g. double remedies, could arise from the concurrent imposition of anti-dumping and countervailing duties, and that where they wanted to address issues arising from the concurrent imposition of anti-dumping and countervailing duties, they did so in explicit terms. This makes it all the more unlikely that the terms of Article 19.4 of the SCM Agreement reflect an implicit intent on the part of the drafters to prohibit the imposition of double remedies with respect to domestic subsidies.

14.121 Finally we note that by contrast, China's Protocol of Accession contains no provision explicitly addressing the issue of double remedies even though it appears to allow for the use of countervailing duties while China remains an NME.[1028] We do not need to decide whether, as the United States argues, China effectively seeks to impose a choice between the use of NME methodologies and of countervailing duties where imports from NMEs are concerned.[1029] In our view, the relevant question is that of the drafters' intent, not the intent behind China's arguments. In addition, the thrust of the United States' arguments on double remedies would suggest that the United States itself does not consider the issue to be so clear cut: the practical import of the United States' arguments is that the existence of double remedies is an evidentiary one, and therefore that the overlap between the two remedies may only be partial. In any event, we need not decide whether the text of Section 15, viewed in isolation, allows the concurrent imposition of anti-dumping duties and countervailing duties in all circumstances *without any limitation*, thereby imposing *no constraint* on the imposition of double remedies. Rather, we merely note the absence of any provision addressing the question of "double remedy" in China's Protocol of Accession. In our view, such an absence again suggests that the drafters of Article 19.4 of the SCM Agreement did not intend this provision to address the issue of double remedies.

14.122 Finally, we note China's argument that for a Member to obtain twice the remedy would frustrate the object and purpose of the SCM Agreement which, the Appellate Body indicated, is "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures". We view China's argument as implying that it is the object and purpose of the SCM Agreement to impose disciplines not only with respect to the use of countervailing duties, but also of anti-dumping duties. As explained above, we are of the view that the object and purpose of Part V of the SCM Agreement is limited to imposition of disciplines with respect to the former.

[1027] The fact that a provision addressing the issue in dispute was formerly in place but disappeared in a successor agreement would seem to fall more properly under the heading of "context" to the treaty provision being interpreted (and therefore fall under Article 31 of the Vienna Convention) rather than under the category of "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion". This is how the Appellate Body characterized the "prior existence and demise" of a provision of a predecessor agreement in *US – Underwear*, where the Appellate Body characterized this as an "another element of the context" of the provision that it was interpreting. (Appellate Body Report on *US – Underwear*, p. 16 DSR 1997:I, at 11).

[1028] China concedes that its Protocol of Accession permits the concurrent imposition of anti-dumping duties calculated under an NME methodology and of countervailing duties. (China response to Panel questions 77 and 85 (first meeting)).

[1029] *See* United States opening statement at the first meeting of the Panel, para. 38:

"China said that it 'does not contend that the United States must 'choose' between the use of countervailing duties and the use of an NME methodology,' only that when applying both, 'it must do so in a manner that takes into account the fact that it offsets the same alleged subsidies through the manner in which it calculates antidumping duties.' This is simply a distinction without a difference. … the logic of China's argument necessarily suggests that the United States must *choose* between the use of countervailing duties and the use of an NME methodology". (emphasis original).

14.123 For these reasons, we find that China has failed to establish that the USDOC's use of its NME methodology in the anti-dumping determinations at issue, concurrently with its determination of subsidization and the imposition of countervailing duties on the same products in the four countervailing duty determinations at issue, was inconsistent with Article 19.4 of the SCM Agreement. In light of this finding, we do not need to address the other arguments of the parties with respect to the scope of application of Article 19.4 of the SCM Agreement, notably the United States' argument that this provision, as well as Articles VI:3 of the GATT 1994 and Article 19.3 of the SCM Agreement, cannot form the basis of a claim with respect to the investigations at issue since no duties were actually levied as a result of these investigations.

(iii) China's claim under Article 19.3 of the SCM Agreement

14.124 Article 19.3 of the SCM Agreement provides, in relevant parts:

> "When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, *in the appropriate amounts in each case*, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. [...]". (emphasis added)

14.125 On its face, Article 19.3 of the SCM Agreement imposes upon the authorities of the importing Member the obligation to levy duties (i) on a non-discriminatory basis on imports from all sources found to be subsidized and causing injury and (ii) in "the appropriate amounts" in each case.

14.126 China's arguments raise the question of the meaning to be given to the terms "appropriate amounts" in this provision. Similar to its arguments under Article 19.4 of the SCM Agreement, China submits that the imposition of anti-dumping duties calculated under an NME methodology is a relevant consideration in assessing the appropriateness of the amount of duties levied. China relies on the interpretation of Article 19.3 by the panel in *EC – Salmon (Norway)*. Specifically, China notes that the *EC – Salmon (Norway)* panel found that the "appropriate" amount of a duty is the amount that is "proper" or "fitting" in light of the purpose of the duty.[1030] China argues, that, applying the same reasoning, the "appropriate" amount of a countervailing duty can be no greater than the amount necessary to offset the subsidy[1031], such that the countervailing duty measures at issue are not "in the appropriate amounts" because they offset alleged subsidies that the United States has also offset through the manner in which it calculates anti-dumping duties under its NME methodology.[1032] China also considers that it is not "appropriate" to offset a subsidy that the investigating authority simultaneously offsets through the manner in which it calculates anti-dumping duties in respect of the same products".[1033]

14.127 The panel in *EC – Salmon (Norway)* considered a claim under Article 9.2 of the AD *Agreement* – which, aside from its reference to anti-dumping duties rather than to countervailing duties, is worded in terms that are virtually identical to those of Article 19.3 of the SCM

[1030] China second written submission, para. 254, citing to Panel Report on *EC – Salmon (Norway)*, paras. 7.704-7.705.

[1031] China argues, on the basis of Article VI:3 and footnote 36 to the SCM Agreement, that the purpose of a countervailing duty is to "offset" the amount of any subsidy bestowed upon the product. (China first written submission, para. 383).

[1032] Id., paras. 380-384.

[1033] China second written submission, para. 254.

Agreement.[1034] In light of dictionary definitions of the term "appropriate", the panel considered that it was reasonable to interpret this term in Article 9.2 of the AD Agreement to mean that the "appropriate" amount of the duty is one which is "proper" or "fitting" in the context of an anti-dumping investigation, and that what is "proper" or "fitting" should be determined in relation to the object and purpose of the collection and imposition of anti-dumping duties. Consequently, the panel, in light of Article VI:2 of the GATT 1994 and of Article 9.1 of the AD Agreement, determined that the "appropriate" amount of anti-dumping duty must be an amount that results in offsetting or preventing dumping, when all other requirements for the imposition of anti-dumping duties have been fulfilled. On this basis, and because dumping is defined in the agreements as the introduction of a product into the commerce of another country at a price which is "less than its normal value", the panel found that an anti-dumping duty may only be collected when the price of the imported product is *less* than its normal value, adding that "normal value constitutes a point of reference for determining when anti-dumping duties may or may not be imposed and collected".[1035]

14.128 We fail to see how the *EC – Salmon (Norway)* panel's interpretation of the terms "appropriate amounts" could support China's claim under Article 19.3 of the SCM Agreement. We recall that countervailing duties are special duties that are collected for the purpose of "offsetting" subsidies. This suggests that, applying the reasoning of the *EC – Salmon (Norway)* panel, countervailing duties are collected in the appropriate amounts insofar as the amount collected does not exceed the amount of subsidy found to exist. We further recall our conclusions above that the manner in which the dumping margin is calculated – through an NME methodology or otherwise – has no impact on the existence of subsidies, which may be found to "exist" in a parallel countervailing duty investigation; and that the fact that a "double remedy" may result from the imposition of anti-dumping duties does not transform these duties into countervailing duties under the covered agreements. For these reasons, the imposition of anti-dumping duties calculated under an NME methodology has no impact on whether the amount of the concurrent countervailing duty collected is "appropriate" or not.

14.129 Furthermore, we recall our conclusion that the context of Article 19.4 of the SCM Agreement confirms our interpretation that that provision does not address the issue of double remedies. The same considerations likewise suggest that it was not the intention of the drafters to the SCM Agreement to address the question of double remedies in Article 19.3 of the SCM Agreement.

14.130 We therefore find that China has failed to establish that the USDOC's use of its NME methodology in the anti-dumping determinations at issue in this dispute, concurrently with its determination of subsidization and the imposition of countervailing duties on the same products in the four countervailing duty determinations at issue, was inconsistent with Article 19.3 of the SCM Agreement. Given these findings, we need not address the United States' argument that Article 19.3 of the SCM Agreement finds no application in the present case given that no duties were actually *levied* as a result of the determinations at issue.

(iv) China's claims under Article 10 of the SCM Agreement and Article VI:3 of the GATT 1994

14.131 China argues that the United States had, under Articles 10 of the SCM Agreement and VI:3 of the GATT 1994, an affirmative legal obligation to (i) ensure that it did not impose countervailing duties to offset subsidies that it simultaneously offset through the methods by which it calculated anti-dumping duties; (ii) take "all necessary steps" to ensure that this did not occur; and (iii) ensure that the USDOC investigated and made a determination as to the "precise amount of a subsidy attributed to the imported products under investigation", taking into account that using simultaneously an anti-

[1034] The one notable difference between the terms of Article 9.2 of the AD Agreement and those of Article 19.3 of the SCM Agreement is that the former uses the term "collected" whereas the latter uses the term "levied".

[1035] Panel Report on *EC – Salmon (Norway)*, paras. 7.704-7.705.

dumping methodology had the effect of offsetting the same subsidies.[1036] China considers that in the investigations at issue, the USDOC failed to meet these obligations. China notes in particular that the USDOC did not take any steps to determine "whether, and in what amount" the use of market-determined costs of production in the parallel anti-dumping investigations had the effect of offsetting the same subsidies that it identified in the countervailing duty investigations[1037], and therefore, did not "ascertain the precise amount of a subsidy attributed to the imported products under investigation".[1038]

14.132 Article 10 of the SCM Agreement and footnote 36 thereto provide:

> "*Application of Article VI of GATT 1994*
>
> Members shall take all necessary steps to ensure that the imposition of a countervailing duty[36] on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. [footnotes omitted in part]
>
> _____
>
> [36.] The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994".

14.133 Article VI: 3 of the GATT 1994 provides that:

> "No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise."

14.134 China does not make clear whether it intends its claims to pertain to the collective operation of Articles 10 of the SCM Agreement and VI:3 of the GATT 1994, and whether it intends them to be

[1036] China second written submission, paras. 243-247, response to Panel question 76. China argues, referring to the findings of the Appellate Body in *US – Countervailing Measures on Certain EC Products* and in *US – Softwood Lumber IV*, that, collectively, Articles 10, 19.1, 19.3, 19.4 of the SCM Agreement and 21.1 of the SCM Agreement and Article VI:3 of the GATT 1994 impose upon investigating authorities an affirmative legal obligation to take "all necessary steps" to ensure that they limit countervailing duties to the amount and duration of the subsidy.

[1037] China notes that the USDOC stated unequivocally that "it has no authority under U.S. law to examine in the context of a countervailing duty investigation whether the use of an NME methodology in a parallel anti-dumping investigation has the effect of offsetting the same alleged subsidies".

[1038] China second written submission, paras. 245 and 248-250; response to Panel question 76 (first meeting). We address here China's claims as presented in its second written submission and subsequent submissions. In its first written submission, China presented its claims under Articles VI:3 of the GATT and 10 of the SCM Agreement and under Article 32.1 of the SCM Agreement as purely consequential to its claims of violation under Articles 19.3 and 19.4 of the SCM Agreement. (China first written submission, para. 385).

in the nature of consequential claims as one would expect to be the case for a claim under Article 10 of the SCM Agreement. In any case, implicit in China's arguments is a claim that the levying of countervailing duties in an amount exceeding the amount of the subsidy "determined to have been granted" is inconsistent with Article VI:3 of the GATT 1994. For this reason, we first consider whether China has established a violation of Article VI:3 of the GATT 1994 before considering whether China has established a violation of Article 10 of the SCM Agreement, taken in isolation, or a violation of Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement collectively.

14.135 Of relevance to China's claims, Article VI:3 of the GATT 1994 provides that countervailing duties are to be levied in amounts not exceeding the "subsidy determined to have been granted". Thus, the pertinent obligation under Article VI:3 is very similar to that under Article 19.4 of the SCM Agreement. Similar to Article 19.4, Article VI:3 is limited in scope: it only establishes a limit with respect to the imposition of *countervailing duties.*

14.136 For the same reasons that we have found that China has not established a violation of Article 19.4 of the SCM Agreement, we also consider that China has not established that the United States imposed duties in excess of the subsidy "determined to have been granted" in the investigations at issue inconsistently with Article VI:3 of the GATT 1994.

14.137 Turning to the second provision cited by China, we note that Article 10 of the SCM Agreement establishes that countervailing duties may only be imposed in accordance with the procedural and substantive obligations contained in the SCM Agreement, indicating that a claim of violation of Article 10 of the SCM Agreement must necessarily be consequential to a claim of violation of other provisions of the covered agreements. We also note China's argument that Article VI:3 of the GATT and Article 10 of the SCM Agreement imposed on the USDOC an obligation to investigate the amount of subsidy that remained to be offset due to the concurrent imposition of anti-dumping duties calculated under an NME methodology.[1039]

14.138 We have already concluded that China has failed to establish that the imposition of anti-dumping duties calculated under an NME methodology is an event that affects the existence of a subsidy or the amount of subsidy conferred on a product in the context of a concurrent countervailing duty investigation. As a consequence, we also find that the USDOC was under no obligation to investigate whether the use of an NME methodology in a parallel anti-dumping investigation had the "effect" of offsetting the same alleged subsidies. China advances no other argument in support of its claims under Articles 10 of the SCM Agreement and VI:3 of the GATT. Hence, we find that China has not demonstrated that the United States acted inconsistently with Articles VI:3 of the GATT 1994 and 10 of the SCM Agreement as a result of the concurrent imposition of anti-dumping duties calculated under the U.S. NME methodology and of countervailing duties in the investigations at issue.[1040]

(v) China's claim under Article 32.1 of the SCM Agreement

14.139 China makes it clear that its claim under Article 32.1 of the SCM Agreement is purely consequential to its claims under Articles 10, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT of the 1994.[1041] As we have found that China has failed to establish a violation of these provisions, we also find that China failed to establish that the United States acted inconsistently with Article 32.1 of the SCM Agreement.

[1039] China second written submission, paras. 248-250.

[1040] Given these findings, we need not address the United States' argument that Article VI:3 does not apply to the measures at issue given that no duties were actually levied as a result of these measures.

[1041] China second written submission, para. 259.

14.140 In addition, we note that our findings set forth in sections (ii)-(iv) concerning China's double remedy claims of necessity are limited to the provisions cited by China in that regard. We have no mandate to, and thus do not, consider whether any other provisions of the WTO Agreement might prohibit any double remedies of the type referred to by China.

4. Claims under Articles 12.1 and 12.8 of the SCM Agreement

14.141 We now examine China's claims in respect of Articles 12.1 and 12.8 of the SCM Agreement. We do so under the assumption that China intends these claims to be independent of its other claims of violation.

(a) Main arguments of the Parties

(i) China

14.142 China claims that, in the investigations at issue, the USDOC did not provide interested parties with "notice of the information which [it] require[d]" to evaluate the existence of a double remedy, and therefore acted inconsistently with its obligations under Article 12.1 of the SCM Agreement. In support of this argument, China submits that the United States, in response to certain Panel questions, "appears to suggest that the USDOC might have taken steps to avoid imposing double remedies in the investigations at issue, had the interested parties presented supporting evidence that a double remedy would occur". China further argues that the USDOC did not inform interested parties of the essential facts under consideration that would "form the basis" for its determination in respect of double remedies and, as a result, acted inconsistently with Article 12.8 of the SCM Agreement.[1042]

(ii) United States

14.143 The United States argues that China's claims must fail because (i) they are premised on the existence of an inherent double remedy in the concurrent application of countervailing duties and NME anti-dumping duties; and (ii) even if a double remedy could be shown to exist, the USDOC did not "require" information to "evaluate the existence of a double remedy" as China argues and such information did not form part of the "essential facts under consideration" that the USDOC was required to disclose. In addition, the United States argues that providing a continuing opportunity for demonstration of an alleged double remedy is an appropriate position for an investigating authority, even where there is no basis for the claim and the investigating authority does not consider and has not found that such a double remedy exists. The United States adds that it is for interested parties who seek to alter the application of countervailing and anti-dumping duties to explain, with supporting evidence, why their proposed course of action is appropriate.[1043]

(b) Assessment by the Panel

14.144 Article 12.1 of the SCM Agreement provides:

> "Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question".

14.145 Article 12.8 of the SCM Agreement provides:

[1042] China second written submission, paras. 268-270.
[1043] United States opening statement at the second meeting of the Panel, paras. 66-69.

> "The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests".

14.146 China claims a violation of the obligation under Article 12.1 of the SCM Agreement for the investigating authorities to give notice "of the information which the authorities *require*". (emphasis added) Thus, to succeed in its claim, China must demonstrate that the USDOC "required" the submission of certain evidence in order to demonstrate that a double remedy existed. China's sole allegation in this respect is that the United States, in response to certain Panel questions, "appears to suggest that the USDOC might have taken steps to avoid imposing double remedies in the investigations at issue, had the interested parties presented supporting evidence that a double remedy would occur". China has not explained why the responses provided by the delegation of the importing Member to panel questions should be relevant in determining what information the authority "required" in the investigation.[1044] Thus, we are not convinced that the USDOC "*required*" the submission of any information with respect to double remedies in the investigations at issue.

14.147 In any event, it seems that China effectively seeks a finding that would require the USDOC to adopt a set of criteria under which to assess the occurrence of double remedies, in the event that it considered that it possesses the legal authority to take action to avoid such an occurrence. We recall that we have already found that the USDOC is not, under the provisions cited by China, under a legal obligation to avoid the imposition of double remedies. While it is certainly desirable that investigating authorities adopt clear positions on certain legal issues that have the potential to arise in the investigations they conduct, we are not convinced that Article 12.1 of the SCM Agreement requires them to do so with respect to any and all such issues. We have sympathy for the United States' argument that it is for interested parties who seek to convince an investigating authority to modify its application of its trade remedy laws (especially where that application has not been shown to be WTO-inconsistent) to bring relevant evidence to the investigating authority.

14.148 Turning to Article 12.8 of the SCM Agreement, we note that this provision, on its face, relates to the obligation for the investigating authority to make a disclosure, prior to the issuance of a final determination, "of the essential facts under consideration *which form* the basis for the decision whether to apply definitive measures". (emphasis added) In other terms, Article 12.8 pertains to the disclosure that an investigating authority must make prior to the issuance of its final determination, in which it must set out the essential facts on which that determination is based. While China's treatment of its Article 12.8 claim in its submissions is too succinct to achieve any certainty in this respect, it seems that China's argument is not that the USDOC failed to disclose the evidence on which its determinations were based, but rather that it failed to indicate what evidence the USDOC would have accepted – if any – to establish the existence of a double remedy. Again, China seems to seek a finding that pertains to the legal framework that the USDOC would apply to the issue of double remedies, but does not explain how the terms of Article 12.8 of the SCM Agreement can accommodate such a claim.

14.149 For these reasons, we find that China has failed to establish that the United States acted inconsistently with its obligations under Articles 12.1 and 12.8 of the SCM Agreement.

5. Claims under Article I:1 of the GATT 1994

14.150 The last claim of China in respect of "double remedies" is its claim under Article I:1 of the GATT, which embodies the "most favoured-nation" (MFN) principle.

[1044] China devotes less than half a page of its submissions (paras. 268-270 of its second written submission) to its arguments in support of its Articles 12.1 and 12.8 claims.

(a) Main arguments of the Parties

(i) China

14.151 China claims that in the four sets of anti-dumping and countervailing duty investigations at issue, the United States denied imports from China MFN treatment under Article I:1 of the GATT 1994 by failing to extend to these imports the same unconditional entitlement to the avoidance of double remedies that it extends to imports from market economy countries. In these investigations, China argues, the USDOC either did not avoid the imposition of a double remedy, or imposed a condition upon the avoidance of a double remedy that it does not impose upon products originating in the territory of other Members.[1045]

14.152 China directs the Panel to a number of USDOC determinations and U.S. court decisions which, it argues, demonstrate that the USDOC has repeatedly recognized that the manner in which it calculates anti-dumping duties can offset subsidies (including domestic subsidies) and that in circumstances where a potential for double remedies arose, the USDOC took steps to ensure that no double remedy would occur.

14.153 China argues, first, citing to the USDOC determination in *LEU from France*, that the USDOC refuses to deduct countervailing duties from the export price in calculating margins of dumping in anti-dumping investigations involving market economy countries. China adds that the USDOC has recognized that to make such a deduction would impermissibly collect countervailing duties twice.[1046, 1047]

14.154 Second, China argues, since at least 1986 and its determination in *Tool Steel from Germany*, the USDOC has considered that it would be inappropriate to add subsidies to producers' costs of production (i.e., to the actual expenses recorded in producers' books and records) in calculating the margin of dumping, because doing so would effectively collect countervailing duties twice, thereby blurring the distinction between anti-dumping and countervailing duties. China argues that making such an addition would be equivalent to deducting subsidies from the export price and that from the standpoint of a potential double remedy, the USDOC's NME methodology has the same effect as adding subsidies to a producer's costs in a market economy investigation: both approaches place the producer in the position of having market-determined costs of production.[1048] China notes that in *Tool Steel from Germany*, the USDOC decided that it would use the producer's actual costs, even if they reflected the effect of subsidies. This determination was appealed to the U.S. Court of International Trade in *Al Tech Speciality Steel Corp*. In this decision, China argues, the Court found considerable support in U.S. law for the plaintiff's argument that the costs used to determine constructed normal value should be based on unsubsidized costs. China indicates that while the Court considered it a close issue, it was ultimately persuaded by the USDOC's argument that adding subsidies to the producer's costs would improperly "blur[] the distinction between antidumping and countervailing duty law". China adds that the USDOC has also recognized (in its determination in *Certain Steel*

[1045] China first written submission, paras. 403-427.

[1046] China first written submission, paras. 405-406; second written submission, para. 214; response to Panel question 74 (first meeting). China also quotes the USDOC as saying, in *LEU from France* that "in the most general terms, the [Tariff Act of 1930] stands for the proposition that dumping margins should not be calculated so as to double-collect CVDs".

[1047] Similarly, China submits, the USDOC has recognized that the deduction of safeguard duties from the export price in anti-dumping investigations would result in an unwarranted double remedy. China cites to the USDOC determination in *Steel Wire Rod from Korea* and the decision of the Federal Court of Appeals, Federal Circuit, in *Wheatland Tube Co. v United States*. (China first written submission, footnote 332).

[1048] Id., para. 409; second written submission, paras. 214 and 227; response to Panel question 74 (first meeting).

Products from the Netherlands)[1049], that using a producer's unsubsidized costs to determine constructed normal value would have the effect of offsetting the subsidies through both anti-dumping and countervailing duties, and that in numerous other anti-dumping investigations of imports from market economy countries, the USDOC has allowed respondents to deduct subsidies from their reported costs of production, where these reported costs did not accurately reflect the cost-reducing effects of the subsidies (*Certain Pasta from Italy, Live Swine from Canada, Red Raspberries from Canada*).[1050] China argues that in determining the constructed normal value based on costs that do not reflect the subsidies found to be received by the producer, the USDOC's NME methodology is indistinguishable from adding subsidies to the producer's costs in a market economy investigation, or from using the producer's reported costs when those costs do not reflect the subsidies received by the producer.[1051]

14.155 China submits that by, on the one hand, maintaining a consistent set of policies and practices to avoid the imposition of a double remedy when establishing margins of dumping for producers from market economy countries, without precondition and without imposing any evidentiary burden on respondents (i.e., "unconditionally") and, on the other hand, refusing to avoid imposing double remedies and/or requiring that respondents demonstrate the existence of a double remedy (e.g. by showing that domestic subsidies pass through, *pro rata*, to export prices) when imports from China were concerned, the United States acted inconsistently with the MFN obligation contained in Article I:1 of the GATT 1994. Referring to the terms of that provision, China argues that:

(i) anti-dumping and countervailing duties are "charges of any kind imposed on or in connection with importation";

(ii) the methods by which the United States calculates such duties (including its policies and practices to avoid the imposition of a double remedy, as well as the assumptions and burdens of proofs applied in evaluating the issue) are either "methods of levying such charges", "rules or formalities in connection with importation", or both[1052];

(iii) the USDOC's policy of avoiding the imposition of a double remedy is an "advantage, favour [or] privilege" that the United States extends to these imports.[1053]

14.156 In response to an argument of the United States, China argues that it does not need to establish that products from China are disadvantaged as compared to "like products" from other Members in order to succeed in its "as applied" claims under Article I:1. China submits in this respect that prior WTO panels have recognized that a violation of Article I:1 occurs when an importing Member applies a discriminatory standard that relates only to the origin of the product at issue, and not to its characteristics, without having to demonstrate the presence of "like products".[1054]

[1049] China second written submission, paras. 214 and 227; response to Panel question 74 (first meeting).
[1050] China response to Panel question 74 (first meeting).
[1051] China response to Panel question 26 (second meeting).
[1052] China cites to the GATT panel in *US – MFN Footwear*, which considered that "the rules and formalities applicable to countervailing duties [...] are rules and formalities imposed in connection with importation, within the meaning of Article I:1". (China first written submission, footnote 337, citing to GATT Panel Report on *US – MFN Footwear*, para. 6.8).
[1053] *See*, generally, China first written submission, paras. 413-427; second written submission, paras. 271-277.
[1054] China response to Panel question 94, citing to Panel Reports on *US – Certain EC Products*, para. 6.54 and *Indonesia – Autos*, para. 14.147.

14.157 Finally, China rejects the United States' argument that the difference in treatment could be justified by its Protocol of Accession since nothing in the Protocol allows Members to impose double remedies.[1055] Likewise, China rejects the suggestion that it is seeking "special treatment" from the United States with respect to the concurrent imposition of anti-dumping and countervailing duties, indicating that it is only asking the United States to apply to imports from China the same standard that it has applied to imports from other Members in other circumstances in which the problem of double remedies has had the potential to arise.[1056]

(ii) United States

14.158 The United States argues that the USDOC treats imports from China no differently than it treats imports from other Members with respect to its refusal to deduct subsidies from the export price and its refusal to add subsidies to costs of production. The United States indicates that the USDOC does not make such adjustments in investigations against Chinese products, including in the investigations at issue.[1057] The United States considers that China has not demonstrated otherwise, which in its view may explain why China formulates its claim under Article I:1 more generally as pertaining to the United States' "avoidance of the imposition of a double remedy". In any case, the United States argues, referring to China's argument that the USDOC's NME methodology has the same effect as adding subsidies to a producer's cost of production, having the "same effect" is different from actually making the adjustment at issue.[1058]

14.159 The United States makes the following comments with respect to the specific USDOC determinations and U.S. court cases cited by China in support of its assertion that the USDOC avoids imposing double remedies in anti-dumping investigations on imports from market economies: First, the United States considers that the analogy drawn by China between the present dispute and the USDOC determinations in *LEU from France*, *Tool Steel from Germany* and *Certain Steel Products from the Netherlands* is inapposite, as these determinations were not based on subsidies being captured by the normal value, but involved the literal counting of countervailing duties twice – once in the actual levying of countervailing duties and once by either adding the countervailing duties to cost or subtracting countervailing duties from export price.[1059] The United States argues that these mathematical certainties cannot be compared to China's theoretical arguments about overlapping economic distortions or overlapping rationales. Specifically, with respect to *LEU from France*, the United States explains that the USDOC considered that subtracting the CVDs from the export price had exactly the same effect as would have adding the same CVDs to the dumping margin after it had been calculated. Therefore, the requested adjustment would have literally collected the CVDs twice.[1060] In *Tool Steel from Germany*, the USDOC refused to add subsidies to the normal value. Had it added them, the dumping margin would have automatically increased by the amount of the countervailable subsidies found in the companion countervailing duty case, thus indisputably collecting countervailing duties twice. The United States argues that the crux of the USDOC's determination in that case was that subsidies are not costs; the USDOC's determination does not contain any discussion of the issue of double remedies.[1061] With respect to *Certain Steel from the Netherlands*, the United States submits that the USDOC's determination was not based on assertions about the alleged effects of subsidies on normal value, but was simply an instance in which the

[1055] China second written submission, paras. 211 and 274; response to Panel questions 77 and 85 (first meeting); oral statement at the second meeting of the Panel, para. 70.
[1056] China second written submission, para. 275.
[1057] United States second written submission, paras. 219-220.
[1058] United States first written submission, footnote 597.
[1059] *See, e.g.*, United States comments on China's response to Panel question 33.
[1060] United States second written submission, footnote 350; response to Panel question 79; comments on China's response to Panel question 32 (second meeting).
[1061] United States second written submission, footnote 350; response to Panel question 79 (first meeting).

USDOC reduced the respondent's cost of capital by the amount of capital received from the government as a grant. Thus, the producer's actual cost of capital was the reduced amount.[1062] Further, the United States argues that the USDOC determination cited to by China is a preliminary determination – the anti-dumping and countervailing duty investigations were terminated before the USDOC issued a final determination – and therefore cannot be considered a final opinion on the matter.[1063]

14.160 The United States finally notes that in *Live Swine from Canada*, the USDOC included government grants as offsets to respondents' reported general and administrative (G&A) costs. The United States argues that rather than being designed to "deduct subsidies from cost" to avoid offsetting any advantage from subsidization, this approach reflects the USDOC's long-standing practice of treating as an offset to cost any income that is received as a result of producing the subject merchandise, irrespective of source, and that is duly recorded in the respondents' books. The United States adds that the USDOC routinely applies similar offsets to both G&A expenses and financial expenses and that this is merely an aspect of the calculation of the dumping margin, rather than a tool to "deduct subsidies from cost" to avoid offsetting any advantage from subsidization, as is evidenced by the fact that the USDOC applies such offsets independently of whether there is a parallel countervailing duty investigation or, in event of such parallel investigation, even if this investigation does not result in the imposition of countervailing duties.[1064]

14.161 The United States also notes that a number of WTO rules explicitly recognize that, in the context of anti-dumping and countervailing duty proceedings, a Member may – and in some circumstances must – accord differential treatment to products from certain Members. Such differential treatment takes the form, for example, of the level of duties, the method of calculating normal value in anti-dumping investigations, or the method of determining the benefit in countervailing duty investigations.[1065] The United States argues that given the explicit authorization for such actions, where they conform to the requirements of these other WTO provisions, they are not inconsistent with Article I:1 of the GATT 1994, as any other approach would render every application of certain provisions of the covered agreements or of China's Protocol of Accession an MFN violation. The United States also submits that, because of the nature of China's economy, investigations involving Chinese products pose methodological challenges which do not arise with respect to market economies, and which require investigating authorities to develop mechanisms to allow them to make the necessary determinations, as recognized in China's Protocol of Accession.[1066] In any case, the United States argues that Article I:1 is inapposite because of the explicit recognition of Members' right to use the NME methodology in respect of China in its Protocol of Accession, with no corresponding prohibition on the concurrent application of countervailing duties, which the United States reads as reflecting the judgment of Members that no double remedy results from the application of that methodology in conjunction with countervailing duties.[1067] In sum, for the United States, China's MFN complaint focuses on the application of the NME methodology, yet the

[1062] United States second written submission, footnote 350.
[1063] United States comments on China's response to Panel question 33 (second meeting).
[1064] Id. The United States notes that *Live Swine from Canada* is an example of an investigation where the USDOC applied such an offset to costs even where the final determination in the corresponding countervailing duty investigation was negative.
[1065] The United States refers the following provisions as examples: Articles VI:2 and VI:3 of the GATT 1994; the second *Ad* Note to Article VI:1 of the GATT 1994; Article 2.2 of the AD Agreement; Article 14(d) of the SCM Agreement; Article 27.10 of the SCM Agreement; paragraphs 15 (a) and (b) of China's Protocol of Accession.
[1066] United States first written submission, paras. 438-442.
[1067] Id., paras. 443-444.

application of that methodology is expressly authorized by paragraph 15(a) of China's Protocol of Accession and hence, does not violate Article I:1 of the GATT 1994.[1068]

14.162 Finally, the United States considers that China has failed to substantiate its claim of inconsistency with Article I:1 of the GATT because it does not identify the "like products" to which the alleged advantage is applied.[1069]

(b) Main arguments of the Third Parties

(i) Canada

14.163 Canada considers that neither the use of the NME methodology nor the concurrent imposition of anti-dumping duties calculated using that methodology and of countervailing duties on Chinese products is inconsistent with Article I:1 of the GATT 1994. Like the United States, Canada notes that the calculation of the normal value using the NME methodology is specifically allowed under China's Protocol of Accession.[1070]

(c) Assessment by the Panel

14.164 We now consider whether, notwithstanding our findings above that China has not established the inconsistency of the determinations at issue with Article VI:3 of the GATT 1994 and Articles 10, 12.1, 12.8, 19.3, 19.4 and 32.1 of the SCM Agreement, those determinations contravened the obligations of the United States under Article I:1 of the GATT.[1071]

14.165 Article I:1 of the GATT 1994 embodies the "Most-Favoured Nation" (MFN) principle, "a cornerstone of the GATT and [...] one of the pillars of the WTO trading system".[1072] The object and purpose of Article I:1 is, *inter alia*, "to prohibit discrimination among like products originating in or destined for different countries".[1073] Article I:1 of the GATT provides as follows:

> "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

[1068] United States opening statement at the first meeting of the Panel, para. 59; second written submission, para. 219.

[1069] United States first written submission, para. 431. The United States notes in this respect that the panel in *US – MFN Footwear* did not consider Brazil's "as applied" claims in that case since Brazil had not established the "like products" condition. (United States response to Panel question 94 (first meeting), citing to GATT Panel Report on *US – MFN Footwear*, paras. 6.11-6.12).

[1070] Canada third-party oral statement, paras. 29-30.

[1071] China claims a violation of Article I:1 of the GATT 1994 "separate and apart" from the violations of the covered agreements discussed above. (China first written submission, para. 403).

[1072] Appellate Body Report on *Canada – Autos*, para. 69.

[1073] Id., para. 84.

14.166 By its terms, three elements must be demonstrated to establish a violation of Article I:1: there must be an "advantage", (of the type covered by that provision) which is not accorded to all "like products" of all WTO Members, "unconditionally".[1074]

14.167 Thus, to succeed in its Article I:1 claim, China needs to establish, first, that the United States grants an "advantage, favour, privilege or immunity" of the type covered by Article I:1 of the GATT 1994 to products originating in other Members which it did not accord to the investigated products from China in the investigations at issue. The scope of Article I:1 of the GATT 1994 has been interpreted broadly by GATT panels as well as by the Appellate Body and WTO panels. Of particular relevance to the present dispute, the GATT panel in *US – MFN Footwear* considered that rules and formalities applicable in the context of countervailing duty investigations were "rules and formalities in connection with importation", within the meaning of Article I:1. At issue in *US – MFN Footwear* were certain procedural advantages pertaining to the revocation of countervailing duty orders conferred upon certain categories of imported products.[1075] Before us, the United States does not contest that advantages pertaining to the administration of countervailing duty laws fall within the scope of Article I:1 of the GATT 1994, and we see no reason to depart from the approach adopted by the *US – MFN Footwear* GATT panel. Further, for the same reasons, we determine that rules and formalities applicable in the context of anti-dumping investigations also fall within the scope of Article I:1 of the GATT 1994.

14.168 In the present dispute, China identifies as the relevant "advantage" under Article I:1 the USDOC "policies and practices to avoid the imposition of a double remedy for the same act of subsidisation" whenever "there is a risk that the calculation of an anti-dumping margin could result in the imposition of [such] a double remedy".[1076] China argues that it is likewise an "advantage, favour [or] privilege" to permit investigated market economy producers to avoid the potential imposition of a double remedy without any requirement to produce "evidence" concerning the existence or extent of a double remedy in general, or in a particular instance.[1077] China argues that in the four sets of anti-dumping and countervailing duty investigations at issue (i) the USDOC did not take any steps to avoid the imposition of double remedies and that it does not in any event have the authority to take such steps, or (ii) alternatively, that the USDOC imposed a condition – the presentation of evidence demonstrating the existence of a double remedy and in particular, evidence that the subsidies at issue had the effect of reducing the export price – upon the avoidance of a double remedy for the same alleged acts of subsidization that it does not impose upon products originating in the territory of other Members.[1078]

14.169 As support for its argument, China refers to a number of USDOC determinations (and U.S. court decisions reviewing these determinations) in which the USDOC made or refused to make certain adjustments. China argues that in these determinations in which a potential double remedy arose, the USDOC did not consider the existence of a double remedy to be "theoretical" or to require any evidence or presumptions about the effects of subsidies on a producer's costs or prices.[1079] Rather, China argues, in each of these circumstances, the USDOC took all necessary steps to

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[1074] Panel Report on *Indonesia – Autos*, para. 14.138, citing to Appellate Body Report on *EC – Bananas III*.

[1075] GATT Panel Report, *US – MFN Footwear*, para. 6.9.

[1076] For instance, in its first written submission, China states: "In every circumstance in which the issue has arisen the United States has consistently taken the position that it will avoid the imposition of a double remedy through the manner in which it calculates anti-dumping and countervailing duties". (China first written submission, para. 404). *See* also China first written submission, para. 413.

[1077] Id., para. 420. (emphasis added).

[1078] Id., para. 427.

[1079] For some of the prior determinations, China also argues that with respect to the imposition of double remedies, making (or not making) the adjustments at issue "has the same effect" as the calculation of a dumping margin under the NME methodology.

investigate and ensure that the manner in which it calculated anti-dumping duties did not have the effect of offsetting subsidies that it simultaneously offset through the imposition of countervailing duties.[1080]

14.170 The first step in our analysis is to examine the USDOC determinations and court decisions cited by China to determine whether they support these allegations.[1081]

14.171 First, China cites to the USDOC determination in *LEU from France*, an administrative review in an anti-dumping investigation. In *LEU from France*, U.S. interested parties requested the USDOC, in calculating the margin of dumping, to deduct from the export price an amount corresponding to countervailing duties that had already been imposed on the same product. The USDOC, consistent with its established practice, rejected this request. The USDOC reasoned that (i) countervailing duties are neither "import duties" nor "selling expenses" under the U.S. Tariff Act, such that the Act does not require that they be deducted from the export price, and (ii) that deducting countervailing duties from the export price "effectively would collect the CVDs a second time". The USDOC added in this respect that "in the most general terms, the US Tariff Act stands for the proposition that dumping margins should not be calculated so as to double-collect CVDs".[1082] We note that in *Steel Wire Rod from Korea*, also cited by China, the USDOC examined the similar question of whether U.S. anti-dumping law requires the deduction of safeguard duties from the export price, and reached the same conclusion, i.e., that it does not.[1083]

14.172 China also refers us to *Tool Steel from Germany*, a 1986 USDOC anti-dumping determination.[1084] In this determination, the USDOC rejected a request of U.S. interested parties that in computing the cost of production and constructed value of an investigated producer, it include an amount for subsidies which the producer had received from the German federal and state governments. The USDOC took the position that it would be inappropriate to add the subsidies to the producer's actual expenses, in other words, that it was appropriate to calculate the costs of production on the basis of producers' reported costs of production, even if those costs reflected the subsidies received. The USDOC's determination makes no reference to the issue of double remedy: the sole rationale provided for the USDOC's decision is that "the purpose of [U.S. anti-dumping law] is to determine whether a company is selling at less than the cost of production, based on actual costs". The USDOC determination in *Tool Steel* was appealed to the U.S. Court of International Trade (*Al*

[1080] China second written submission para. 215.

[1081] In certain instances, China submitted only excerpts from the relevant determinations and we had to retrieve the full text of the relevant decisions in order to properly understand the context in which the USDOC decisions or statements cited by China were made. We recall that China bears the burden of proof in respect of factual assertions it makes, and therefore that it is, in the first place, China's responsibility to provide the Panel with sufficient explanations and evidence to allow the Panel to make the required factual findings.

[1082] The USDOC seems to have derived this "rationale" from the amendments the U.S. Congress made to the Tariff Act to prevent the imposition of double remedies with respect to export subsidies in the context of concurrent anti-dumping and countervailing duty investigations. The USDOC also noted prior U.S. court decisions that relied on the same rationale for not deducting countervailing duties from U.S. prices in calculating margins of dumping.

[1083] *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review* ("Steel Wire Rod from Korea"), Exhibit CHI-125, p. 19160. The Court of Appeals for the Federal Circuit upheld the USDOC's interpretation of the statute as not requiring the deduction of safeguard duties from the export price in *Wheatland Tube Co. v United States*. In its findings, the Court, *inter alia*, finds "reasonable" the USDOC's conclusion that deducting safeguard duties from the export price would improperly lead it to collect a double remedy. (*Wheatland Tube Company and Allied Rube & Counduit Corporation. v United States* ("Wheatland Tube"), Exhibit CHI-126, p. 1366). China's discussion of these two decisions is limited to a sentence in footnote 332 of its first written submission.

[1084] *Tool Steel From the Federal Republic of Germany; Correction to Early Determination of Antidumping Duty*, Exhibit CHI-127, pp. 10071-10072.

Tech Specialty Steel Corp. v. US)[1085], which upheld it. The Court found that the USDOC's interpretation of the U.S. Tariff Act was not unreasonable: the Court noted that administrative practice and judicial precedent were inconsistent on the issue but ultimately, it considered that to add subsidies to a producer's costs of production would improperly blur the distinction between anti-dumping and countervailing duty remedies by allowing the USDOC to counteract subsidization without complying with the requirements of the countervailing duty statute.[1086]

14.173 China also cites to the USDOC's preliminary determination in *Certain Steel Products from the Netherlands*.[1087] In this determination, "to avoid possible double-counting", the USDOC subtracted from a respondent's production costs the amount of subsidies received from the government in the form of a grant, which had been preliminarily determined to be a subsidy in a parallel countervailing duty case. The USDOC added that it considered this result to be consistent with past practice and with a prior ruling of the U.S. Court of International Trade (in *Connors Steel)*, but provided no further explanations in this respect. The USDOC invited comments on its treatment of this issue, but ultimately, the investigations were rescinded prior to the issuance of the USDOC's final determination.[1088] Finally, China refers to the USDOC determinations in *Certain Pasta from Italy*, *Live Swine from Canada*, and *Red Raspberries from Canada*[1089], as examples of instances in which the USDOC allowed investigated producers to reduce their reported costs of production by the amount of subsidies received. The USDOC's determinations in these three cases contain no discussion of the issue of double remedies; rather, the adjustments were seemingly made in application of the USDOC's normal practice of allowing, as offsets to producers' G&A costs, deduction of subsidies "attributable directly" to the production of the subject merchandise.

14.174 China characterizes these different cases as all pertaining to a single situation or issue, the avoidance of a double remedy in respect of a particular act of subsidization. We disagree. We see the determinations cited by China as pertaining to three distinct factual situations, and we do not consider that they stand for the proposition that as a factual matter the United States takes all necessary steps to avoid the imposition of double remedies in situations in which such double remedies are likely to arise, or that it maintains a policy or practice of taking such steps.

14.175 The first situation, that in LEU from France and Steel Wire Rod from Korea, pertains to the adjustments that should be made to the export price to arrive at an ex-factory price as a basis from which to calculate a dumping margin. Specifically, in these investigations, the USDOC considered whether other trade remedies (countervailing duties and safeguards, respectively) that already applied to the product at issue were normal "customs duties" (which would be deducted from the export price in the course of the ex-factory calculation) or otherwise were relevant to the determination of the export price. The USDOC's conclusion was that making a deduction for these remedies would not be appropriate as it would result directly and literally in collecting those other trade remedies twice. That these past investigations do not pertain at all to the issue of double remedies raised by China in this claim is confirmed by the fact that the USDOC applied the same approach to the deduction of

[1085] *Al Tech Specialty Steel Corp. v. US* ("Al Tech"), 651 F. Supp. 1421 (Ct. Int'l Trade, 1986) (no exhibit provided by China).

[1086] U.S. interested parties had argued that not taking subsidies into account would allow foreign producers to evade anti-dumping disciplines.

[1087] *Preliminary Determination of Sales Not Less Than Fair Value: Certain Steel Products from the Netherlands*, Exhibit CHI-156.

[1088] *Certain Steel Products From Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom; Termination of Countervailing Duty and Antidumping Investigations*, Exhibit US-177, p. 49059.

[1089] *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy*, Exhibit CHI-157; *Issues and Decision Memorandum for the Final Determination in the Antiduping Duty Investigation of Live Swine from Canada*, Exhibit CHI-158; and *Red Raspberries from Canada; Final Determination of Sales at less Than Fair Value*, Exhibit CHI-159.

safeguard duties as it did with respect to countervailing duties. Instead, the determinations cited by China stand for the narrower proposition that in performing dumping calculations, the USDOC does not deduct existing countervailing duties or safeguard duties from export price. Further, we note that China does not allege that the USDOC made deductions for existing duties in the anti-dumping investigations at issue in this dispute and thus treated imports from China differently than it treats imports from market economies.

14.176 The other determinations cited by China pertain to the question of the basis upon which the USDOC calculates costs of production in anti-dumping investigations on market economy imports: The concern of the Court in *Al Tech* and – to the extent that it can be discerned from its determination – that of USDOC in *Tool Steel from Germany*, seems to have been primarily that a producer's *actual costs* should serve as the basis of dumping calculations – even if they reflect subsidization – and that any subsidization allegations should be addressed not by an anti-dumping investigation but rather by a countervailing duty investigation. Not only is the issue of double remedy *per se* not raised, but the Court's concerns about the nature of the remedies at issue and the need to avoid using the anti-dumping statute to address questions of subsidization would be equally applicable in the absence of a parallel countervailing duty investigation; in fact, there is no reference in either decision to the USDOC conducting a concurrent countervailing duty investigation in that case, or to a countervailing duty measure already being in place.

14.177 The remaining determinations address the same issue, on the basis of the same underlying premise (the calculation of the normal value on the basis of actual costs), as in the USDOC determination in *Tool Steel* and the court decision in *Al Tech*, but pertain to a different factual situation, i.e., where a producer's reported costs of production do not reflect the subsidies that it has received. The only case in which avoidance of a double remedy was mentioned by the USDOC, *Certain Steel Products from the Netherlands*, is a preliminary determination and never resulted in the imposition of a measure or collection of any duties.[1090] In the other cases (in which measures were imposed) referred to by China in which deductions of subsidies from costs were allowed, those allowances were treated as "offsets", a type of adjustment used in certain instances in U.S. anti-dumping calculations. China has not demonstrated that this type of adjustment, pertaining to a known amount of subsidy received by an investigated firm, is related to the question of avoidance of double remedies. Hence, we conclude from these determinations that where the USDOC has allowed the deduction of subsidies received by a firm from its reported costs of production, and imposed measures on the basis of a methodology that allowed such deductions, it did so on another basis than to avoid the imposition of a double remedy.

14.178 In sum, the USDOC determinations and court decisions in *Tool Steel from Germany*/*Al Tech*, *Certain Steel Products from the Netherlands*, *Certain Pasta from Italy*, *Live Swine from Canada*, and *Red Raspberries from Canada* are all instances of application, in two different factual circumstances, of a USDOC policy to use a producer's *actual* costs in the calculation of costs of production and of constructed normal values in anti-dumping investigations of market economy imports. A similar situation does not present itself in the context of USDOC anti-dumping investigations involving imports from China: For imports from China, the USDOC uses surrogate costs which, by definition, are not the producer's *actual* costs. Hence, the issue of adjusting *reported* costs to ensure that they represent *actual* costs simply does not arise. Further, the USDOC methodology follows, in this respect, the second *Ad* Note to Article VI:1 of the GATT 1994 (incorporated by reference in the AD Agreement through Article 2.7) and Section 15(a) of China's Protocol of Accession, which recognize that market-economy and NME imports are in different factual situations and for this reason, explicitly allow the use of different methodologies – based on surrogate costs and prices – to calculate dumping margins in respect of NME imports.

[1090] *See, e.g.*, Exhibit CHI-156, p.3.

14.179 For the foregoing reasons, we consider that none of the cases cited by China establishes as a factual matter that the USDOC takes all necessary steps to avoid the risk of imposing a double remedy in respect of a single act of subsidization whenever such a risk exists, or that the United States maintains a policy or practice of taking such steps. Rather, as explained above, these determinations establish narrower points: that in calculating dumping margins: (i) the USDOC does not deduct countervailing duties or safeguard duties from the export price; and (ii) in the case of market economy investigations, the USDOC constructs normal value and calculates costs of production on the basis of a producer's *actual* costs of production.

14.180 Further, even if the determinations cited by China were considered relevant in establishing the existence of the policy or practice alleged by China, it is significant that in all of the instances cited by China, the existence of double remedies was a matter of mathematical equivalency. In those investigations, there was no question as to the amounts of subsidies received by the investigated firms. That is, there was clear, verified record evidence of those amounts. By contrast, while we have found above that the use of a surrogate value in principle reflects the use of unsubsidized costs, we also have indicated that the precise extent to which the NME calculation captures any subsidization is a factual issue which it could be difficult to ascertain. For these reasons, we consider misleading China's characterization of one aspect of the alleged "advantage" at issue as being that the USDOC does not, in the case of investigations on imports from market economies, require any evidence of the existence of a double remedy.

14.181 For the foregoing reasons, we consider that China fails to establish as a factual matter that, in the context of certain anti-dumping investigations of market economy imports, the USDOC has taken steps to ensure that it does not offset, through the calculation of anti-dumping duties, the same subsidies that it simultaneously offsets through the imposition of countervailing duties, or that the USDOC has done so without requiring evidence of the existence of a double remedy. As a consequence, China also fails to establish that the USDOC maintains a consistent "policy" or "practice" of taking all necessary steps to avoid the imposition of double remedies in circumstances in which there is a risk that one would arise. Thus, we find that China has failed to establish the existence of the "advantage, favour, privilege, or immunity" which it alleges.[1091]

14.182 The foregoing reasons suffice, in our view, to find that China has not established that the United States acted inconsistently with the MFN obligation contained in Article I:1 of the GATT 1994 when, as a result of the investigations at issue, it concurrently imposed anti-dumping duties calculated under the U.S. NME methodology and countervailing duties.[1092]

[1091] In addition, we note that the "advantage" alleged by China is not the specific course of action (e.g. adjustment or non-adjustment) taken by the USDOC in a specific instance. That is, China is asserting discrimination in terms of the *effects* of certain behaviours (making adjustment "x" in anti-dumping calculation results in a double remedy), rather than asserting discrimination in respect of the behaviours themselves (USDOC makes adjustment "x" in market-economy calculations but not in NME calculations). In this sense, China's claim would seem to depart from the typical claim of violation under Article I:1 of the GATT. In light of our findings above, we need not determine whether the terms of Article I:1 of the GATT 1994 are broad enough to allow a claim of this nature.

[1092] Given these findings, we do not consider whether China had to demonstrate discrimination as between "like products" in the context of its "as applied" claims under Article I:1 of the GATT 1994.

XV. CHINA'S CLAIM PERTAINING TO THE USDOC'S FAILURE TO PROVIDE AT LEAST 30 DAYS TO REPLY TO THE NEW ALLEGATIONS AND SUPPLEMENTAL QUESTIONNAIRES

A. CLAIM OF CHINA

15.1 China claims that the USDOC failed to give China and other interested parties at least 30 days to respond to the "supplemental" and "new allegations" questionnaires issued by the USDOC in the four countervailing duty investigations at issue, contrary to Article 12.1.1 of the SCM Agreement.[1093]

B. MAIN ARGUMENTS OF THE PARTIES

1. China

15.2 China submits that the term "questionnaires" in Article 12.1.1 of the SCM Agreement refers not only to the first questionnaire issued in a countervailing duty investigation, but to "all" questionnaires, without qualification. Therefore, China claims, the United States acted inconsistently with this provision by failing to give China and investigated producers at least 30 days to reply to the "supplemental" and "new allegations" questionnaires issued by the USDOC in the four investigations at issue.[1094]

15.3 China considers its interpretation of Article 12.1.1 to be the only one consistent with the ordinary meaning of that provision, read in the context of Article 12 as a whole. China submits that the ordinary meaning of the word "questionnaire" is "[a] formulated series of questions by which information is sought from a selected group, usually for statistical analysis; a document containing these", and asserts that both the "supplemental" and "new allegations" questionnaires qualify as "questionnaires" under the ordinary meaning of this term.[1095] China adds that the term "questionnaires" in the plural form in Article 12.1.1 should be given its ordinary meaning. If the drafters had intended to refer to the issuance of a single questionnaire, they would have so indicated explicitly by using phrases such as "a questionnaire" or "the initial questionnaire". China therefore contends that the minimum 30 days for reply applies to all questionnaires used in an investigation.[1096] China further considers that read in context, Article 12.1.1 gives content to the "ample opportunity" requirement in Article 12.1 by requiring that interested parties be given at least 30 days to reply to questionnaires, and that given that it has no caveats, this entitlement applies to all questionnaires used in a countervailing duty investigation. This right, China argues, constitutes one of the due process rights in Article 12 of the SCM Agreement that the Appellate Body has held "are enjoyed by interested parties throughout an investigation".[1097]

15.4 On this basis, China submits that the reasoning of the unappealed panel report in *Egypt – Steel Rebar*, which concluded that in anti-dumping investigations the only questionnaire to which the 30-

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[1093] Paragraph B.1(g)(ii) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (m); second written submission, para. 315 (m).

[1094] China first written submission, paras. 444 and 447.

[1095] Id., para. 445. China argues that "questionnaires" in Article 12.1.1 should be interpreted in accordance with this ordinary meaning such that if a document represents "a formulated series of questions by which information is sought", then it is a questionnaire, and if it is used in a countervailing duty investigation, then the 30-day requirement under Article 12.1.1 must be provided. China submits that the inquiry under Article 12.1.1 is whether (i) the document received by an interested party is a questionnaire; and (ii) whether this questionnaire was used in a countervailing duty investigation. (China response to Panel question 107 (first meeting) and question 36 (second meeting)).

[1096] China first written submission, para. 447.

[1097] Id., paras. 448-449, citing to Appellate Body Report on *Mexico – Anti Dumping Measures on Rice*, para. 292.

day requirement applies is the initial questionnaire, is not persuasive and therefore should not be followed in the present dispute. More specifically, China argues, *inter alia*, that that panel did not have the benefit of the Appellate Body's decisions which collectively have emphasized that the procedural and due process obligations under Article 12 apply "throughout an investigation", and that the panel's interpretation disregarded the ordinary meaning of the term "questionnaires", as well as the balance that the AD and SCM Agreements seek to achieve.[1098]

15.5 According to China, its interpretation of Article 12.1.1 of the SCM Agreement is also consistent with the balance that Article 12 of the SCM Agreement strikes between, on the one hand, the due process rights of interested parties and, on the other hand, the right of investigating authorities to proceed expeditiously. A different interpretation of Article 12.1.1, China alleges, would give investigating authorities an "unfettered discretion" as, *inter alia*, in the name of completing their investigations expeditiously, they could issue any number of extensive questionnaires with short periods for reply, for example, the far less than 30 days granted by the USDOC for replies to the various supplemental and new allegations questionnaires issued in the investigations at issue in the present dispute.[1099] In China's view, the 30-day period to respond to all questionnaires used in an investigation ensures that investigating authorities comply with their deadlines for completing the investigations without imposing unrealistic and inappropriate burdens on questionnaire recipients.[1100]

15.6 China submits that even accepting *arguendo* that the 30-day requirement in Article 12.1.1 applies only to the "full initial questionnaire", the USDOC failed to give at least 30 days to respond to the "first" new allegations questionnaires issued in the investigations. China argues that the "first" new allegation questionnaires issued by the USDOC in the investigations at issue qualify as the first questionnaire in the newly initiated "investigations" with respect to new subsidy allegations. According to China, the USDOC opens up an entirely new avenue of inquiry when it initiates an investigation into new subsidy allegations, and the questionnaires it uses neither supplement a previous inquiry nor are related in any way to prior questionnaires. China explains that therefore "new allegations questionnaires" are indistinguishable from "full initial questionnaires".[1101] China adds that the similarity between those questionnaires lies in the nature of the questions and the level of detail required from respondents.[1102]

2. United States

15.7 The United States considers that there is no obligation under Article 12.1.1 of the SCM Agreement to provide the minimum 30-day period for reply to supplemental and new allegations

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[1098] China first written submission, para. 451; response to Panel question 107 (first meeting).

[1099] China first written submission, paras. 450 and 452. China points, in particular, to the LWS and OTR countervailing duty investigations, where the new allegations questionnaires issued by the USDOC contained questions about twelve and ten new subsidy programmes, respectively. As regards supplemental questionnaires, China indicates that these were not only quite extensive but also did not include mere "follow-up" inquiries. (China first written submission, paras. 453-456).

[1100] Id., paras. 450. According to China, providing the minimum 30-day period for reply to all questionnaires would not prevent investigating authorities from finishing their investigations within the timeframes allowed under the SCM Agreement, but rather, doing so would ensure that investigating authorities consider carefully the information they require and draft their questionnaires accordingly. For instance, if allowing 30 days for reply to new allegations questionnaires would impede the USDOC's completion of its investigations, the United States should reconsider its policy of allowing petitioners to file new subsidy allegations during the course of the investigations. (Id.; response to Panel question 36 (second meeting)).

[1101] For example, China submits that in virtually every case, the new allegations questionnaires included the so called Appendix 1, i.e., a list of "Standard Questions", which respondents must fill out with respect to the subsidy programmes initiated at the outset of the investigation. (China first written submission, footnote 364; second written submission, paras. 311-313).

[1102] China response to Panel question 105 (first meeting).

questionnaires. According to the United States, "questionnaires" in Article 12.1.1, for which investigating authorities must provide at least 30 days for reply, refers to the questionnaire issued at the outset of an investigation, and not to subsequent requests for information.[1103]

15.8 First, the United States submits that the ordinary meaning of the word "questionnaire" is "[a] formulated series of questions by which information is sought from a selected group, usu[ally] for statistical analysis", and that this meaning encompasses only "formal requests for information" by an investigating authority in the form of a "series of questions". Second, the United States argues that the context of Article 12.1.1, namely paragraphs 6 and 7 of Annex VI to the SCM Agreement, clarifies that a "questionnaire" in the sense of Article 12.1.1 only refers to the questionnaire issued at the outset of an investigation, and not to every subsequent request for information by investigating authorities, even if such subsequent requests take the form of a "series of questions". According to the United States, paragraphs 6 and 7 of Annex VI clearly show that not every request for information constitutes a "questionnaire" to which the minimum 30-day requirement for response applies, and that by referring to the term "the questionnaire" in the singular in Annex VI, Members contemplated the existence of only one document to be considered "the questionnaire" for purposes of the SCM Agreement.[1104] According to the United States, the explicit reference to "the questionnaire" in Annex VI further supports its view that the term "questionnaires" in the plural form in Article 12.1.1 refers to the recipients in the plural; that is, Members, foreign producers, exporters. While it agrees with China that Members could have used words like "the initial questionnaire" instead of the term "questionnaires", it further argues that had the drafters of the Agreement intended the interpretation advanced by China, they could have done so by saying "[a]ny exporter, foreign producer or interested Member receiving questionnaires".[1105]

15.9 In the view of the United States, the single document referred to in Annex VI could only be the questionnaire issued at the outset of an investigation. Given that this questionnaire requires more extensive information than subsequent requests for information, it is thus logical that the 30-day requirement for reply in Article 12.1.1 only refers to the questionnaire issued at the outset of the investigation.[1106] The United States also notes that if all requests for information were subject to the 30-day requirement under Article 12.1.1, investigating authorities would be prevented from seeking supplemental information from interested parties[1107]; from completing investigations within the timeframes established in Article 11.11[1108]; and/or from granting any extensions of time for replies as encouraged by Article 12.1.1.[1109]

[1103] United States first written submission, paras. 475 and 482; second written submission, para. 226; response to Panel question 36 (second meeting). The United States argues that the Government of China and respondents were given at least 30 days to reply to the questionnaire that the USDOC issued at the outset of the investigations at issue, and therefore, the USDOC complied with Article 12.1.1 of the SCM Agreement. (United States first written submission, para. 484).

[1104] Id., paras. 476-478; response to Panel question 36 (second meeting).

[1105] United States first written submission, para. 486.

[1106] Id., para. 479. The United States notes in this regard that in each of the investigations at issue, the questionnaire issued by the USDOC at the outset of the investigations posed far more questions than any subsequent request for information. (Id., footnote 632).

[1107] In particular, the United States observes that subsequent requests for information are (i) one means by which investigating authorities "give notice of the information" that they require and (ii) a mechanism by which interested parties are provided with the "opportunity" to submit evidence, and that China's interpretation would therefore prevent investigating authorities from making such requests for information, thereby denying interested parties some of the very "notice" and "opportunity" mandated in Article 12.1 of the SCM Agreement. (Id., paras. 475 and 488).

[1108] According to the United States, meeting the timeframes imposed by the SCM Agreement becomes even more difficult when a respondent fails to answer questions posed in the initial questionnaire; for instance, if a 30-day period would have been required for each of the follow-up requests for additional information made

15.10 The United States also considers that China's interpretation of Article 12.1.1 ignores the other provisions of the SCM Agreement that ensure the due process rights of interested parties in proceedings before investigating authorities. In particular, the United States observes that Article 12.1, which provides that interested parties "be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant", ensures that subsequent requests for information are not subject to unreasonable time constraints that would prevent interested parties from adequately defending their interests.[1110] The United States argues that in light of this, its interpretation of Article 12.1.1 would not give investigating authorities some sort of "unfettered discretion" as China contends, but rather, would give interested parties a meaningful amount of time to reply to the most comprehensive questionnaire issued in an investigation, i.e., the questionnaire at the outset of the investigation, while providing interested parties with sufficient opportunities to be informed of the additional information needed in an investigation and therefore to be better positioned to provide relevant evidence.[1111]

15.11 Lastly, the United States rejects China's argument that new allegations questionnaires are indistinguishable from initial questionnaires. According to the United States, China's contention overlooks the conceptual difference between the two types of questionnaires, i.e., an initial questionnaire is issued at the outset of an investigation and includes not only questions about specific programmes but also general (non-programme specific) questions, while a new allegation questionnaire is issued in the course of an investigation and includes questions only with respect to a specific programme (or programmes). In any case, the United States contends that China has not demonstrated that these questionnaires are indistinguishable.[1112]

C. MAIN ARGUMENTS OF THE THIRD PARTIES

1. Argentina

15.12 Argentina agrees with China that the minimum 30-day period for reply in Article 12.1.1 of the SCM Agreement applies to all "questionnaires" issued in an investigation, including the "new allegation" questionnaires. According to Argentina, this interpretation is consistent with the due process principle of "ample opportunity" in Article 12.1 of the Agreement.[1113]

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in the course of the investigations at issue, the USDOC would have required between 240 and 540 days only for the collection of most of the relevant factual information with respect to subsidization. In this light, China's interpretation of Article 12.1.1 would compel investigating authorities to resort to facts available, rather than giving interested parties multiple opportunities to provide information that they have failed to submit in previous questionnaires. (United States first written submission, paras. 480-481; response to Panel question 36 (second meeting); comments on China's response to Panel question 36 (second meeting)).

[1109] United States first written submission, para. 484. The United States finds support for its interpretation in the Panel Report in the *Egypt –Steel Rebar* case in which the panel arrived at the same conclusion with regard to the term "questionnaires" in Article 6.1.1 of the AD Agreement by noting, *inter alia*, the use of the term "the questionnaire" in Annex I to the AD Agreement and the practical difficulties that would result if Article 6.1.1 were to cover requests for information other than the questionnaire issued at the outset of an investigation. (Id., para. 483, citing to Panel Report on *Egypt – Steel Rebar*, paras. 7.276-7.277).

[1110] According to the United States, had China considered that it was denied such an opportunity in respect of the new allegations questionnaires, it could have raised that claim.

[1111] United States first written submission, para. 489; second written submission paras. 234-235; comments on China's response to Panel question 36 (second meeting).

[1112] In particular, the United States argues that China's reliance on questions from only two of the four investigations at issue as well as its narrow focus on the "nature" and "level of detail" of questions do not show that new allegations and initial questionnaires are indistinguishable. (United States first written submission, footnote 633; second written submission paras. 228-233; comments on China's response to Panel question 36 (second meeting)).

[1113] Argentina third-party submission, paras. 63-64.

2. Canada

15.13 Canada, recalling the findings of the panel in *Egypt – Steel Rebar*, considers that the 30-day requirement in Article 12.1.1 of the SCM Agreement only applies to the initial questionnaire issued in an investigation. Canada considers that this interpretation is supported by the context of Articles 12.1 and 12.1.1 of the Agreement. Canada notes, *inter alia*, the implications for respondents of a broader interpretation of Article 12.1.1: investigating authorities required to respect the timeframes imposed by Articles 11.11 and 12.12 might refrain from asking follow-up questions or pursuing new lines of questioning, and rely instead on facts available. Canada is also of the view that while the "ample opportunity" requirement in Article 12.1 applies throughout the course of an investigation, Article 12.1.1 deals only with one particular instance during the investigation (i.e., the issuance of the initial questionnaire) where "ample" means at least 30 days, and that other questions arising during the investigation are subject to the general "ample opportunity" requirement.[1114]

3. European Communities

15.14 The European Communities considers that Article 12.1.1 of the SCM Agreement should be interpreted in light of the chapeau provided by Article 12.1, and notes, in this regard, that the Appellate Body has highlighted that interested parties must be afforded "ample opportunity" for presentation of evidence, but that it does not imply that interested parties have "indefinite" rights so as enable them to submit relevant evidence as and when they choose. Therefore, the European Communities is of the view that Article 12.1 requires an "adequate balance" between the rights given to interested parties, on the one hand, and the obligation for the authorities to conclude their investigations in a timely manner, on the other hand. According to the European Communities, this analysis should be made on a case-by-case basis and on reasonable grounds, i.e., deadlines to reply to questions should be proportionate to the amount and complexity of the information requested.[1115]

D. ASSESSMENT BY THE PANEL

15.15 This claim by China raises two main issues. The first is the meaning of the term "questionnaires" in Article 12.1.1, to which the 30-day minimum period for reply applies. The second is whether the "supplemental" and/or "new allegation" questionnaires issued in the four countervailing duty investigations before the Panel are "questionnaires" in the sense of Article 12.1.1, and thus should have been subject to that provision's 30-day minimum reply period. We take these issues up in turn.

1. Interpretation of the term "questionnaires" in Article 12.1.1 of the SCM Agreement

15.16 Concerning the meaning of the term "questionnaires" in Article 12.1.1 of the SCM Agreement, we note at the outset that China does not dispute that the United States complied with its obligation under Article12.1.1 to give to the Government of China and investigated producers at least 30 days to respond to the initial questionnaires used in the investigations at issue.[1116] Rather, what China challenges is that the United States failed to provide China and investigated producers at least 30 days to reply to the so-called "supplemental" and "new allegation" questionnaires issued during the course of the investigations.

15.17 For the purpose of this dispute, we understand the parties to be referring to the following terms in accordance with the following meanings: (i) "initial" questionnaire or "questionnaire issued at the outset of an investigation" as the first comprehensive questionnaire issued once the

[1114] Canada third-party submission, paras. 65-70.
[1115] European Communities third-party submission, paras. 65-69.
[1116] China first written submission, para. 444.

investigation has been initiated; (ii) "supplemental" questionnaire as a questionnaire containing follow-up inquiries to questions posed in a prior questionnaire; and (iii) "new allegation" questionnaire as the first questionnaire issued in respect of each new subsidy allegation filed during the course of an investigation.[1117]

15.18 For China the term "questionnaires", and thus the 30-day rule, in Article 12.1.1 applies not only to the initial questionnaire issued at the outset of an investigation, but to "all" questionnaires, including supplemental and new allegations questionnaires. For the United States, on the other hand, the 30-day rule applies only to the comprehensive questionnaire issued at the outset of an investigation and not to any subsequent requests for information, even if these are in the form of a formulated series of questions.

15.19 We first consider the relevant text of Article 12.1 of the SCM Agreement:

> "12.1 Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.
>
> > 12.1.1 Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.[40] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable".
>
> [40] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory."

15.20 The first sentence of Article 12.1.1 on its face compels investigating authorities to grant at least 30 days for replies to "questionnaires". This sentence does not, however, qualify the term "questionnaires" except to require that the 30-day period be provided to "exporters, foreign producers or interested Members receiving questionnaires". Nor does the SCM Agreement define the term "questionnaires". We thus turn to an examination of the ordinary meaning of this term in its context, and in the light of the object and purpose of the provision and the SCM Agreement.

15.21 We recall that the parties submit that the dictionary definition of the word "questionnaire" is "a formulated series of questions by which information is sought from a selected group, usu[ally] for statistical analysis", and we find this definition to be appropriate.[1118] For China, this dictionary definition should be directly ascribed to the term "questionnaires" in Article 12.1.1, in the sense that any "formulated series of questions" from an investigating authority is a "questionnaire" to which the 30-day rule applies. For the United States, however, various contextual elements in the SCM Agreement mean that not every "formal request for information in the form of a series of questions" is a "questionnaire" in the sense of Article 12.1.1.

[1117] We note that under U.S. law, the applicant or other domestic interested party in a countervailing duty investigation may file a "new subsidy allegation" no later than 40 days before the scheduled date of the preliminary determination. (Exhibit CHI-130).

[1118] The parties refer to *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 2447. (Exhibits CHI-134 and US-95).

15.22 We note that the above dictionary definition of "questionnaire" contains no limits or qualifications, such that on its face it would encompass any request for information in the form of a formulated series of questions. This definition on its own thus would not exclude "supplemental" and "new allegation" questionnaires. In our view, however, this definition by itself is not sufficient to ascertain the meaning of "questionnaires" as used in Article 12.1.1 of the SCM Agreement. In general, we consider that dictionary definitions, while useful, are not dispositive of the meaning of terms that appear in the WTO Agreements.[1119] Rather, the meaning of such terms can only be discerned by reference to their context and in the light of the object and purpose of the agreement in question.[1120] We thus now turn to this further analysis.

15.23 A number of provisions of the SCM Agreement, starting with Article 12 including its overall structure, provide relevant context for interpreting the term "questionnaires" in Article 12.1.1 of the SCM Agreement. In the first place, Article 12, entitled "Evidence", contains a series of evidentiary rules, including as to the requesting, receipt and handling of evidence by investigating authorities, the particular subject of Article 12.1 of the SCM Agreement. In this regard, the chapeau of Article 12.1 establishes two overarching requirements: that interested Members and parties be given (i) "notice" of the information required of them by the authorities; and (ii) "ample opportunity to present in writing all evidence which they consider relevant". Neither of these requirements is circumscribed in any way, in terms of form or time period. In particular, the notice requirement places no limits on how, precisely, an investigating authority must request the information it requires, and thus seems to envisage different possible types of information requests. The ample opportunity requirement also contains no specific limits, and indeed extends beyond responses to requests from investigating authorities, to encompass the provision of information by an interested Member or party at its own initiative. Where an information request from an investigating authority is concerned, in our view the word "ample" must be understood to mean "ample" in the light of the specific nature and scope of that request, something that by its very nature can only be determined on a case-by-case basis.

15.24 Turning to Article 12.1.1, in our view, the term "questionnaires" in that provision represents one specific case within the overarching "notice" requirement in the chapeau. Similarly, the 30-day rule for response to questionnaires represents one specific case within the overarching "ample opportunity" requirement. That is, in the particular case of "questionnaires" the "ample opportunity" is explicitly defined as the "minimum of 30 days", with an additional mandatory period of one week for questionnaires to exporters, *per* footnote 40, accompanied by a general encouragement for the granting of extensions of these periods upon cause shown. Thus, while the chapeau of Article 12.1 in conjunction with Article 12.1.1 do not directly address the meaning of the term "questionnaires" in Article 12.1.1, in our view the fact that the "questionnaires" subject to the specific 30-day "ample opportunity" rule are only one of the possible means of providing notice to interested parties of the information required suggests that not every request for information falls within the term "questionnaires" in Article 12.1.1 of the SCM Agreement.

15.25 Footnote 40 to Article 12.1.1 of the SCM Agreement provides further indications in this direction. As noted, this footnote lengthens the 30-day rule by one week for questionnaires to exporters, providing generally that "the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week

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[1119] *See, e.g.*, Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 248; cited with approval in Appellate Body Report on *China – Publications and Audiovisual Products*, para. 348.

[1120] We recall that Article 31(1) of the Vienna Convention provides in relevant part that:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

See also Appellate Body Report on *China – Publications and Audiovisual Products*, para. 348.

from the date on which it was sent to the respondent". Most relevant to our inquiry is the formulation in the singular of the reference to "the questionnaire" for "exporters". That is, this provision seems to envisage one particular kind of questionnaire destined to all of the exporters. The formulation in Article 12.1.1 of "exporters, foreign producers or interested Members receiving questionnaires" seems to be an extended version of the formulation in footnote 40, suggesting that the term "questionnaires" (plural) in this Article refers to the different kinds of questionnaires sent to the different kinds of recipients referred to (exporters, foreign producers, and interested Members). In other words, this phrase in Article 12.1.1 could be seen as a collective reference to the questionnaire for the exporters, the questionnaire for the foreign producers, and the questionnaire for the interested Members. This view finds further support in the use of the definite article "the" before "questionnaire" in footnote 40. Had the drafters intended the term "questionnaires" in Article 12.1.1 to refer to any and all information requests in the form of a series of questions, one might more naturally expect either a plural formulation, or an indefinite formulation such as "any" or "a" "questionnaire", in footnote 40.

15.26 The same singular, definite formulation ("the questionnaire") appears in the other references to "questionnaire" in the provisions of the SCM Agreement pertaining to countervailing measures[1121], i.e., paragraphs 6 and 7 of Annex VI. In particular, paragraph 6 refers to "[v]isits to explain the questionnaire". Paragraph 7 provides that a verification visit "should be carried out after the response to the questionnaire has been received". These provisions do not refer to the term "questionnaire" as "a questionnaire" or "any questionnaire" or "questionnaires" in the abstract, although any of these formulations would have been grammatically correct.

15.27 To us, these contextual elements suggest that the term "questionnaires" in Article 12.1.1 refers to one kind of document in an investigation that constitutes "the" questionnaire for each kind of questionnaire recipient referred to (exporters, foreign producers, and interested Members). This, in turn, suggests that not every formulated series of questions from an investigating authority during the course of an investigation is subject to the 30-day minimum period for reply required by Article 12.1.1 of the Agreement.

15.28 We now consider which particular documents constitute the "questionnaires" to which the 30-day rule applies. In our view, the same contextual elements discussed above aid in answering this question. In particular, the reference in paragraph 6 of Annex VI to "visits to explain the questionnaire" suggests that such a questionnaire is a substantial information request (to warrant a possible on-the-spot visit by the investigating authority to a foreign country purely for the purpose of explaining it). This provision further suggests that the questionnaire is sent to the respondent entity relatively early in the investigation (logically, an explanatory visit would only take place upon or after receipt of the questionnaire, and to be useful presumably it would need to take place well in advance of the due date for the response, and well in advance of any verification visit as referred to in paragraph 7). The provision in paragraph 7 of Annex VI that, because the main purpose of the on-the spot investigation is to "verify information provided or obtain further details" normally that visit should take place "after the response to the questionnaire has been received", provides a further indication both that "the questionnaire" is a substantial and significant enough information request to warrant a verification visit, and that it is sent early in the investigation. The reference to the verification visit in the singular ("the on-the-spot investigation"), and the advance notice and agreement requirements related to such a visit, referred to in Article 12.6 of the SCM Agreement, and paragraphs 2, 3, 4, 5, and 7 of Annex VI, indicate, similarly, that the verification visit itself is substantial and significant, not something that can be done lightly, or that is likely to occur frequently

[1121] The "questionnaire" referred to in Article 25 of the SCM Agreement is the "questionnaire on subsidies" to be used by Members to notify their subsidies to the SCM Committee, and thus is not related to countervailing measures.

over the course of an investigation.[1122] These textual signals of the weightiness of a verification visit provide a further indication that "the response to the questionnaire" which paragraph 7 identifies as a main focus of the visit also is substantial and significant, as otherwise such a visit would not be warranted.

15.29 While the SCM Agreement does not explicitly indicate which document constitutes the substantial and significant information request referred to in the SCM Agreement as "the questionnaire", we consider that the above elements taken together suggest that this is the initial comprehensive countervailing duty questionnaire issued to an interested Member and each of the different kinds of interested parties by an investigating authority at or following the initiation of an investigation, which questionnaire seeks information as to all relevant issues pertaining to the main questions that will need to be decided (subsidization of the product, injury and causation). Of course, as discussed above, the Agreement recognizes that there will be variations in the initial comprehensive questionnaires sent to the different kinds of questionnaire recipients (including exporters, foreign producers, and interested Members), reflecting these parties' different natures, activities and roles. Furthermore, depending on how a Member organizes its own conduct of countervailing duty investigations, there may be separate initial comprehensive questionnaires covering the subsidy-related issues and the injury and causation-related issues, and we consider that the initial comprehensive document or set of documents covering all of these issues are encompassed by the term "questionnaires" in Article 12.1.1.[1123]

15.30 Furthermore, we recall that Members are required under the chapeau of Article 12.1 to give interested parties notice of the information required for the conduct of the investigation, and Members also are generally required (as set forth in the various provisions of the SCM Agreement) to conduct their investigations and reach their determinations on the basis of verified "evidence", and within a maximum overall timeframe. The amount and complexity of the information needed to conduct a countervailing duty investigation in accordance with the multilateral rules, and the need for that information ultimately to be subject to some sort of verification process (through a visit or otherwise) before it can be relied upon[1124], implies the use of a comprehensive questionnaire (or set of such questionnaires for the different kinds of questionnaire respondents)[1125] at the outset of an investigation as the basis for gathering the necessary information.[1126]

[1122] We do not mean to imply that the SCM Agreement prohibits multiple verification visits to a given entity during the course of an investigation, but rather to emphasize that due to the weightiness of the exercise an investigating authority would be unlikely to conduct multiple visits.

[1123] This would likely be the case, for example, where separate agencies are responsible for the subsidization and injury/causation sides of an investigation.

[1124] While the SCM Agreement does not require verification visits as such, Article 12.5 requires that investigating authorities "shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based".

[1125] We emphasize that it is the comprehensive nature of the questionnaire(s) issued at the outset of an investigation and not necessarily its exact timing that we find determinative here. In particular, different Members may circulate other kinds of "questionnaires" with a very narrow focus (aimed, for example, at determining whether sampling will be necessary) at the very outset of an investigation. Such narrow requests for information would not, in our view, fall within the meaning of the term "questionnaires" in Article 12.1.1.

[1126] We note that the use of a questionnaire at the very outset of an investigation is more explicitly provided for in the AD Agreement (in paragraph 1 of Annex II, concerning "Best Information Available"): "As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party and the manner in which that information should be structured by the interested party in its response". We recognize that the SCM Agreement contains no analog to Annex II of the AD Agreement, but recall the statement by the Appellate Body in *Mexico – Anti Dumping Measures on Rice* that conditions relative to the use of facts available similar to those in Annex II to the AD Agreement apply under the SCM Agreement. While the issue decided by the Appellate Body was different from the one before us, we consider the general indication in Annex II of the AD Agreement that at the very outset the investigating

15.31 Our reading of the term "questionnaires" based on the text and context of Article 12.1.1 is identical to that reached by the panel in *Egypt – Steel Rebar* in respect of the same term, "questionnaires", in Article 6.1.1 of the AD Agreement (the analog to Article 12.1.1 of the SCM Agreement).[1127] In that case, the panel rejected Turkey's claim that follow-up questions to the original questionnaire responses and requests for new information constituted "questionnaires" within the meaning of Article 6.1.1 of the AD Agreement. The panel found strong contextual support in paragraphs 6 and 7 of Annex I of the AD Agreement for concluding that the term "questionnaires" in Article 6.1.1 refers only to the original questionnaire sent to interested parties at the outset of an investigation.[1128] The panel also noted that if only some, but not all, other requests for information were considered "questionnaires", investigating authorities would be unable to determine which of their further requests for information were subject to the 30-day rule in Article 6.1.1. On the other hand, the panel considered that if all requests for information were to be considered "questionnaires" in the sense of Article 6.1.1, it could be impossible for an investigation to be completed within the maximum time limits imposed by the Agreement.[1129]

15.32 We consider that the last two points made by the panel in *Egypt – Steel Rebar* (with which we agree) speak to the object and purpose of the provision, and more generally, of the countervailing duty rules (the counterpart to the anti-dumping rules that were the subject of that dispute). Starting with the first point, we note that the SCM Agreement contains no guidance as to how to determine which requests for information other than the initial comprehensive questionnaire or set of questionnaires would be subject to the 30-day rule in Article 12.1.1 of the SCM Agreement. Thus, to treat some but not all such further requests for information (i.e., other than the initial comprehensive questionnaire or set of questionnaires) as subject to the 30-day rule in Article 12.1.1 would introduce enormous procedural uncertainty for both investigating authorities and interested parties and Members. This would be inconsistent with the Agreement's general emphasis on due process, in Article 12 and elsewhere.[1130] As for the second point, if all requests for information by investigating authorities were

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authority should present to interest parties its detailed request for information is equally pertinent to countervailing duty investigations, and is important for due process. (Appellate Body Report on *Mexico – Anti Dumping Measures on Rice* , paras. 290-295).

[1127] In light of the almost identical wording of Article 6.1.1 of the AD Agreement with Article 12.1.1 of the SCM Agreement, we consider that the *Egypt – Steel Rebar* panel's reasoning is fully applicable to the issue before us.

[1128] Panel Report on *Egypt – Steel Rebar*, paras. 7.275-7.276.

[1129] The *Egypt – Steel Rebar* panel stated:

> "If any requests for information other than the initial questionnaire were to be considered 'questionnaires' in the sense of Article 6.1.1, a number of operational and logistical problems would arise in respect of other obligations under the AD Agreement. First, there is no basis in the AD Agreement on which to determine that some, but not all, information requests other than the initial questionnaire also would constitute 'questionnaires'. Thus, even if an investigating authority was not obligated to provide the minimum time-period in Article 6.1.1 in respect of every request for information, it would not be able to determine from the Agreement which of its requests were and were not subject to that time-period. On the other hand, if all requests for information in an investigation were 'questionnaires' in the sense of Article 6.1.1, this could make it impossible for an investigation to be completed within the maximum one year (or exceptionally, 18 months) allowed by the AD Agreement in Article 5.10. Moreover, a 30- or 37-day deadline for requests for information made in the context of an on-the-spot verification -- i.e., the 'obtain[ing of] further details' explicitly referred to in Article 6.7 [...] as one of the purposes of such verifications -- obviously would be completely illogical as well as unworkable." (Id., at para. 7.277).

[1130] *See*, for example, Appellate Body Report in *Mexico – Anti Dumping Measures on Rice* : "[...] Article 12 of the *SCM Agreement* as a whole 'set[s] out evidentiary rules that apply *throughout* the course of the

"questionnaires" within the meaning of Article 12.1.1, and thus subject to the 30-day minimum response period, investigating authorities often would find themselves having to choose between seeking the most accurate and complete information, so as to ensure a sound basis for their determinations at the risk of exceeding the allowed timeframe in Article 11.11 for completing their investigations, on the one hand, or completing their investigations within the allowed timeframe, but on the basis of poor quality and/or incomplete information, on the other hand. Neither alternative would be in the interest of investigating authorities or interested Members and parties.[1131]

15.33 In this regard, we recall that in considering similar questions, the Appellate Body has consistently taken into account the balance of the due process rights of interested parties contained in Article 12 of the SCM Agreement against the need of investigating authorities to control the conduct of the investigation and to carry out the multiple steps required to reach a timely completion of the investigation. For example, in *Mexico – Anti-dumping Measures on Rice*, the Appellate Body stated that:

> "[T]he due process rights in Article 6 of the AD Agreement [the analogous provision to Article 12 of the SCM Agreement]—which include the right to 30 days for reply to a questionnaire—'cannot extend indefinitely' but, instead, are limited by the investigating authority's need 'to 'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion' of the proceeding".[1132]

15.34 We note the specific elements of the balance struck in Article 12 in this regard. From the point of view of the investigating authority, first, an interpretation of the term "questionnaires" in Article 12.1.1 as going beyond the initial comprehensive questionnaire or set of questionnaires in an investigation is difficult to reconcile with the extension requirement under the second sentence of that provision.[1133] In particular, if a minimum 30-day period applied to all requests for information, any extensions of this time-limit pursuant to Article 12.1.1 would compromise the possibility to complete an investigation within the required timeframes. Similarly, as noted, pursuant to Article 12.5 of the SCM Agreement investigating authorities must "satisfy themselves as to the accuracy of the information supplied" upon which their findings will be based. One means by which investigating authorities may satisfy this "accuracy" requirement is by requesting clarifications and/or additional information. If all such requests were questionnaires within the meaning of Article 12.1.1, and thus subject to the 30-day rule, this again would impede the timely completion of the investigation. Furthermore, applying the 30-day rule to all requests for information would be at odds with Article 12.12 of the SCM Agreement, which generally provides that the procedures set out in Article 12 are not intended to prevent investigating authorities from "proceeding expeditiously" to reach a preliminary or final determination.

[...] investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' *throughout* [...] an investigation'". (Appellate Body Report on *Mexico – Anti Dumping Measures on Rice*, para. 292).

[1131] The United States emphasises this point, arguing that meeting the timeframes imposed by Article 11.11 becomes even more difficult where respondents fail to answer questions posed in the initial questionnaire; for instance, if the 30-day rule would have applied to each of the follow-up requests for additional information made in the investigations at issue, the USDOC would have required between 240 and 540 days only for the collection of most of the relevant factual information with respect to subsidization, and given the subsequent phases of the proceeding, the USDOC would have been unlikely to meet the timeframes established in Article 11.11. (United States first written submission, paras. 480-481) China does not contest this.

[1132] Appellate Body Report on *Mexico – Antidumping Measures on Rice*, para. 282 (quoting Appellate Body Report on *US – Oil Country Tubular Goods Sunset Reviews*, para. 242, in turn quoting Appellate Body Report on *US – Hot Rolled Steel*, para. 73., in turn quoting Panel Report on *US – Hot Rolled Steel*, para. 7.54).

[1133] The second sentence of Article 12.1.1 states, "Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable".

15.35 On the other hand, we do not see that interpreting the term "questionnaires" in Article 12.1.1, as the initial comprehensive (set of) questionnaire(s) in an investigation, would leave the interested Members and parties with inadequate due process protections against unreasonable and overly burdensome information requests with unduly short deadlines, and the resultant risk of resort to facts available, as China argues. In particular, the procedural rules for collecting and handling evidence in Article 12 contain a number of provisions preventing investigating authorities from behaving in such a manner. First, Article 12.7 of the SCM Agreement, governing the use of "facts available" by investigating authorities, addresses China's concern by precluding investigating authorities from resorting to facts available where, *inter alia*, information is provided "within a reasonable period". Thus, even if information is submitted after a deadline, but within a reasonable period, investigating authorities are not entitled to apply facts available.[1134] In addition, the "ample opportunity" requirement in Article 12.1 of the Agreement ensures that requests for information that are not questionnaires, and thus are not subject to the 30-day rule, nevertheless are protected from unreasonable deadlines that would prevent the submitters of the information from adequately defending their interests.[1135] Furthermore, we note that pursuant to Article 12.11 of the Agreement, investigating authorities are required to take "due account" of any difficulties experienced by interested parties in supplying information requested. Therefore, we do not see that an interpretation of "questionnaires" in Article 12.1.1 as the initial comprehensive questionnaire or set of questionnaires in an investigation would deprive respondents of due process rights or would give investigating authorities unfettered license in regard to information requests. More generally, as noted, it is in the ultimate due process interests of respondent parties in countervailing duty investigations that the investigating authorities have the possibility, within the timeframes and other constraints imposed by the SCM Agreement, to obtain the information necessary for them to render well-founded determinations.

15.36 Thus, in our view, interpreting the term "questionnaires" in Article 12.1.1 of the SCM Agreement as referring only to the comprehensive (set of) questionnaire(s) issued at the outset of the investigation is supported by the object and purpose of the countervailing duty provisions, in that it effectively strikes the balance that Article 12 requires between, on the one hand, the due process rights of interested parties and, on the other hand, the right of investigating authorities to obtain the information they need to conduct their investigations in the manner prescribed in the SCM Agreement.

15.37 For the foregoing reasons, we conclude that the term "questionnaires", as used in Article 12.1.1 of the SCM Agreement, refers to the initial comprehensive questionnaire (or set of questionnaires)[1136] issued by an investigating authority at or following the initiation of a

[1134] In this regard, we note that the Appellate Body in *US – Hot-Rolled Steel* held that while investigating authorities may impose deadlines for the submission of information in order to allow the timely completion of the investigations, investigating authorities are not entitled, under Article 6.8 of the AD Agreement (the analogous provision of Article 12.7 of the SCM Agreement), to reject information provided by interested parties for the "sole reason" that it was submitted beyond the deadlines for responses to questionnaires. According to the Appellate Body, investigating authorities must consider whether, in light of all the facts and circumstances of the case, the information was however submitted within a reasonable period of time. The Appellate Body went on to explain that the determination of whether information is submitted within a reasonable period of time must be defined on a case-by-case basis, "consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness'" and in light of the specific facts and circumstances of each case. (Appellate Body Report on *US – Hot-Rolled Steel*, paras. 84 and 89).

[1135] We recall that China has made no claim pursuant to Article 12.1 that the USDOC failed to give it "ample opportunity" to provide its responses to the supplemental and new allegations questionnaires that are the subject of this claim.

[1136] Whether in one or several documents, as issued to each interested Member, and to each kind of interested party. We note here the definition of "interested parties" in Article 12.9: an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the

countervailing duty investigation covering the spectrum of issues on which the investigating authority will have to make determinations in relation to subsidization of the investigated product, injury and causation.

2. The questionnaires and subsequent requests for information issued by the USDOC[1137]

15.38 Having interpreted the term "questionnaires" in Article 12.1.1 as referring to the comprehensive questionnaire(s) issued at or following the initiation of the investigation, the question becomes whether any or all of the "supplemental" or "new allegation" questionnaires issued by the USDOC in the investigations at issue before us constituted "questionnaires" of this type. We thus now examine the evidence concerning the nature of these questionnaires.

15.39 We recall that the "supplemental" and "new allegation" questionnaires are the only information requests subject to this claim, i.e., that there is no claim concerning the amount of time allowed for responses to the initial questionnaires issued at the outset of each investigation, or in respect of any other information requests that may have been made. We also note that the parties do not disagree that the USDOC allowed less than 30 days for responses to all of the "supplemental" and "new allegation" questionnaires.

15.40 In all of the investigations at issue, the questionnaire issued to the Government of China by the USDOC at the outset of the investigations included the following questions: (i) "general questions" including on the tariff classification of the products concerned, and their official descriptions, as well as requests for Annual reports of the People's Bank of China; (ii) "program-specific questions", requesting specific information with respect to individual alleged subsidy programmes; (iii) "Appendix 1", containing a standard series of questions to be answered for each alleged subsidy programme, including: description, purpose and date of establishment of the programme; identification of authorities administering the programme; relevant laws, regulations and reports; application process and eligibility criteria; identification of applicants and beneficiaries; and (iv) "Appendix 2", containing a standard information request to be answered for each programme involving "grants", including the date of approval and disbursement of the grant(s) and the amount of the grant(s) approved and actually authorized.[1138]

15.41 The questionnaires issued to the exporters and/or producers ("Chinese respondents") by the USDOC at the outset of the investigations included the following requests for information: (i) "Affiliated Companies", requesting information on affiliations among firms in the industry; (ii) "general questions", requesting information on, *inter alia*, ownership, legal structure and financial data of the firm(s) concerned; process of production of the product(s) concerned, marketing and

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members of which are producers, exporters or importers of such product; and a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

[1137] We note here that in U.S. countervailing duty investigations, the USDOC's questionnaires address only the issues related to subsidization, and do not address injury or causation. These latter issues are handled by a separate agency which issues its own questionnaires on these matters. China has raised no claims concerning injury or causation in respect of any of the investigations before us.

[1138] CWP Initial Questionnaire to the Government of China; Initial Questionnaire to Respondent Producers; First Supplemental Questionnaire to the Government of China; and First Supplemental Questionnaire to Kingland (Exhibit US-104); LWS Initial Countervailing Duty Questionnaire to the Government of China; Initial Questionnaire to Respondent Producers; and First Supplemental Questionnaire to the Government of China (Exhibit US-105); LWR Initial Questionnaire to the Government of China; Initial Questionnaire to Respondent Producers; First Supplemental Questionnaire to the Government of China; and First Supplemental Questionnaire to Aifudi (Exhibit US-106); OTR Initial Questionnaire to the Government of China; Initial Questionnaire to Respondent Producers; First Supplemental Questionnaire to the Government of China; and First Supplemental Questionnaire to TUTRIC (Exhibit US-107).

channels of distribution; sales and export data; (iii) "program-specific questions", requesting specific information with respect to individual alleged subsidy programmes; (iv) "Appendix 1", containing a standard series of questions to be answered for each alleged subsidy programme, including: application and approval process; eligibility criteria; benefits received; identification of merchandise benefited; and (v) "Appendix 2", containing a standard information request to be answered for each programme involving "grants", including the amount authorized and received from all grants authorized, date of approval and receipt of the grant.[1139]

15.42 In each investigation, in addition to these initial questionnaires, the USDOC issued both "supplemental" questionnaires and "new allegation" questionnaires. Concerning the supplemental questionnaires issued to the Government of China and the Chinese respondents in all of the investigations[1140], the record evidence shows that the questions they contained were in the nature of follow-up to the initial questionnaire responses, i.e., requests for additional information related to questions previously posed, clarifications, explanations, details, confirmations, provision of documentation and/or translations, responses to questions that had not been answered or been answered incompletely, and sources for the information provided.[1141]

15.43 Concerning the new allegation questionnaires, we note that these mainly contained the same standard information requests as in Appendices 1 and/or 2 of the questionnaires issued at the outset of the investigations.[1142] For a limited number of subsidy programmes, however, the new allegation questionnaires omitted the Appendix 1 and 2 information requests and contained only questions related to the specific programmes concerned.[1143]

15.44 We recall our finding above that the term "questionnaires" to which the 30-day rule applies pursuant to Article 12.1.1 of the SCM Agreement refers to the (set of) initial comprehensive questionnaire(s) issued by an investigating authority at or following the initiation of a countervailing duty investigation. As discussed, the fact that such initial questionnaires by nature are comprehensive is a main reason why, in our view, the SCM Agreement establishes a specified minimum period to respond to them.

15.45 Considering the "supplemental" questionnaires from this perspective, in our view, the record evidence demonstrates that these were not comprehensive questionnaires covering the spectrum of issues on which the USDOC needed information, but instead were requests for information generated by and directly related to the responses provided by the various interested parties to the initial questionnaires including, in a number of instances, restatements of questions not answered or only

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[1139] Exhibits US-104-107.

[1140] In each investigation, the USDOC issued a series of three to five supplemental questionnaires. Before us, the parties have provided evidence only in respect of the first supplemental questionnaire in each investigation. The United States submits, and China does not contest, that the second and subsequent supplemental questionnaires contained considerably fewer questions and covered fewer programmes than did the first.

[1141] Exhibits US-104-107.

[1142] *See, e.g.,* CWP First New Allegations Questionnaire to the Government of China (Exhibit US-130); CWP First New Allegations Questionnaire to Kingland (Exhibit US-131); CWP First New Allegations Questionnaire to Shuangjie (Exhibit US-132); CWP Second New Allegations Questionnaire to East Pipe (Exhibit US-133); CWP Second New Allegations Questionnaire to the Government of China (Exhibit US-134); LWR First New Allegations Questionnaire to the Government of China (Exhibit US-136); LWR First New Allegations Questionnaire to East Pipe (Exhibit US-137); LWS First New Allegations Questionnaire to the Government of China (Exhibit US-139); LWS First New Allegations Questionnaire to SSJ (Exhibit US-141); LWS First New Allegations Questionnaire to Aifudi (Exhibit US-143); OTR First New Allegations Questionnaire to GTC (Exhibit US-144); OTR First New Allegations Questionnaire to TUTRIC (Exhibit US-145); OTR First New Allegations Questionnaire to the Government of China (Exhibit US-146).

[1143] *See, e.g.,* CWP Second New Allegations Questionnaire to Kingland (Exhibit US-135).

partially answered in the initial questionnaire response. Thus, we find that none of the supplemental questionnaires was a "questionnaire" in the sense of Article 12.1.1 subject to the 30-day rule for response.

15.46 Concerning the "new allegation" questionnaires, China argues that even accepting, *arguendo*, that the 30-day rule in Article 12.1.1 applies only to the "full initial questionnaire", the "first" round of new allegation questionnaires issued by the USDOC in the investigations at issue qualifies as the initial questionnaire in the newly initiated "investigations" with respect to new subsidy allegations. China submits in this regard that the "first new allegation questionnaires" are indistinguishable from the "full initial questionnaires" issued at the outset of the investigation, because they neither supplement nor are related in any way to the initial questionnaires or other prior questionnaires; and because the nature of the questions and the level of detail requested in the new allegation questionnaires are similar to those of the questions in the initial questionnaires.[1144]

15.47 In our view this is a closer question than that in respect of the supplemental questionnaires. As the parties both recognize, the new allegation questionnaires concern newly-alleged subsidies, which were not referred to in the application for the investigation or in the initial questionnaires. As such, the kinds of information requested in the new allegation questionnaires, regarding these alleged subsidies, is essentially the same as that regarding the alleged subsidies referred to in the initial questionnaires. In other words, the kinds of information requested concerning the alleged subsidy programmes are indistinguishable as between the initial and new allegation questionnaires.[1145]

15.48 That said, the new allegation questionnaires did not include the full range of questions contained in the initial questionnaires (i.e., they contained no questions about the product under investigation, about company affiliations, ownership, legal structure and financial data, production processes, marketing, channels of distribution, sales and export data, etc.). To the contrary, the questions were limited to standardized information requests and/or programme-specific questions concerning the newly-alleged subsidies.[1146] While these newly-alleged subsidies were unrelated to the alleged subsidies covered by the initial questionnaires, all of the newly-alleged subsidies, like those covered by the initial questionnaires, were alleged to be benefiting the same products that were the subjects of the ongoing investigations. This indicates to us that these questionnaires, which pertained

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[1144] *See, e.g.*, China first written submission, footnote 364; second written submission, paras. 311-313; response to Panel question 105 (first meeting).

[1145] In fact, as we noted in para. 15.43, *supra*, the majority of "new allegation" questionnaires mainly contained the same standard information requests as in Appendix 1 and/or Appendix 2 of the questionnaires issued by the USDOC at the outset of the investigations.

[1146] Furthermore, our examination of the evidence on the record indicates that the new allegation questionnaires were far less extensive than the questionnaire issued by the USDOC at the outset of the investigations. For instance, the United States submits, and China does not argue to the contrary, that: (i) in the CWP investigation, the initial questionnaire covered 28 subsidy programmes, containing at least 93 questions for the Government of China and at least 85 questions for the respondent producer, while the first new allegation questionnaire issued to these respondents covered only 1 subsidy programme and contained fewer questions than the initial questionnaire; (ii) in the LWR investigation, the initial questionnaire covered 27 subsidy programmes, containing at least 81 questions for the Government of China and 87 questions for the respondent concerned, while the new allegation questionnaire issued to all these respondents covered only 1 programme and contained fewer questions than the initial questionnaire; (iii) in the LWS investigation, the initial questionnaire covered 23 subsidy programmes, containing 66 questions for the Government of China and 63 questions for the respondent concerned, while the new allegation questionnaire issued to all these respondents covered between 7-12 subsidy programmes and contained fewer questions than the initial questionnaire; and (iv) in the OTR investigation, the initial questionnaire covered 21 subsidy programmes, containing 76 questions for the Government of China and 81 questions for the respondent concerned, while the first new allegation questionnaire issued to all these respondents covered 8-10 programmes and contained fewer questions than the initial questionnaires. (United States first written submission, footnote 632; second written submission, footnotes 411 and 413-415).

to the same allegedly subsidized products as, but whose scope was considerably more limited than, the initial questionnaires, did not pertain to entirely new countervailing duty investigations, but rather to the ongoing investigations, and thus did not constitute "questionnaires" to which the 30-day rule of Article 12.1.1 applies. We note in this regard that China raises no claim, and we make no finding, as to the WTO-consistency of adding new subsidy allegations to an investigation subsequent to initiation and the issuance of the initial (set of) questionnaire(s).

15.49 For the foregoing reasons, we find that China has not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.1.1 of the SCM Agreement in providing less than 30 days for responses to the "supplemental" questionnaires and "new allegation" questionnaires in the four countervailing duty investigations at issue in the present dispute.

XVI. CHINA'S CLAIM PERTAINING TO THE USDOC'S APPLICATION OF "FACTS AVAILABLE"

A. CLAIMS OF CHINA

16.1 In respect of the provision of goods (HRS) through transactions involving trading companies, China claims that the USDOC's use of facts available in the LWR and CWP countervailing duty investigations to determine the benefit allegedly conferred on investigated producers with respect to these transactions was inconsistent with Articles 12.1 and 12.7 of the SCM Agreement.[1147]

B. MAIN ARGUMENTS OF THE PARTIES

1. China

16.2 China argues that the USDOC failed to give investigated producers notice of the information that was necessary for the subsidy calculations at issue, because it did not ask investigated producers about the amount and origin of the HRS they purchased from trading companies that had been produced by SOEs. Moreover, China contends, the USDOC did not give the investigated producers the opportunity to present *any* evidence that they would have considered relevant to the investigations, in particular, the opportunity to demonstrate that they had purchased greater percentages of privately-produced HRS from trading companies than the percentages determined by the USDOC. Therefore, China submits, the USDOC failed to comply with the "procedural and due process obligations" under Article 12.1 of the SCM Agreement. China further submits that the USDOC's failure to request investigated producers to provide such information, and the USDOC's resort instead to facts available and adverse inferences, unfairly penalized investigated producers, contrary to Article 12.1 of the SCM Agreement.[1148]

16.3 China also considers that the United States' use of facts available was inconsistent with Article 12.7 of the SCM Agreement. According to China, this provision limits the use of facts available to situations in which a party "refuses access to, or otherwise does not provide" necessary information and, as observed by previous panels, investigating authorities are required to request the "necessary information" before resorting to facts available.[1149] China submits that the investigated

[1147] Paragraph B.1(g)(viii) of the "as applied" claims in China request for establishment of the Panel; China first written submission, para. 468 (n); second written submission, para. 315 (n).

[1148] China first written submission, paras. 461-463, citing to Panel Report on *Argentina – Ceramic Titles*, para. 6.54.

[1149] Id., para. 464, citing to Panel Report on *EC – Countervailing Measures on DRAM Chips*, para. 7.60; Panel Report on *Japan DRAMs (Korea)*, para. 7.381.

producers neither refused access to nor otherwise failed to provide information pertaining to the origin of the HRS they purchased from trading companies.[1150]

16.4 In China's view, the United States has essentially conceded that the USDOC's use of facts available was, in fact, inconsistent with Articles 12.1 and 12.7 of the SCM Agreement.[1151]

2. United States

16.5 The United States submits that the USDOC resorted to the use of facts available because, until a very late stage of the investigations, the USDOC was not presented evidence that indicated the need for information about the amount of HRS produced by SOEs that investigated producers had purchased from trading companies.[1152] Thus, in order to determine the benefit conferred on the investigated producers with respect to these transactions, the USDOC relied on evidence from the records of the underlying investigations; specifically, the USDOC relied on information submitted by China. The United States adds that, before any definitive countervailing duty is levied, investigated producers would be provided the opportunity, in an assessment review, to present evidence with respect to the amount of the HRS they purchased from trading companies that was produced by SOEs. In response to questioning from the Panel, the United States clarified that it does not claim that the alleged violations of Articles 12.1 and 12.7 of the SCM Agreement would be "cured" by this subsequent collection of additional information. Rather, the United States indicates, should the Panel find that it acted inconsistently with Articles 12.1 and 12.7 of the SCM Agreement, it "would determine during implementation how to bring its measures into conformity with those obligations and take any appropriate action accordingly".[1153]

C. ASSESSMENT BY THE PANEL

16.6 The United States does not explicitly assert that the USDOC's resort to facts available in the investigations at issue was WTO-consistent. Nor does the United States directly contest China's claim that the USDOC's use of facts available was inconsistent with Articles 12.1 and 12.7 of the SCM Agreement. Rather, the United States indicates, the USDOC's basis to rely on facts available was that the USDOC "was not presented evidence that indicated the need for information about the amount of [HRS] purchased through trading companies that came from SOEs until a very late stage of the investigations".[1154]

16.7 We start our consideration of this claim by recalling that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[1155] Thus, notwithstanding the fact that the United States appears not to contest China's claims, we must, consistent with the approach adopted by previous panels, satisfy ourselves that China has established a *prima facie* case

[1150] China first written submission, paras. 464-466. China also argues that Article 6.8 of the AD Agreement provides further context for interpreting Article 12.7 of the SCM Agreement.

[1151] China second written submission, para. 43.

[1152] The United States further indicates that given the time-limits for completing the investigations, the USDOC could not request investigated producers to provide additional clarifying information with respect to this issue. (United States response to Panel question 109 (first meeting)).

[1153] United States first written submission, paras. 493-494; response to Panel questions 108 and 109 (first meeting).

[1154] *See, e.g.*, United States response to Panel question 109 (first meeting).

[1155] Appellate Body Report on *EC – Hormones*, para. 104 (quoting Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14). In order to establish a *prima facie* case, a complaining party must adduce evidence sufficient to raise a presumption that what is claimed is true. However, precisely how much and precisely what kind of evidence will be required to establish a presumption that a claim is valid will necessarily vary from case to case. (Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, at 323).

of violation.[1156] We will therefore examine the arguments and evidence presented by China, in order to determine whether it has established a *prima facie* case of inconsistency with Articles 12.1 and 12.7 of the SCM Agreement.

16.8 We first examine China's claim concerning the inconsistency of the United States' use of facts available with Article 12.7 of the SCM Agreement, which governs the use of facts available by an investigating authority in a countervailing duty investigation, and provides as follows:

> "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available".

16.9 Thus, pursuant to the plain language of Article 12.7 of the SCM Agreement, recourse to facts available is permissible only under the limited circumstances where an interested Member or interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. Both parties agree with our reading of Article 12.7 of the SCM Agreement.[1157] Our interpretation is also consistent with that of prior panels and Appellate Body that have considered this provision.[1158]

16.10 China argues that, in the LWR and CWP countervailing duty investigations, investigated producers neither refused access to nor otherwise failed to provide information regarding the origin of the HRS they purchased from trading companies, and therefore, the United States' resort to facts available was inconsistent with Article 12.7 of the SCM Agreement.

16.11 Before addressing China's claim, we will examine the relevant facts relating to the USDOC's resort to facts available in the underlying investigations, as set forth in the USDOC's determinations.[1159]

16.12 In its Issues and Decision Memoranda in both investigations, the USDOC explained that, in a "change" from its preliminary determination, it decided to treat purchases of HRS from privately-owned trading companies that in turn purchased HRS from state-owned producers/suppliers as countervailable subsidies. The USDOC also indicated that it did not, during the course of the investigation, seek information from the respondents regarding the amount of the HRS they had purchased from trading company suppliers that was produced by SOEs, and therefore that it examined the information on the record "to determine what information [was] available to calculate this amount".[1160] In addition, in the LWR investigation, the USDOC added that it would seek this information in any future administrative review in the event that the investigation resulted in a countervailing duty order.[1161]

16.13 In both investigations, the USDOC relied on information submitted by the Government of China with respect to the production of HRS by SOE members of China Iron Steel Association

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[1156] *See, e.g.*, Panel Reports on *US – Shrimp (Ecuador)*, para. 7.11; *US – Stainless Steel (Mexico)*, para. 7.52; and *US – Anti-Dumping Measures on PET Bags (Thailand)*, para. 7.7.

[1157] *See, e.g.*, United States response to Panel question 108 (first meeting); China first written submission, para. 464.

[1158] Appellate Body Reports on *Japan – DRAMs (Korea)*, para. 235 and *Mexico – Anti-Dumping Measures on Rice*, para. 291; Panel Reports on *Japan – DRAMs (Korea)*, para. 7.383 and *EC – Countervailing Measures on DRAM Chips*, para. 7.245.

[1159] We note that the parties do not dispute the facts on the record.

[1160] Exhibits CHI-1, p. 10 and CHI-2, pp. 8-9.

[1161] Exhibit CHI-2, p. 9.

("CISA") to determine the amount of the HRS purchased by investigated producers through trading companies. In the CWP countervailing duty investigation, the USDOC noted that the Government of China had reported that SOE members of CISA accounted for approximately 71 per cent of HRS production in China in 2006. In the LWR countervailing duty investigation, China's ownership information was updated at verification: The Government of China reported that CISA members accounted for 70.81 per cent of HRS production in China in 2006. Subsequently, however, the USDOC determined that the ownership categorization of HRS producers reported by the Government of China had been developed by China's legal counsel through public sources and not collected by CISA itself as the Government of China had reported. On this basis, the USDOC considered that the Government of China had not properly disclosed how the reported ownership structures of CISA members were obtained, and as a consequence, the USDOC determined that the Government of China did not act to the best of its ability. Thus, the USDOC drew an adverse inference with respect to the ownership of HRS producers in China, and concluded on that basis that 96.1 per cent of HRS production in China was by SOEs.[1162]

16.14 In the CWP investigation, the USDOC relied on this figure to determine the amount of SOE-sourced HRS that investigated producers had purchased from private trading companies, and therefore, to calculate the benefit investigated producers received from these transactions.[1163], [1164] In the LWR investigation, however, the USDOC decided to use the production figure reported by the Government of China – that is, 70.81 per cent – to calculate the benefit allegedly conferred on investigated producers from such trading company transactions.[1165, 1166]

[1162] In both investigations, the USDOC, rather than relying on the ownership characterization of CISA's producers provided by the Government of China, instead categorized HRS producers as state-owned where (i) the evidence on the record indicated that the producer was state-owned or (ii) where the Government of China had failed to provide factual evidence supporting the classification of the company.

[1163] Exhibit CHI-1, p. 11; and *Final Determination Calculation Memorandum for Zhejiang Kingland Pipeline and Technologies Co., Ltd.; Kingland Group Co., Ltd., Beijing Kingland Century Technologies Co.; Zhejiang Kingland Pipeline Industry Co., Ltd.; and Shanxi Kingland Pipeline Co., Ltd*., Exhibit US-75, p. 3.

[1164] The record indicates that, in both investigations, the USDOC also relied on this figure to determine the appropriate benchmark for establishing whether the government provision of HRS conferred a benefit. (*See, e.g.*, Exhibits CHI-1, p. 65 and CHI-2, p. 4). We note, however, that China is not challenging this particular use of facts available by the USDOC. As we understand it, China is only challenging the USDOC's resort to facts available in order to calculate the proportion of the producers' purchases of HRS from trading companies that originated from SOEs.

[1165] Exhibit CHI-2, pp. 9 and 25-26; *Final Determination Calculation Memorandum for Kunshan Lets Win Steel Machinery Co., Ltd*., Exhibit US-76, p. 3; and *Final Determination Calculation Memorandum for Zhangjiagang Zhongyuan Pipe Making Co., Ltd.; Jiangsu Qiyuan Group Co., Ltd.; Jiangsu Zhongjia Steel Co., Ltd.; Zhangjiagang Zhongxin Steel Product Co., Ltd.; and Zhangjiagang Baoshuiqu Jiaqi International Business Co., Ltd*., Exhibit US-77, p. 5.

[1166] In its determination, the USDOC stated as follows:

> "[...] we agree with the GOC and GWSP that we never asked the respondent companies to report these amounts. Thus, the respondents have not failed to provide requested information and no adverse inference is warranted [...] Similarly, [...] we do not find that ZZ Pipe withheld information [...] Nonetheless, in light of our decision that purchases of SOE-produced HRS from trading companies provide a countervailable subsidy, we need to quantify the amount of such HRS [...] As explained above, we are not applying [adverse facts available] to the respondent companies for their purchases through trading companies because we did not ask them to report such information. Instead, we have reviewed other non-adverse information on the record to use as a basis for determining the amount of HRS purchased from trading companies that was produced by SOEs. [Thus] we are relying on the GOC reported SOE production figure for CISA members (i.e., 70.81 per cent). Because the GOC supplied this information, we do not believe that using this amount is adverse to the respondent companies." (Exhibit CHI-2, pp. 25-26).

16.15 Thus, our analysis of the evidence indicates that the USDOC's basis for resorting to facts available in both investigations was the same: the USDOC applied facts available for the sole reason that, during the course of the investigations, it did not request information from the investigated producers regarding the amount of SOE-sourced HRS they purchased from trading companies. Nothing on the record indicates that the investigated producers refused access to or failed to provide information about the amount of the HRS they had purchased from trading companies that was produced by SOEs. To the contrary, it is clear to us that, notwithstanding the fact that this information was deemed "necessary" to determine the benefit that investigated producers allegedly received from such trading company transactions[1167], the USDOC never requested investigated producers to provide the information. Furthermore, there is no indication on the record, nor does the United States argue, that the USDOC considered that investigated producers "significantly impede[d]" the investigations at issue.

16.16 We have determined above that Article 12.7 of the SCM Agreement limits the circumstances under which an investigating authority may resort to facts available to those where an interested party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation". The SCM Agreement contemplates no other possibilities; for instance, where an investigating authority, until a very late stage of the investigation, learns the need for information which it did not request during the course of the investigation and that is necessary to its final subsidization or injury determinations. As the USDOC's reliance on facts available in the present instance does not fall within the situations contemplated in Article 12.7, we find that the USDOC's use of facts available in the CWP and LWR investigations was inconsistent with Article 12.7 of the SCM Agreement.

16.17 For the reasons set forth above, we conclude that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement in applying facts available to determine the amount of the HRS investigated producers purchased from trading companies that originated from SOEs.

16.18 In the light of our findings under Article 12.7, it would not be necessary to examine, or to make additional findings concerning, China's allegation that the USDOC also acted inconsistently with the obligations of the United States under Article 12.1 of the SCM Agreement by failing to request information on the amount of HRS purchased by investigated producers from trading companies that originated from SOEs, were such a claim properly before us. We do not consider this to be the case, however, as the only references to Article 12.1 in China's request for establishment of

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> We observe that there is no explanation on the record as to why, in contrast to the LWR investigation, the USDOC in the CWP investigation calculated the amount of SOE-sourced HRS purchased from trading companies by using the figure of HRS production it derived from the adverse inference it drew with respect to the ownership of HRS in China. In any event, whether the USDOC merely relied on facts available or, in addition, drew adverse inferences is not germane to our resolution of China's claim. The essence of China's claim concerns the USDOC's application of facts available itself and not which information from the record the USDOC actually selected as "facts available".

[1167] It is undisputed that the information regarding the amount of HRS that investigated producers purchased from trading companies that was produced by SOEs was deemed "necessary" for purposes of determining the benefits at issue. For instance, in the LWR investigation, the USDOC stated that: "[…] in light of our decision that purchases of SOE-produced HRS from trading companies provide a countervailing subsidy, *we need to quantify the amount of such HRS*". (Exhibit CHI-2, p. 25). (emphasis added) In its first written submission, the United States also confirmed that "*such information was necessary* to determine the existence of a benefit conferred on producers of the product subject to investigation." (United States first written submission, para. 493. (emphasis added)).

the Panel concern (i) the alleged "failure to provide notice to interested parties of the information which the US authorities required to make a determination with respect to whether certain entities are 'public bodies'", an entirely separate issue, which China did not pursue in this dispute; and (ii) the alleged "failure to provide notice to interested parties of the information which the US authorities required to determine whether the simultaneous application of anti-dumping and countervailing duties results in a double remedy", addressed *supra*, at Section XIV.C.4.

XVII. CONCLUSIONS AND RECOMMENDATIONS

17.1 For the reasons set out above, we conclude:

(a) in respect of China's claims concerning the USDOC's determinations of financial contributions in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining in the relevant investigations at issue that SOEs and SOCBs constituted "public bodies";

(ii) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 1.1 of the SCM Agreement by failing to determine, in the LWR, CWP, and OTR investigations, that trading companies were "entrusted" or "directed" by the government to make financial contributions to producers of the investigated products, in the form of the provision of goods;

(b) in respect of China's claims concerning the USDOC's specificity determinations in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(a) of the SCM Agreement by determining in the OTR investigation that lending by SOCBs to the OTR tire industry was *de jure* specific;

(ii) The USDOC acted inconsistently with the obligations of the United States under Article 2 of the SCM Agreement by determining that the government provision of land-use rights, in the LWS investigation, was regionally-specific;

(c) in respect of China's claims concerning the USDOC's benefit determinations in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Articles 10, 14, 19.1, 19.4 or 32.1 of the SCM Agreement or Article VI:3 of the GATT 1994 by failing to conduct a pass-through analysis in the OTR investigation to determine whether any subsidy benefits received by trading companies selling rubber inputs were passed through to the OTR producers purchasing those inputs;

(ii) The USDOC acted inconsistently with the obligations of the United States under Articles 1.1 and 14 of the SCM Agreement by failing to ensure in the OTR investigation that the methodology it used to establish the existence and amount of benefit to tire producers from their purchases of SOE-produced

inputs from trading companies did not calculate a benefit amount in excess of that conferred by the government provision of those inputs;

(iii) In the light of our findings in respect of China's claims on facts available (paragraph 17.1(f)(ii), *infra*), we apply judicial economy in respect of China's claims concerning the USDOC's benefit determinations in the LWR and CWP investigations regarding the provision of HRS by trading companies;

(iv) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by not "offsetting" positive benefit amounts with "negative" benefit amounts, either across different kinds of rubber or across different months of the period of investigation, in the OTR investigation; and that China thus also did not establish that the United States also thereby acted inconsistently with its obligations under Articles 10, 19.1, 19.4, or 32.1 of the SCM Agreement, or Article VI:3 of the GATT 1994;

(v) China's claims in respect of the benchmarks actually used by the USDOC to calculate the benefit from the provision of loans and land-use rights by China in the LWS, OTR and CWP investigations, respectively, fall within our terms of reference;

(vi) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for HRS in the CWP and LWR investigations and for BOPP in the LWS investigation;

(vii) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(b) of the SCM Agreement by rejecting interest rates in China as benchmarks for calculating the benefit from RMB-denominated loans from SOCBs, in the CWP, LWS and OTR investigations, or that the benchmarks actually used in respect of the RMB-denominated loans were inconsistent with those obligations;

(viii) The USDOC acted inconsistently with the obligations of the United States under Article 14(b) of the SCM Agreement by using average annual interest rates as benchmarks for GTC's U.S. dollar-denominated loans from SOCBs in the OTR investigation;

(ix) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting land-use prices in China as benchmarks for government-provided land-use rights in the LWS and OTR investigations, or that the benchmarks actually used were inconsistent with those obligations;

(d) In respect of China's claims of consequential violations of Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 in connection with its claims referred to at paragraphs 17.1 (a)(i) and (ii), (b)(i) and (ii), and (c)(ii), (iv), (vi), (vii), (viii) and (ix): as indicated at paragraph 13.1, we apply judicial economy.

(e) in respect of China's double remedy claims, that:

(i) The "omission" challenged by China as part of its "as such" claims with respect to double remedies falls outside our terms of reference; consequently, we also find that China's "as such" claims under Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement and Articles VI and I:1 of the GATT 1994 equally fall outside our terms of reference;

(ii) China did not establish that the United States acted inconsistently with its obligations under Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement or under Article VI:3 of GATT 1994 by reason of the USDOC's use of its NME methodology in the four anti-dumping investigations at issue and the imposition of anti-dumping duties on that basis concurrently with the imposition of countervailing duties on the same products in the four countervailing duty investigations at issue;

(iii) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Articles 12.1 and 12.8 of the SCM Agreement by failing to give the Government of China and interested parties "notice" of the information it required to evaluate the existence of a double remedy, and to inform them of the essential facts under consideration that would "form the basis" for its determination in respect of double remedies, in the four countervailing duty investigations at issue;

(iv) China did not establish that the United States acted inconsistently with its obligations under Article I:1 of GATT 1994 when, as a result of the investigations at issue, it concurrently imposed anti-dumping duties calculated under the U.S. NME methodology and countervailing duties;

(f) in respect of China's claims of procedural violations in the countervailing duty investigations at issue, that:

(i) China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 12.1.1 of the SCM Agreement by failing to provide the Government of China and investigated producers at least 30 days to respond to the "supplemental" questionnaires and "new allegation" questionnaires used in the four countervailing duty investigations at issue;

(ii) The USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by applying facts available in the LWR and CWP investigations to determine the amount of HRS investigated producers purchased from trading companies that originated from SOEs; and

(iii) China's claim of violation of Article 12.1 is outside our terms of reference as it is not included in China's request for establishment of the Panel.

17.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with certain provisions of the SCM Agreement and of the GATT 1994, it has nullified or impaired benefits accruing to China under these agreements.

17.3 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with provisions of the SCM Agreement and of the GATT 1994 as set out above, we recommend that the United States bring its measures into conformity with its obligations under those Agreements.

ANNEX A

EXECUTIVE SUMMARIES OF FIRST WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

(27 April 2009)

I. INTRODUCTION

1. This dispute presents fundamental issues regarding the proper interpretation and application of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") and other covered agreements. The four sets of anti-dumping duty ("AD") and countervailing duty ("CVD") determinations at issue are *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China ("CWP")*, investigations A-570-910 and C-570-911; *Light – Walled Rectangular Pipe and Tube from the People's Republic of China ("LWR")*, investigations A-570-914 and C-570-915; *Laminated Woven Sacks from the People's Republic of China ("LWS")*, investigations A-570-916 and C-570-917; and *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China ("OTR")*, investigations A-570-912 and C-570-913. In each of these determinations the United States Department of Commerce ("Commerce") made findings and conclusions that were inconsistent with multiple provisions of the SCM Agreement. Commerce's conduct of the underlying investigations was likewise unlawful, leading to frequent denials of the due process and procedural rights of China and other interested parties in these investigations.

II. LEGAL ARGUMENT

A. COMMERCE'S INPUT SUBSIDY DETERMINATIONS IN EACH OF THE FOUR CVD INVESTIGATIONS WERE BASED ON FINDINGS OF "FINANCIAL CONTRIBUTION" INCONSISTENT WITH ARTICLE 1 OF THE SCM AGREEMENT

2. In each of the four CVD investigations under challenge, Commerce concluded that the Government of China bestowed countervailable subsidies without any legitimate basis for finding the requisite financial contributions by a "government" within the meaning of Article 1.1 of the SCM Agreement. None of the financial contributions deemed to confer countervailable input subsidies in these investigations was provided by the Government of China or any of its official agencies. Rather, all of the allegedly subsidized inputs were sold by corporate entities with separate legal personalities, owned in part or in whole by China (so-called State Owned Enterprises ("SOEs")), and in some cases, by private trading companies.

3. The Appellate Body recognized in *US –DRAMS* that under well-established principles of customary international law, the actions of state-owned corporate entities are *prima facie* private, and thus presumptively are not attributable to a Member under Article 1.1 of the SCM Agreement.[1] Their ordinary commercial sales thus cannot be deemed financial contributions unless they have been "entrusted or directed" within the meaning of Article 1.1.(a)(1)(iv) to provide the goods in question. Commerce made no such inquiry in any of the four CVD investigations. The record before the Panel is therefore devoid of any findings that the Government of China entrusted or directed SOEs to provide inputs to respondent producers.

[1] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112 & n.179.

4. Commerce sought to avoid the burden of making an entrustment or direction showing by concluding that the SOEs were "public bodies" within the meaning of Article 1.1(a)(1). Commerce reached this conclusion *solely* on the basis of what it characterized as a "rule of majority ownership," *i.e.*, if an SOE were majority-owned by the Government of China or a state-owned entity, Commerce treated that entity as a "public body" with no further inquiry or analysis. China submits that the conclusion that an entity is a "public body" solely because it is majority-owned by the government cannot be reconciled with the meaning of that term, as properly interpreted in accordance with the principles of Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention").

5. The ordinary meaning of "public body," read in light of the immediate context of Article 1.1(a)(i) and the SCM Agreement's object and purpose, establishes that it is an entity that exercises powers and authority vested in it by the State for the purpose of performing governmental functions. That conclusion is fully supported by the context provided by other WTO Agreements, particularly the GATS, as well as by "relevant rules of international law applicable in the relations between the parties," both of which must be examined under the interpretative framework set forth in Article 31 of the Vienna Convention.

6. Both the Appellate Body and Panels alike repeatedly have acknowledged that the ILC Articles[2] reflect a codification of customary international law and thus constitute "relevant rules of international law" for purposes of interpreting the WTO Agreements. Most relevant for present purposes is the Appellate Body's express endorsement of the principles set forth in the ILC Articles with respect to when the conduct of state-owned entities may constitute a financial contribution within the meaning of Article 1.1(a)(1). In *US – DRAMS*, the Appellate Body favourably cited the Commentary to ILC Article 8, which recognizes that "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority [within the meaning of Article 5]."[3] Thus, mere state ownership is insufficient, as a matter of international law, to attribute the conduct of a state-owned corporate entity to a State, and by extension, to a Member for purposes of Article 1.1 of the SCM Agreement. Thus, in the typical case, the conduct of state-owned corporate entities is not to be attributed to a State unless they are acting on the instructions of, or under the direction or control of the government within the meaning of Article 8, which is closely analogous to the standard enshrined in Article 1.1(a)(1)(iv), as the Appellate Body recognized in *US – DRAMS*.

7. The only other basis recognized under international law for attributing the conduct of state-owned corporate entities to a State is if they are "exercising elements of governmental authority" within the meaning of Article 5 of the ILC Articles, as the Appellate Body recognized in *US – DRAMS*. Article 5 of the ILC Articles addresses the conduct of entities that are "empowered by the law of the State to exercise functions of a public character normally exercised by State organs." Article 5 encompasses within its scope the type of entity that the SCM Agreement characterizes as a "public body" in Article 1.1. Accordingly, the standards it establishes for attributing State responsibility are directly relevant to interpreting the proper scope of that term. The key lesson they offer is that government ownership *per se* has little to do with attributing responsibility under Article 5, and by extension, with determining whether an entity is a public body for purposes of Article 1.1. As the Commentary to ILC Article 5 emphasizes, the "decisive criteria" for purposes of attribution with respect to such entities is not the degree of government ownership or control over them, but rather the fact that they are empowered to exercise governmental authority.[4]

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[2] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, adopted by the International Law Commission at its Fifty-third Session (2001) [hereinafter ILC Articles] (CHI-102).

[3] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112 and n.179 (quoting ILC Article 8, Commentary para. (6)).

[4] ILC Articles, p. 43, Commentary to Article 5, para. 3 (CHI-102).

8. In none of the CVD investigations did Commerce establish that any of the multiple SOEs alleged to have provided financial contributions were empowered under Chinese law to sell inputs at below-market prices in support of governmental policies, or that they in fact exercised such authority when making sales of inputs to the respondent producers or their trading company suppliers. Accordingly, all of the financial contribution findings in relation to inputs provided by SOEs were inconsistent with Article 1.1 of the SCM Agreement.

9. With respect to the sale of inputs by private trading companies, Commerce's financial contribution analysis was even more flawed. Commerce made no inquiry into whether China "entrusted or directed" these entities to provide inputs to the respondent producers, the only basis for finding that these entities made a financial contribution within the meaning of Article 1. Commerce asserted that no such findings were necessary because the trading companies sold inputs they purchased from SOEs, which Commerce had concluded (unlawfully) to be public bodies. In Commerce's view, because the trading companies had thus received a financial contribution, there was no need to determine whether they, in turn, had made a financial contribution to the respondent producers that purchased their goods.

10. The SCM Agreement requires a finding of a financial contribution by a government for every transaction or series of transactions that an investigating authority determines to be an actionable subsidy. It necessarily follows that when a respondent producer purchases goods from a private trading company, a financial contribution may be deemed to exist only if the evidence supports a finding that the trading company *itself* was entrusted or directed by the government to provide such goods to the respondent producer. However, in none of the CVD investigations did Commerce establish that any of the many private trading companies alleged to have provided financial contributions had been entrusted or directed to do so. Commerce thus failed to discharge its burden to establish through actual evidence the existence of a financial contribution by a government.

B. COMMERCE'S FINDINGS THAT SOEs AND PRIVATE TRADING COMPANIES PROVIDED INPUTS FOR LESS THAN ADEQUATE REMUNERATION WERE INCONSISTENT WITH THE SCM AGREEMENT

11. Commerce's benefit analysis, like its financial contribution analysis, failed to conform to the standards established in the SCM Agreement. Commerce (1) unlawfully presumed that Chinese private prices were distorted when selecting benchmarks to measure the adequacy of remuneration, (2) unlawfully presumed that trading companies received benefits in their purchases of inputs from SOEs, and (3) unlawfully found a benefit where none existed by including in its calculations only those purchases made for less than the benchmark price, while excluding all purchases made for more than the benchmark price.

12. The Appellate Body has made clear that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision *is very limited*."[5] The records in the CWP, LWR, and LWS investigations contained evidence of the prices at which private suppliers in China sold the same inputs alleged to be provided by SOEs for less than adequate remuneration. As the Appellate Body recognized in *US – Softwood Lumber IV*, those private prices should have been the "primary benchmark" for determining the adequacy of remuneration under Article 14(d) of the SCM Agreement. Instead, Commerce rejected them solely on the basis that they were presumptively distorted by virtue of the degree of state ownership of the industries producing the relevant inputs.

13. Commerce's exclusive focus on the degree of government ownership of input suppliers to conclude that private prices were distorted cannot be reconciled with the Appellate Body's recognition that "an allegation that a government is a significant supplier *would not, on its own, prove distortion*

[5] Appellate Body Report, *US – Softwood Lumber IV*, para. 102 (emphasis added).

and allow an investigating authority to choose a benchmark other than private prices in the country of provision."[6] It also is inconsistent with Commerce's obligation to undertake the "case-by-case" factual analysis that Article 14(d) requires before a finding of distortion lawfully can be made. Commerce's reliance on alternative benchmarks for measuring adequate remuneration with respect to the provision of inputs in the CWP, LWR and LWS investigations, both from SOEs and from private trading companies, was predicated exclusively on its invalid findings that private prices were distorted. Accordingly, all of Commerce's benefit calculations relying on those alternative benchmarks are invalid.

14. In the CWP, LWR and OTR CVD investigations, Commerce countervailed the purchases of inputs not only from the SOEs, but from the private trading companies as well. Commerce's determinations were flawed, because Commerce never established that the private trading companies themselves received subsidies by virtue of their purchases of hot-rolled steel ("HRS") and rubber inputs from SOEs. Although Commerce concluded that the trading companies had received financial contributions from the SOEs (unlawfully, as explained above), it never investigated whether such purchases conferred a benefit. Therefore, when Commerce concluded that "all or some portion of the benefit" purportedly received by the trading companies was conferred on the producers who purchased inputs from these companies, Commerce presumed the "pass through" of a benefit that had not been found to exist in the first place.

15. Finally, Commerce unlawfully created a benefit where none existed by including in its benefit calculations in the OTR investigation only those transactions that produced a positive benefit, while excluding transactions that yielded no benefit. Commerce's calculation methodology cannot be reconciled with Article VI:3 of the GATT 1994 and relevant provisions of the SCM Agreement, which make clear that a countervailing duty is to be imposed in respect of the "*product*" under investigation "*as a whole*". When goods were purchased frequently over the period of investigation, determining whether remuneration was "adequate" thus necessarily required an *aggregate* analysis that took into account *all* of the respondents' purchases over the *entire* period of investigation, including those that were made for more than the benchmark price, and not merely those that were made for less than the benchmark price.

C. COMMERCE'S IMPOSITION OF COUNTERVAILING DUTIES BASED ON ALLEGED "POLICY LENDING" PROGRAMMES WAS CONTRARY TO THE SCM AGREEMENT

16. In the OTR, CWP, and LWS determinations, Commerce imposed countervailing duties based on its finding that state-owned commercial banks ("SOCBs") provided preferential, below-market loans to respondent producers pursuant to what Commerce characterized as "policy lending" programmes. China challenges Commerce's findings of financial contribution, specificity, and benefit as they pertain to the OTR determination, and Commerce's findings of benefit as they pertain to the CWP and LWS determinations.

17. The alleged "policy lending" programme that Commerce identified in the OTR investigation does not exist. The basic path of reasoning that underlies Commerce's "policy lending" construct, while difficult to discern, seems to be as follows: (1) Various economic planning documents in China contain general statements that encourage the development of different industries in China, including the industries in which the respondent producers allegedly operate; (2) the Government of China has ownership interests in SOCBs; (3) therefore, all loans by SOCBs to respondent producers must be "preferential, non-commercial" loans that the SOCBs made "pursuant to" the alleged "policy" defined by the economic planning documents, even though these planning documents do not refer to preferential loans by SOCBs, and do not in any way target the relevant industries for the provision of such loans.

[6] Appellate Body Report, *US – Softwood Lumber IV*, para. 102 (emphasis added).

18. Commerce rejected Chinese interest rates for RMB-denominated loans as the applicable benchmark under Article 14(b) of the SCM Agreement, on the grounds that these interest rates are "distorted" by "government interventions", and instead used fictitious interest rates to evaluate whether the loans were "preferential". In this way, the "policy lending" construct became self-fulfilling: because Chinese interest rates were lower than the fictitious benchmarks, the loans to respondent producers must have been "preferential", the "policy lending" programmes must therefore exist, and the SOCBs must have made these loans "pursuant to" the alleged "policies". Commerce's "policy lending" construct is a circular form of reasoning that brings the "subsidy" into creation through its own internal logic.

19. It is undisputed that all of the loans in question in OTR were made not by the Government of China, but by commercial banks in which the government has ownership interests. Commerce based its financial contribution finding on the theory that the SOCBs are "public bodies", but made no finding that the SOCBs made loans in the exercise of governmental authority, an essential prerequisite to a "public body" finding. Nor would any such finding have been possible on the OTR record, because the Government of China has not bestowed authority on SOCBs to provide preferential loans to tyre producers, either through the national and provincial planning documents on which Commerce relied, or through any other means.

20. The same economic planning documents upon which Commerce relied to find a financial contribution provided the cornerstone of Commerce's specificity analysis, and once again these documents were unsupportive of the conclusions that Commerce reached. The "legislation" on which Commerce relied for its finding of *de jure* specificity did not, as Article 2.1(a) of the SCM Agreement requires, define the elements of the subsidy that Commerce countervailed. It therefore could not provide the basis for Commerce's finding that the alleged "policy lending" subsidy was *de jure* specific to the tyre industry. In addition, Commerce did not find that the "subsidy" it purported to identify in these measures was "explicitly limited" to the tyre industry. Nor could Commerce plausibly have reached this conclusion, because the "subsidy" that Commerce identified for RMB-denominated loans, even assuming it existed, was available to virtually every borrower in China and therefore could not be specific under Article 2.

21. Finally, in all three of the "policy lending" determinations, Commerce was able to find an alleged "benefit" for RMB-denominated loans only by resorting to a fictitious benchmark based on interest rates that it derived from 33 different countries. This fictitious interest rate was not a "comparable commercial loan which the firm could actually obtain on the market", and was inconsistent with Article 14(b) for this reason alone. Nor does Commerce's rationale for rejecting the applicable benchmark under Article 14(b) – that interest rates in China are "distorted" by "government interventions" – withstand analysis. Interest rates are a tool of monetary policy and are directly influenced by government intervention. These interventions, which are an ordinary feature of monetary policy all over the world, cannot provide a basis to disregard the plainly applicable requirements of Article 14(b).

D. COMMERCE'S IDENTIFICATION OF A "LAND-USE" SUBSIDY IN THE LWS INVESTIGATION WAS INCONSISTENT WITH THE SCM AGREEMENT

22. In the LWS investigation, Commerce found that the Huantai County Land Bureau provided land-use rights in the New Century Industrial Park to Aifudi, a respondent producer, for less than adequate remuneration. Commerce's finding that the alleged subsidy was "regionally specific" under Article 2.2 of the SCM Agreement was deficient on its face. A finding of specificity under Article 2.2 requires a finding that the subsidy is "*limited to certain enterprises* located within a *designated geographical region* within the jurisdiction of the granting authority …". Pursuant to Article 2.4 of the SCM Agreement, any determination of specificity under Article 2.2 must be "clearly substantiated on the basis of positive evidence." Commerce failed to make the necessary finding that the alleged provision of land use rights for less than adequate remuneration was limited according to the terms of

Article 2.2, and an investigating authority cannot rely upon Article 2.2 as the basis for a finding of specificity in the absence of the required finding of limitation.

23. Even if Commerce had evaluated the evidence on the record, it could not possibly have determined that the alleged subsidy was limited under the terms of Article 2.2. First, if a subsidy is available to *all* enterprises within the designated geographical region, then it is not limited to *certain enterprises* within the region. Evidence on the record demonstrated that all companies inside New Century Industrial Park, including Aifudi, paid the same lease rate, except for a few companies that negotiated earlier leases. Second, if a subsidy is available to enterprises located *outside* the designated geographical region, it is likewise not specific under Article 2.2. The record established that commercial leaseholders located elsewhere in Huantai County paid the same or *lower* lease rates than those leaseholders inside the industrial park. Therefore, it would have been impossible for Commerce to make the required finding that the alleged subsidy was specific, even had Commerce undertaken the necessary evaluation of the record evidence.

24. Further, Commerce's finding of benefit was inconsistent with Article 14 of the SCM Agreement. As it did with respect to the alleged input subsidies and "policy lending" programmes, Commerce rejected the use of land prices in China as the applicable benchmark under Article 14(d) of the SCM Agreement. Commerce determined that Huantai County provided land-use rights for less than adequate remuneration based on a comparison to prices for certain industrial property in Bangkok, Thailand, over 3,000 kilometres away. In *Softwood Lumber*, the Appellate Body cautioned that, even in the "very limited" circumstances in which an investigating authority can resort to a benchmark other than private prices in the country of provision, "the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in [the country of provision], and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)."[7] Commerce's use of a Thai land benchmark to value land-use rights in China does not satisfy the Appellate Body's standard. Land prices in Thailand (or in any other country) do not "relate or refer to … prevailing market conditions" for land-use rights in China.

E. THE SIMULTANEOUS IMPOSITION OF COUNTERVAILING DUTIES AND ANTI-DUMPING DUTIES CALCULATED UNDER THE U.S. NME METHODOLOGY RESULTS IN AN IMPERMISSIBLE DOUBLE REMEDY FOR THE SAME ALLEGED ACTS OF SUBSIDIZATION

25. In August 2006, Commerce concluded that "market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."[8] Accordingly, Commerce continues to designate China as a non-market economy ("NME"), and to reject Chinese producers' actual costs and prices for the purpose of determining normal value. In March 2007, seven months after Commerce elected to continue to designate China as an NME, Commerce found that "market forces now determine the prices of more than 90 per cent of products traded in China" and these market forces are sufficiently developed to evaluate whether a particular alleged subsidy "constitutes a distortion in the normal allocation of resources."[9]

26. This paradoxical set of findings led Commerce, for the first time, to apply its NME methodology in AD investigations *simultaneously with* the application of countervailing duties to the same categories of imports. This is contrary to Commerce's stated position, over the course of nearly 25 years, that it is "impossible" to identify subsidies in a country that Commerce has designated as an

[7] Appellate Body Report, *US – Softwood Lumber IV*, para. 103.

[8] PRC Lined Paper Memo, p. 4 (30 Aug. 2006) (Final Loan Benchmark and Discount Rate Memorandum, Attachment 2 (7 July 2008) (OTR)) (CHI-88).

[9] Georgetown Steel Memo, p. 5 (29 Mar. 2007) (CHI-89).

NME, "because the concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in such an economy."[10]

27. The rationale for designating a country as an NME is that prices and costs within an NME are not determined by market forces and, therefore, are not considered an appropriate basis for determining normal value. It is this determination that allows an investigating authority to replace the producer's actual costs and prices with what it considers to be market-determined costs and prices, and to calculate a dumping margin from this market-determined position.

28. Likewise, the rationale for imposing countervailing duties is that a government has provided productive resources to a company on terms that were not market-determined. The Appellate Body has repeatedly emphasized that a subsidy "benefit" exists if a company has received a financial contribution on terms more favourable than those available to the recipient in the market. It is the market-determined outcome that provides the baseline for determining whether a company is better off than it would have been in the absence of the government financial contribution. The purpose of a countervailing duty is to offset the competitive advantage that the producer thereby obtains.

29. And therein lies the problem of imposing two remedies for the same alleged acts of subsidization. Fundamentally, the rationale for using an NME methodology to determine normal value in an anti-dumping investigation subsumes the rationale for imposing countervailing duties on imported products. By applying both remedies simultaneously, Commerce necessarily will offset any alleged subsidies twice – once when it calculates an anti-dumping margin on the basis of a "surrogate" market-determined cost of production, and again when it calculates a countervailing duty on the basis that the producer obtained its productive resources on market-determined terms. Prior to its determination in *CFS Paper,* Commerce had consistently maintained that, with respect to a particular country or industry, it could *either* apply its NME methodology in an anti-dumping investigation *or* it could apply countervailing duties, but it could not apply both simultaneously. This understanding was affirmed by the U.S. courts, endorsed by the U.S. Congress, and directly reflected in Commerce's CVD regulations. In *CFS Paper,* however, Commerce abandoned this principle – at least as it relates to China.

30. Commerce does not deny that the concurrent application of the NME methodology and countervailing duties could give rise to a double remedy, but Commerce has taken the seemingly contradictory positions that: (a) it lacks authority under U.S. law to avoid the imposition of double remedies in the case of imports from NME countries; but (b) to the extent that it actually has some unspecified authority to address this problem, the existence of a double remedy is a factual question for which the respondent producer bears the burden of presenting "evidence" that "domestic subsidies automatically lower prices (including export prices) *pro rata*…."[11]

31. First, to the extent that Commerce lacks authority to avoid the imposition of double remedies in the case of imports from NME countries, U.S. law is inconsistent with the covered agreements, both as such and as applied in the present investigations. According to the SCM Agreement, the purpose of a countervailing duty is to "offset[] any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994." Article 19.4 of the SCM Agreement states that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." And Article 19.3 of the SCM Agreement states that "[w]hen a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the *appropriate amounts* in each case, on a non-discriminatory basis on imports of such product …." When the United States imposes an anti-dumping duty on an imported product, calculated in accordance with its NME methodology, and simultaneously imposes a

[10] CFS Paper I&D Memo, pp. 23-24 (internal citations omitted).
[11] CFS Paper I&D Memo (AD), p. 13.

countervailing duty on the same product, it has necessarily levied a countervailing duty that is "in excess of the subsidy found to exist" and is not "in the appropriate amounts", in violation of the SCM Agreement.

32. China considers that a double remedy arises in *all* cases in which Commerce applies its NME methodology in conjunction with countervailing duties, while Commerce appears to consider that a double remedy arises only where there is "evidence" that "subsidies pass through, *pro rata*, to U.S. prices". In either event, U.S. law is inconsistent with the covered agreements if Commerce lacks legal authority to address the problem of double remedies in NME investigations under *any* circumstance. In addition, without regard to whether Commerce has any legal authority to avoid the imposition of double remedies, its imposition of double remedies for the same alleged acts of subsidization in the investigations at issue in this dispute was inconsistent with the United States' obligations under the covered agreements.

33. Second, to the extent that Commerce has legal authority to avoid the imposition of double remedies in parallel AD/CVD investigations of NME imports only if producers present "evidence" that "subsidies pass through, pro rata, to U.S. prices", U.S. law is again inconsistent with the covered agreements, both as such and as applied. Contrary to Commerce's assertions in *CFS Paper* and in the subsequent determinations at issue in this dispute, the existence of a double remedy is *not* a factual issue for which the respondent producer bears the burden of presenting "evidence". Rather, as Commerce correctly understood for nearly 25 years prior to *CFS Paper*, the use of an NME methodology in an anti-dumping investigation and the application of countervailing duties to the same products are mutually exclusive of each other, in their entirety. To the extent that some unspecified provision of U.S. anti-dumping law allows Commerce to avoid the imposition of double remedies, but only if the respondent producer presents "evidence" on the irrelevant issue of whether "subsidies pass through, *pro rata*, to U.S. prices", this provision of law, whatever it might be, is inconsistent with the United States' obligations under the covered agreements.

34. This inconsistency is both as such and as applied. For the reasons set forth above, the imposition of double remedies for the same alleged acts of subsidization is inconsistent with the SCM Agreement and Article VI of the GATT 1994. To the extent that U.S. law conditions the avoidance of a double remedy for the same alleged acts of subsidization upon the presentation of "evidence" that is irrelevant to the occurrence of a double remedy, this provision of law is and will be inconsistent with the United States' obligations under the covered agreements in all cases in which it is applied. Without regard to whether there is, in fact, any provision of U.S. law that requires "evidence" that "subsidies pass through, *pro rata*, to U.S. prices", Commerce's insistence upon such "evidence" in the present investigations as a condition to the avoidance of a double remedy was likewise inconsistent with the United States' obligations under the covered agreements.

35. Finally, separate and apart from the unlawful imposition of double remedies for the same alleged subsidies, the United States has denied imports from China most-favoured nation treatment under Article I:1 of the GATT 1994 by failing to extend to these imports the same unconditional entitlement to the avoidance of double remedies that it extends to imports from countries that it designates as market economies. Commerce has maintained a consistent set of policies and practices to avoid offsetting the same subsidies twice through the manner in which it calculates anti-dumping duties, at least in investigations involving imports from countries that the United States has designated as market economies. In the case of imports from China, Commerce has stood these policies and practices on their head. This treatment not only deprives Chinese imports of most-favoured nation treatment under Article I:1 of the GATT, but it also serves to underscore Commerce's consistent recognition of the impermissibility of offsetting the same subsidies twice.

F. COMMERCE'S CONDUCT OF THE FOUR CVD INVESTIGATIONS UNDER REVIEW FAILED TO COMPLY WITH THE DUE PROCESS AND PROCEDURAL REQUIREMENTS OF THE SCM AGREEMENT

36. Commerce violated Article 13.1 of the SCM Agreement when it failed to invite China for consultations prior to the initiation of investigations into so-called "new subsidy allegations". Long after a countervailing duty investigation is initiated, U.S. law permits petitioners effectively to start an entirely new investigation by submitting subsidy allegations not presented in their original petition. This occurred in each of the four determinations at issue, and twice each in the CWP and OTR investigations. In total, Commerce initiated six separate investigations into new subsidy allegations, without once inviting China for consultations. Commerce also failed to comply with Article 12.1.1 of the SCM Agreement by refusing to give China and the respondent producers at least 30 days to respond to all questionnaires issued in the CVD investigations, including questionnaires issued in response to new subsidy allegations, as well as so-called "supplemental" questionnaires. Finally, in connection with its determinations in CWP and LWR that producers obtained a countervailable subsidy whenever the HRS they purchased from private trading companies had been produced by an SOE, Commerce failed to give China and the respondent producers notice of the information it required, in violation of Article 12.1 of the SCM Agreement. Having failed to give such notice, Commerce improperly resorted to "facts available" in order to determine the amount of SOE-produced hot-rolled steel that respondent producers had purchased from trading companies, in violation of Article 12.7 of the SCM Agreement.

III. CONCLUSION

37. For the reasons set forth in China's First Written Submission, as summarized herein, China respectfully requests that the Panel recommend that the United States bring the challenged measures into conformity with its obligations under the relevant covered agreements.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(8 June 2009)

I. INTRODUCTION

1. In this dispute, China urges the Panel to accept unsupported interpretations of WTO provisions so as to limit the effective applicability of the anti-dumping (AD) and countervailing duty (CVD) disciplines, and to ignore the particular features of China's economy, well documented on the records of the investigations at issue, that substantiate the determinations made by the Department of Commerce (Commerce) in those investigations.

II. REQUEST FOR PRELIMINARY RULINGS

2. The alleged "failure of the United States to provide legal authority for [Commerce] to avoid the imposition of a double remedy" is not a "specific measure at issue" in this dispute and, accordingly, is not within the Panel's terms of reference. China's complaint is not about the absence of any "legal authority," but a requirement it believes to exist under U.S. law to apply AD and CVD measures in a way that results in the alleged "double remedy." By failing to identify the U.S. legal provisions underlying this alleged requirement, China denied the United States and third parties notice, to which they were entitled under Article 6.2 of the DSU, of the measure that give rise to the alleged impairment of benefits at issue in this dispute.

3. In addition, by introducing this alleged "measure" for the first time in its panel request – and not in its request for consultations – China seeks to expand the scope of the dispute and enlarge the Panel's terms of reference. In its consultations request, China explicitly limited the matter at issue to determinations and orders issued in connection with eight specific investigations by Commerce. Notwithstanding this clear limitation of the scope of the dispute, in its panel request China went beyond those specific, identified investigations to add claims against this wholly new "measure." China's addition of this new "measure" converted the dispute from one limited to a series of "as applied" claims to a dispute that now includes a "measure" challenged "as such."

III. COMMERCE'S FINANCIAL CONTRIBUTION DETERMINATIONS ARE CONSISTENT WITH THE SCM AGREEMENT

4. Commerce's determinations in the challenged CVD investigations that certain Chinese state-owned enterprises (SOEs) and state-owned commercial banks (SOCBs) were public bodies were based on a proper interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. The ordinary meaning of the term "public body", read in its context and in light of the object and purpose of the SCM Agreement, indicates that a public body is an entity that is owned by the government, but not necessarily authorized to exercise, or in fact exercising, government functions.

5. The ordinary meaning of the term "public" includes the following: "belonging to, affecting, or concerning the community or nation"; "[r]elating or belonging to an entire community, state, or nation"; "of or relating to the people as a whole; that belongs to, affects or concerns the community or the nation"; and "[i]n general, and in most of the senses, the opposite of *private*." However one

examines the term "public," the ordinary meaning of that term includes the notion of belonging to, or owned by, the state. If an entity is owned by the state, the ordinary meaning of the term "public" indicates that such entity can be a "public body".

6. The context of the term "public body" supports this interpretation. The SCM Agreement uses two different terms in referring to the types of entity that can provide a financial contribution, "government" and "public body." Thus the terms "government" and "public body" must have distinct and different meanings. China mistakenly conflates these two terms, suggesting that they are "functional equivalents". This cannot be the case, or there would have been no need to use two different terms in Article 1.1(a)(1) of the SCM Agreement.

7. China's reliance on the definition of the term "public entity" in the GATS as context for the interpretation of "public body" is also inappropriate, as the terms are different, and the two agreements relate to different subject matter. The Working Party Report on China's accession, however, is relevant context and provides a recognition by China that its state-owned enterprises are public bodies that provide financial contributions and a commitment by China to this effect.

8. China's interpretation of "public body" also cannot be reconciled with the object and purpose of the SCM Agreement, which the Appellate Body has explained includes the right of WTO Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement." Consistent with this object and purpose, and the need to prevent circumvention of the SCM Agreement, the term "public body" should be interpreted so that subsidizing governments cannot use SOEs to avoid the reach of the SCM Agreement.

9. The meaning of the term "public body" was at issue in the *Korea – Commercial Vessels* dispute. The panel there concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)." That panel's reasoning is consistent with the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement. Majority government ownership can demonstrate control.

10. Commerce's determinations that certain state-owned enterprise producers of hot-rolled steel, rubber, and petrochemicals are "public bodies" are consistent with Article 1.1(a)(1) of the SCM Agreement. Commerce applied a rule of majority ownership to determine whether an entity was a public body. Because Commerce properly determined that certain SOEs and SOCBs were public bodies, no entrustment or direction analysis was required.

11. In addition, Commerce's treatment of sales made through private trading companies was proper and fulfilled the requirements of Article 1 of the SCM Agreement. China argues that Commerce was required to find that public bodies "entrusted or directed" the trading companies to sell goods to the respondents. China ignores the fact that the SCM Agreement contemplates situations in which the benefit might be received by different recipients. China appears to assume that Article 1.1 of the SCM Agreement requires there to be only one recipient, and that this recipient must receive both the financial contribution and the entire amount of the benefit. China has offered no basis for this assumption. In this case, the financial contribution occurred with the sale of goods (whether hot-rolled steel or rubber) by the public body SOEs to the intermediary trading companies. This government provision of goods then conferred benefits upon the respondent producers of *CWP*, *LWRP*, and *OTR Tires*, when the trading companies sold the goods to these respondents. Although the intermediary trading companies received the financial contribution and perhaps some benefit, this possibility does not preclude the respondent subject merchandise producers from receiving a benefit.

12. Commerce's finding in the *OTR Tires* CVD determination that SOCBs are "public bodies" is consistent with Article 1.1(a)(1) of the SCM Agreement. Commerce found that the Government of China holds dominant ownership stakes in the SOCBs. Outside commentators have remarked that the

government's ownership of banks is "exceptional." China does not dispute this. Given China's ownership of its banks, these banks are "public bodies."

13. China's argument that Commerce's benefit analysis undermines its public body determination conflates the "public body" question with the question of benefit. This is the same mistaken interpretation of Article 1.1 of the SCM Agreement rejected by the panel in *Korea – Commercial Vessels*.

IV. COMMERCE'S BENCHMARK DETERMINATIONS ARE CONSISTENT WITH THE SCM AGREEMENT

14. The Appellate Body has previously acknowledged that Article 14 of the SCM Agreement provides flexibility, should not be interpreted or applied in an overly restrictive manner, and permits the use of out-of-country benchmarks in certain situations. In addition, paragraph 15(b) of China's Accession Protocol and paragraph 150 of the Working Party Report confirm the permissibility of using out-of-country benchmarks to measure any benefit in CVD investigations concerning imports from China. Paragraph 15(b) expressly recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks."

15. Commerce's determinations to use external benchmarks were based on findings that the dominant role of the Chinese government in various markets distorted prices and interest rates in China. Commerce used Chinese prices whenever they were available and appropriate as market benchmarks. Where the facts demonstrated that Chinese prices were distorted by the government's predominant role in a market and unsuitable as commercial benchmarks, Commerce used market-derived prices from outside of China.

16. China alleges that Commerce applied a "*per se* rule" that only considered the degree of state ownership of the industries. China mischaracterizes Commerce's decisions and ignores the detailed rationale Commerce provided for each of its factual conclusions. Commerce reviewed all record evidence and determined appropriate benchmarks on a case-by-case basis in each of the challenged investigations. Indeed, in the *OTR Tires* CVD investigation, based on record evidence, Commerce did not find government distortion of the PRC rubber markets, and used actual import prices and domestic purchase prices from private producers as benchmarks, even where the government owned the majority of the domestic production.

17. In the case of the government provision of hot-rolled steel, petrochemicals, policy loans, and land-use rights, however, Commerce determined, based on all of the evidence on the record of the investigations, that domestic prices and interest rates in China were distorted because of the predominant role of the Chinese government in the markets, rendering those domestic prices and interest rates unsuitable as benchmarks. Consequently, Commerce determined that it was necessary to use out-of-country benchmarks to measure benefit.

18. Furthermore, China's assertion that Commerce did not "make any effort whatsoever to ensure that these benchmarks related to prevailing market conditions in China" is without foundation. For input subsidies, Commerce relied upon world market prices and made adjustments to account for "prevailing market conditions," consistent with Article 14(d) of the SCM Agreement.

19. In evaluating the benefit of government-provided loans, after Commerce established that it would not be possible to use RMB-denominated loans provided in China, it developed an out-of-country benchmark interest rate to measure benefit. To do so, Commerce used a group of interest rates, rather than just one out-of-country interest rate, because various factors can impact national averages for interest rates. Commerce's benchmark accounted for the maturity of the loans, adjusted for exchange rate expectations through an inflation adjustment accounting for currency differences, matched lending during the same time periods, and factored in the quality of the countries'

institutions, a known influence on interest rates. Through these means, Commerce calculated comparison interest rates that were tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market," as required by Article 14(b) of the SCM Agreement.

20. China's argument that Commerce was required to use RMB-denominated loans as benchmarks, which would mean that Commerce was required to use in-country benchmarks because RMB-denominated loans are not available outside China, is untenable. China's position is inconsistent with the Appellate Body's interpretation of Article 14 of the SCM Agreement and the commitments China made in its Accession Protocol. Moreover, under China's interpretation, assuming the absence of any commercial loans in a particular currency, if a government provides loans in that currency, it would not be possible for another Member to measure benefit at all. Not only does the text of Article 14 not require that interpretation, but such an outcome would be incongruous with the flexible nature of the guidelines in Article 14 and the object and purpose of the SCM Agreement to permit Members to fully offset the benefit of injurious subsidies.

21. China's argument that Commerce improperly used a yearly average LIBOR rate as a benchmark is without support. Article 14(b) of the SCM Agreement contains no preference for a daily rate over a yearly average. The benchmark developed by Commerce for these loans matched the duration and the currency denomination, and was structured on the same basis as GTC's loans (LIBOR plus a spread). In light of the flexibility afforded by Article 14, Commerce's comparison was consistent with the guideline in Article 14(b) of the SCM Agreement.

22. Similar to its position on RMB lending, China argues that Article 14(d) of the SCM Agreement prevents Members from ever using an out-of-country benchmark to measure the benefit of land-use rights provided by a government. China's position is inconsistent with the Appellate Body's interpretation of Article 14 of the SCM Agreement and the commitments China made in its Accession Protocol.

23. Based on record information, Commerce determined to measure benefit by comparing respondents' land-use rights to the sales of certain industrial land in industrial estates, parks, and zones in Thailand. By selecting land prices in a country with a comparable per capita GNI and population density and by using prices for comparable types of land (*e.g.*, industrial zones, allocated versus granted land-use rights), the comparison prices reasonably reflected the "prevailing market conditions for the good or service in question," while at the same time ensuring that the benefit calculation did not contain distortions caused by China's predominant role in the market.

V. COMMERCE WAS NOT REQUIRED TO PROVIDE A CREDIT IN THE BENEFIT CALCULATIONS FOR INSTANCES IN WHICH CHINA PROVIDED RUBBER PRODUCTS FOR ADEQUATE REMUNERATION IN THE *OTR TIRES* CVD INVESTIGATION

24. Commerce was under no obligation to provide a credit in its benefit calculations for instances in which China provided rubber for adequate remuneration, *i.e.*, when China did not provide a subsidy, in the *OTR Tires* CVD investigation. China's argument to the contrary is based on a misreading of the SCM Agreement and the GATT 1994, coupled with a misapplication of the reasoning in Appellate Body reports.

25. Article 14 of the SCM Agreement provides investigating authorities flexibility in the methodology applied to calculate the benefit of a subsidy. Article 14 does not prescribe any particular level of aggregation at which the calculation of subsidy benefit must be conducted, but instead permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided. Additionally, the text of Article 14 explicitly pertains to the calculation of the "benefit" to the recipient. The concept of "benefit" relates only to situations in which a firm receives a "favourable or helpful factor or circumstance" or "an

advantage," rather than a detriment or disadvantage. Article 14 imposes no obligation on Members to conduct an "aggregate" analysis nor to provide credit in the benefit calculation when a government provides goods for adequate remuneration. Indeed, China does not argue that such a requirement is even contained in Article 14.

26. Rather, China argues that the use of the term "product" in Article VI:3 of the GATT 1994 and Articles 10, 19.3, and 19.4 of the SCM Agreement required Commerce to provide a credit in the benefit calculation for those instances in which China sold rubber for adequate remuneration. China mistakenly relies on the Appellate Body's zeroing reports to support its argument. However, the legal provisions on which those decisions are based apply solely to AD determinations and do not apply to CVD determinations. Accepting China's argument would mean that the mere use of the term "product" in other provisions of the SCM Agreement and the GATT 1994 overrides the "latitude" and "leeway" that panels and the Appellate Body have found in the guidelines set forth in Article 14 of the SCM Agreement.

27. Moreover, China's argument cannot be reconciled with the definition of a subsidy in Article 1 of the SCM Agreement. Any time a government provides a financial contribution and a benefit is thereby conferred, a subsidy is "deemed to exist." Instances of non-subsidies cannot eliminate or diminish the benefits conferred when a government provides a financial contribution.

28. In addition, China ignores the troubling implications of its argument. If China's interpretation were accepted, it would necessarily apply to all of Article 14 and would require that credit be provided whenever an investigating authority found that a financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even different types of subsidies. China's interpretation would result in a benefit calculation that is artificially low, or even zero, preventing the United States from fully offsetting the effect of subsidies found to exist. China's interpretation of Article 14 thus fails to read that article in light of the object and purpose of the SCM Agreement, and for that reason as well, China's interpretation must be rejected.

VI. COMMERCE PROPERLY MEASURED THE BENEFIT CONFERRED UPON PRODUCERS OF SUBJECT MERCHANDISE IN INSTANCES WHERE PRODUCTION INPUTS WERE PURCHASED FROM TRADING COMPANIES

29. China fails to identify any provision of the SCM Agreement or GATT 1994 with which Commerce's benefit determinations are purportedly inconsistent. China merely asserts that Commerce was required to determine the benefit conferred upon trading companies engaged in buying and selling an input product, in addition to determining the benefit conferred upon producers of the merchandise that was the subject of Commerce's CVD investigations. However, it was not necessary to measure any benefit that may have been received by the trading companies. The amount or portion of any benefit received by the trading companies is irrelevant for the purpose of determining the benefit conferred upon the subject merchandise producers.

30. To the extent that a trading company may have received a benefit from the financial contribution provided by an SOE, and some portion of the benefit of that financial contribution, in effect, passed through the trading company to a producer of subject merchandise, Commerce accounted for this and properly calculated the benefit conferred upon the producer of subject merchandise. To do so, Commerce compared the price the producer of subject merchandise paid for the input product with an appropriate benchmark price. As a result, Commerce's analysis identified only the amount of benefit that effectively "passed through" the trading companies and was conferred upon producers of subject merchandise.

VII. COMMERCE'S SPECIFICITY DETERMINATIONS IN THE *OTR TIRES* AND *LWS* CVD INVESTIGATIONS WERE CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

31. China challenges Commerce's specificity determination for policy lending with respect to the *OTR Tires* CVD investigation, though not with respect to the other CVD investigations in which Commerce made similar specificity findings for similar policy lending subsidies. Commerce found policy lending in the *OTR Tires* CVD investigation specific because the loans were provided as part of government programmes guiding financial institutions to lend to tire producers. This finding was based on evidence in the record of the *OTR Tires* CVD investigation, which contains central, provincial, and municipal-level government plans and policies that guided lending to a group of industries, including the tire industry.

32. China argues that none of the measures relied upon by Commerce "defines a subsidy," none of the measures "explicitly limits" access to the subsidy to "certain enterprises," and none of the loans were "made pursuant to the measures" identified by Commerce. The three points that China asks the Panel to examine are not the elements that Article 2.1(a) of the SCM Agreement contains, and on that basis alone, China's argumentation should be rejected.

33. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether: (i) the granting authority explicitly limits access to a subsidy to "certain enterprises;" or (ii) the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to "certain enterprises." Nothing in Article 2.1(a) requires Members to identify legislation that defines the elements of a subsidy (*i.e.*, financial contribution and benefit).

34. The central, provincial, and municipal policy documents each clearly substantiate that the various levels of government guided lending to a *group* of industries, which included the OTR tire industry. The policies focus on stimulating the quantity of credit, or the availability of credit at all, rather than reducing the price of credit. The policies target certain industries for the direction of credit, and prohibit credit to other industries. Article 2.1 of the SCM Agreement defines "certain enterprises" to include a group of industries and permits a specificity determination based on a subsidy that is specific to a group of industries.

35. Evidence on the record of the *OTR Tires* CVD investigation showed that the SOCBs acted pursuant to the central, regional, and municipal government policies in making their lending decisions. Thus, contrary to China's arguments, Commerce correctly determined that SOCBs do, in fact, act pursuant to industrial policies in making loans.

36. China also challenges Commerce's specificity determination for land-use rights in the *LWS* CVD investigation. Pursuant to Article 2.2 of the SCM Agreement, a subsidy is specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. Commerce determined that Huantai County created New Century Industry Park for the purpose of providing selected companies, including Aifudi, with land-use rights. Thus, Huantai County limited this land-use rights subsidy to enterprises located in a designated geographical region.

37. New Century Industry Park meets the ordinary meaning of a designated geographical region. There is no basis in the SCM Agreement for the narrower definition for which China argues, and, in any event, the New Century Industry Park meets the requirements of China's narrower definition.

38. China argues that if a subsidy is available to all enterprises within a designated geographical region, it is not specific pursuant to Article 2.2 of the SCM Agreement. Following China's reasoning, the only difference between Articles 2.1(a) and 2.2 of the SCM Agreement is that, pursuant to the latter, the "certain enterprises" to which a subsidy is explicitly limited happen to be located within a

designated geographical region within the jurisdiction of the granting authority. However, even if they were not located within a designated geographical region, the subsidy granted to them would nevertheless be specific pursuant to Article 2.1(a) by virtue of the explicit limitation. China's interpretation of Article 2.2 would render that provision redundant, which is incompatible with the rules of treaty interpretation. Furthermore, China's interpretation of Article 2.2 is also contrary to Article 8.1(b) and 8.2(b) of the SCM Agreement.

39. As demonstrated in the record, the land-use rights subsidy at issue was used as an incentive to relocate producers to the New Century Industry Park and was tied to the level of investment within the park. Therefore, the subsidy is unique and only available to enterprises investing within the park. The fact that Huantai County granted other types of land-use rights to other leaseholders for other purposes outside the industrial park is irrelevant to determining whether the particular subsidy at issue was only accessible to enterprises within the industrial park. Interpreting Article 2.2 of the SCM Agreement as requiring an investigating authority to find that the benefit was not available to any enterprise outside of the designated geographical region would be too restrictive and would enable circumvention of the subsidies disciplines.

VIII. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH THE SCM AGREEMENT OR THE GATT 1994 IN THE CONCURRENT APPLICATION OF CVD AND AD MEASURES TO CERTAIN PRODUCTS FROM CHINA

40. The WTO agreements and their predecessors have always recognized that the dumping and subsidization of imports are distinct unfair trade practices, to which, where they cause injury, Members are entitled to apply separate remedies. Beginning with the signing of the GATT in 1947, separate rules have generally governed the conduct of AD and CVD proceedings. The separate nature of the two remedies was recognized in the separate Tokyo Round AD Code and Subsidies Code, and subsequently in the Uruguay Round AD Agreement and SCM Agreement.

41. The GATT Contracting Parties reinforced the separate nature of the remedies available from AD and CVD proceedings by providing for only one instance – set forth in Article VI:5 of the GATT 1994 – in which both remedies may not be applied to the full amount provided for in Article VI of the GATT 1994. As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members considered when it would be appropriate to constrain Members' resort to the concurrent application of AD and CVD remedies, and agreed that it would be appropriate only where imposing AD duties together with CVDs would compensate for "the same situation of dumping or export subsidization."

42. Article 15 of the Tokyo Round Subsidies Code provides further evidence that parties to the Code considered that no other provision in the GATT 1947 contained such a requirement. The addition of Article 15 would not have been necessary if there had been any other restriction on the concurrent application of AD and CVD measures to exports from non-market economy (NME) countries. The disappearance of that provision in the successor SCM Agreement reinforces the presumption, created by the express limitation in Article VI:5 itself, that WTO Members never agreed on such a prohibition.

43. China's Accession Protocol makes clear that Members, including China, contemplated the concurrent application of CVD and AD measures to China, in full, notwithstanding China's continued treatment as a non-market economy country. In paragraph 15(a) of its Accession Protocol, China agreed that Members, when determining price comparability in AD proceedings involving imports from China, have the right to use special measurement methodologies that are not based on a strict comparison with domestic prices or costs in China. In other words, Members may apply AD duties to offset the full dumping margins, while treating China as a non-market economy country. Paragraph 15(b) makes clear that Members also have the right to apply the WTO's CVD rules to

imports from China. Nothing in paragraph 15 limits a Member's right to concurrently apply both remedies.

44. China argues that the AD duties imposed by Commerce are, in fact, really CVDs, and therefore the duties should be added together when examining their consistency with the provisions of the SCM Agreement that limit the level of CVDs that may be imposed. Based on this theory, China argues that the United States acted inconsistently (i) with Article 19.4 of the SCM Agreement because the AD duties and CVDs, taken together, are in excess of the amount of subsidy found to exist, and (ii) with Article 19.3 of the SCM Agreement because the AD duties and CVDs, taken together, are in excess of the "appropriate amounts" of the CVDs. However, the GATT 1994 and the SCM Agreement define a CVD as a duty "levied for the purpose of offsetting" any subsidy. The AD duties calculated on the basis of Commerce's non-market methodology cannot be equated with CVDs, as China suggests, because the AD duties are levied to offset *dumping* of imported products that have caused injury. Commerce's use of the methodology expressly provided for in China's Accession Protocol to calculate dumping margins in the investigations at issue does not somehow transform the *AD duty* itself into a CVD. China does not contest the fact that the duties imposed pursuant to the four CVD investigations at issue in this dispute are themselves *not* in excess of the levels permitted under Articles 19.3 and 19.4.

45. In respect of Article I:1 of the GATT 1994, the United States notes, as a threshold matter, that China makes "as such" and "as applied" claims of inconsistency. **With regard to the "as applied" claims, China has failed to substantiate this claim because it has not identified "like products" to which the alleged "advantage" is applied. In any event, with respect to the two aspects of the calculation of the dumping margin discussed by China,** Commerce treats products from China no differently than it treats products from other Members. Just as it would in an AD proceeding involving a product from a market economy, Commerce did not deduct CVDs in calculating the export price of a product in any of the four AD proceedings at issue in this dispute. Similarly, Commerce did not add the amount of subsidies actually received to the cost of production of any Chinese producer in the four AD investigations at issue in this dispute.

46. Moreover, China fails to recognize that a number of WTO rules explicitly recognize that, in the context of AD and CVD proceedings, a Member may—and in some circumstances must—accord certain treatment to products from one Member that may not be accorded to like products from another Member. These include Paragraph 2 of the *Ad* Note to Article VI:1 of the GATT 1994, Article 2.2 of the AD Agreement, Article 14(d) of the SCM Agreement, and paragraph 15 of China's Protocol. Given the explicit authorization for such actions, it is clear that, as in the present dispute, these actions, where they conform to the requirements of these other WTO provisions, are not inconsistent with Article I:1.

47. Finally, China has failed to demonstrate the theoretical premise of each of its "as such" and "as applied" claims, namely, that a so-called double remedy *inheres* in the concurrent application of AD duties calculated using a methodology not based on a strict comparison of domestic costs and prices in China and CVDs. For example, first, China's theory fails to account for the fact that subsidies may easily reduce the normal value determined pursuant to the NME methodology by reducing the *quantity* of factors consumed by the NME producer in manufacturing the product at issue. Under Commerce's methodology, multiplying the surrogate factor values by lower factor quantities results in lower normal values and, hence, lower dumping margins. Second, one of the premises underlying China's argument–that subsidies reduce costs *pro rata*–is unsubstantiated and inconsistent with how many subsidies may be offered and used in the real world. Other weaknesses in China's theory reinforce the failed premise of its claims.

IX. THE UNITED STATES REMAINED AVAILABLE FOR CONSULTATIONS WITH THE GOVERNMENT OF CHINA BEFORE INITIATION AND THROUGHOUT EACH INVESTIGATION, AND AFFORDED INTERESTED PARTIES AMPLE TIME AND NUMEROUS OPPORTUNITIES TO SUBMIT RELEVANT INFORMATION IN THE INVESTIGATIONS

48. China claims that the United States did not comply with its obligation under Article 13.1 of the SCM Agreement because the United States did not formally invite China for consultations before examining, within the same investigation, information received about new subsidies that had not been identified in the application under Article 11. Contrary to China's reading, the only "investigation" referred to in Article 13.1 is the investigation triggered by the filing of a duly substantiated application as provided for in Article 11, and not by the filing of information on newly-reported subsidies. This is confirmed by additional provisions in the SCM Agreement that clarify that the procedural focus for purposes of consultations is whether the investigation covers a *product* that is alleged to have been subsidized and imports of which are causing injury, so that the examination of additional subsidies on a product already subject to investigation would not constitute a new "investigation."

49. China similarly argues that the United States did not comply with its obligation under Article 12.1.1 of the SCM Agreement by failing to provide 30 days for reply not only to the questionnaire issued at the outset of an investigation, but to subsequent requests for information as well. Understood in its proper context, including Annex VI of the SCM Agreement, the obligation in Article 12.1.1 to provide thirty days for reply applies only to the former, and not to the latter. China's reliance on the Appellate Body's statement in *Mexico – Rice* that Article 12 of the SCM Agreement "as a whole" provides for evidentiary rules and due process rights that apply "throughout" an investigation is misplaced. Not only does this statement fail to address the particular text of Article 12.1.1, but China's argument overlooks the Appellate Body's recognition in *US – Hot-Rolled Steel* that Article 6.1.1, a parallel provision in the AD Agreement, "prescribes an absolute minimum of 30 days for the *initial response to a questionnaire*."

50. China argues that, by failing to request certain necessary information from respondents in the *CWP* and *LWRP* CVD investigations and consequently relying on facts available, the United States acted inconsistently with Articles 12.1 and 12.7 of the SCM Agreement. It was not until a very late stage in these investigations that Commerce was made aware that information about the amount of steel purchased through trading companies that came from SOEs was necessary to determine the existence of a benefit conferred on producers of the product subject to investigation. Commerce relied on evidence from the records of the investigations in order to make these determinations. Before any definitive rate of CVD is levied, respondents in the *CWP* and *LWRP* CVD investigations would be provided the opportunity to present evidence with respect to the amount of hot-rolled steel purchased from trading companies that was produced through SOEs.

X. CONCLUSION

51. For the foregoing reasons, the United States respectfully requests that the Panel grant the U.S. requests for a preliminary ruling and reject the remainder of China's claims.

ANNEX A-3

RESPONSE OF CHINA TO THE U.S. REQUEST FOR PRELIMINARY RULINGS

(12 June 2009)

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TABLE OF REPORTS CITED IN THIS SUBMISSION

Short Title	Full Report Title and Citation
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443
Columbia – Ports of Entry	Panel Report, *Colombia - Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, circulated to WTO members on 27 April 2009
EC – Customs Matters	Appellate Body Report, *European Communities - Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX,
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, circulated to WTO Members on 4 February 2009
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, circulated to WTO Members 1 October 2008
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Customs Bond Directive (India)	Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties*, WT/DS345/AB/R, adopted 1 August 2008
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3

1. In accordance with paragraph 12 of the Panel's working procedures for this dispute, China hereby responds to the request by the United States for certain preliminary rulings, as set forth in the United States' first written submission to the Panel.

2. The requests for preliminary rulings by the United States relate to the identification by China in its panel request of a specific measure, namely, the failure of the United States to provide the U.S. Department of Commerce ("Commerce") with legal authority to avoid the imposition of a double remedy for the same alleged subsidies when it imposes anti-dumping duties determined pursuant to the U.S. non-market economy ("NME") methodology simultaneously with the imposition of countervailing duties on the same product. The United States contends that this is not a "specific measure at issue" within the meaning of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and is outside the Panel's terms of reference because it was not identified in China's request for consultations under Article 4 of the DSU. As China will demonstrate, both of these requests for preliminary rulings are unfounded and should be rejected.

3. Before turning to the merits of the U.S. requests for preliminary rulings, China considers that it is important to place the U.S. arguments in their proper context. As China will demonstrate, from the very beginning of its consideration of whether to apply the U.S. countervailing duty laws to imports from countries that it designates as NMEs, Commerce has been vague and evasive as to whether it possesses legal authority to address the question of double remedies. The United States has continued to pursue this strategy of obfuscation into the present dispute, refusing to identify in its first submission to the Panel whether Commerce has legal authority to avoid the imposition of double remedies that arise from the simultaneous application of countervailing duties and its NME methodology, and what the nature and extent of that legal authority might be.

4. Against this backdrop, it is surprising that the *United States* should now accuse *China* of an alleged lack of clarity in specifying the measures at issue in this dispute. Not only are these accusations legally baseless, but they fail to reflect the fact that it is the United States' *own conduct* that is the origin of whatever uncertainty exists as to the provisions of U.S. law – or their absence – that relate to the problem of double remedies. Having refused to provide any indication to respondent producers, the Government of China, and now this Panel of the legal framework in which Commerce would address the double remedy problem – a problem that Commerce has acknowledged to exist and claims to be "determined to prevent … from arising"[1] – the United States simply is not in a position to fault China for the manner in which it has chosen to define the measures at issue in this dispute.

I. BACKGROUND

5. Beginning with its anti-dumping and countervailing duty investigations of *Coated Free Sheet Paper* ("*CFS Paper*"), Commerce has recognized the problem of double remedies that arises from simultaneous AD and CVD investigations of imports from NME countries. In March 2007, Commerce issued a press release to accompany its preliminary determination in the countervailing duty investigation of *CFS Paper,* in which Commerce stated that "the possibility of double counting result[s] from simultaneous anti-dumping and countervailing duty investigations" of imports from NME countries.[2] In June 2007, Commerce released its preliminary determination in the parallel anti-dumping investigation of *CFS Paper*. There, it stated that "the question of whether a double remedy has been or could be applied, *or whether the Department has the authority to adjust for such a situation*, involves complex factual, methodological and *legal* issues that will require additional time

[1] CFS Paper I&D Memo (AD), p. 13 (CHI-94).

[2] U.S. Department of Commerce, Office of Public Affairs, "Commerce Applies Anti- Subsidy Law to China", press release dated 30 March 2007 (CHI-135) (emphasis added). In an official Department of Commerce newsletter published the next month, Commerce reiterated that "[a] possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from NME countries. U.S. Department of Commerce, International Trade Administration, *International Trade Update*, April 2007, p. 4 (CHI-136).

to analyze."[3] Commerce stated that it would "analyze comments regarding the double remedy that are submitted by interested parties during the course of this investigation, and may seek additional information on the topic."[4]

6. Commerce's statements in connection with *CFS Paper* unambiguously acknowledge that "[a] possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from countries that Commerce designates as NMEs and that "whether the Department has the authority to adjust for such a situation, involves complex … legal issues". Commerce also made clear that it would "have to respond" to issues and evidence that interested parties identified during the course of the investigations concerning the existence and extent of a double remedy for the same alleged acts of subsidization.[5]

7. Notwithstanding Commerce's clear recognition of the problem of double remedies, and notwithstanding its concession in the *CFS Paper* preliminary determination regarding the uncertain nature of its legal authority to address the problem, Commerce never identified for the interested parties in the *CFS Paper* investigations: (1) the legal framework in which it would evaluate the unidentified "specific facts" it considered relevant to determine whether a double remedy would arise; or (2) the specific steps it would take within that legal framework to avoid the imposition of a double remedy.

8. As China documented in its first written submission to the Panel, to this day Commerce still has not identified the legal framework in which it would analyze the double remedy issue. Beginning with the final determinations in *CFS Paper*, and continuing into the investigations at issue in this dispute, Commerce has adopted an internally contradictory, two-pronged position on the question of double remedies. As China explained in its submission, Commerce has (1) proclaimed that it has no legal authority to address the problem of double remedies in the context of NME investigations; while (2) blaming the respondents for allegedly failing to present "data" or "evidence" relevant to the question of double remedies, even though Commerce has never identified what this "data" or "evidence" might be.[6]

9. Remarkably, the United States has continued to pursue this strategy of evasion in its first submission to the Panel. China has plainly challenged the United States in this dispute to identify whether Commerce has legal authority to address the imposition of double remedies, what the nature of this authority might be, what types of evidence are required within this legal framework, and why this evidence is relevant to the existence or extent of a double remedy. In its first written submission to the Panel, the United States says literally nothing in response. In fact, the United States more or less abandons Commerce's theory that the relevant issue is whether "subsidies pass through, *pro rata*, to U.S. prices", leaving China – and now the Panel – even *more* in the dark as to when the United States considers that a double remedy would arise, and under what legal authority it would fulfil its "determin[ation] to prevent any double remedies from arising" in these unspecified circumstances.[7]

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[3] Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 30758, 30760 (4 June 2007) (CHI-137) (emphasis added).

[4] Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 30758, 30760 (4 June 2007) (CHI-137).

[5] U.S. Department of Commerce, Office of Public Affairs, "Commerce Applies Anti- Subsidy Law to China", press release dated 30 March 2007 (CHI-135).

[6] *See* China First Written Submission, paras. 359-361.

[7] CFS Paper I&D Memo (AD), p. 13 (CHI-94), As China will demonstrate in its rebuttal submission, the United States' attempt to dismiss Commerce's "*pro rata*" theory as one that the *respondents* invented is patently disingenuous. *See* U.S. First Written Submission, n.607. Commerce stated in the OTR AD

10. As China will proceed to demonstrate, China has done nothing more than take Commerce's own statements at face value for the purpose of defining the relevant measures and claims in this dispute. There is no respect in which China's identification of the absence of legal authority as a measure at issue in this dispute failed to comport with the requirements of Article 6.2 of the DSU.

II. THE FAILURE OF THE UNITED STATES TO PROVIDE LEGAL AUTHORITY FOR COMMERCE TO AVOID THE IMPOSITION OF DOUBLE REMEDIES IS A SPECIFIC MEASURE AT ISSUE IN THIS DISPUTE

11. In its request for establishment of a panel, China specified as a measure at issue in this dispute, as an omission, "the failure of the United States to provide legal authority for the U.S. Department of Commerce to avoid the imposition of a double remedy when it imposes anti- dumping duties determined pursuant to the U.S. NME methodology simultaneously with the imposition of countervailing duties on the same product."[8] The United States contends that this is not a "specific measure at issue" within the meaning of Article 6.2 of the DSU. This contention is entirely without basis.

12. The Appellate Body has observed that Article 6.2 requires the complaining Member to "identify the specific measures at issue" and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[9] These requirements serve two purposes. First, "as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of the panel."[10] Secondly, these requirements "serve the due process objective of notifying respondents and potential third parties of the nature of the dispute".[11]

13. The Appellate Body has stated that "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[12] An examination of the sufficiency of a panel request under Article 6.2 "does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement."[13] The relevant inquiry is whether the complaining Member has "present[ed] the problem clearly" so as to define the scope of the dispute and advise other Members as to the nature of the dispute.

14. As China will proceed to demonstrate, the United States does not even remotely establish that China failed to "present the problem clearly" when it identified Commerce's lack of legal authority to avoid the imposition of double remedies as a measure at issue in this dispute.

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determination, for example, that "[t]he GOC and the responding parties have not demonstrated that a double remedy will result from this investigation *because they have failed to present any data* showing that the benefits received from any domestic subsidy *lowers U.S. prices, pro rata* …" OTR I&D Memo (AD), p. 12-13 (emphasis added). This was *Commerce's* articulation of what it considered to be the relevant factual issue, not the respondents'.

[8] Request for the Establishment of a Panel by China (WT/DS379/2) (12 December 2008), p. 3. As discussed below, this measure follows directly from Commerce's own statements in the final anti-dumping and countervailing duty determinations that China also specified as measures at issue in this dispute.

[9] Appellate Body Report, *Korea – Dairy*, para. 120.

[10] Appellate Body Report, *US – Continued Zeroing*, para. 161.

[11] Appellate Body Report, *US – Continued Zeroing*, para. 161.

[12] Appellate Body Report, *US – Continued Zeroing*, para. 169.

[13] Appellate Body Report, *US – Continued Zeroing*, para. 169.

A. THE UNITED STATES' ARGUMENT IS PREMISED ON A MISCHARACTERIZATION OF CHINA'S CLAIMS CONCERNING THE ISSUE OF DOUBLE REMEDIES

15. The United States' argument concerning the measure identified by China in its panel request is inextricably bound up with its erroneous contention that China's claims are based on a "supposed *requirement* in U.S. law to impose a double remedy" (*i.e.*, to apply concurrent AD and CVD measures)".[14] This is a false characterization of China's claims. Contrary to the United States' argument, China's complaint does not relate to any provision of U.S. law that ***requires*** Commerce to apply countervailing duties concurrently with anti-dumping duties determined in accordance with its NME methodology. Any such claim would be absurd in light of Commerce's two-decade long history of taking the position that it could *not* apply the U.S. countervailing duty laws concurrently with its NME anti-dumping methodology.

16. Contrary to the United States' attempt to re-characterize China's claims, China's contention is that ***when*** Commerce ***chooses*** to apply countervailing duties concurrently with anti- dumping duties determined in accordance with its NME methodology, as it has done in the four investigations at issue in this dispute, a necessary consequence of that choice is the imposition of a double remedy for the same alleged acts of subsidization. This is because, as Commerce itself has stated, it lacks authority under U.S. law to account for the double remedies that arise in these circumstances, and therefore has "no choice but to apply both duties without making any adjustments" for double remedies.[15] The double remedy arises as a necessary result of the operation of the two remedies whenever they are used in conjunction with each other, not from any "requirement" of U.S. law to impose double remedies or to apply the two remedies concurrently.

17. This is precisely why it is the *absence* of legal authority to *avoid* the imposition of double remedies that is the gravamen of China's complaint. As China documented in its first written submission to the Panel, and as discussed in more detail below, the United States – including Commerce – has repeatedly recognized the problem of double remedies arising from the simultaneous application of countervailing duties and its NME methodology. While China and the United States appear to differ on the circumstances in which a double remedy will arise, the existence of the double remedy problem cannot seriously be in doubt. Commerce has repeatedly invoked the absence of legal authority as a reason why it cannot take steps to avoid the imposition of double remedies in the case of parallel AD/CVD investigations of imports from NME countries. Clearly, then, it is the absence of legal authority to avoid the imposition of double remedies that is among the sources of China's complaint.[16]

18. Accordingly, the only remaining question under Article 6.2 of the DSU is whether China has "present[ed] the problem clearly". As China will demonstrate next, its request for establishment of a panel easily meets that test.

B. CHINA'S DESCRIPTION OF THE ABSENCE OF LEGAL AUTHORITY PRESENTS THE PROBLEM CLEARLY

19. The omission that China has identified in its request for establishment of a panel is the failure of the United States to give Commerce legal authority to avoid the imposition of double remedies for

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[14] U.S. First Written Submission, para. 70.

[15] GAO Report, p. 29 (CHI-121).

[16] The Appellate Body has stated that "a 'nexus' must exist between the responding Member and the 'measure', such that the 'measure' – whether an act or omission – must be 'attributable' to that Member", and "the 'measure' must be the *source* of the alleged impairment …". Appellate Body Report, *US – Gambling*, para. 121 (emphasis original). Based on Commerce's own words and actions, it is clear that the absence of legal authority – an omission – is the source of the impairment of which China complains in this dispute in respect of double remedies.

the same alleged subsidies in those instances in which Commerce applies countervailing duties simultaneously with the application of anti-dumping duties determined in accordance with its NME methodology. In the investigations at issue in this dispute, Commerce identified this lack of legal authority as at least one justification for its failure to avoid the imposition of double remedies for the same alleged subsidies.

20. While "an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement"[17], there is no question that China may properly challenge under the DSU the absence of legal authority for Commerce to avoid the imposition of double remedies in parallel AD/CVD investigations of imports from NME countries. The Appellate Body has repeatedly stated that "[i]n principle, any act *or omission* attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[18] The failure of a Member to enact legislation that would permit its investigating authority to avoid acting inconsistently with the covered agreements is certainly a type of "omission" that is cognizable within WTO dispute settlement.

21. In its first written submission to the Panel, China has exhaustively documented the facts and circumstances that demonstrate this omission by the United States. In particular, China has demonstrated that:

- The U.S. Government Accountability Office ("GAO") found that "U.S. law does not provide Commerce with any specific authority to avoid double counting" when it imposes countervailing duties simultaneously with anti- dumping duties determined in accordance with its NME methodology;

- The Department of Commerce informed the GAO that, for this reason, Commerce "would have no choice but to apply both duties without making any adjustments" for double remedies;

- The GAO recommended that the U.S. Congress "consider adopting legislation to provide Commerce clear authority to … make corrections to avoid double counting domestic subsidy benefits when applying both CVDs and antidumping duties to the same products from NME countries …";

- The U.S. House of Representatives did, in fact, pass a bill that *would* have given Commerce authority to avoid the imposition of double remedies in the case of imports from NME countries, but this bill was never enacted into U.S. law; and

- In *CFS Paper*, and continuing into the investigations at issue in this dispute, Commerce repeatedly referred to the absence of legal authority as a reason why it could not take steps to avoid the imposition of double remedies for the same alleged subsidies.[19]

22. The fact that the U.S. House of Representatives considered it necessary to pass a bill that would have given Commerce the authority to avoid double remedies in the case of parallel AD/CVD investigations of NME imports is strongly indicative of the possibility that Commerce lacks such authority. The fact that this bill never became a law is even more indicative of the possibility that Commerce *continues* to lack such authority, and that this lack of authority explains its failure to account for double remedies in the investigations at issue in this dispute. Most importantly, the fact

[17] Appellate Body Report, *US – Continued Zeroing,* para. 169.

[18] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81 (emphasis added); *see also* Appellate Body Report, *EC – Customs Matters*, para. 133; Appellate Body Report, *US – Continued Zeroing*, para. 176.

[19] *See* China First Written Submission, paras. 357-359.

that Commerce invoked the absence of legal authority in these investigations as a justification for its inaction confirms that it is, in fact, the *absence* of legal authority that is the origin of the impermissible double remedies of which China complains.

23. In sum, it is hard to imagine how China could have been any more precise in describing and documenting: (1) the omission of the United States in failing to provide legal authority for Commerce to avoid the imposition of double remedies when it imposes anti-dumping duties determined pursuant to the U.S. NME methodology simultaneously with the imposition of countervailing duties; and (2) the relationship between this omission and the legal claims that China advances in this dispute. China has clearly demonstrated, based on Commerce's own words, that the absence of legal authority is one possible explanation for Commerce's imposition of double remedies in the investigations at issue, and has further demonstrated that this imposition of double remedies for the same alleged subsidies impairs benefits that accrue to China under the covered agreements.

24. In light of these considerations, it is difficult to understand the basis for the United States' suggestion that China's request for establishment of a panel failed to "present the problem clearly" for the purposes of Article 6.2 of the DSU.[20] There can be no doubt that China's panel request goes well beyond the minimal requirement of identifying the relevant measures "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[21] The "gist of what is at issue" is whether Commerce has authority under U.S. law to avoid the problem of double remedies in parallel AD/CVD investigations of NME imports – a problem that Commerce itself has acknowledged and purports to be determined to prevent.

25. Moreover, the United States has not even suggested, let alone demonstrated, that its ability to defend its interests in this dispute has been impaired by the manner in which China chose to define the measure at issue. There is no plausible prejudice to the United States arising from the identification as a measure of a legal deficiency that has been the subject of extensive discussion within the U.S. Government, and that Commerce specifically identified in the investigations at issue. In point of fact, it is entirely within the power of the United States to resolve this matter by indicating whether Commerce does or does not have authority under U.S. law to avoid the imposition of double remedies in parallel AD/CVD investigations of NME imports, and, if Commerce does have such authority, to describe what this authority is. In the absence of any prejudice to the United States, the due process concerns of Article 6.2 of the DSU simply are not implicated in this case.

26. For these reasons, the Panel should reject the United States' claim that the failure to provide legal authority is not a specific measure at issue in this dispute.

III. THE ADDITIONAL MEASURE IDENTIFIED BY CHINA IN ITS PANEL REQUEST IS WITHIN THE TERMS OF REFERENCE

27. In its request for preliminary rulings, the United States claims that the one additional measure that China set forth in its request for establishment of a panel is outside the terms of reference because it was not the subject of consultations. The U.S. argument wholly disregards the direct relationship between the one additional measure that China included in its panel request and the measures that were the subject of consultations, and ignores the Appellate Body's jurisprudence on the relationship between consultations requests and panel requests.

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[20] Indeed, China suspects that the problem is all *too* clear to the United States – after repeatedly acknowledging the problem of double remedies in the context of NME investigations, the United States would prefer to avoid any discussion of why it has been unable to specify the legal framework in which it would evaluate this issue, or to explain why Commerce failed to avoid the imposition of double remedies in the investigations at issue.

[21] Appellate Body Report, *US – Continued Zeroing*, para. 169.

28. It is well-established that Articles 4 and 6 of the DSU do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[22] The Appellate Body has stated that, "[a]s long as the complaining party does not expand the scope of the dispute," it would "hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for establishment of a panel, as this would substitute the request for consultations for the panel request."[23]

29. The Appellate Body recently re-emphasized this point, explaining that a complaining Member may add measures to a panel request so long as the additional measures "relate to essentially the same dispute" that was the subject of consultations.[24] In evaluating this issue, the Appellate Body examined whether the additional measures "relate" to the measures identified in the consultations request, and whether the "legal basis" of the claims raised in respect of the additional measures is the same as the legal basis of the claims set forth in the consultations request.[25]

30. The one additional measure that the United States challenges in its request for preliminary rulings easily satisfies both of these standards, and unquestionably "relate[s] to essentially the same dispute" as the dispute that was the subject of consultations. The one additional measure that the United States challenges states as follows:

> In certain of the investigations specified above, the U.S. Department of Commerce stated that U.S. law provides no basis to make any adjustment to either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy for the same unfair trade practice, where such a double remedy arises from the use of the U.S. non-market economy (NME) methodology to impose anti-dumping duties simultaneously with the imposition of countervailing duties on the same product. The measures therefore include, as an omission, the failure of the United States to provide legal authority for the U.S. Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the U.S. NME methodology simultaneously with the imposition of countervailing duties on the same product.[26]

31. This additional measure clearly "relates" to the measures that were the subject of consultations. The paragraph begins by noting that "*in certain of the investigations specified above*" – *i.e.*, the measures that were the subject of consultations – Commerce stated that it lacks legal authority to avoid the imposition of double remedies in the context of parallel AD/CVD investigations of imports from NME countries. Thus, Commerce's lack of legal authority to avoid the imposition of double remedies in parallel NME investigations was *already evident* on the face of the measures that were the subject of consultations.[27] China's panel request does nothing more than identify this

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[22] Appellate Body Report, *Brazil – Aircraft*, para. 132 (original emphasis).

[23] Appellate Body Report, *US – Upland Cotton*, para. 293.

[24] Appellate Body Report, *US – Continued Zeroing*, para. 235. The United States' failure to address this recent jurisprudence on the relationship between consultation requests and panel requests is a telling omission. The argument that the United States advances in the present dispute concerning the one additional measure that China included in its panel request is at least as tenuous as the argument that the United States advanced in *US – Continued Zeroing* in respect of the 14 additional measures at issue in that dispute. Both the panel and Appellate Body rejected the U.S. argument that the additional measures were outside the terms of reference.

[25] Appellate Body Report, *US – Continued Zeroing*, para. 228.

[26] Request for the Establishment of a Panel by China (WT/DS379/2) (12 December 2008), p. 3.

[27] *See* First Written Submission of China, para. 359.

absence of legal authority as a distinct measure, in the form of an omission by the United States in failing to provide Commerce with legal authority to avoid the imposition of double remedies.[28]

32. In its request for preliminary rulings, the United States makes no attempt to demonstrate that this one additional measure is unrelated to the measures that were the subject of consultations. The United States baldly asserts that the additional measure is "wholly new", but ignores the fact that the description of the measure in China's panel request establishes a direct connection to the measures that were the subject of consultations.[29] The United States likewise disregards the fact that China's first written submission clearly establishes the relationship between the measures that were the subject of consultations and the omission that China specified as an additional measure in its panel request.[30] The United States simply pretends that Commerce never made the statements that it actually made in the underlying determinations.

33. Even if Commerce had not specifically referred to the absence of legal authority in the underlying determinations, the omission that China has specified in its panel request relates to the measures that were the subject of consultations because the absence of legal authority is one possible explanation for Commerce's failure to avoid the imposition of double remedies in the investigations at issue. China has demonstrated that there has been extensive consideration by different parts of the U.S. Government as to whether Commerce has legal authority to avoid double remedies in parallel NME investigations.[31] That Commerce may lack such authority plainly relates to Commerce's failure to avoid the imposition of double remedies in the measures that were the subject of consultations.

34. It is equally clear that the legal basis for China's claims in respect of the additional measure is identical to the legal basis for China's claims in respect of the measures that were the subject of consultations. Fundamentally, the legal issue with respect to *all* of these measures is whether the imposition of double remedies for the same alleged acts of subsidization is inconsistent with the covered agreements. In particular:

- With respect to the measures that were the subject of consultations, China's claim is that the United States acted inconsistently with specified provisions of the covered agreements, because it applied both anti-dumping and countervailing duties to the same products without

[28] For this reason, the United States' reliance upon *US – Customs Bond Directive (India) (AB)* is misplaced. See U.S. First Written Submission, n. 79. China has not expanded the scope of the dispute to include a broader set of legal authorities, as was the case in *US – Customs Bond Directive.* It is only by mischaracterizing the nature of China's claims that the United States can argue that the additional measure identified by China in its panel request "derive[s] from an unspecified set of statutory provisions that … operate jointly so as to deprive Commerce of certain legal authority that China believes it should have." U.S. First Written Submission, para. 84. As discussed above, this re-characterization of China's claims is entirely misguided. China's claims in respect of double remedies do not arise from an "unspecified set of statutory provisions"; they arise from Commerce's stated lack of legal authority to avoid the imposition of double remedies when it decides to apply anti-dumping duties determined in accordance with its NME methodology simultaneously with the imposition of countervailing duties. This absence of legal authority was evident on the face of the determinations that were the subject of consultations and was specifically invoked by Commerce as a rationale for its inaction. China has identified this aspect of Commerce's determinations as a distinct measure in its panel request merely to highlight the apparent importance of the absence of legal authority as an explanation for why Commerce failed to avoid the imposition of double remedies in these determinations.

[29] U.S. First Written Submission, para. 81.

[30] *See, e.g.*, China First Written Submission, para. 395 ("Commerce stated, unequivocally, that the U.S. countervailing duty laws do not give it authority to avoid the imposition of double remedies in this instance. In respect of the U.S. anti-dumping laws, Commerce continued to make statements that are consistent with its previous position that it lacks authority to avoid double remedies in NME investigations.").

[31] *See* China First Written Submission, paras. 347-354.

accounting for the fact that its anti-dumping methodology necessarily offset the same alleged subsidies for which it imposed countervailing duties.

- With respect to the omission that China identified as an additional measure in its panel request, China's claim is that the United States acts inconsistently with the identical provisions of the covered agreements, because the absence of legal authority for Commerce to account for double remedies in the context of NME investigations ensures that the United States will act inconsistently with the same provisions of the covered agreements in all cases in which Commerce applies the two remedies simultaneously.

35. In short, the legal issues relating to these measures are identical. Just as the 14 additional measures at issue in *US – Continued Zeroing* concerned the same zeroing methodology that Commerce had used in the 38 measures that were the subject of consultations, the measures that China identified in its consultations request and the one additional measure that it identified in its panel request relate to the same basic question: whether the United States may impose countervailing duties to offset subsidies that it necessarily offsets through the use of its NME methodology in a parallel anti-dumping investigation. Hence, it is clear that China's consultations request and its panel request refer to the same subject matter and constitute the same dispute. China has not expanded the scope of this dispute, and therefore the one additional measure that China included in its panel request is within the terms of reference of this Panel.

36. It is evident from the U.S. submission that its *actual* grievance is that China has challenged "as such" the failure of the United States to provide legal authority to Commerce to avoid the imposition of double remedies in parallel AD/CVD investigations of imports from NME countries. The United States appears to suggest that China's "as such" claims have some bearing upon the measures that China was required to identify in its consultations request.[32] But as the Appellate Body has recently observed, "the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement."[33] This distinction is no more than a "heuristic device" that provides "an analytical tool to facilitate the understanding of the nature of a measure at issue."[34] The fact that China has challenged a measure "as such" is not relevant to whether that measure relates to the dispute that was the subject of consultations. As China has just demonstrated, the additional measure in its panel request clearly relates to the same dispute that was the subject of consultations, and is therefore within the terms of reference without regard to whether China raises "as applied" or "as such" claims, or both, in respect of this additional measure.

37. For these reasons, China respectfully requests the Panel to find that the omission specified by China in its panel request is within the Panel's terms of reference.

IV. CONCLUSION

38. As China has demonstrated, the United States has steadfastly refused to identify (1) when, if ever, it would consider a double remedy to arise; (2) the legal authority under which it would evaluate the existence and extent of a double remedy; (3) the types of "facts" or "evidence" that would be relevant to its analysis; (4) why these "facts" or "evidence" are relevant to determining the existence or extent of a double remedy; (5) the specific steps that it would take to avoid the imposition of double remedies, if the relevant "facts" or "evidence" were presented; and (6) whether it considers that

[32] U.S. First Written Submission, para. 82.

[33] Appellate Body Report, *US – Continued Zeroing*, para. 179. *See also* Panel Report, *US – Continued Zeroing*, para. 7.46 ("In our view, the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement, nor is this distinction intended to replace or override the requirements of Article 6.2 of the DSU as to how measures have to be identified in a panel request.").

[34] Appellate Body Report, *US – Continued Zeroing*, para. 179.

it has any legal obligation, either under U.S. law or under the covered agreements, to avoid the imposition of double remedies in the context of parallel AD/CVD investigations of NME imports.

39. China considers that the United States' request for preliminary rulings is merely a continuation of the U.S. strategy of avoiding any response to these questions. Ironically, if the United States wanted to respond to China's "as such" claims with respect to the issue of double remedies, it would need to do nothing more than identify the specific authority that Commerce possesses under U.S. law to identify and avoid the imposition of double remedies in the context of NME investigations. If the United States were to come forward with this authority, the parties could then debate before the Panel whether this authority is *sufficient* to address the problem of double remedies, and the United States could explain why Commerce did not *apply* this authority in the investigations at issue in this dispute. Having failed to do so, however, the United States should not be heard to criticize China for the manner in which it has chosen to specify the measures at issue in this dispute.

40. For the reasons stated herein, China respectfully requests that the Panel reject the United States' requests for preliminary rulings.[35]

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[35] While China considers that the United States' requests for preliminary rulings have no legal foundation, China believes that the Panel should follow the practice of other panels in deferring any ruling on these requests until the final report. *See, e.g.*, Panel Report, *US – Continued Zeroing*, para. 7.28; Panel Report, *Columbia – Ports of Entry*, para. 7.14; Panel Report, *Canada – Aircraft*, para. 9.15. Among other considerations, the Panel will then be in a position to assess whether the United States' due process rights were prejudiced by the alleged deficiencies in China's panel request.

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THIRD PARTY SUBMISSIONS

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ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF ARGENTINA

(15 June 2009)

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I. INTRODUCTION

1. In this third-party submission, Argentina is setting out its views on some of the issues that form part of this dispute, in accordance with the written submissions to this Panel by China and the United States.

II. THE WTO RULES DO NOT CONTAIN ANY RESTRICTIONS ON THE SIMULTANEOUS APPLICATION OF ANTI-DUMPING DUTIES DETERMINED USING THE SURROGATE COUNTRY METHODOLOGY AND COUNTERVAILING DUTIES

2. China claims that the application of anti-dumping duties determined using the methodology corresponding to a non-market economy country concurrently with countervailing duties on the same product is contrary to Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI of GATT 1994. In Argentina's opinion, China's claim is based on an incorrect interpretation of the rules.

A. ARTICLE VI.5 OF GATT 1994 DEALS SPECIFICALLY WITH THE SIMULTANEOUS APPLICATION OF ANTI-DUMPING DUTIES AND COUNTERVAILING DUTIES AND DOES NOT PROHIBIT SIMULTANEOUS APPLICATION IN THE TERMS SET OUT BY CHINA

3. GATT 1994 regulates combined application of anti-dumping duties and countervailing duties specifically in Article VI.5. The ordinary meaning of the wording in Article VI.5 shows that this provision prohibits the simultaneous application of anti-dumping duties (regardless of whether these have been determined according to Article 2 of the AD Agreement or using the surrogate country methodology provided in the second explanatory note to paragraph 1 of Article VI of the GATT) and countervailing duties that offset export subsidization to the extent that both duties are intended to remedy the "the same situation". This situation only occurs when the export price is lower in comparison with the normal value because of a subsidy in the same amount granted for the export of the goods.

4. It is therefore Argentina's opinion that the simultaneous application of anti-dumping duties and countervailing duties is consistent with the WTO rules provided that the countervailing duties in question are intended to offset domestic subsidies and not export subsidies.

5. In addition, the *chapeau* of Article 15 of China's Protocol of Accession introduces, as far as imports of Chinese origin are concerned, a series of rules in addition to those laid down in Article VI, the AD Agreement and the SCM Agreement. Argentina considers that if, when negotiating the terms of its accession to the WTO, China had obtained from Members the concession that imports of Chinese origin could not be subject to the simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties, Article 15 of the Protocol would have explicitly included such a provision.

B. ABSENCE OF AN EXPLICIT PROHIBITION ON THE SIMULTANEOUS USE OF ANTI-DUMPING DUTIES AND COUNTERVAILING DUTIES IN THE CASE IN QUESTION

6. The WTO rules include a series of provisions which, in different contexts, prohibit the simultaneous application of certain measures.[1] It is thus clear that, when Members agree to prohibit the simultaneous application of certain measures, such a prohibition is explicitly incorporated in the WTO rules. In fact, the principle *expressio unius est exclusio alterius* suggests that, as the WTO rules contain a specific prohibition on simultaneous application of certain measures but no specific prohibition on simultaneous application of anti-dumping duties determined using the surrogate

[1] See for example the footnote to Article 35 of the SCM Agreement; Articles 8.2 and 13 of the Agreement on Agriculture; and Article 6.1 of the Agreement on Textiles and Clothing (in force up until 2004).

country methodology and countervailing duties, simultaneous application in this latter case is consistent with the WTO rules

C. ARTICLE 19.3 AND 19.4 OF THE SCM AGREEMENT ARE NOT IN ANY WAY CONNECTED WITH THE ISSUE OF SIMULTANEOUS APPLICATION OF ANTI-DUMPING DUTIES DETERMINED USING THE SURROGATE COUNTRY METHODOLOGY AND COUNTERVAILING DUTIES

7. China's claim is mainly founded on the claim of violation of Article 19.3 and 19.4 of the SCM Agreement. Neither Article 19.4 nor Article 19.3 deal with the question of simultaneous application of anti-dumping and countervailing duties and, therefore, there is no textual basis at all for China's claim that the simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties violates these two provisions.

8. In Argentina's view, an assessment of whether Article 19.3 and 19.4 regulate the question of the simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties must necessarily take into account both Article VI.5 of GATT 1994 and Article 15 of the Protocol, which, as explained above, deal with the simultaneous application of anti-dumping duties and countervailing duties in general and the simultaneous application of anti-dumping duties determined according to the surrogate country methodology and countervailing duties in particular, respectively.

9. This approach would be consistent with the principle, well established in WTO case law, that one of the corollaries of the "general rule of interpretation" in the Vienna Convention is that the interpretation must have meaning and affect all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[2]

D. THE SURROGATE COUNTRY METHODOLOGY IS NOT A METHODOLOGY RELEVANT TO COUNTERVAILING DUTIES AND CONSEQUENTLY DOES NOT YIELD A NORMAL VALUE FOR THE PURPOSES OF THE AD AGREEMENT, ADJUSTED FOR THE EFFECTS OF SUBSIDIZATION

10. China asserts that the surrogate country methodology applied in anti-dumping proceedings yields a market economy normal value already adjusted for the effects of subsidization on the prices and costs of the exporting non-market economy country.

11. Argentina does not share China's view that application of the surrogate country methodology yields not only a market economy normal value but also a normal value that is "subsidization free". There is no basis whatsoever, either conceptually or legally, for upholding this claim. Prices and costs in countries where subsidies are granted are distorted by the latters' effects, and obtaining prices and costs that reflect market economy conditions by applying the surrogate country methodology in no way implies that such prices and costs have already been adjusted by the distorting effects inherent in the subsidies.

III. INTERPRETATION OF THE TERM "PUBLIC BODY" IN THE SCM AGREEMENT

12. Argentina does not see why it should be considered that, in the context of the SCM Agreement, either the "welfare" or the "best interests" as objectives for action by an entity are more relevant than the effective control of a body by the State or government in order to be termed a "public body" in the context of the SCM Agreement.

[2] *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/R), Report of the Appellate Body, adopted on 20 May 1996, page 21, second paragraph (in the English text).

13. In fact, Argentina considers that the distinction between public and private relevant to Article 1.1 of the SCM Agreement concerns the corporate form in which the control of entities capable of providing such goods and services is organized, regardless of their final destination. In broad terms, therefore, there are private bodies that produce public goods, and public bodies that produce private goods. Characterization as one or the other entity depends on the control over the actor carrying out the activity and not on the destination of the goods or services produced. This issue had to be addressed by the Panel in *Korea – Measures Affecting Trade in Commercial Vessels*, and Argentina agrees with the Panel's evaluation of the issue in this case.[3]

14. For the foregoing reasons, Argentina considers that ownership of a public body by the government is sufficient to define it as such, in terms of its control, and for the purposes of Article 1.1 of the SCM Agreement.

IV. PROCEDURAL ASPECTS OF THE SCM AGREEMENT

A. FAILURE TO HOLD THE CONSULTATIONS PRESCRIBED IN ARTICLE 13.1 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)

15. The Argentine Republic endorses most of the points expressed by China in its submission regarding the "broad interpretation" of Article 13.1 of the SCM Agreement.

16. Argentina considers, in general terms, that failure to hold these consultations or their delayed holding nullifies the objective for which they were created, which is none other than to allow the countries involved to reach a mutually agreed and satisfactory solution, through the exchange of information, and so avoid the initiation of an investigation.

17. One argument that upholds the view expressed above can be found in a proper interpretation of footnote 44 to Article 13.2, which in the relevant part provides that: "*It is particularly important, […], that no affirmative determination whether preliminary or final be made without **reasonable opportunity** for consultations having been given.*"

18. In this respect, Argentina deems it essential to express its disagreement regarding the 20-day deadline allowed by the Department of Commerce for determining whether or not to initiate an investigation as this period in no way suffices to enable a country under investigation to collect and transmit the information needed to defend its position.

B. FAILURE TO GIVE INTERESTED PARTIES THE PERIOD OF 30 DAYS PRESCRIBED IN ARTICLE 12.1.1 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)

19. The Argentine Republic also endorses China's interpretation of Article 12.1.1 of the SCM Agreement regarding the investigating authority's obligation to allow a period of 30 days for each one of the "questionnaires".

20. In this connection, Argentina wishes to emphasize that a balanced and appropriate interpretation of the WTO rules should above all observe the "due process principle" codified in Article 12.1.1 in the part which states: " … **ample opportunity** to present in writing all evidence which they consider relevant in respect of the investigation in question".

[3] Panel report, *Korea – Measures Affecting Trade in Commercial Vessels* (WT/DS273/R), especially paragraphs 7.45 to 7.50.

21. For the foregoing reasons, Argentina is of the view that it is an obligation inherent in Article 12.1.1 that every Member should allow a minimum period of 30 days in which to reply to all questionnaires sent out during the investigation procedure.

V. CONCLUSION

22. In accordance with the analysis set out in this submission, Argentina is of the view that:

- The simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties is consistent with the WTO rules;
- government ownership of an entity is a sufficient factor to determine the existence of a public body in relation to the SCM Agreement;
- failure to hold the consultations or their delayed holding nullifies the objective laid down in Article 13.1 of the SCM Agreement; and
- the 30-day period allowed in which to reply to all questionnaires is consistent with a balanced interpretation of the SCM Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF AUSTRALIA

(15 June 2009)

A. INTRODUCTION

1. In its written submission Australia focuses on a select few topics which raise significant systemic issues and important questions of legal interpretation.

B. PUBLIC BODY

2. Australia submits that the Panel should be mindful not to conflate the test for entrustment or direction under Article 1.1(a)(1)(iv) with the definition of a public body for the purposes of Article 1.1(a)(1)(i)-(iii). In Australia's view, the term 'public body' is treated as an equivalent of government in Article 1.1(a)(1) because public bodies, by their nature, are an extension of government for the purposes of implementing government policy. This is consistent with the fact that Article 1.1(a)(1) provides that both governments and public bodies are referred to as "government" in the SCM Agreement. Conversely, Article 1.1(a)(1)(iv) recognises that private bodies can be used indirectly by governments to provide a financial contribution. Article 1.1(a)(1)(iv) imposes an additional test to attribute the actions of a private body to the government – that of entrustment or direction.

3. Australia considers that, consistent with the Appellate Body findings in *US - DRAMs*, a clear distinction needs to be maintained between the test required in subparagraphs (i)-(iii) which relate to the identity of the *actor* (public body) on the one hand, and subparagraph (iv) which relates to the nature of the *action* (including entrustment or direction), on the other. The Panel in *Korea - Commercial Vessels* highlighted the difficulty in defining an entity as public or private depending on the functions it was exercising at the time. It found that ultimately an entity can exercise dual government and non-government functions intermittently and that a body's activities are not conclusive of that body's character at any given time.

4. Australia submits that the test for identifying whether an entity is a public body should relate to evidence of government control over the entity and not the daily functions or actions of the entity as determined by the Panel in *Korea - Commercial Vessels*. Government ownership of an entity is strong evidence of government control but should be considered among other factors and evidence of control. In *Korea - Commercial Vessels* the Panel also looked at other indicia of government control, including:

- management of the entity (in that case the company was presided over by a president and executive directors who were appointed and dismissed by the Government of Korea);

- government ministerial approval of the operations and programmes of the entity; and

- the ability of the government to issue instructions to the entity.

C. ENTRUSTMENT OR DIRECTION OF A PRIVATE BODY

5. Article 1.1(a)(1)(iv) recognises that private bodies can also be an indirect channel through which governments can provide a financial contribution by "entrusting or directing" a private body to act in a particular way. An important issue that arises is the appropriate evidentiary standard to be applied to determine the existence of entrustment or direction.

6. In Australia's view, the text of Article 1.1(a)(1)(iv) relates to the government action of entrusting or directing a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii). The Appellate Body in *US - DRAMs* articulated the test for "entrustment and direction" in terms of "entrustment" requiring a government to "give responsibility to a private body", and "direction" requiring a government to "exercise its authority over a private body".

7. In Australia's view, entrustment or direction will not necessarily arise only in terms of a direct instruction to act or through the creation of a law by government. The Panel in *EC - DRAMs* noted that entrustment or direction "does not necessarily need to be 'explicit'". It elaborated that Article 1.1(a)(1)(iv) is to ensure that indirect government action is also captured by the SCM Agreement. If the scope of Article 1.1(a)(1)(iv) were limited to only explicit government acts, governments would be able to circumvent their commitments under this provision. The Appellate Body in *US - DRAMs* recalled that this provision is in effect an anti-circumvention provision.

8. The Panel in *Japan - DRAMs* stated that "since entrustment or direction of a private body will rarely be formal or explicit … allegations of government entrustment or direction are likely to be based on pieces of circumstantial evidence". This is consistent with the earlier Appellate Body statement in *US - DRAMs* that "entrustment or direction need not be determined on the basis of explicit acts". Instead, the Appellate Body determined in that case that a Panel's assessment requires "a consideration of the inferences that might reasonably have been drawn … on the basis of the *totality* of the evidence".

9. Article 1.1(a)(1)(iv) does not require that there be an explicit command or instruction to a private body in terms which satisfy the requisite elements of a subsidy under the SCM Agreement. Rather, a complaining party must provide evidence sufficient in its totality to justify a finding of entrustment or direction to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii).

D. SUBSIDIZED INPUTS PURCHASED FROM TRADING COMPANIES

10. In Australia's view, and as the Appellate Body noted in *US - Softwood Lumber IV*, Article 10 of the SCM Agreement and Article VI:3 of GATT 1994 are relevant provisions when examining subsidization of inputs to produce the imported product. The Appellate Body in that case found that a "pass through analysis" is not necessary in every situation in which a subsidy is provided on the production of an input product.

11. Australia notes that the Panel in *Mexico - Olive Oil*, in recalling the Appellate Body's analysis in *US - Softwood Lumber IV*, summarised the principles for when a pass-through analysis would be necessary stating that "a pass through analysis is required in circumstances in which *both* of the following conditions are present:

1. A subsidy is provided in respect of a product that is an input into the processed, imported product that is the subject of the countervail investigation; and

2. The producer of the input product and the producer of the imported product subject to the countervail investigation are unrelated."

12. This approach is consistent with the Appellate Body's findings in *US - Countervailing Measures* that there may be a direct or indirect recipient of the benefit of the financial contribution. Therefore, the direct recipient of the benefit may be the input producer and the indirect recipient may be the producer of the imported product.

13. Notwithstanding the issue of whether or not a pass-through analysis must be made, Australia is of the view that the Panel could also examine what could constitute a pass-through analysis. Such an analysis could include examination: (i) establishing the existence of a subsidy provided to an input product; and (ii) of the price paid by the producer of the imported product subject to the countervail investigation compared with an appropriate benchmark price, to reveal the benefit conferred to that producer. In Australia's view, this would reflect the understanding of "countervailing duty" as defined in footnote 36 of Article 10 of the SCM Agreement and Article VI:3 of GATT 1994, that countervailing duties are intended to offset subsidies bestowed directly or indirectly.

E. POLICY LENDING

14. In Australia's view, "policy lending" is a term that has been applied to describe a certain type of subsidy programme whereby a government makes a policy decision to provide loans to certain industries on preferential terms. Australia considers that a subsidy provided through a policy lending programme is subject to the same fundamental requirements under Articles 1 and 2 of the SCM Agreement as all other subsidies. In particular, the test for the existence of a subsidy under Article 1 of the SCM Agreement and for specificity under Article 2 of the Agreement, are separate tests. Consequently, where a financial contribution pursuant to a policy lending programme is not provided by the government or a public body, it must be demonstrated that the relevant private body was entrusted and directed according to Article 1.1(a)(1)(iv).

15. Statements of government policies, plans and intentions are highly relevant considerations in determining the existence of a subsidy and that the subsidies are targeted to certain industries or enterprises. In terms of *de jure* specificity under a policy lending programme, Australia considers that the policy statement that forms the basis of the programme must "explicitly limit access to a subsidy to certain enterprises". Australia finds no basis for the assertion that it must explicitly be "to the exclusion of other certain enterprises". Australia submits that if a programme is explicitly only available to certain enterprises or where eligibility is explicitly limited to certain enterprises, it is implicit that this will be to the exclusion of other certain enterprises. Thus a policy statement will be *de jure* specific if it explicitly refers to supplying loans only with respect to 'particular forms or branches of productive labour; a trade; a manufacture' as opposed to being "broadly available2 throughout the economy. Furthermore, *de jure* specificity does not require that there be legislation that identifies the elements of a subsidy.

16. China states that the policy banks have an express mandate from the central government to provide loans to targeted industries and 'state-supported' projects. In Australia's view, while commercial banks may take account of government policies when evaluating risks associated with loans, it is an entirely different matter for a commercial bank to be given, to take into account, and to act on a government direction in determining or evaluating lending decisions.

17. Once the existence of a subsidy is established in accordance with Article 1 of the SCM Agreement and specificity is established in accordance with Article 2 of the SCM Agreement, there is no need to impose an additional third requirement on instances of policy lending in terms of the "transaction" being "made pursuant to" the legislation. The issue of the connection between the policy statement and the provision of the financial contribution is addressed through the analysis of 'entrustment or direction' under an Article 1 analysis.

F. REGIONAL SPECIFICITY

18. Regional specificity under Article 2.2 of the SCM Agreement provides that a "subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific" (emphasis added). The test for regional specificity in Article 2.2 sits separately from the tests for specificity provided in Article 2.1(a)-(c). Article 2.2 can be distinguished from the tests in Article 2.1(a)-(c), because it specifically establishes regional locality as the limiting factor that renders a subsidy specific.

19. Australia does not accept that Article 2.2 involves an additional element so that the subsidy must be limited to certain enterprises within a limited designated geographic region within the jurisdiction of the granting authority. Australia notes that if this interpretation of regional specificity were to be adopted, it would be difficult to envisage a situation covered by Article 2.2 that would not already be covered by Article 2.1(a)-(c). Article 2.2 establishes an alternative basis upon which a subsidy might be specific. To require an additional test of limitation to certain enterprises within the regional specificity test already contained in Article 2.2, would render Article 2.2 meaningless.

20. Australia agrees with the United States that Article 8.1(b) and Article 8.2(b) may provide relevant context in determining regional specificity under Article 2.2. Article 2.1 provides that "an enterprise or industry or group of enterprises or industries" be referred to in the SCM Agreement as "certain enterprises". In Australia's view, "certain enterprises" in the Agreement should be read as "an enterprise or industry or group of enterprises or industries". Australia submits that this interpretation, in particular with respect to "certain enterprises" in Article 2.2, would be relevant to the Panel's examination. The Panel could also usefully clarify whether the use of the term "certain enterprises" in Article 2.2 is descriptive to distinguish between enterprises that are located within the designated geographical region and those that are outside.

G. BENCHMARK FOR THE DETERMINATION OF BENEFIT

21. Another important issue that arises in this case is the appropriate market benchmark to be applied to determine the existence of "benefit" under Article 1.1(b) of the SCM Agreement with respect to a "loan by a government" under Article 14(b) of the SCM Agreement.

22. As the Appellate Body stated in *Canada - Aircraft*, "Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison". The question then becomes, which "marketplace"; how to determine the boundaries of the relevant market place; and whether the firm could actually obtain a comparable commercial loan on the market. Article 14 clearly distinguishes between the appropriate market comparisons for government loans (subparagraph (b)) and those for "equity capital" (subparagraph (a)), "loan guarantees" (subparagraph (c)) and "goods and services2 (subparagraph (d)).

23. Article 14(b) states that the comparison should be with a "comparable commercial loan" actually obtainable on "the market". It does not refer to "prevailing market conditions … in the country of provision or purchase", as subparagraph (d) does. This distinction is due to the fact that subparagraph (b) relates to "loans" and not to "goods and services" as in subparagraph (d). Consequently, Australia submits that Article 14(b) does not also require the market benchmark to "relate or refer to, or be connected with the conditions prevailing in the market of the country of provision". Article 14(b) simply does not have the same explicit connection to the "country of provision or purchase". This is because "loans" are available on an international financial market that is subject to international influences.

24. Furthermore, Australia considers that there is no basis in the text of Article 14(b) of the SCM Agreement to limit consideration of a comparable market benchmark to loans in the same

currency as the RMB-denominated government loans under investigation. Loans obtained in one currency can be used to purchase any particular currency at rates determined by international markets. Again, Australia considers there is no basis to impose an Article 14(d) market comparison that relates or refers to, or is connected with the conditions prevailing in the market of the country of provision.

H. CONCURRENT APPLICATION OF ANTI-DUMPING AND COUNTERVAILING MEASURES

25. In Australia's view, anti-dumping and countervailing measures are trade remedies that address two distinct trade practices and have different purposes and effects. Anti-dumping measures address dumped products that cause injury to the domestic industry in the importing country. Countervailing measures on the other hand address subsidized imports that cause injury to the domestic industry.

26. As provided in Article VI:1 of GATT 1994 and Article 2.1 of the *Agreement on Implementation of* Article *VI of the General Agreement on Tariffs and Trade 1994* (the AD Agreement), an anti-dumping investigation entails a price comparison between the normal value of the product in the home market of the exporting country and the export price in the export market. Article VI:2 of GATT 1994 provides that an anti-dumping duty may be levied to offset or prevent dumping (that is, the difference between the normal value and the export price). Article VI:3 of GATT 1994 provides that a countervailing investigation will determine the existence, degree and effect of alleged subsidies which are provided by governments or public bodies. Article VI:3 of GATT 1994 further provides that a countervailing duty may be imposed to the amount of the subsidy, granted directly or indirectly on the manufacture, production or export of the product.

27. The SCM Agreement and the AD Agreement provide, respectively, that the imposition of the full amount of the subsidy as a countervailing duty or the full margin of dumping as an anti-dumping duty is a decision to be made by the investigating authorities.[1] However, neither Agreement addresses concurrent or parallel anti-dumping and countervail investigations. They do not specify that consideration of the imposition of the full dumping margin or the full amount of the subsidy must take into account other trade remedy actions which may be underway in the importing country. Nor does anything in GATT Article VI or elsewhere in the WTO Agreements prevent concurrent or parallel anti-dumping and countervailing duty investigations into the same product. Indeed, the text of Article VI:5 reinforces the right of Members to do both.

28. The Panel could usefully examine the following aspects of Article VI:5 of 1994:

(a) Whether the meaning of "situation" refers to the existence of dumping or subsidisation or to the injurious effects of those actions;
(b) Whether the meaning of "compensate" relates to the level of the dumping and subsidy margins;
(c) Whether "export subsidization" has a different meaning to "manufacture, production or export" of a product under Article VI:3 of GATT 1994;
(d) Whether the meaning and use of "export subsidization" is distinct from determining whether a subsidy is an export subsidy or a subsidy provided for the manufacture or production of a product;
(e) Whether the meaning and use of 'export subsidization' limits its application to export subsidies; and
(f) Whether the meaning and use of "export subsidization" may also capture subsidies provided for the manufacture or production of a product which is nevertheless exported.

[1] Article 19.2 of the SCM Agreement and Article 9.1 of the AD Agreement.

29. Australia fails to see that there is a "double remedy" of the effect of any subsidy where there are concurrent investigations. It could be entirely consistent for investigating authorities to make determinations of subsidization by an exporting Member and at the same time, determine that there are no sales in the ordinary course of trade in the domestic market of the exporting country due to a particular market situation where, for example, government influences prices. If a "surrogate" market is used to establish a normal value in an anti-dumping investigation because there are no sales in the ordinary course of trade, Australia is of the view that such sales do not reflect the subsidized production in the home market. Indeed, it could be argued that such prices are used to ensure that there is no perversion of prices in determining the normal value.

I. CONCLUSION

30. For the reasons set out in its Submission, Australia submits that the Panel in this dispute should:

(a) Take into account Australia's observations on the appropriate definition of "public body" under Article 1.1(a)(1) of the SCM Agreement;
(b) Draw on guidance provided by the highlighted WTO cases on the appropriate test for entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement;
(c) Consider what elements of an examination would constitute a pass-through analysis in determining whether a subsidy is provided on production of an input product;
(d) Note that China has conflated the elements of Article 2.1(a) and Article 1 of the SCM Agreement for determining *de jure* specificity when considering "policy loans";
(e) When interpreting Article 2.2 of the SCM Agreement, be mindful of its relationship with Article 2.1(a) of the SCM Agreement;
(f) Take into account Australia's observations on the proper market benchmark for a "loan by a government" when determining the existence of benefit under Article 14(b) of the SCM Agreement; and
(g) Note Australia's observations when interpreting Article VI:5 of GATT 1994 when considering China's claims about the concurrent application of anti-dumping and countervailing duties.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF BRAZIL

(15 June 2009)

I. ARGUMENTS

A. THE CONCEPT OF "PUBLIC BODY" IN ART. 1.1(A)(1) OF THE SCM AGREEMENT

1. Brazil is of the view that the ordinary meaning of the expression "public body" in Article 1.1(a)(1), interpreted in its context, and in light of the object and purpose of the SCM Agreement, indicates that shareholding control or ownership by a Government does not warrant, in and of itself, a presumption that a company is a "public body" for purposes of establishing the existence of a financial contribution. This view is supported by both WTO jurisprudence and general international public law, which confirm that corporate entities that are legally separate from the State, even if wholly or partly owned by that State, are presumed to be private entities, and therefore their actions are to be considered *prima facie* of a private nature.[1]

2. Brazil believes that nothing in Article 1.1(a)(1) supports an interpretation of the term "public" in "public body" as referring to "public property". On the contrary, the immediate context of the expression "public body" indicates that it refers to an entity closely assimilated to the government itself. The use of the term "government" throughout the SCM Agreement to refer indistinctly to "a government or any public body" underscores the closeness of the nexus between the two concepts. This same approach was adopted by the Appellate Body in *US - CVD DRAMs*.[2]

3. In order to be closely assimilated to the government, the link of an entity with the government must go beyond mere ownership. It must perform functions and exercise attributions that are typical of the government. It must, for all purposes, be considered part of the government itself. That is certainly not the case of companies that operate in the market, under the rule of private law, conducting businesses that are typical of privately-owned companies, regardless of whether the government owns a majority stake in it or not. This understanding is corroborated by the *ILC Draft Articles*[3] and by Appellate Body precedents.

4. In *US - CVD DRAMs* the Appellate Body noted that "the conduct of private bodies is presumptively not attributable to the State" and, to support such view, quoted approvingly to the following extract of the Commentaries to the ILC Draft Articles: "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are

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[1] *Commentaries to the ILC Draft Articles on State Responsibility of Internationally Wrongful Acts* (ILC Draft Articles), Article 8, Commentary (6), as referred to in *Appellate Body Report, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) From Korea*, WT/DS296/AB/R, adopted 20 July 2005 (*US – CVD DRAMs*).

[2] *US – CVD DRAMs*, footnote 166.

[3] The ILC Draft Articles have been frequently relied on by the Appellate Body, panels, and also arbitrators acting under Article 22.6 of the DSU in interpreting WTO law. The *ILC Articles* have been cited as "rules of general international law", and as reflective of "customary international law".

exercising elements of governmental authority". By connecting its interpretation of private bodies to a commentary that specifically affirms that the conduct of corporate entities owned or controlled by the State is *prima facie* not attributable to the State, the Appellate Body has made it clear its opinion on two interconnected issues: *first*, that shareholding control or ownership is not sufficient to define a public body; and *second*, that control or ownership can be a relevant factor in the analysis of whether the company (or corporate entity) is exercising elements of governmental authority. Or, under the terms of 1.1(a)(1)(iv) of the SCM Agreement, of whether the company is being entrusted or directed by the government.

5. In this connection, it is important to differentiate between the enquiries undertaken in order to ascertain if a state-owned company is (a) a "public body" under Article 1.1(a)(1) of the SCM Agreement; or (b) a "private body" entrusted or directed by the government to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii) thereof. In Brazil's view, the first enquiry must be directed at the nature of the entity in question, whereas the second enquiry refers to specific instances in which the actions of the entity reveal governmental involvement in the form of entrustment or direction. The issue of ownership is not, in itself, determinative of the status of a state-owned entity in either enquiry. Conversely, state ownership may be a relevant element, among others, in assessing both if an entity has the nature of a "public body" or if it is a "private body" entrusted or directed to act as a proxy of the government in specific instances.

6. It is worthy noting, in this regard, that in the investigation at issue in *US – CVD DRAMs* the investigating authorities seem to have understood that control or ownership by the government does not suffice to characterize a company as a "public body". In that investigation several companies owned or controlled by the government were not found by the investigating authorities to be public bodies.[4]

7. Brazil agrees with the view that SCM provisions were constructed with the intent of preventing as much as possible circumvention of its disciplines.[5] Nevertheless, Brazil believes that the mechanism built into the SCM Agreement to fulfil this goal is the 'entrustment or direction' clause in Article 1.1(a)(1)(iv), whereby the possibility of targeting operations disguised as private in nature but actually resulting from the exercise of governmental authority is provided for. Brazil does not consider that this objective was meant to be achieved by a broad, "fast track" interpretation of the "public body" definition, one which would actually allow the circumvention of the steps set out in Article 1.1(a) for a financial contribution to be found.

8. It follows from the above that, when undertaking a countervailing duty investigation, the investigating authorities bear the burden of proof regarding the identification of a possible 'entrustment or direction' situation involving companies that, albeit owned or controlled by the government, are *prima facie* private entities. As explained before, whereas government shareholding control may be relevant evidence, it cannot be determinative in itself. Furthermore, Brazil understands that a finding of entrustment or direction of an entity by the government should be restricted to the specific action under consideration by the investigating authorities, and should not be automatically extended to any other actions attributable to such entity.

9. However, if the investigating authority believes that the company in question has the nature of a public body and not of a private entity, it must establish that such company is fundamentally and permanently devoted to the promotion of public goals determined by the government, performing functions and exercising attributions that are typical of the government itself. In this case, Brazil contends that the burden faced by the investigating authority is substantially heavier, since it is required not simply to demonstrate the government's entrustment or direction in respect of specific

[4] *See US – CVD DRAMs*, para. 131.
[5] United States' First Written Submission, para. 117

actions, but it must demonstrate that the entity in question is, by its very nature, and in relation to all its actions, public and not private.

B. THE SIMULTANEOUS APPLICATION OF AD AND CVD MEASURES

10. Article VI.2 of the GATT 1994 and Article 9.1 of the AD Agreement authorize Members to impose antidumping duties up to the amount of the dumping margin determined according to the requirements and criteria set out in Article VI of the GATT 1994 and in the provisions of the AD Agreement. Concurrently, Article VI.3 of the GATT and Article 19.4 of the SCM Agreement allow Members to levy countervailing duties up to the amount of the subsidy found to exist pursuant to Article VI of the GATT 1994 and the disciplines of the SCM Agreement.

11. In Brazil's view, provided that the requisite legal requirements for the imposition of each remedy are properly observed, there is nothing in the AD Agreement or in the SCM Agreement to suggest that parallel AD measures and CVD measures cannot be imposed on the same product exported by the same Member. Not surprisingly, no cross-references can be found in the AD Agreement or in the SCM Agreement conditioning the imposition of one remedy on the satisfaction of requirements established in relation to the other remedy. It is clear, therefore, that AD measures and CVD measures have been conceived as autonomous remedies, which should stand or fall on their own respective merits or faults.

12. This understanding is supported by Article VI:5 of the GATT 1994 which contains the only limitation on the concurrent application of AD and CVD measures that can be found in the covered agreements. Article VI:5 establishes certain constraints on the parallel application of AD and CVD remedies in specific circumstances of export subsidization. Apart from the limitation explicitly set out in Article VI:5, which is circumscribed to export subsidies, no other limitation in this regard is provided for anywhere in the GATT 1994, in the AD Agreement or in the SCM Agreement. The text of Article VI:5 shows that Members were well aware that if they intended to impose any restrictions or conditions on the parallel application of AD and CVD measures, they had to so explicitly. In this context, it does not seem credible to argue that, decades after the entry into force of the GATT 1947, the drafters of the AD and SCM Agreements intended to limit the parallel application of the two remedies but decided to do so implicitly.

13. The GATT 1994 treats remedies adopted to offset export subsidies more stringently than those aimed at subsidies "granted on the manufacture or the production" of a product due to the direct link between export subsidies and pricing practices adopted by their recipients. The economic operation of an export subsidy typically allows greater returns on foreign sales than on domestic sales. In principle, this type of governmental intervention induces recipients to lower the prices of their foreign sales while keeping their domestic prices stable; i.e., they are induced to dump in the amount of the export subsidy received. Conversely, the potential effects of manufacture or production subsidies on pricing practices are normally much less direct. It is therefore inappropriate to apply the logic behind the limitation of Article VI:5 of the GATT to subsidies that are not contingent on export performance.

14. Brazil also holds the view that the legal permissibility for the parallel application of AD and CVD measures, and its underlying logic, apply indistinctly to investigations conducted in relation to "market economy" Members and "non-market economy" Members. Accepting the argument that methodological challenges arising from price comparability difficulties in "non-market economy" Members somehow constrain the parallel application of AD and CVD measures in relation to them would result in discrimination against "market economy" Members. This result is not supported by the letter or the spirit of the GATT 1994, the AD Agreement or the SCM Agreement. In fact, WTO

rules do not establish any provision that create exceptions to the possibility of parallel application of the two remedies based on the characteristics of the economy of the Member concerned.

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF CANADA

(15 June 2009)

I. INTRODUCTION

1. Canada is participating in these proceedings because it has a systemic interest in the interpretation of WTO subsidy rules and the important consequences the findings of the Panel in this dispute will have for the future application of those disciplines, both in general and to cases involving China.

2. The *Protocol on the Accession of the People's Republic of China,* the *Report of the Working Party on the Accession of China*, and the transitional nature of China's economy inform Canada's views on many of the issues in this dispute and should likewise guide the Panel.

II. CHINESE STATE-OWNED ENTERPRISES AS PUBLIC BODIES

3. Canada submits that entities controlled by the government are public bodies within the meaning of Article 1.1(a)(1) of the *SCM Agreement*. A government may exercise such control through whole or majority ownership.

4. Canada's position is consistent with the Panel's decision in *Korea – Commercial Vessels*. The Panel in that case found that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)". The Panel found that government control over a Korean entity was "evidenced primarily by the fact that [the entity] is 100 per cent owned" by the government or other public bodies. Evidence suggesting government control over the entity also included the fact that the operations were presided over by directors who were appointed and dismissed by the government, and the fact that governmental approval of the operations programme was required. These factors are consistent with the means that a majority owner would ordinarily have to control a company.

5. Upon its accession, China conceded that its state-owned enterprises ("SOEs") constitute public bodies. Indeed, in light of the special characteristics of China's economy (including the prevalence of SOEs), members of the Working Party sought to clarify that when Chinese SOEs make financial contributions they do so as government actors for the purposes of Article 1.1(a)(1). The representative of China did not challenge this clarification.

6. China's position is not consistent with the context of Article 1.1(a)(1). Under China's interpretation, an SOE is a private body when it is not exercising governmental authority conferred to it by the law of the state. It is only when it exercises governmental authority that it would become a "public body". Where the SOE does exercise governmental authority and sells goods, its actions would constitute a financial contribution under Article 1.1(a)(1)(iv) of the *SCM Agreement*. In that case, the Chinese Government could be said to have entrusted or directed the putative private body (the SOE) to sell goods. Consequently, there would be no need for the SOE to be characterized as a public body for its action to be characterized as a financial contribution (under Article 1.1(a)(1)(iii) of

the *SCM Agreement*). As such, China's interpretation of the term "public body" would essentially make the term inutile.

III. COMMERCE'S USE OF BENCHMARKS OUTSIDE CHINA TO MEASURE THE BENEFIT CONFERRED BY THE PROVISION OF GOODS BY STATE-OWNED ENTERPRISES

7. Canada submits that the United States' reading of the Appellate Body's decision in *US – Softwood Lumber IV* in the context of this dispute is erroneous. Nevertheless, in the investigations at issue, Commerce's actions were consistent with the United States' WTO obligations by virtue of subparagraph 15(b) of China's *Accession Protocol*.

8. In *US – Softwood Lumber IV*, the Appellate Body indicated that, under Article 14(d) of the *SCM Agreement*, an importing WTO Member may only reject private prices in the market of the country of provision if it can demonstrate on the basis of facts that the government's status as a significant supplier of goods actually distorts the private prices for the goods in that country.

9. In *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China and Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, Commerce considered that Chinese prices were significantly distorted due to the Chinese Government's status as a substantial provider of goods.

10. Such an approach did not satisfy the requirement of Article 14(d) of the *SCM Agreement*, as interpreted by the Appellate Body in *US – Softwood Lumber IV*.

11. However, the *Working Party Report* and China's *Accession Protocol* provide an exception to this requirement for imports of Chinese origin.

12. At paragraph 150 of the *Working Party Report*, members noted that the transitional nature of China's economy could make it difficult to apply Article 14 of the *SCM Agreement*.

13. Accordingly, subparagraph 15(b) of China's *Accession Protocol* provides that an importing WTO Member may calculate a Chinese subsidy benefit on the basis of costs or prices outside China if there are "special difficulties" in the application of Article 14 of the *SCM Agreement*.

14. The dominance of Chinese SOEs – a legacy of China's history as a centrally planned economy – and the potential resulting distortion on private prices for the products they sell are precisely the sort of "special difficulties" in the application of Article 14 of the *SCM Agreement* that are contemplated in subparagraph 15(b) of China's *Accession Protocol*.

15. Such special difficulties arise when Chinese SOEs are the predominant providers of goods in China. Chinese private prices may be distorted and may not constitute appropriate benchmarks as a result of the role of the SOEs in the market.

16. Under such circumstances, Canada submits that subparagraph 15(b) of China's *Accession Protocol* allows an importing WTO Member to rely on prices outside China without having to demonstrate in accordance with Article 14(d) of the *SCM Agreement* that Chinese private prices are distorted.

IV. THE CONCURRENT APPLICATION OF ANTI-DUMPING AND COUNTERVAILING DUTIES WHERE NORMAL VALUE IS CALCULATED USING COSTS OR PRICES OUTSIDE CHINA

17. The *WTO Agreement* treats dumping and subsidization as two different causes of injury to domestic industries, and provides distinct sets of rules for each, giving rise to separate remedies: an anti-dumping duty to remedy injurious dumping and a countervailing duty to remedy injurious subsidization.

18. When an imported product happens to be both dumped and subsidized, and causes injury, an importing Member may impose both an anti-dumping duty equal to the margin of dumping and a countervailing duty equal to the amount of the subsidy.

19. Article VI:5 of *GATT 1994* confirms the ability of WTO Members, as reflected in practice, to impose concurrent anti-dumping and countervailing duties except to the extent that they both remedy dumping or *export* subsidization.

20. Nothing in the *WTO Agreement* prevents the concurrent application of duties determined on the basis of prices or costs found outside the market of the exporting Member whose products are under investigation.

21. Article 15 of the *GATT Subsidies Code* prohibited importing countries from applying both anti-dumping duties determined on this basis and countervailing duties. However, this prohibition was not carried over during the Uruguay Round.

22. If WTO Members intended to prohibit the concurrent application of anti-dumping duties calculated on the basis of subparagraph 15(a)(ii) of China's *Accession Protocol* and countervailing duties, they could have stated that intention in China's *Accession Protocol* as they had done earlier in the *GATT Subsidies Code*. Instead, taken together subparagraphs 15(a)(ii) and 15(b) of China's *Accession Protocol* enable an importing WTO Member to impose both anti-dumping duty calculated on the basis of costs or prices outside China and countervailing duty at the same time.

23. A countervailing duty on a Chinese product will be in "the amount of the subsidy found to exist" under Article 19.4 of the *SCM Agreement* if it is calculated in accordance with Article 14 of the *SCM Agreement* or subparagraph 15(b) of China's *Accession Protocol*.

24. As long as the importing WTO Member does not impose countervailing duty in excess of "the amount of the subsidy found to exist", the duty will be in the "appropriate amount", as required by Article 19.3 of the *SCM Agreement*.

25. The Panel in *EC – Salmon (Norway)* interpreted the phrase "appropriate amounts" in largely the same way under the analogous provision of the Anti-dumping Agreement. The Panel in *Argentina – Poultry Anti-Dumping Duties* reached essentially the same conclusion.

V. REGIONAL SPECIFICITY

26. Article 2.2 of the *SCM Agreement* simply covers subsidies that are limited to a designated geographical region.

27. Pursuant to Article 2.1 of the *SCM Agreement*, where access to a subsidy is limited to certain enterprises, that subsidy shall be specific. Reading this requirement into Article 2.2 as well would render Article 2.2 redundant and inutile.

28. Reading Article 2.2 as including both requirements would allow subsidies provided to all enterprises located in a designated geographical region to escape the disciplines of the *SCM Agreement* even though these potentially trade-distorting subsidies are not broadly available in the country.

VI. QUESTIONNAIRES

29. The 30-day requirement in Article 12.1.1 of the *SCM Agreement* only applies to the initial questionnaire that the investigating authority sends to respondents.

30. The Panel in *Egypt – Steel Rebar* addressed this issue in the context of Article 6.1.1 of the *Anti-dumping Agreement*, which is analogous to Article 12.1.1 of the *SCM Agreement*. The panel found that "the term 'questionnaires' in Article 6.1.1 [refers] only to the original questionnaires sent to interested parties at the outset of an investigation".

31. While the requirement in Article 12.1 of the *SCM Agreement* that parties receive "ample opportunity" to present evidence in writing applies throughout the course of an investigation, Article 12.1.1 deals only with a particular instance during an investigation – the issuance of the initial questionnaire – where what is "ample" is defined by the drafters of the *SCM Agreement* as at least 30 days.

32. If an investigating authority had to extend a new 30-day response period to a respondent every time it had a new or follow-up question arising from its obligation under Article 12.5 of the *SCM Agreement*, it would be very difficult for it to complete the investigation in accordance with Articles 11.11 and 12.12 of the *SCM Agreement*.

33. This could have troubling implications for respondents: pressed to complete an investigation within the timeframes stipulated in Articles 11.11 and 12.12, the investigating authority might refrain from asking follow-up questions or pursuing new lines of questioning arising from the information it has gathered, and rely instead on the facts available.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(15 June 2009)

I. INTRODUCTION

1. Whilst not taking a final position on the specific facts of this case, the European Communities will provide its views on (i) the claims relating to the provision of goods by State-Owned Enterprise ("SOEs"), (ii) some issues relating to the policy loans and the provision of land-use rights (iii) the simultaneous application of anti-dumping and countervailing measures (iv) due process requirements, in particular those mentioned in Articles 13.1 and 12.1.1 of the *SCM Agreement*.

II. PROVISION OF GOODS BY SOEs

A. FINANCIAL CONTRIBUTION

2. The key question on this point appears to be whether the USDOC's application of majority ownership as the only factor to establish that SOEs are "public bodies" is consistent with the *SCM Agreement*. Whilst not entering into the specific facts of this case, the European Communities agrees with the United States that the Working Party Report on China's accession is a relevant document that the Panel should examine in its assessment. To the extent that China might reasonably be considered to be under an obligation to respond to the specific clarification requested, and China's silence a reasonable basis on which to construe consent, this would be a relevant factor, to be taken into consideration with all the relevant facts and evidence, in the determination by the United States that the SOEs in this case were "public bodies" providing financial contributions under Article 1.1(a)(1) of the *SCM Agreement*.

3. Leaving aside the particularities of the Working Party Report, the European Communities considers that a high level of government ownership is a very relevant factor in determining whether an entity is a "public body" in the sense of Article 1.1(a)(1) of the *SCM Agreement*. This factor should be examined in the light of the specific circumstances of the case in order to establish whether actions by SOEs can be attributed to the government. In the EC view, a fundamental element in the financial contribution determination is the participation of the government, either directly (as a government or public body) or indirectly (through private parties). In other words, the action of the entity at hand must be somehow attributable to the government. In this respect, the European Communities observes that majority ownership has been considered a very relevant factor (although not the only one) when establishing that actions of private bodies were attributed to the government. Consequently, in order to determine whether the actions of an entity can be attributed to the government directly or indirectly, *the degree of ownership* is a highly relevant factor.

4. The European Communities further notes that a test such as the "five-factor" test is not expressly referred to in the *SCM Agreement* as a basis on which to determine whether or not an entity is a public body within the meaning of Article 1(1)(a) of the *SCM Agreement*. In some cases such a test may be appropriate. In other cases, depending on the totality of the facts and evidence, and the particular procedural circumstances, the extent of ownership may have a preponderant role to play in determining that an entity is a "public body" under Article 1.1(a)(1) of the *SCM Agreement*. If no other facts or evidence are available, and the appropriate procedural steps have been followed, or if all

other available facts and evidence confirm the systematic role of the State, then State ownership could be determinative.

5. As regards the provision of goods by private trading companies, whilst not taking a position on the facts of this case, the European Communities would like to highlight that, in general terms, the provision of the goods by a trading company can be understood as a mere *intermediate act* which does not change the nature of the financial contribution (*i.e.*, the fact that SOEs are the suppliers of the inputs which are then incorporated into the subsidised products).

B. BENEFIT

1. Selection of Market Benchmarks

6. The European Communities considers that prices set by public bodies may not be considered as a relevant market benchmark in cases where those bodies are also involved as players in the market concerned. Furthermore, the European Communities considers that the Appellate Body's observations in *US - Softwood Lumber IV* would be pertinent to this case. They indicate that the fact that the government is the predominant supplier of certain goods in the market is likely to be a determining factor when examining all the relevant facts and evidence in order to ascertain whether market prices established by private parties can be used as the benchmark for the benefit determination, or whether, exceptionally, another benchmark should be used. If it is demonstrated that domestic prices are almost fully determined by SOEs representing public bodies and are highly distorted, then an investigating authority would have a sufficient ground to depart from the general rule of prices in the country of provision also in light of the above jurisprudence interpreting and applying Article 14 of the *SCM Agreement*. Finally, the European Communities considers that China's Protocol of Accession does not weaken the relevance of the observations made by the Appellate Body in *US - Softwood Lumber IV*.

2. Private Trading Companies: Pass-Through

7. Whilst not taking a position on the facts of this case, the European Communities considers that insofar as trading companies act as mere intermediaries in the transaction, without resulting in any transformation of the product concerned, it would be unnecessary for the U.S. authorities to show pass-through. Furthermore, as the European Communities understands that USDOC has calculated the subsidy benefit at the level of the exporters concerned, no adjustment at the level of the trading companies would appear necessary.

3. Denial of Offsets of Benefits Found When Calculating the Amount of Subsidisation ("Zeroing")

8. The European Communities considers that injurious subsidisation is not investigated on an individual transaction basis; rather, Article VI:3 of the *GATT 1994* and Articles 10, 11.2(ii), 12.9, 12.10, 13.1, 13.2, 13.4, 15.3, 15.5, 16.1, 16.3, 18.6, 19.3, 19.4, 20.1, 20.6, 22 and footnote 36 and 46 of the *SCM Agreement* refer to "merchandise", "product" or "product under investigation". Since the purpose of imposing countervailing duties is to offset any subsidy or subsidies given to a product, the calculation of the total amount of subsidisation granted to a particular product allows for the aggregation of *all* subsidies found to have been granted to that product during a particular period of time (*i.e.*, the period of investigation or "POI"). Thus, it is undisputed that aggregation of all subsidies is necessary to offset the total benefits obtained by the subsidised product.

9. However, an issue that arises in the present dispute seems to be whether a similar aggregation can be done when calculating the amount of subsidisation in a particular subsidy scheme. In this respect, the European Communities observes that, although investigating authorities have

considerable leeway in calculating benefits in accordance to Article 14 of the *SCM Agreement*, any methodology used to calculate the amount of subsidisation must be *reasonable*. In the EC view, when calculating the amount of subsidisation in a given case the question is what amount of benefit has been given to a particular product through the specific subsidy scheme during a defined period of time (*i.e.*, period of investigation). Thus, when calculating the amount of injurious subsidisation in a given case investigating authorities must identify the various subsidy schemes from which a particular product has benefited from during an established period of time. In doing this exercise, great importance should be given to how investigating authorities define the relevant subsidy scheme, the specific terms and conditions to obtain the subsidy by the recipient as well as the POI. Once the subsidy scheme has been defined and the POI has been selected, investigating authorities must be *coherent* with their own selection throughout the investigation when calculating the *overall* benefit granted to the product concerned through that subsidy practice in the selected period.

10. In comparing a particular price with a benchmark under the *SCM Agreement*, in order for the result of the comparison to be meaningful, the guiding principle is that like must be compared with like, due adjustment being made where necessary, unless there is a justification for doing otherwise. Accordingly, the terms and conditions and timing of the price should in principle be comparable to those of the benchmark. Thus, for example, if the price, amount and normal delivery date are fixed (*ex ante*) in the contract, then the market benchmark must also be that prevailing (*ex ante*) on the date of the contract, on the same terms and conditions. On the other hand, if the price, amount and normal delivery date are only fixed subsequent to the contract at the time of order (*ex post*), then the market benchmark must be that prevailing (*ex post*) on the date of the order. Similarly, if the market benchmark is a monthly average of spot prices, then one would expect that to be compared with a monthly average of transaction spot prices. Of course, the ideal objective of ensuring comparability may depend in practice on the facts and evidence that are reasonably available during the municipal administrative proceedings, which depends on the facts of each case.

III. POLICY LOANS

A. FINANCIAL CONTRIBUTION

11. The European Communities understands that, in the financial contribution determination, the USDOC found that SOCBs were "public bodies" in the sense of Article 1.1(a)(1) of the *SCM Agreement*, by relying *inter alia* on the state-ownership of the banking sector, China's legal framework limiting the SOCB's independence from the government and the continued government influence in the bank sector and bank lending decisions. However, China argues that the SOCBs are "commercial banks" and not state-policy banks with the express purpose of providing financing for state-supported projects. As mentioned before, in the case of SOCBs (*i.e.*, banks more than 50 per cent owned by the government), it may be easier for the government to influence them to act in a certain manner. Other factors may also be relevant.

B. BENEFIT

12. As regards the calculation of the benefit, the European Communities notes that, the interpretation followed by the Appellate Body in *US – Softwood Lumber IV* (although in the context of Article 14(d) of the *SCM Agreement*) may be relevant for clarifying the meaning of Article 14(b). The Appellate Body based its interpretation on the objective of Article 14 of the *SCM Agreement*, which is the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient". In view of this objective, if the relevant market conditions are distorted, the comparison contemplated by Article 14 would become useless. In the case of commercial loans, if it can be shown that the "comparable commercial loan which the firm could actually obtain on the market" is also distorted because of the government intervention, then it would follow that having recourse to other benchmarks could be possible on a reasonable basis.

C. SPECIFICITY

13. The European Communities would like to add that if a subsidy in the form of a loan can be obtained by companies of all sizes (as long as they are sufficiently credit-worthy) with respect to projects across all sectors of the economy, it is unlikely that those loans could be specific under Article 2.1(a) or Article 2.1(c) of the *SCM Agreement*. Thus, the fact that a subsidy reaches a wide number of beneficiaries and industries may call into question the specificity of the measure. Furthermore, the European Communities is of the view that the analysis of the specificity of a subsidy should focus on the characteristics of the measure at issue rather than merely on the disbursements made thereunder. In other words, it is the subsidy itself which *de jure* or *de facto* limits access to an "enterprise or industry or group of enterprises or industries".

IV. PROVISION OF LAND-USE RIGHTS FOR LESS THAN ADEQUATE REMUNERATION

14. On the issue of specificity, the European Communities would like to point out that regional subsidies are not *per se* specific under the *SCM Agreement*. Indeed, Article 2.2 of the *SCM Agreement* addresses the specificity of subsidies limited to *certain enterprises* located within a designated geographical region within the jurisdiction of the granting authority. By contrast, subsidies destined to *all* enterprises in *a* geographical region are not considered specific *under Article 2.2 of the SCM Agreement*. In this respect, the European Communities notes that the text of Article 2.2 of the *SCM Agreement* was changed with respect to the *Dunkel Draft* which would have rendered all regional subsidies specific. Thus, such a change should have a meaning. Whether such regional subsidies are specific under Article 2 of the *SCM Agreement* has to be established by an *integrated reading* of Article 2.

15. As regards the calculation of the benefit, the European Communities considers that the Appellate Body's observations in *US – Softwood Lumber IV* are relevant to the present dispute. Indeed, if it is found that prices are distorted in the relevant market, it would be necessary to have recourse to an alternative market benchmark to establish the existence and amount of the benefit granted. In this respect, the European Communities also notes that the fact that a piece of land is located 3,000 kilometres away is not sufficient reason alone to conclude that the market benchmark used is unreasonable.

V. SIMULTANEOUS IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING MEASURES

16. On this issue, the European Communities understands that several arguments can be made in relation to the simultaneous imposition of anti-dumping duties and countervailing duties in cases involving NME countries. The European Communities invites the Panel to interpret the relevant provisions of the covered agreements involved (*i.e.*, the *GATT 1994*, the *Anti-Dumping Agreement* and the *SCM Agreement*) in an harmonious manner, applying the customary rules of interpretation of public international law as required by Article 3.2 of the *DSU*.

VI. DUE PROCESS

A. U.S. FAILURE TO REQUEST CONSULTATIONS UNDER ARTICLE 13.1 OF THE SCM AGREEMENT

17. The European Communities considers that Article 13.1 of the *SCM Agreement* establishes a temporal moment where the invitation for consultations must occur: after an application under Article 11 is accepted and before the initiation of the investigation. The specific reference to Article 11 (entitled "Initiation and Subsequent Investigation") of the *SCM Agreement* would seem to indicate that Article 13.1 deals with the situation where the investigating authority has not yet

complied with the substantive requirements mentioned in Article 11 that must be satisfied before an importing Member may initiate a countervailing duty investigation. By contrast, Article 13.2 of the *SCM Agreement* (which should serve as *immediate context*) contains the obligation throughout the period of investigation to afford "a reasonable opportunity to *continue* consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution" (*emphasis added*). This would seem to indicate that, if investigating authorities find new subsidy schemes in the course of an investigation, they may continue the investigation including the new subsidy allegations provided that due process rights are not disregarded. In this respect, the obligation for continued consultations with the country concerned throughout the investigations would seem to have an identical objective as the obligation to invite that country for consultations before the initiation of the investigation pursuant to Article 11: to preserve the Member's due process rights by allowing both parties to clarify the factual situation and try to reach a solution.

B. U.S. FAILURE TO ISSUE NEW QUESTIONNAIRES

18. The European Communities considers that the interpretation of Article 12.1.1 of the *SCM Agreement* should be read in light of the chapeau provided by Article 12.1. The European Communities considers that Article 12.1 of the *SCM Agreement* calls for an *adequate balance* between the rights given to interested parties (which should be given ample opportunities to provide the necessary evidence) on the one hand, and the obligation for the authorities to conclude investigations in a timely manner, on the other hand. Such analysis should be made on a case by case basis and on *reasonable grounds*.

ANNEX B-6

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF JAPAN

(15 June 2009)

I. INTRODUCTION

1. In this third party submission, Japan would like to present its views on systemic aspects of the following issues: (a) the underlying concept of the double remedy in Article VI:5 of the General Agreement on Tariffs and Trade 1994("*GATT 1994*"), and the consistency of the simultaneous imposition of anti-dumping and countervailing duties with Articles 19.3 and 19.4 of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"); (b) the definition of "public body" under Article 1.1(a) of the *SCM Agreement*; (c) the consistency of the calculation of benefit with the *SCM Agreement*; and (d) the application of the non-zeroing principle in the context of the *SCM Agreement*.

II. DISCUSSION

A. THE SIMULTANEOUS IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES

1. Article VI:5 of the *GATT 1994* Expresses the Underlying Concept that Members Are Not Allowed to Impose the Double Remedy with Respect to the Same Subsidy

2. Article VI:3 of the *GATT 1994*, which allows an importing Member to impose a countervailing duty up to the amount of the subsidy at issue, predicates that the export price would be lowered by the per-unit amount of the export subsidy. If an exporting Member grants a subsidy only on a product for export, only the export price of the product would be lowered due to the effects of the export subsidy while the normal value remains unaffected. In such a case, if the importing Member calculates the margin of dumping of such product to impose an anti-dumping duty, the resulting margin would consist of two parts: (i) the difference between the normal value (which is unaffected by the export subsidy) and the export price without the effects of the export subsidy; and (ii) the difference between the export price without the effects of export subsidy and the actual export price, which was lowered by the export subsidy. In such a situation, if the importing Member also imposes a countervailing duty for the amount of the subsidy, the countervailing duty also would remedy the effect of export subsidization, which already had been captured and remedied by the anti-dumping duty. Article VI:5, therefore, explicitly prohibits the simultaneous imposition of anti-dumping and countervailing duties where export subsidization is involved.

3. Article VI:5 of the *GATT 1994*, however, provides no explicit requirement on the prohibition of the double remedy in other situations. For example, when a subsidy was conferred on inputs for the production of a product, and when the product is sold in the home market and for export, both the home market price and the export price would be lowered by the same amount due to the effects of the subsidy. In such a case, if the dumping margin is based on the difference between the actual home market price and the actual export price, the resulting margin would not be affected by the subsidy. Accordingly, a double remedy would not occur in such an instance even when the importing Member also imposes a countervailing duty to account for the per-unit amount of the subsidy at the same time.

In the same situation, however, a double remedy may occur if the margin of dumping is calculated by adjusting the home market price upward for the per-unit amount of the subsidy without an adjustment of the actual export price.

4. Whether the potential double remedy exists in the situation of dumping and subsidization other than export subsidization depends on how the investigating authority calculates the margin of dumping. The underlying concept of the prohibition on double remedies may not be disregarded when an authority imposes the anti-dumping duty and the countervailing duty on the same product from the same exporting Member at the same time.

2. The Imposition of a Countervailing Duty Must Be Consistent with Articles 19.3 and 19.4 of the *SCM Agreement*

5. According to China, the countervailing duties on the four products in question are inconsistent with Article 19.4 of the *SCM Agreement* because anti-dumping duties on the same product would already include the amount of subsidies. Article 19.4 concerns the amount of subsidies found to exist through the countervailing duty investigation. Article 19.1 of the *SCM Agreement* clarifies that the amount of subsidy is based on evidence collected through the countervailing duty investigation. The provisions of Article 19.4 set forth no further limitation on the maximum amount of the countervailing duty. This Article is irrelevant to how an anti-dumping duty would be determined by the separate anti-dumping investigation in accordance with the provisions of the *AD Agreement*.

6. China also argues that the imposition of the countervailing duties in this dispute was not necessary and thus inconsistent with Article 19.3 of the *SCM Agreement*. In the context of this Article, Article 19.2 of the *SCM Agreement* provides, "the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member." Article 19.2 clarifies that the investigating authority of the importing Member has discretion to set the amount of the countervailing duty up to the full amount of the subsidy found in the countervailing duty investigation. Article 19.4 confirms this discipline, setting forth that the maximum amount of the countervailing duty shall be the amount of the subsidy found to exist during the period of the countervailing duty investigation. In this context, Article 19.3 accords the importing Member the discretion to impose a countervailing duty deemed as appropriate to the extent that the duty does not exceed the amount of the subsidy found to exist. No further obligations are placed on the authority's decision of the "appropriate amount".

B. THE DEFINITION OF "PUBLIC BODY" UNDER ARTICLE 1.1(A)(1) OF THE *SCM AGREEMENT*

7. China argues that a public body in Article 1.1(a)(1) of the *SCM Agreement* should be defined as an entity which "has been empowered by the law of the State to exercise functions of a governmental or public character", based on Article 5 of the *Responsibility of States for Internationally Wrongful Acts* adopted by the *International Law Commission* ("*ILC Articles*").

8. Although the *ILC Articles* might be referred to when interpreting the WTO agreements in some cases, Article 5 of the *ILC Articles* is not a "relevant" rule of international law in terms of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. While the issue in the present case is the meaning of the term "public body", Article 5 of the *ILC Articles* neither defines nor uses the term in any way.

9. As the Vienna Convention clarifies, the meaning of the terms of the *SCM Agreement* must be considered in their ordinary meanings in the context of the *SCM Agreement* and other relevant *WTO Agreements*. In this connection, Japan notes that the term of "public body" is undefined in the

SCM Agreement. Japan also notes that the panel in *Korea - Commercial Vessels* found that an entity will be recognized as a "public body" in light of the government control over it under the *SCM Agreement*.

10. At minimum, no provision of the *WTO Agreements* suggests that a "public body" under Article 1.1(a)(1) of the *SCM Agreement* would be limited to entities which have been empowered by "the law of the State". A public body under the Article may include an entity that is empowered by other means to exercise an element of the government.

11. The analysis of the term "public body", as discussed above, indicates that the consistency of the USDOC's finding of public bodies should be examined based on the totality of facts of the respective cases in dispute. On this aspect, China correctly argues that the mere fact of government ownership of an entity would not conclusively establish that the entity is a public body. It appears that the United States also takes a similar view by arguing that the USDOC's findings were not solely based on the mere ownership of the Chinese government.

12. In sum, the consistency of the investing authority's finding of public bodies should be examined in accordance with the particular facts of the underlying investigations.

C. THE CONSISTENCY OF THE USDOC'S BENEFIT DETERMINATION WITH ARTICLES 14(B) AND (D) OF THE *SCM AGREEMENT*

1. Article 14(d) of the *SCM Agreement*

13. If the state-owned enterprises ("SOEs") are found to be public bodies, their sales of hot-rolled steel ("HRS") or petrochemical products, on which China argues that sales prices by SOEs were not controlled by the Chinese government, would be financial contributions under Article 1.1(a)(1) of the *SCM Agreement*. The sales price of a financial contribution by a public body itself cannot be a benchmark to measure the benefit.

14. The question under Article 14(d) in this dispute would be whether transaction prices other than sales by SOEs in China can be a benchmark, or more specifically, whether private prices in the Chinese market were distorted by the transaction prices of financial contributions. The Appellate Body in *US - Softwood Lumber IV* stated, "[w]henever the government is the predominant provider of certain goods, … it is likely that it can affect … 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." "Thus, while requiring investigating authorities to calculate benefit "in relation to" prevailing conditions in the market of the country of provision, Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market."

15. As the Appellate Body clarified, the question presented to this Panel is whether the USDOC had sufficient evidence and facts found in their totality, including adverse inferences, to arrive at its conclusions that private prices of HRS or petrochemical products in China were distorted and thus unusable as a benchmark under Article 14(d).

16. Where the evidence on the record shows that the private prices were distorted by financial contributions by the government, an investigating authority has certain discretion to find a reasonable methodology. This discretion, however, is not unlimited. As the Appellate Body has stated in *US – Softwood Lumber IV*, the terms "shall" and "guidelines" in the last sentence of the chapeau of Article 14 "establish mandatory parameters within which the benefit must be calculated". The USDOC was required to find benchmarks "related or referred to, or were connected with, prevailing

market conditions in Canada, (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)" under Article 14(d).

2. Article 14(b) of the *SCM Agreement*

17. Should this Panel find that RMB-denominated loans by the government-owned banks are financial contributions by the government, such loans cannot serve as a benchmark. Furthermore, if such government loans are found to be predominant in the financial market of China, an investigating authority could disregard the remaining loans by private banks in China as the benchmark.

18. Where the government loan dominates the relevant financial market, there would be no commercial loans "which the firm could actually obtain on the market," as provided in Article 14(b). In such a case, as the Appellate Body has stated in *Japan - DRAMs (Korea)*, the authority would have "some latitude as to the method it chooses to calculate the amount of benefit." Even in such a case, however, the requirement to identify "a comparable commercial loan" as a benchmark under Article 14(b) still remains. As clarified by the Appellate Body in *Japan - DRAMs (Korea)*, "informational constraints do not alter the basic framework from which the analysis should proceed." An investigating authority must find a benchmark, which is "comparable" to the government loan in question and is "commercial", even where private loans undistorted by government loans are not available in the domestic market of the exporting Member.

19. In conclusion, the question presented to this Panel, therefore, is whether sufficient evidence and intermediate findings support the USDOC's conclusion that there were no private loans or private prices of inputs, which were not distorted by the financial contributions of the government. Should the Panel find that there were no such benchmarks, the Panel then should further review the USDOC's adopted benchmark to determine whether they are consistent with the framework of Articles 14 (b) and (d).

D. THE BENEFIT SHOULD BE EXAMINED ON A SUBSIDY-SPECIFIC BASIS WITHOUT ZEROING

20. China argues, "[m]ultiple provisions of the SCM Agreement, including Articles 10, 19.3 and 19.4, likewise make clear that a countervailing duty is to be imposed in respect of '*product*' under investigation."

21. A countervailing duty may be imposed to offset the amount of a subsidy if the amount exists at the time of its imposition, as provided for in footnote 36 and Articles 19.2 and 19.4 of the *SCM Agreement*. The question before the investigating authority, and accordingly, before this Panel is to define the scope of "a subsidy".

22. Article 1.1(a)(1) of the *SCM Agreement* provides that "*a subsidy* shall be deemed to exit if there is *a financial contribution*". Subparagraph (i) then provides that there is a financial contribution where "*a* direct transfer of funds" is involved. The paragraph (c) of Article 2.1 of the *SCM Agreement* then provides that "*a* subsidy ... is specific" where it will be granted upon "use of a subsidy program". These provisions indicate the premise of the *SCM Agreement* that "a subsidy" may be granted by "a financial contribution" from the government, such as a direct transfer of funds, under one subsidy programme.

23. Article 14 of the *SCM Agreement* does not define what would constitute a subsidy. Investigating authorities are required to first determine the financial contribution, which consist of a subsidy. The determination of a benefit conferred on the recipient, including identification of an appropriate benchmark, follows the determination of the financial contribution.

24. What constitutes a specific financial contribution under a subsidy programme is an issue of fact. For example, a government might agree to sell input materials under certain terms and conditions for a certain period of time through multiple shipments. In such a case, the entire series of shipments as a whole may be considered to be a financial contribution. Accordingly, the calculation of the amount of the subsidy from such a financial contribution should be based on the total value of all shipments covered by the agreement, rather than the assessment of the benefit for an individual shipment based on the value of its shipment.

25. The issue of the amount of a subsidy from the input transactions in question, therefore, must be based on the finding of one financial contribution upon an examination of underlying facts of these transactions.

III. CONCLUSION

26. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure the fair and objective application of the *SCM Agreement* and the *GATT 1994*.

ANNEX B-7

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF MEXICO

(15 June 2009)

1. Mexico is setting out its views on the interpretation of certain provisions of the GATT 1994, the Protocol of Accession of the People's Republic of China (the "Protocol"), the Anti-dumping Agreement ("AD Agreement") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), given the systemic importance the Panel's conclusions will have.

2. As regards the simultaneous application of anti-dumping and countervailing duties, we note that neither the AD Agreement nor the SCM Agreement contain any provisions in this respect. On the other hand, Article VI:5 of the GATT 1994 does explicitly address this point. Indeed, it prohibits such simultaneous application when both duties are intended to compensate the "same situation". It does not explain when dumping and export subsidization result in the "same situation", but this can be deduced from the negotiating history of Article VI:5.

3. According to the negotiating history, the prohibition in Article VI:5 of the GATT 1994 does not apply to countervailing duties that offset domestic subsidies because these do not result in dumping. Consequently, Mexico takes the view that when countervailing duties target domestic subsidies (and not export subsidies), the simultaneous application of anti-dumping and countervailing duties is consistent with the rules of the WTO.

4. In our view, the Protocol permits such simultaneous application. We note that there is no basis for assuming that Article VI:5 applies only to Members with market economies. Article 15 of the Protocol contains specific provisions in addition to those of GATT Article VI, the AD Agreement and the SCM Agreement for imports of Chinese origin (normal value, measuring benefit, etc.). With respect to the AD Agreement, Article 15 recognizes the surrogate country methodology and acknowledges that the imports may form the subject of a countervailing duty investigation. If China, in negotiating its accession, had succeeded in negotiating a prohibition on applying simultaneous duties to its products, this would have been specified in the Protocol. As there is no such provision, it can only be concluded that Article 15 of the Protocol does allow the combined application of anti-dumping and countervailing duties.

5. Moreover, exempting China from the parallel imposition of anti-dumping duties and countervailing duties would lead to China's being given preferential treatment relative to all other Members, to which they can be applied simultaneously under Article VI of the GATT 1994. For us, China's claim looks like an attempt to obtain from the dispute settlement system a result that it should have tried to obtain when negotiating its accession to the WTO.

6. The fact is, that when the negotiators of the WTO agreements considered it necessary to prohibit the simultaneous application of different mechanisms, they said so expressly, so that there is no basis whatsoever for assuming that the WTO Agreements establish such a restriction. Thus, according to the principle *expressio unius est exclusio alterius*, as the simultaneous imposition of countervailing duties and anti-dumping duties calculated under the surrogate country methodology has not been expressly prohibited, it cannot be held that it is contrary to WTO rules.

7. If Members had wanted to prohibit the simultaneous imposition of countervailing duties and anti-dumping duties calculated under surrogate country methodology, the SCM Agreement, or failing that the Protocol, would have included a provision to that effect. In Mexico's opinion, the fact that such a provision was not incorporated either in the AD Agreement, in the SCM Agreement or in the Protocol reinforces the conclusion that such "simultaneous imposition" is permitted under the rules of the WTO.

8. Nor is it acceptable, in Mexico's view, to seek to give the articles of the SCM Agreement a meaning that they do not have. China claims that simultaneous imposition violates articles 19.3 and 19.4 of the SCM Agreement. However, as neither of these provisions concerns the matter at issue, we consider that China's claim has no basis at all. Consequently, we consider that China has not proved *prima facie* violation by the United States of these provisions of the SCM Agreement.

9. At the same time, China omits to mention that Article VI:5 of the GATT 1994 deals expressly with the simultaneous imposition of anti-dumping duties and countervailing duties, and that the Protocol regulates aspects of the Anti-Dumping Agreement and the SCM Agreement with regard to imports of Chinese origin that relate to simultaneous imposition.

10. Article VI:5 of the GATT does not prohibit, nor does the Protocol limit, simultaneous application as China contends. In fact, what China claims is tantamount to negating Article VI:5 of the GATT 1994 and Article 15 of the Protocol, which would be totally contrary to the principle of effectiveness recognized in WTO precedent (*United States – Gasoline*).

11. With regard to the surrogate country methodology in anti-dumping investigations, China argues that application of this methodology yields a normal value free from distortions (including distortions caused by subsidies granted in non-market economy countries).

12. There is no basis for this at all. Application of the surrogate country methodology does not enable prices and costs adjusted for the distorting effects of the subsidy to be obtained. Consequently, Mexico sees no reason whatsoever to consider that the simultaneous imposition of countervailing duties and anti-dumping duties calculated under the surrogate country methodology is inconsistent with the WTO agreements. Thus, we consider that China has not proved *prima facie* violation by the United States on the grounds that the surrogate country methodology implies determination of market-economy normal value adjusted for the effects of subsidies.

13. Basing itself on *United States – DRAMs*, China claims that for a company owned by the State to be termed a "public body", the requirements in the Draft Articles[1] of the United Nations International Law Commission must be met, namely (1) the enterprise must be empowered by the State to exercise functions of a public character normally exercised by the State, and (2) the conduct of the entity must concern governmental activity and not other private or commercial activity in which the entity may engage.

14. Mexico considers China's approach to be erroneous. The definition of the term "public body" was not addressed in *United States – DRAMs.* In that case, the Appellate Body examined whether an act by a private entity could be considered as being instructed by a government to make a financial contribution and based itself on the *Draft Articles*. At no time did it say anything about whether the public character of a body depended on the form in which the body acted.

15. In our view, the function performed by the entity is irrelevant in determining its "public body" status. That status must be determined on the basis of government shareholdings in the entity in question, and not on the basis of the intended purpose of the goods or services it produces or provides

[1] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries.*

(see *Korea – Commercial Vessels*). In other words, we take the view that government shareholding in a body is sufficient to consider it public.

16. Moreover, the Draft Articles refer to the concept of "public entity" in the context of "wrongful acts". The granting of subsidies is not a wrongful act, so that the concept of "public entity" in the Draft Articles does not apply to this dispute.

17. At the same time, the standard proposed by China is unacceptable. Since State enterprises which sell goods and services are not established by "the law of the State to exercise functions of a public character normally exercised by State organs", and their sales of goods and services would not qualify as "functions relating exclusively to their governmental activity and unconnected with private or commercial activity", State enterprises that sell goods and services would never be considered to be "public bodies", despite the fact that Article 1.1(a)(1)(iii) of the SCM Agreement clearly includes them.

18. As regards the analysis of pass-through of the benefit, China argues that the analysis was necessary in cases where the investigated enterprises bought inputs from private trading companies which, in their turn, had purchased them from State enterprises. China claims that by failing to carry out this analysis, the United States acted inconsistently with the WTO agreements.

19. Mexico does not agree with China. As can be seen from several precedents in both the GATT and the WTO (*United States – Pork; United States – Softwood Lumber IV;* and *Mexico – Olive Oil*), it is clear that this analysis is only needed when the subsidies are given for the production of a good that is an input for the product under investigation. As in this case the subsidies were granted for the production of the goods investigated themselves, the pass-through analysis was not required, regardless of whether the State enterprises sold to private trading companies which then sold to the companies under investigation.

20. Regarding the determination of the existence of benefit for the trading companies, it should be pointed out that the Appellate Body determined (*United States – Countervailing Measures on Certain EC Products*) that a financial contribution may be granted to a company indirectly. In this case, because the private trading companies were only the vehicle through which the contribution reached the companies under investigation, they received the contribution indirectly, so that there was no reason whatsoever to determine whether these trading companies had obtained a benefit.

21. Concerning the benchmark used by the United States, Mexico considers that the standard applicable is that indicated by the Appellate Body in *United States – Softwood Lumber IV*, according to which an investigating authority may indeed use a reference point other than prices in the country under investigation provided that it is determined that the prices are distorted by the role played by the government.

22. China claims that the United States failed to establish its benchmark properly and points out that in the *Laminated Woven Sacks* investigation, there was no single or uniform government-set price, that there was no Chinese government agency that set prices for inputs, and that significant private investment existed in the petrochemical industry in China, so that their internal data had to be used.

23. In Mexico's view, the points raised by China have nothing to do with the key element for determining whether the U.S. benchmark was proper or not, namely whether or not there was distortion due to the role played by the Chinese government.

24. Thus, Mexico considers that if the U.S. had sufficient evidence of the existence of such distortion, the Panel should find that the U.S. acted in conformity with the WTO agreements.

Obviously, since we do not know whether that evidence existed, our opinion is not intended to prejudge whether the U.S. could, indeed, use the benchmark or whether that benchmark was properly determined.

25. Mexico is grateful to the Panel for the opportunity to comment on these questions of interpretation with systemic implications.

ANNEX B-8

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF NORWAY

(15 June 2009)

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I. INTRODUCTION

1. As a third party to this Norway would like to address the following interpretative issues:

- The criteria for defining a "public body" under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") (chapter II);
- The use of a "zeroing" methodology when calculating "benefit" received from inputs provided by State Owned Enterprises (SOEs) (chapter III); and
- "Double Remedy" (chapter IV).

II. WHETHER STATE OWNED ENTERPRISES ("SOE") AND STATE OWNED COMMERCIAL BANKS ("SOCB") MUST BE CONSIDERED "PUBLIC BODIES"

A. INTRODUCTION

2. For a measure to constitute a subsidy according to Article 1 of the *SCM Agreement*: (i) it must entail a financial contribution or income or price support by a government or a public body; and (ii) it must confer a benefit.

3. As regards State Owned Enterprises ("SOE") and State Owned Commercial Banks ("SOCB"), a key issue in the dispute is whether these enterprises can be considered "public bodies" within the meaning of Article 1.1(a)1 of the *SCM Agreement.* Were the Panel to consider that these enterprises are <u>not</u> public bodies, then the United States would have had to show that a non-public body was nevertheless "entrusted or directed" by the State to provide a financial contribution to the exporter or producer under investigation. Such analysis was not performed by the United States.[1]

B. INTERPRETATION OF THE TERM "PUBLIC BODY"

4. The question at issue is whether majority state ownership alone is sufficient to conclude that an enterprise is a "public body" within the meaning of article 1.1 of the SCM Agreement, or whether "public body" requires a functional relationship to the exercise of some form of governmental authority when providing the financial benefit.

5. Norway believes that it is important to read the reference to "government or any public body" also in light of Article 1.1(a)(1)(iv) and its reference to situations where the government "entrusts or directs a private body to carry out one or more of the type of <u>functions ... which would normally be vested in the government</u>..." (emphasis added).

6. By focussing on situations where a private body has been "entrusted or directed" to perform <u>functions that would normally be vested in the government,</u> Article 1.1(a)(1)(iv) gives a clear indication that the dividing line between the "public bodies" and the "private bodies" is based on a <u>functional delimitation</u> where the key element is whether the body in question performs governmental functions or not. If the body in question does not perform governmental functions, any financial contribution it provides is only attributable to the State if the government has *entrusted or directed* it to provide such contribution.

7. In *EC – DRAMS,* the Panel noted that "...it should be clear that, in our view, government ownership, in and of itself , is not sufficient to establish entrustment or direction under

[1] *United States, First Written Submission ("US FWS"),* para. 65.

Article 1.1(a)(1) of the *SCM Agreement."*[2]. The Panel went on to state that "In the case of a 100 per cent government-owned bank, such as Woori Bank, it thus needs to be demonstrated that the government *actually exercised* its shareholder power to direct the bank to support to Hynix."[3] When government ownership is not sufficient to establish "entrustment or direction", Norway submits that it is even less suited to establish that such companies shall be considered as "public bodies".

8. The same Panel stated, more as an *obiter* in footnote 129, that "We do not wish to imply that it would not be possible or justified to treat a 100 per cent government owned entity as a public body, depending on the circumstances. [...]". Norway submits that the particular circumstance that could lead to a conclusion that a 100 per cent government owned entity was a public body, would only be present where the government owned company exercises governmental functions.

9. The Panel in *Korea - Commercial Vessels* took the opposite view that government 100 per cent ownership and control could be sufficient to consider that the Korean Export Credit Guarantee Institute (KEXIM) was a public body.[4] The Panel, however, noted that it also relied on such factors as government appointment of officers, government approval of budget and operations programme and Koreas own description of KEXIM as a "special governmental financing institution" and as an "export credit agency".[5]

10. Although the Panel reports are differently worded, Norway considers that both reports lend support to the position that government ownership is not sufficient in and of itself to determine that a company is a "public body". Other elements must be present, of which Norway suggests that a key element would be the exercise of governmental functions.

11. Based on the above, Norway submits that Article 1.1(a)(1) of the *SCM Agreement* cannot be interpreted to mean that all companies with more than 50 per cent government ownership are automatically to be considered "public bodies". Where the body, after a factual analysis of its functions, is found not to perform governmental functions, it is not a "public body" within the meaning of Article 1.1(a)(1) – but may well be a private body covered by the *SCM Agreement* by virtue of Article 1.1(a)(1)(iv).

III. EXCLUSION OF TRANSACTIONS AT PRICES BELOW THE EXTERNAL BENCH-MARK IN THE CALCULATION OF OVERALL BENEFIT

A. INTRODUCTION

12. China claims that the United States acted inconsistently with Article 14 of the *SCM Agreement* and Article VI:3 of the GATT in the calculation of benefit in the OTR CVD investigation. China argues that the United States would have concluded that there was no benefit, if it had conducted an aggregate analysis over the whole period of investigation, without the use of "zeroing" of certain transactions.[6]

B. ANALYSIS

13. The issue before this Panel is whether the reasoning that led Panels and the Appellate Body to conclude that "zeroing" is prohibited under the *Anti-Dumping Agreement* and Article VI:1 and VI:2 of

[2] Panel Report, *EC – DRAMS,* para. 7.119.
[3] *Id.,* para. 7.120.
[4] Panel Report, *Korea – Commercial Vessels,* para. 7.50. Similar statements were made in respect of four other Korean government agencies.
[5] *Id,* paras. 7.50 – 7.52.
[6] China FWS, paras. 142 – 143.

the GATT, applies equally to the benefit calculations under Article 14 of the *SCM Agreement* and Article VI:3 of the GATT. Norway will point to two elements that support the claim that the "zeroing" methodology employed by the United States in this case is inconsistent with Article VI:3 of the GATT.

14. Article VI:3 of the GATT provides that a countervailing duty is levied on *a* product, and that any such countervailing duty shall not be in excess of the benefit (bounty) granted on the manufacture, production or export of *such* product. The use of the singular form of the noun makes clear that the calculation of benefit from inputs received from SOEs must be for all input transactions during the period of investigation. The reasoning that led the Appellate Body to find that similar words in Article VI:2 of the GATT precluded a finding of dumping for individual transactions applies with equal force to the calculation of benefits derived from single input transactions viewed separately.

15. Furthermore, as Norway understands the case, the United States created monthly external benchmark prices to measure benefit from subsidization. Using monthly benchmark prices in such a situation, and "zeroing" monthly results which showed no "benefit", made a finding of a countervailable subsidy almost certain from the outset. The application of a methodology that is almost certain to lead to a conclusion of "benefit" and countervailable subsidization in all cases, based on single transactions compared to a benchmark set by the investigating authorities, cannot be said to comply with the requirements of Article 14(d) of the *SCM Agreement* and Article VI:3 of the GATT.

IV. "DOUBLE REMEDY"

A. INTRODUCTION

16. Norway in this part only addresses certain interpretative issues related to China's claim that the U.S. Department of Commerce's use of its Non-Market Economy methodology to determine normal value in the anti-dumping determinations, concurrently with a determination of subsidization and the imposition of countervailing duties on the same products, was inconsistent with Articles 10, 19.3, 19.4, and 32.1 of the *SCM Agreement* and with Article VI of the GATT. [7]

B. ANALYSIS

17. Norway does not exclude that it may be permissible in certain situations to apply anti-dumping duties and countervailing duties simultaneously to the same imports, notwithstanding the provision of Article VI:5 of the GATT, but to wishes to draw the Panel's attention to certain elements that may be pertinent to its analysis of the legal issues surrounding simultaneous application of the two instruments.

18. An investigating authority under the anti-dumping agreement, in its determination of normal value for the product under consideration, may apply a Normal Value based on different methodologies provided for in Article 2.2 of the *Anti-dumping Agreement* and in the *ad note* to Article VI:1 of the GATT. The choice of methodology and the cost elements that go into the calculation of Normal Value can have an important bearing on the issue of subsidization.

19. Where the Normal Value is based on the producer's sales price in his home market in the ordinary course of trade, that price may have been lowered due to e.g. subsidization of inputs into the production. In such cases, a dumping duty only offsets the dumping itself (the "price differentiation" between home market price and export price), not the subsidization of his "cost of production".

[7] *China FWS*, para. 468(h) and Section VI(E).

20. Where the Normal Value is based on constructed normal value (CNV), the question is whether CNV is based on the producers actual data for the inputs (i.e. subsidized inputs are included with the subsidized price), or constructed prices for the inputs. If CNV is calculated using the subsidized input prices in its calculation, the CNV will be lower than for non-subsidized production. In such cases AD + CVD may be applied. If the CNV is not calculated with subsidized prices for the inputs – but with "non-distorted" or "benchmark" prices for the (otherwise subsidized) inputs, then the effect of any subsidy is "extinguished" in the CNV calculation and applying an anti-dumping duty up to the maximum permitted under the *Anti-dumping Agreement* will provide a remedy for the subsidization at the same time. In such cases, applying a CVD will neither be appropriate under the *SCM Agreement* Article 19.3 of nor permissible under Article 19.4.

21. Where the Normal Value is based on a Third Country Market as benchmark, the same issues relating to how the benchmark is calculated applies. China argues, and the United States does not appear to dispute, that in calculating the constructed normal value based on a Third Country Market benchmark, US DOC avoids the use of any surrogate value that may itself be subsidized.[8] It would thus appear that the Chinese producer's export price to the United States is compared to a market economy cost of production free from any dumping or subsidy distortion. By applying the full anti-dumping duty up to this Third Country Market benchmark, all effects of subsidization is extinguished at the same time. Applying a CVD in such cases will neither be appropriate under Article 19.3 of the *SCM Agreement* nor permissible under Article 19.4 of the *SCM Agreement.*

[8] *China FWS,* para. 371 and corresponding footnote 315.

ANNEX B-9

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF SAUDI ARABIA

(15 June 2009)

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I. INTRODUCTION

1. The Kingdom of Saudi Arabia has joined as a third party in this dispute to provide its views on a number of fundamental issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). The Kingdom takes no position on the merits of the claims that are based on the particular facts of this case.

II. STATE OWNERSHIP IS INSUFFICIENT FOR AN ENTITY TO BE CONSIDERED AS A "PUBLIC BODY" UNDER ARTICLE 1 OF THE SCM AGREEMENT

2. For an entity to be considered a "public body" under Article 1.1(a)(1), it must: (i) be vested with governmental authority, thus allowing the government to control its activities; and (ii) function as a governmental entity that serves a public policy objective rather than a commercial objective.

3. The ordinary meaning of the term "public body" denotes a **governmental** function, not State ownership. The Kingdom notes that the Spanish version uses the term "organismo público" to refer to both "public body" as well as to "government agency." The same is true for the French term "organisme public" in the French version of the text. In *Canada – Dairy* the Appellate Body interpreted these terms to mean an entity which exercises powers vested in it by a government to perform functions of a governmental character, *i.e.*, to regulate, restrain, supervise or control the conduct of private citizens. The fact of State ownership by no means plays a dispositive role in this interpretation. The Panel should therefore consider "public body" as synonymous with a government agency.

4. The context in which the term "public body" appears in Article 1.1 of the SCM Agreement supports a narrow reading of the term as a government agency. Article 1.1(a)(1) refers to a "financial contribution by a government or any public body within the territory of a Member (***referred to in this Agreement as 'government'***)….". Thus, ***the drafters of the SCM Agreement made clear that a "public body" is to be regarded as a subset of "government."***

5. The SCM Agreement relates to the actions of WTO Members, *i.e.*, to the behaviour of governments. Indeed, this point is reinforced by the inclusion of the "entrustment or direction" disciplines set out in Article 1.1(a)(1)(iv). Only entities possessing some type of governmental authority are able to "entrust or direct" private bodies to act in a particular manner. Furthermore, even in the context of "entrustment or direction", State ownership plays a relatively limited role. Since complete government ownership does not suffice to conclude that an entity acts under the entrustment or direction of the government, then, *a fortiori*, such government ownership is not sufficient to consider the entity to be a "public body" (*i.e.*, the government itself), as such a finding would obviate the need to determine the existence of entrustment or direction.

6. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body accepted the International Law Commission conclusion that where corporate entities are owned by the State, their conduct is not attributable to the State "unless they are exercising elements of governmental authority."[1] It is important to stress that the Appellate Body's comment was made in the context of Article 1 of the SCM Agreement, and so is highly relevant in the present dispute. A state-owned enterprise (SOE) that is not "exercising elements of governmental authority" is not a "public body" under Article 1.

7. The GATS definition of the closely-related term "public entity" reinforces the governmental nature of a "public body" under Article 1.1(a)(1) of the SCM Agreement. The GATS definition of a

[1] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112, footnote 179.

"public entity" requires more than simple government ownership or control - the entity's primary functions must be "governmental."

8. In terms of relevant context, the Kingdom would respectfully caution the Panel against the use of China's Working Party Report as the basis for the interpretation of a term as important as "public body" in the SCM Agreement. China's WPR may contain commitments specific to China. It cannot, however, serve as the basis for interpreting provisions of the WTO agreements that apply to all WTO Members, such as Article 1 of the SCM Agreement.

9. The object and purpose of the SCM Agreement further support a narrow interpretation of the term "public body." The Appellate Body has stated 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."[2] The interpretation of "public body" cannot be so broad as to allow Members to apply countervailing measures to any sales made by certain entities simply because they are partially or wholly owned by the State.

10. Finally, the Kingdom is of the view that the Panel Report on *Korea – Commercial Vessels* supports a reading of the term "public body" as an entity that is controlled by government such that it is acting in a governmental capacity. The Panel in *Korea – Commercial Vessels* found that an entity will constitute a "public body" if it is "controlled" by the government, such that its actions may be attributed to the government. The ***criterion used by the Panel was "control", not "ownership." Ownership was simply part of the evidence of such control.*** The Panel also attached great importance to the "public policy" objective of an entity, and the fact that it acted in an "official capacity." According to the Panel, an entity that is vested with governmental authority and acts in an "official capacity" is a public body, even if it makes its financial contribution based on commercial principles.[3]

11. In sum, the Kingdom is of the view that the term "public body" in Article 1.1(a)(1) of the SCM Agreement, based on its ordinary meaning, its context and the Agreement's object and purpose, refers to an entity vested with governmental authority that exercises a governmental function. To interpret this term to include an entity on the sole ground of State ownership would be an error in treaty interpretation.

III. THE USE OF ALTERNATIVE BENCHMARKS FOR THE DETERMINATION OF BENEFIT IS PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, AND IS SUBJECT TO STRICT DISCIPLINES

12. The principal benchmark for calculating a benefit under Article 14(d) of the SCM Agreement is the domestic market price in the country of provision. The use of an alternative benchmark is permissible only in exceptional circumstances. If exceptional circumstances necessitating the use of an alternative benchmark have been established, then the cost of production of the goods in the country of provision serves as the most appropriate alternative to domestic market prices.

13. Article 14(d) of the SCM Agreement establishes domestic market price as the principal standard for determining whether and to what extent a benefit is conferred by the provision of a good for the purpose of Part V of the Agreement. Price is foremost among the "prevailing market conditions" enumerated in Article 14(d) and it should thus be the first reference point used by an investigating authority to determine benefit.

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[2] Appellate Body Report, *US – Softwood Lumber IV*, para. 64.
[3] Panel Report, *Korea – Commercial Vessels*, para. 7.48.

14. In *US – Softwood Lumber IV*, the Appellate Body made clear that alternative benchmarks may be used only in exceptional circumstances, and emphasized that the possibility under Article 14(d) for investigating authorities to use a benchmark other than private prices in the country of provision is "very limited."[4] The Appellate Body has interpreted Article 14(d) to allow for the use of alternative benchmarks only as an exception of last resort, when it has been established that private prices are distorted, such that "private suppliers will align their prices with those of the government-provided goods."[5] As stated by the Appellate Body, distortion cannot be presumed to exist simply because the government is a significant supplier or has a major presence in the market of the goods in question. Instead, investigating authorities are obliged to establish that the prices are actually distorted "on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."[6]

15. Furthermore, as is clear from the Appellate Body's reasoning in *US – Softwood Lumber IV*, if such distortion is established, any alternative benchmark employed by the investigating authority must properly reflect domestic market conditions in the country in question.

16. In the Kingdom's view, external benchmarks are an inappropriate alternative for the calculation of a benefit under Article 14(d) of the SCM Agreement. The nature and extent of the adjustments that would be required for external market prices to reflect in-country market conditions make meeting these requirements practically impossible in virtually all cases. The Appellate Body has warned that countervailing measures cannot be used to "offset differences in comparative advantages between countries."[7] Moreover, the use of external benchmarks is demonstrably inappropriate with respect to financial contributions in the form of the provision of land.

17. The Kingdom submits that benchmarks based on the domestic cost of production of the goods or services in question are the most appropriate and WTO-consistent alternative to domestic market prices when an investigating authority has made a determination that such prices are distorted. The cost of production benchmark is not only the most reliable possible alternative, but it has also been supported and endorsed in previous Appellate Body jurisprudence.

IV. AN INVESTIGATING AUTHORITY MUST BASE LOAN BENCHMARKS ON THE ACTUAL COMMERCIAL BORROWING EXPERIENCE OF A FIRM

18. An investigating authority, in determining a benchmark under Article 14(b) of the SCM Agreement, is required to inquire into the actual commercial borrowing experience of the recipient firm in order to determine what comparable commercial loans the firm could "actually obtain."

19. The use of the term "comparable" in Article 14(b) strongly suggests that the benchmark loan should be a loan that is expressed in the same currency, and subject to the same generally applicable financial regulations of the country providing the government loan. The word "commercial" refers to any transaction that is made in the ordinary course of commerce. Finally, the phrase "which the firm could actually obtain on the market" imposes a requirement that the benchmark be based on the actual borrowing experience of the recipient firm.

20. Contrary to what the United States is arguing, the Appellate Body's interpretation of Article 14(d) in *US - Softwood Lumber IV* is not "equally applicable" to the determination of benefit under Article 14(b) SCM Agreement. The Appellate Body Report in *US - Softwood Lumber IV* was demonstrably not "based on the entirety of Article 14", as the United States argues, but rather was

[4] Appellate Body Report, *US - Softwood Lumber IV*, para. 102. Emphasis added.
[5] Appellate Body Report, *US - Softwood Lumber IV*, para. 115.
[6] Appellate Body Report, *US - Softwood Lumber IV*, para. 102.
[7] Appellate Body Report, *US - Softwood Lumber IV*, para. 109.

based on the specific terms of Article 14(d). Moreover, assuming *arguendo* that the Appellate Body's reasoning in *US - Softwood Lumber IV* did apply to Article 14(b), then the Appellate Body's clear admonitions on the use of outside benchmarks would apply as well.

V. IN CASES OF ALLEGED SUBSIDIZED INPUTS, THE INVESTIGATING AUTHORITY MUST CONDUCT A "PASS-THROUGH" ANALYSIS TO DETERMINE IF THE DOWNSTREAM PRODUCER HAS RECEIVED A BENEFIT

21. The issue of "pass-through" relates to a basic principle of WTO disciplines with respect to the use of countervailing measures: a countervailing duty can only be levied on a product where an investigating authority determines that a subsidy has been granted, directly or indirectly, on the product subject to the duty.

22. The basic principle of GATT Article VI:3 is that an authority may only impose a countervailing duty on a product to offset a subsidy granted either directly or indirectly to that product. In case of "arm's length" sales between unrelated parties, an investigating authority may not presume that all or part of the benefit was passed through.

23. There is no basis to use a different approach simply because the subsidy has had an alleged "effect" on the market price for the product sold by the direct recipient of the subsidy. A contrary approach would render the need for a "pass-through" analysis meaningless, as any subsidy granted to the upstream producer could have some effect on the market price for its products.

24. The problem caused by an expansive approach to the application of the pass-through concept would be exacerbated by the use of out-of-country benchmarks. Investigating authorities could use a broad pass-through approach to ignore domestic market prices for upstream products which are allegedly "distorted" by the original subsidy on those products. Instead, the authority would use market prices in a third country as a benchmark for determining the benefit that upstream inputs confer on unrelated downstream exporters purchasing the inputs in arm's length transactions at market prices. This would lead to a finding of subsidization where in fact no subsidies were granted to the producers of the product subject to the investigation.

VI. CONCLUSIONS

25. The Kingdom respectfully urges the Panel to resolve this dispute in a manner that maintains the balance that was clearly intended by the drafters of the Agreement.

ANNEX B-10

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF TURKEY

(16 June 2009)

I. INTRODUCTION

1. Turkey thanks the Panel for this opportunity to present its views in this proceeding. Although the dispute between the U.S. and China covers many issues, Turkey will focus on three major subjects namely "public body determination", use of out-of country benchmark" and "pass through of a benefit" arise from this dispute.

II. DETERMINATION OF PUBLIC BODY

2. Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains two separate terms "government" and "public body". Therefore in order to accept that a subsidy is granted, a financial contribution must be provided either by "government" or a "public body".

3. Since the SCM Agreement used two terms, in Turkey's view, the meanings of these terms should be construed differently. However, SMC Agreement does not provide any definition with regard to these two terms. Therefore, what constitutes "government" or "public body" under the article in question needs to be interpreted. This interpretation should be made in accordance with the ordinary meanings taken into account in the context, object and the purpose of the SCM Agreement pursuant to Article 31.1 of the Vienna Convention.

4. China argued that in order to accept an entity as a public body, both an entity should perform governmental functions and the powers to perform these functions should be vested by the state. However China's claim to take governmental character as a prerequisite to determine an entity as a public body narrows the actual meaning of the "public body" and equates it to "government". Such an interpretation would annul the distinction between the two terms and render the "public body" meaningless.

5. In Turkey's views, Paragraph 5(c)(i) of the Annex on Financial Services to the GATS is not the relevant legal basis to interpret the term public body used in the SCM Agreement. Firstly, while the SCM Agreement states "public body", the referred paragraph of the Annex in question provides the definition of "public entity", so it is clear that these two terms are not the same. Secondly, it is clear from the *"For the purpose of this Annex ...*" expression mentioned in the same paragraph that, the "public entity" definition is only for the scope of the Annex in question.

6. On the other hand Turkey also considers ILC Articles as an irrelevant legal basis for interpreting the term "public body" for several reasons. First of all ILC Articles are not among the annexes of the Marrakesh Agreements. In addition, the scope and the application of the ILC Articles are totally distinct from the SCM Agreement. Furthermore due to the *lex specialis* clause contained in the Article 55 of the ILC Articles, it is not possible to apply the ILC Articles to this dispute.

7. Turkey is of the view that "government control" criterion[1] set forth by the Korea - Commercial Vessels Panel is the most proper criteria for determining whether an entity is a public body and Turkey also considers that the ownership is the main indicator of the control of an entity.

III. USE OF EXTERNAL BENCHMARK

8. During its accession to the WTO China acknowledged the fact that it had a centrally-planned economy and undertook some commitments in its Accession Protocol including commitments on the application of trade remedies by other Members.

9. Specifically, in the Article 15(b) of the Accession Protocol, China accepted to be subject to special rules with regard to subsidies. It is clear from this article that, the Members are allowed to use appropriate ways to ensure applicability of the rules against subsidies.

10. Besides, Turkey is of the view that the Accession Protocol is not the only source which allows using external benchmark. Pursuant to Article 14 of the SCM Agreement external benchmarks may be used in some cases.

11. Similarly, the Appellate Body also ruled that, even for market economies the primary benchmarks provided in the Article 14(d) of the SCM Agreement may not work. If the investigating authority determines that private prices in that country are distorted because of the predominant role of the government, it may use another benchmark.[2] Turkey considers that in cases where the prevailing market conditions in a Member do not provide an appropriate base to make a meaningful comparison to determine whether a benefit has been conferred due to the predominance of the government in the economy, the rules of the SCM Agreement will still be applicable.

12. In the Accession Protocol, China has already accepted that the prevailing terms and conditions in China may not always be available as appropriate benchmarks. If the investigating authority uses the private prices as the benchmark while the predominance of the government is a fact, benefit will probably be artificially low or even zero. As a result, the full extent of the subsidy would not be captured and the rights of Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the SCM Agreement" [3] would be injured.

IV. PASS THROUGH OF A BENEFIT

13. In Turkey's view, the SCM Agreement does not require that the recipients of a benefit and a financial contribution should be the same. This approach is also in line with the reasoning stated in *Mexico - Olive Oil* Panel Report.[4] Acceptance of the opposite would lead to the circumvention of the disciplines on subsidization by including a private party to the chain.

V. CONCLUSION

14. For the reasons stated above, Turkey requests the Panel, in deciding the dispute, to take into account observations and comments stated in this submission.

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[1] Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749, para 7.50

[2] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, para. 90

[3] *US - Softwood Lumber CVD* Final (AB), Para.95.

[4] Panel Report, *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, para 7.152

ANNEX B-11

THIRD PARTY ORAL STATEMENT OF ARGENTINA

(7 July 2009)

1. Argentina thanks the Panel and the parties to this dispute for the opportunity of attending the hearing today, as a third party, and putting forward its points of view on certain issues that are of systemic interest.

2. Argentina has already referred to the question of simultaneous application of anti dumping and countervailing measures on exports from China by the United States Department of Commerce. In this statement, Argentina will not reiterate the elements already set forth in its written submission, but will instead refer to complementary elements.

3. Argentina considers that, when deciding whether or not determination of an anti-dumping duty *using the surrogate country methodology* simultaneously with determination of a countervailing duty is consistent with the WTO rules, it must be established whether there is any provision in these rules prohibiting a Member from such simultaneous application. China has not pointed to any express provision establishing this, nor has Argentina been able to find one in the Articles of the GATT 1994 (GATT), or in the Anti-dumping Agreement (AD Agreement), or in the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Moreover, neither Article 19.3 nor Article 19.4 of the SCM Agreement, on which China implicitly bases its argument, regulate the question of "double remedy" or duplication in the terms claimed by China.

4. In its first written submission, the United States brings into the discussion Article 15.1 of the Subsidies and Countervailing Measures Code of the Tokyo Round (SCMC)[1], which expressly contains a prohibition on the simultaneous determination of anti-dumping and countervailing duties in the cases covered by paragraph 1.2 of the Note Ad Article VI of the GATT 1994. This provision was not retained in the SCM Agreement, which lacks a similar prohibition. The relevance of Article 15 of the SCMC is twofold: on the one hand, why should particular significance be attached to the absence of a similar rule in the SCM Agreement? On the other, why should this provision, or rather its absence, be relevant when interpreting Article 19.3 and 19.4 of the SCM Agreement?

5. The wording of Article 19.4 of the SCM Agreement is identical to Article 4.2 of the SCMC of the Tokyo Round, whereas the first sentence of Article 19.3 of the SCM Agreement, which is the part put forward by China to substantiate its claim, is reasonably similar to Article 4.3 of the Tokyo Round SCMC.[2] Presumably, if both rules had the scope claimed by China in its assertions to the effect that in themselves they establish a prohibition on the simultaneous application of the two measures, Article 15.1 of the Tokyo Round SCMC would be devoid of meaning and this redundancy cannot be

[1] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.

[2] The difference between the two texts is limited to use of the singular "appropriate amount" in the Tokyo Round SCMC and "appropriate amounts" in the current SCM Agreement.

inferred on the basis of the principle of interpretation which the Appellate Body indicated as a corollary to the general rule of interpretation of the Vienna Convention.[3]

6. In the absence of any express legal prohibition substantiating the argument relating to the alleged prohibition on the use of both measures simultaneously, China turns to reasoning that equates the concepts of distortion and subsidization.[4] Following this line of reasoning, China concludes that "[h]aving made this determination and calculated anti-dumping duties on this basis, Commerce has necessarily addressed any allocation of productive resources within that economy that was not determined by market forces, including the provision of subsidized resources. A double remedy will therefore arise in all cases in which Commerce applies the two remedies simultaneously".[5]

7. Argentina does not agree. Argentina considers that not every measure involving price or cost distortion in an economy can be classified a subsidy in the terms of Article 1 of the SCM Agreement. The Panel adopted this line of reasoning in *United States – Measures Treating Export Restraints as Subsidies*, in which it found that the SCM Agreement "was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement".[6]

8. The goal of the surrogate country methodology is to provide an alternative for transparent prices in situations where there are distortions in the economy, and not to offset any subsidies that might exist. Even if we could agree with China that subsidies are the quintessence of distortions[7], they are not the only category of distortions that can affect variables in a market and, in any event, offsetting them must be done according to the terms of the relevant Agreement.

9. Accordingly, the application of the two measures – anti-dumping according to the surrogate country methodology, and countervailing duties – simultaneously, does not in itself imply the situation of duplication that China claims, and is therefore not inconsistent with the rules of the WTO.

10. Argentina thus concludes its oral submission at this hearing, once again expresses its thanks for the opportunity given and is ready to answer any questions or expand on the elements it has set out should the Panel so require.

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[3] *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R), report of the Appellate Body, section IV, page 21 of the English text.

[4] First written submission of China (FWS), paragraph 373, which states: "Indeed, seen at one level, one might say that a non-market economy is an economy in which *all* resources are subsidized, i.e., *none* of the productive resources within that economy are allocated according to market forces. Thus, the rationale for using an NME methodology in an antidumping investigation, necessarily subsumes the rationale for imposing countervailing duties, i.e., that a government has provided a 'trade distorting' financial contribution that leaves the recipient of the subsidy 'better-off' than it would have been had it obtained the same resource on market determined terms" (emphasis in the original text).

[5] FWS of China, paragraph 374.

[6] Report of the Panel, WT/DS/194/R, paragraph 8.63.

[7] FWS of China, paragraph 373, which states: "A subsidy is the quintessential example of a government intervention that disrupts the normal allocation of resources".

ANNEX B-12

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF AUSTRALIA

(17 July 2009)

A. 'PUBLIC BODY' UNDER ARTICLE 1.1(A)(1)

1. Australia is concerned that a definition of 'public body' that would require a body to: (i) be vested with governmental authority, and (ii) carry out governmental functions for governmental purposes[1], has no basis in the text of the *Agreement on Subsidies and Countervailing Measures* (Subsidies Agreement). It instead appears to be created by conflating the test for entrustment or direction under Article 1.1(a)(1)(iv) and by using external sources of international law[2] which are not relevant in this instance.

The necessary distinction between 'public body' and the test for entrustment or direction

2. In Australia's view, it is necessary to maintain a distinction between the definition of 'public body' and the test for entrustment or direction. Fundamentally, the test for entrustment or direction serves a different purpose; that is, to capture those incidents when private bodies are used by governments to provide a financial contribution. This should not be conflated with the definition of 'public body,' which goes to the nature of the body in question.

3. The interpretive context that Article 1.1(a)(1)(iv) provides is a point of contrast and distinction, not one from which parallels or analogies can be drawn.[3] Australia is concerned that attempts to artificially introduce the concepts of government authority and the exercise of governmental functions into a definition of 'public body' would undermine the distinction between the meaning of 'public body' and the test for entrustment or direction.

Recourse to other international texts for interpretative context

4. China has advocated recourse to Articles 5 and 8 of the *United Nations International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts* as relevant context for the interpretation of Article 1 of the Subsidies Agreement.[4] Australia considers that the Articles offer no interpretive assistance in this case.

5. Articles 5 and 8 of the ILC Draft Articles address the 'conduct of persons or entities exercising elements of government authority' and 'conduct directed or controlled by a State',

[1] See First Written Submission of China paras. 65 and 68; Third Party Submission of the Kingdom of Saudi Arabia para. 5; Third Party Submission of Norway, paras. 12-13.

[2] First Written Submission of China, para. 72.

[3] Third Party Written Submission of Norway, para. 12.

[4] Article 31(3)(c) of the *Vienna Convention on the Law of Treaties:* First Written Submission of China, paras. 72, 77, and 83.

respectively.[5] They do not address the definition of public body. Instead they would appear to address the situation where an otherwise private or non-state actor's actions can be attributed to a government - a situation that would more closely mirror entrustment or direction, if any.

6. Similar arguments apply in relation to the attempt to use the definition of 'public entity' in paragraph 5(c) of the GATS Annex on Financial Services.[6] The GATS Annex specifically prefaces its definition of 'public entity' with the phrase '*For the purpose of this Annex…*'. The scope and purpose of the Annex as stated in paragraph 1(a) is for 'measures affecting the supply of financial services.' This points to the specialised role of the definition of a 'public entity' within the GATS.

7. More fundamentally, Australia does not agree that an apparent recourse to 'context' for the purposes of interpretation can be used to transform the scope of a provision in a way that is not otherwise available from the text. Nor can interpretative context be used to include an additional test of exercising government authority that is not apparent from the text, particularly when to include such a test would undermine a clear distinction between the definition of public body and the test for entrustment or direction.

B. PRIVATE TRADING COMPANIES AND PASS-THROUGH

8. Further to Australia's statements in section D of its written submission, Australia considers that where trading companies act as mere intermediaries in a transaction, it may be unnecessary to conduct a full pass-through analysis, particularly where the trading companies appear to have constituted an indirect route for providing a subsidy to exporters. This approach is consistent with the Appellate Body statement in *US – Softwood Lumber* that a 'pass through analysis' is not necessary in every situation in which a subsidy is provided on the production of an input product.[7]

9. Furthermore, Australia considers that in the case of an indirect subsidy, where an intermediate act does not change the nature of the input, the benefit is most accurately calculated at the level of the exporters concerned. This approach is consistent with the Appellate Body's findings in *US − Countervailing Measures* that there may be a direct or indirect recipient of the benefit of a financial contribution.[8]

C. ARTICLE 14(D) AND THE USE OF BENCHMARKS OTHER THAN PRIVATE PRICES IN THE HOME MARKET

10. Australia considers that Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market so long as 'investigating authorities calculate benefit "in relation to" prevailing conditions in the market of the country of provision.'[9]

11. Australia further considers that there is nothing in the Subsidies Agreement to support the argument that the provision of land should be treated differently to the provision of other goods under Article 14(d). On the contrary, the term 'goods' has been given a broad meaning under

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[5] Articles 5 and 8 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations International Law Commission, Report on the Work of its Fifty Third Session (10 August 2001).

[6] China First Written Submission, para. 62; Third Party Submission of Saudi Arabia, para. 42-43; Third Party Submission of Norway, para. 22-23.

[7] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 17 February 2004, para. 141.

[8] Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, WT/DS212/AB/R, 9 December 2002, para. 143.

[9] Appellate Body Report, *United States − Softwood Lumber*, Ibid, para. 101.

Article 1.1(a)(1)(iii) of the Subsidies Agreement to include immovable property.[10] As the Appellate Body stated in *US - Softwood Lumber*, a broad interpretation, as reflected in the French and Spanish language texts, suggests that land is indeed a 'good' for the purposes of the Subsidies Agreement.[11]

D. POLICY LENDING AND SO CALLED 'DOUBLE REMEDIES'

12. In relation to policy lending, Australia would like to reiterate the key point that 'statements of government policies, plans and intentions are highly relevant considerations in determining the existence of a subsidy and whether the subsidies are targeted to certain industries or enterprises.'[12]

13. In terms of the issue of so-called 'double remedies', Australia would like to reiterate that anti-dumping and countervailing duties are two separate remedies under two distinct WTO Agreements. Nothing in GATT Article VI or elsewhere in the WTO Agreements prevents concurrent or parallel anti-dumping and countervailing duty investigations with respect to the same product.

[10] Appellate Body Report, *United States − Softwood Lumber*, Ibid, at paras. 59 and 65.
[11] Appellate Body Report, *United States − Softwood Lumber*, Ibid, at paras. 59 and 65.
[12] See Third Party Written Submission of Australia, para. 30.

ANNEX B-13

THIRD PARTY ORAL STATEMENT OF BRAZIL

(7 July 2009)

Mr. Chairman, distinguished Members of the Panel,

1. Brazil appreciates the opportunity to present this oral statement as a Third Party in the current proceedings. The present dispute raises several questions of systemic interest to many WTO Members, as the number of Third Party Submissions makes evident. Brazil would like to contribute to this debate by furthering additional elements to some specific issues discussed in its submission. The first issue Brazil wishes to address is the definition of the expression "public body" in Article 1 of the SCM Agreement. Clarification of the meaning and scope of this expression will contribute to the proper application of CVD measures.

2. As indicated in its Third Party Submission, Brazil does not opine on the specific factual context of this dispute and takes no position on whether the Chinese companies involved in the present case are encompassed by a proper definition of "public body". This assessment will depend on the examination of the totality of facts before the panel, which may well include, for instance, issues related to determinations made in light of non-cooperation on the part of investigated companies. Such assessment is beyond the remit of this intervention.

3. As regards the legal interpretation of the expression "public bodies" in Article 1 of the SCM Agreement, Brazil does not consider appropriate the classification of enterprises totally or partially-owned by the State as "public bodies" in CVD investigations based solely on majority state shareholding. This automatic classification could lead to regular market transactions involving non-public state-owned companies being regarded as financial contributions under the SCM Agreement, potentially burdening these entities unfairly. It is not infrequent to find state-owned companies operating in the market with autonomy, indistinguishably from any other private company, despite an ownership link to the government.

4. For this reason, Brazil advocates the necessity of a two-tiered evaluation: firstly, the investigating authority should delve into the evidence provided in order to ascertain if the underlying nature of the entity in question is that of a "public body"; if a negative answer is found, the examination should instead search for specific instances where governmental entrustment or direction was present.

5. Article 1.1(a)(1)(iv) of the SCM Agreement expressly refers to private bodies that carry out functions "which would normally be vested in the government". This is the more immediate "context" under which the expression "public body" in the SCM Agreement should be interpreted, as per the guidelines of treaty interpretation found in the Vienna Convention. It can be directly inferred from Art 1.1(a)(1)(iv) that the main dividing line between actions determined by public or by private motivations should be the presence of public interest – be it *incidental*, as in the case of entrusted or directed private bodies, or more *permanent*, as is characteristic in public bodies.

6. Moreover, the Panel in *EC-DRAMS*[1] assumed that even when actions involve entities wholly owned by the State, it must be demonstrated that the government actually exercised its power over that entity and directed it to take actions against market logic. As previously stated, non-public state-owned companies typically enjoy a significant degree of autonomous decision-making in pursuing its objectives in the marketplace. For obvious reasons, such an analysis is even more important in regard of partially state-owned enterprises, where private agents may be directly affected and therefore exert an opposing force to a hypothetical governmental intervention.

7. For these reasons, Brazil respectfully submits that an overly broad definition of the expression "public body" would disturb the balance of the disciplines of the SCM Agreement.

8. Regarding the alleged "double remedy" issue, Brazil contends that, the SCM and AD Agreements should be treated as independent sets of disciplines, to the extent that there is no provision establishing cross-references between them. The only linkage between anti-dumping and countervailing duty disciplines found in the Covered Agreements is GATT Article VI.5, which expressly refers to export subsidies.

9. The possibility of simultaneous application of anti-dumping and countervailing duties on the same imported product is evident from at least two different perspectives. Firstly, the existence of an explicit ban in the legal text regarding export subsidies can be easily read, *contrario sensu*, to allow for the concomitant application of both duties in all other situations. This is synthesized in the *expressio unius est exclusio alterius* general legal principle. Secondly, this argument is reinforced by the existence of a specific discipline within SCM Agreement's predecessor, the GATT *Subsidies Code*, which prohibited the simultaneous application of both duties on imports from a certain set of countries. The fact that this prohibition was not replicated in the current SCM Agreement underscores the intention of its drafters not to prohibit the combined imposition of AD and CV duties on imports from Members, irrespective of their status as Market or Non-Market Economies.

10. This concludes Brazil's Oral Statement.

[1] Panel Report, EC – DRAMS, para. 7.120.

ANNEX B-14

THIRD PARTY ORAL STATEMENT OF CANADA

(7 July 2009)

INTRODUCTION

1. Mr. Chairman, distinguished members of the Panel, Canada would first like to express its appreciation to the Panel and the Secretariat for their work in this dispute.

2. This dispute concerns the imposition of anti-dumping and countervailing duties on Chinese products. In this connection, Canada would like to emphasize the status and importance of China's *Accession Protocol* and the commitments made by China that are noted in the *Working Party Report* on its accession. Both documents are integral parts of the WTO Agreement. They relate specifically to China and are central to a finding of WTO-consistency or inconsistency with respect to certain issues in this dispute.

3. In this oral statement, I will discuss two issues not addressed in Canada's written submission: pass-through and the offsetting of benefit. I will then make some additional comments on one issue addressed in Canada's written submission: the concurrent imposition of anti-dumping and countervailing duties.

I. PASS-THROUGH

4. I will first deal with issues arising in the context of the successive sales of input goods by state-owned enterprises to trading companies and by the trading companies to respondent producers.

5. In three of the investigations at issue, the U.S. Department of Commerce found that the sales by state-owned enterprises constituted financial contributions that conferred a countervailable benefit to respondent producers.

6. China argues that Commerce violated the *SCM Agreement* by failing to find that the trading companies themselves provided a financial contribution when they sold the inputs and by failing to find that the trading companies had received a benefit from the sale of inputs by the state-owned enterprises. For its part, the United States alleges that there was no obligation on Commerce to make these findings.

7. Under Article 1.1 of the *SCM Agreement*, a subsidy shall be deemed to exist if there is a financial contribution and a benefit is thereby conferred.

8. To impose a valid countervailing duty on a product as a result of the successive sales at issue, Commerce had to determine that the sales of inputs by the state-owned enterprises to the trading companies constituted a financial contribution that conferred a benefit both directly upon the trading companies and indirectly upon the respondent producers.

9. The possibility that a single financial contribution could confer both a direct and indirect benefit is confirmed by the Appellate Body's decision in *United States – Softwood Lumber IV*. Indeed, the Appellate Body found that the requirement for a financial contribution could be fulfilled

where the government made a financial contribution to an input producer who in turn sold the input to a respondent producer.

10. The Appellate Body did not require that the input producer make a separate financial contribution to a respondent producer for the purposes of determining whether the respondent producer is subsidized under Article 1.1 of the *SCM Agreement*.

11. Similarly, in the current matter, there was no requirement for Commerce to find that the trading companies made financial contributions to the respondent producers. Finding that the sale of inputs by state-owned enterprises constituted a financial contribution was sufficient.

12. However, to countervail a subsidy, Commerce had to demonstrate that the financial contribution made by the state-owned enterprises ultimately conferred a benefit upon the respondent producers.

13. China argues that, without a valid finding that the trading companies had received a benefit, there was no legitimate basis for Commerce to conclude that all or some portion of the benefit was conferred on the respondent producers who purchased the inputs from the trading companies. China adds that Commerce undertook no examination of the price the trading companies paid for the inputs they purchased.

14. The United States answers that it was not necessary for Commerce to measure any benefit that the trading companies may have received.

15. Canada submits that a direct recipient of a benefit cannot pass through to an indirect recipient a higher amount of benefit than what it received. The amount of benefit conferred on the direct recipient is the maximum amount of benefit that can pass through to the indirect recipient and be countervailed.

16. Therefore, in most cases, a precise calculation of the amount of benefit conferred on a direct recipient is necessary to determine the amount of the benefit that passes through to an indirect recipient.

17. However, such a precise calculation may not be necessary if the direct recipient purchases goods from a government or public body, does not further process them, and simply resells them for at least as much as it purchased them. In that case, the difference between the resale price paid by the indirect recipient and the benchmark price reflects the extent to which the direct recipient passed the benefit received from the financial contribution through to the indirect recipient.

II. OFFSETTING OF BENEFIT

18. I now turn to the issue of the proper calculation of benefit provided by way of the provision of goods by a government or public body in a situation where some transactions are made above a relevant benchmark price.

19. China argues that Commerce should have taken such transactions into account. The United States responds that Commerce was entitled to ignore them.

20. I will make a few general observations on this issue.

21. Article 14(d) of the *SCM Agreement* is the key provision with respect to the calculation of the amount of benefit conferred on a recipient through the provision of goods. It provides that the provision of goods by a government or public body must not be considered as conferring a benefit

unless the provision is made for less than adequate remuneration. The adequacy of remuneration will generally be assessed by comparison with a benchmark price.

22. There is no provision in the *SCM Agreement* that specifically requires that a benefit conferred on a recipient through one or more transactions be offset where other transactions between the recipient and the government or public body are on terms that are less favourable than prevailing market terms.

23. However, under certain circumstances, the examination of whether the provision of a good through one or more transactions is made for adequate remuneration may require that other transactions be examined. For example, where there is an on-going contractual relationship between a government supplier and a purchaser, it may be appropriate to take into account a range of transactions between the same parties concerning the same goods in order to determine whether one or more transactions were made for adequate remuneration.

III. CONCURRENT IMPOSITION OF COUNTERVAILING AND ANTIDUMPING DUTIES

24. Finally, I wish to address the WTO-consistency of the concurrent imposition of countervailing and anti-dumping duties determined on the basis of prices or costs outside China; that is, using the so-called "non-market economy methodology".

25. China argues that such concurrent imposition gives rise to a "double remedy" and is inconsistent with Articles 19.3 and 19.4 of the *SCM Agreement* and Article I:1 of *GATT 1994*. The United States replies that the concurrent imposition of duties is not inconsistent with the WTO Agreement.

26. Canada demonstrates in its written submission that, in the case of products of Chinese origin, the concurrent imposition of duties is consistent with Articles 19.3 and 19.4 of the *SCM Agreement*.

27. It is also Canada's position that neither the use of the "non-market economy methodology" nor the concurrent imposition of duties on Chinese products using that methodology is inconsistent with Article I:1 of *GATT 1994*.

28. Article VI:1 of *GATT 1994* and Article 2 of the *Anti-dumping Agreement* require a strict comparison with domestic prices or costs to establish the normal value of products from "market economy" Members. However, subparagraph 15(a)(ii) of China's *Accession Protocol* specifically allows an importing Member to calculate the normal value of Chinese products using the "non-market economy methodology". Thus, the application of that methodology to Chinese products does not amount to an importing Member according an "advantage, favour, privilege or immunity" to "market economy" Members in breach of Article I:1 of *GATT 1994*.

29. Nor is Article I:1 breached when an anti-dumping duty based on the "non-market economy methodology" is imposed on a Chinese product concurrently with a countervailing duty. Notwithstanding China's allegation that the concurrent imposition gives rise to a "double remedy", Section 15 of the *Accession Protocol*, Article VI of *GATT 1994,* and the provisions of the *SCM Agreement* and the *Anti-dumping Agreement* permit such concurrent imposition.

30. Moreover, as discussed in Canada's written submission, a subsidized and dumped product from a "market economy" Member is also subject to both countervailing and anti-dumping disciplines. Therefore, the concurrent imposition on Chinese products of countervailing and anti-dumping duties, however calculated, is consistent with Article I:1 of *GATT 1994*.

CONCLUSION

31. Mr. Chairman, distinguished members of the Panel, this concludes Canada's oral statement.

ANNEX B-15

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(7 July 2009)

Mr. Chairman, distinguished Members of the Panel,

1. In this oral statement the European Communities will further comment on one issue: the concurrent application of anti-dumping and countervailing duties to the "same situation", responding in particular to certain observations contained in the third party written submissions.

2. We agree with the United States that China has not pursued a claim under Article VI:5 of the *GATT 1994*, which is the only provision in the covered agreements that expressly addresses the concurrent application of anti-dumping and countervailing duties.[1] China's silence implies that it does not challenge the interpretation of that provision advanced by the United States. We note that China does make a claim under the "appropriate" standard referenced in Article 19.3 of the *SCM Agreement*[2], but we do not see why, as the pleadings stand, the Panel need reach the question of the interpretation of Article VI:5 of the *GATT 1994*. Accordingly, given that Article VI:5 of GATT 1994 has not been invoked and that the United States appears not to have exceeded the amount of subsidy when imposing countervailing duties, we would invite the Panel to reject China's claims under both Article 19.3 and Article 19.4 of the *SCM Agreement*.

3. In any event, the European Communities agrees with the United States' interpretation of Article VI:5 of the *GATT 1994*.

4. We have carefully noted the observations of a number of third parties with respect to the interpretation of Article VI:5.[3] We agree with the United States[4] that the term "export subsidization" is synonymous with various other terms as used in the covered agreements, such as, notably: "export subsidization";[5] "subsidy … on the … export";[6] "subsidy … upon … the export";[7] "export subsidy" or "export subsidies";[8] "subsidy to exports";[9] "subsidies contingent, in law or in fact, … upon export performance";[10] and "subsidy … in fact tied-to … exportation or export earnings"[11] (as evidence of a subsidy contingent upon export performance).[12]

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[1] Request for Consultations, para. (6); Panel Request, paras B.1.(f) and B.2; China's First Written Submission, Section VI; United States First Written Submission, Section VIII.

[2] China's First Written Submission, Section VI.

[3] For example, Australia's Third Party Written Submission, para. 49; Japan's Third Party Written Submission, para. 7; Norway's Third Party Written Submission, paras. 41 to 47.

[4] For example, United States First Written Submission, paras. 397 and 399.

[5] For example, *Agriculture Agreement*, Article 9(3).

[6] For example, *GATT 1994*, Article VI:3, first sentence and Article XVI, paras. 2, 3 and 4.

[7] For example, *GATT 1994*, Article VI:3, second sentence.

[8] For example, *GATT 1994*, Article XVI, Section B, title; *SCM Agreement*, footnote 5 and Annex I; *Agriculture Agreement*, Article 1(e) (defining "export subsidies" as subsidies contingent upon export performance).

[9] For example, *GATT 1994*, ad note to Article VI, paragraphs 2 and 3, second paragraph.

[10] For example, *SCM Agreement*, Article 3.1(a).

5. We also agree with the United States that this contingency or tie between the subsidy and the export is confirmed by the *ordinary meaning* of the term "export subsidization".[13] The juxtaposition of these terms, and particularly the choice of the term export as opposed to any other term, implies such a contingency or tie. In our view, the ordinary meaning of the term "export subsidisation" does not extend to the situation in which there is no such contingency or tie – and in particular does not extend to the situation in which there is a mere allocation of part of a neutral subsidy to exports.

6. We further agree with the United States that this view is well-supported by the *context*, including, but not only, the provisions we have referred to above, in particular Article VI:3 of the *GATT 1994*.[14] In particular, we find that the context suggests that the term "export subsidization" in Article VI:5 refers back to the term "subsidy … on the … export" in Article VI:3. We believe that this view is supported by the French and Spanish versions. Further, we note that the terms "manufacture" and "production" may overlap; that these terms, together with the term "transportation" may overlap with the term "export"; and that these terms may not describe all possible types of countervailable subsidies – that being something assured in any event by the term "indirectly". In these circumstances, we agree with the United States that it is significant that the term "export" is specifically picked out in Article VI:3, suggesting that it refers to a particular type of subsidy – that is, an export subsidy. Taken together with the other context we have referred to, we find that this confirms that the term "export subsidization" in Article VI:5 does not include a situation in which a neutral subsidy (for example, on the "manufacture" or "production" of a product) is partially allocated to exports. Contrary to what is suggested by some of the other Third Party submissions, this is not contradicted by the term "indirectly" in Article VI:3, which rather ensures that all types of subsidy are captured, and does not suggest that the relationship between the subsidy and the export for the purposes of Article VI:5 of the *GATT 1994* could be "indirect". Furthermore, contextually, we find it significant that, whilst Section V of the *SCM Agreement*, Section A of Article XVI of the *GATT 1994* and Section III of the *SCM Agreement* all contemplate the possibility of neutral subsides having an effect on exports, none of them use in this context the specific term "export subsidy" or one of its synonyms.

7. Consequently, we agree with the United States that the mere fact that a countervailing duty has been imposed does not necessarily mean that a determination has been made that there is "export subsidization" within the meaning of Article VI:5 of the *GATT 1994*. A countervailing duty may be imposed not only to counter a subsidy contingent upon export (which is what Article VI:5 of the *GATT 1994* refers to), but also a neutral subsidy, allocated in part to exports, which does not fall within the scope of the term "export subsidization" in Article VI:5.

8. Turning to *object and purpose*, we agree with the United States[15] that the limited scope of Article VI:5 of the *GATT 1994* is explained by the fact that, where normal value is based on sales, a neutral subsidy may reasonably be considered to press down equally on both sides of the dumping calculation. The dumping calculation therefore remains unaffected by the subsidy analysis. On the other hand, a subsidy contingent upon export may reasonably be assumed to have a direct impact on the price or quantity of exports – and exports alone. It follows that, since the export contingent subsidy affects prices or quantities, the anti-dumping and countervailing duties would indeed be imposed to compensate for the "same situation" (that is, a situation in which the subsidy, by reducing only the export price, or increasing only the export volume, would increase the amount of dumping). This is what justifies, for example, an adjustment in the rate of anti-dumping duty applied.

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[11] For example, *SCM Agreement*, footnote 4.
[12] Appellate Body Report, *EC - Export Subsidies on Sugar*, paras. 279 to 282.
[13] For example, United States First Written Submission, para. 397.
[14] For example, United States First Written Submission, para. 398.
[15] For example, United States First Written Submission, para. 397.

9. We have carefully considered China's argument that, if the normal value is constructed or derived from an analogue country, and therefore not depressed by that part of the neutral subsidy allocated to the domestic market of the exporting Member, there is no difference, in economic terms, between an export contingent subsidy of 5 (where an adjustment is required) and a neutral subsidy of 10, of which 5 has been allocated to exports in the countervailing duty determination (where no adjustment is made).[16] However, as well as failing from the point of view of ordinary meaning[17] and context,[18] we think this argument also fails from the point of view of object and purpose. It appears to us to assume that the countervailing determination must be taken to mean that a neutral subsidy allocated in part to exports has necessarily decreased the price or increased the quantity of the exports, thus falling foul of the "same situation" parameter. However, under the terms of the *SCM Agreement*, it is only necessary to show a subsidy, injury, and that the subsidised imports, through the effects of the subsidies (based particularly on evidence about the volume of subsidised imports and their effect on prices in the importing Member), cause the injury. It is not necessary to demonstrate any causal link between the subsidy and the export.[19] Nor is it necessary to demonstrate that the subsidy has caused the price of the export to decrease – the enquiry is rather what effect the subsidised imports have had on prices in the importing country. Thus, a neutral subsidy might be used, for example, to pay for advertising, benefiting both domestic sales and exports. This might not increase the volume or decrease the price of exports. But it could force producers in the importing country to reduce their prices in order to compensate for the unfairly subsidised advertising campaign. In such a situation, we agree with the United States that the legal conditions for the application of a countervailing duty would be satisfied; and yet, at the same time, it could not be said that an anti-dumping and countervailing duty would be imposed to compensate for the "same situation" of dumping or export subsidization.

10. For these reasons we respectfully invite the Panel to agree with the United States, and reject China's claims with respect to this matter.

[16] China's First Written Submission, Section VI.
[17] See para. V.4 of this Oral Statement.
[18] See para. V.5 of this Oral Statement.
[19] Appellate Body Report, *Japan - DRAMs*, paras. 257 to 278.

ANNEX B-16

THIRD PARTY ORAL STATEMENT OF INDIA

(7 July 2009)

Mr. Chairman,

India thanks the Panel for this opportunity to present its views in these panel proceedings concerning a disagreement between China and the United States as to the conformity with the covered agreements of four sets of anti-dumping duty and countervailing duty determinations made by the United States. India intervenes in this case as a third party because of its systemic interest in the correct interpretation and application of the General Agreement on Tariffs and Trade 1994 (GATT 1994), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

While not taking any final position on the facts of the case, India wishes to express its views on some of the issues raised in this dispute.

A. THE CONCEPT OF "PUBLIC BODY" IN ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

One of the issues in this dispute is the concept of 'Public Body' under Article 1.1(a)(1) of the SCM agreement and the extent to which Government shareholding control is determinative for the characterization of a company as a 'public body'.

In India's view the ordinary meaning of the term 'Public body' in Article 1.1(a) (1) does not warrant a presumption that the shareholding control or ownership by the Government in itself may lead to a determination that a company is a 'public body' for the purpose of establishing the existence of a financial contribution.

India respectfully submits that a high level of government ownership may indeed be a pertinent factor in determining whether an entity is a 'public body' as understood under Article 1.1(a)(1)of the SCM Agreement. At the same time, however, India disagrees that the degree of government ownership shall in itself be the necessary and sufficient condition for considering an entity as a 'public body'. In previous cases where the Panel has treated an entity as a 'public body' or a 'private body' entrusted with governmental functions on the basis of the extent of government ownership, it has also looked at other relevant factors.

The Panel in the *EC - DRAMS* case, while addressing the issue of whether wholly or partially owned government banks could be considered to have been entrusted with the function of providing financial contribution, observed that, "*government ownership, in and of itself, is not sufficient to establish entrustment or direction under Article 1.1(a)(1) of the SCM Agreement*." It further stated that, "*in case of a 100 percent government owned bank, such as Woori Bank, it thus needs to be demonstrated that the government actually exercised its shareholder power to direct the bank to support to Hynix*."

In India's view in order to be closely assimilated to the government, the link of an entity with the government must go beyond mere ownership and it must perform functions or attributions that are typical of the government.

In *US - CVD DRAMs* the Appellate Body noted that 'the conduct of private bodies is presumptively not attributable to the State' and to support this view the AB quoted that 'since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima-facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority'.

India considers and submits that when government ownership in the Panel's own opinion could not be considered to be sufficient to guarantee entrustment of governmental functions as under Article 1.1(a) (1) (iv) of the SCM Agreement, it is even more implausible to argue that ownership shall in itself lend to the conclusion that an entity is a 'public body'.

B. USE OF OUT OF COUNTRY BENCHMARKS TO CALCULATE THE AMOUNT OF SUBSIDIY IN TERMS OF THE BENEFIT TO THE RECIPIENT UNDER ARTICLE 14(D) OF THE *SCM AGREEMENT*

On the question of use of out of country benchmarks to calculate the amount of subsidy, U.S. maintains that the use of alternative market benchmarks outside China is permitted by paragraph 15(b) of China's Protocol of Accession which allows for use of out of country benchmarks with reference to China in case of *special difficulties* in applying provisions contained in Articles 14(a), 14(b), 14(c) and 14(d) of the SCM Agreement. Further the United States contends that the fact that government of China was the predominant owner of production of the inputs concerned was the only factor which was taken into account. However, the USDOC also contends that they have examined other evidence, including prices of inputs established by private parties in China and import data, in order to arrive the conclusion that the prices in China were distorted because of government of China's predominant role as supplier of the inputs concerned. However, China argues that sale prices by SOEs were not controlled by the Chinese government, and therefore did not distort the market price.

In India's view the Panel may have to examine the contentions of the Parties taking the existing jurisprudence on Article 1.1(a)(1) of the SCM Agreement including the facts of the case on hand to ascertain whether China's SOEs are authorities or 'public bodies' for the purpose of Article 1.1(a)(1) of the SCM Agreement.

With respect to the U.S.'s assertion that use of out of country benchmarks is also permissible as per the *SCM Agreement [Article 14(d)]* and the AB decision in *US - Softwood Lumber IV* concerned*, India* believes that the Panel may also have to consider the Appellate Body's decision in the light of the limitations that the AB itself had expressed while giving its decision. The AB had *inter alia* opined that the circumstances in which a Member may use benchmarks other than the private prices in the country of provision are 'very limited'. It had further stated that:

> *"The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the facts underlying each countervailing duty investigation."*

In India's view the Panel should consider U.S.'s use of out of country benchmarks in the present case in light of the specific limitations that the Appellate Body had prescribed for using it while determining the quantum of benefit under Article 14(d) of the SCM Agreement.

C. CONCURRENT IMPOSITION OF ANTIDUMPING AND COUNTERVAILING DUTY IN CASES WHERE NORMAL VALUE IS DETERMINED USING PRICES OR COSTS OUTSIDE THE NON MARKET ECONOMY COUNTRY ('NME')

India believes that the issue of "double remedy" has not been dealt with in the past and therefore requires careful consideration by the Panel. China has argued that the United States has imposed double remedy, in the form of AD as well as CVD, in contravention of Article 19.3 and 19.4 of the *SCM Agreement*. According to China the United States by using NME methodology in calculating anti-dumping duties will offset any alleged subsidies through two duties.

Article VI:3 of GATT 1994 allows Members to apply CVD "equal to the estimated bounty or subsidy determined to have been granted". The *SCM Agreement* contains detailed provisions relating to what constitutes a subsidy, calculation of benefit and the amount of duty that may be imposed. Articles 19.3 and 19.4 provide that the CVD shall be in appropriate amount and no duty shall be levied in excess of the amount of subsidy found to exist. Further Article VI:5 permits the application of both AD and CVD on product except when the two duties compensate for the same situation of dumping or export subsidization.

India notes that whilst it is true that the Appellate Body has confirmed that the WTO Agreement constitutes a single undertaking, the context of the relevant agreements is potentially relevant to the process of interpretation of any particular provision. Anti-dumping and Countervailing duties are two separate remedies to counter two different types of situations of trade distortion. The relevant provision which expressly limits the right of WTO Members to impose both types of duty is Article VI:5 of GATT 1994.

India accordingly holds the view that the legal permissibility for the parallel application of AD and CVD measures, and its underlying logic apply to investigations conducted both in relation to 'market economy' Members and 'non-market economy' Members.

D. THE USE OF A 'ZEROING' METHODOLOGY WHEN CALCULATING 'BENEFIT' RECEIVED FROM INPUTS PROVIDED BY STATE OWNED ENTERPRISES ('SOES')

Mr. Chairman, India's position against the use of "zeroing" methodology is well documented. India was the original complainant in *EC-Bed Linen* case where the practice of zeroing was the first time held to be against the provisions of the *AD Agreement* and believes that the existence and use of "zeroing" under *SCM Agreement* too needs to be reviewed.

In the case of *OTR* investigation China alleges that the United States unlawfully *created* a benefit where none existed by including only those transactions that produced a positive benefit, while excluding those transactions, which did not confer any benefit. According to China this methodology cannot be reconciled with Article VI:3 of GATT 1994 as well as multiple provisions of the *SCM Agreement* such as Articles 10, 19.3 and 19.4 which suggest that a CVD may be imposed only with reference to a "*product"*. According to China in order to determine if goods provided for *less* than *adequate* remuneration provided a subsidy to the production or manufacture of the product as a whole, Commerce was obliged to conduct an *aggregate analysis* of all the transactions during the *period of investigation*.

The *SCM Agreement* does not define a period of investigation. The length of the period of investigation is upon the discretion of the investigating authority. During the said period on investigation numerous export transaction of the *product* may be undertaken. According to Article VI:3 of GATT 1994 the CVD may be "equal to the estimated bounty or subsidy determined to have been granted". Further as per Article 19.2 of the *SCM Agreement* the CVD can be up to the full

amount of the subsidy or less. Thus the CVD imposed should be equal or less than the amount of subsidy found to exist during the period of investigation.

According to Article 19.2 and 19.4 of the *SCM Agreement* the investigating authority is required to calculate "*a subsidy*". Further according to the Appellate Body's decision in *Canada – Aircraft* a subsidy provided is when a government makes a *financial contribution,* which subsequently confers a benefit. In India's view the task of the investigating authority is to determine if a financial contribution has been made, and if so the benefit should be calculated for all transactions over the period of investigation and not with reference to isolated transactions, disregarding other transactions. India believes that an *aggregate analysis* of all transactions during the period of investigation must be conducted to determine the "benefit", and not merely of those transactions which *confer* benefit.

India appreciates this opportunity to present its views to the Panel and we are confident that the Panel will apply an appropriate interpretative methodology and add to its analysis in this very important dispute, in accordance with the principles set out under Article 3.2 of the DSU.

ANNEX B-17

THIRD PARTY ORAL STATEMENT OF JAPAN

(7 July 2009)

I. INTRODUCTION

1. Mr. Chairman, and distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for your attention to this dispute, which involves important systemic issues on the disciplines of Article VI of the *GATT 1994* and the *SCM Agreement*. Because time is limited, however, Japan would like to focus on two issues today.

II. DISCUSSION

A. SIMULTANEOUS IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES

2. The first issue is the discipline of the avoidance of the double remedies when a Member imposes anti-dumping and countervailing duties simultaneously. In our third party submission, Japan explained that Article VI:5 of the *GATT 1994* is the expression of the underlying concept of the prohibition on double remedies.

3. Article VI of *GATT 1994* provides for two types of trade remedy measures. One is anti-dumping duties, which an importing Member is permitted to impose in an amount not exceeding the margin of dumping. The other is countervailing duties, which the importing Member may impose up to the amount of subsidies. These two trade remedy measures are aimed to counteract different types of practices in the exporting Member. As the Appellate Body correctly found, "the concept of dumping relates to the pricing behaviour of exporters or foreign producers".[1] On the other hand, the countervailing duties relate to the actions by the government of the exporting Member. So far as each measure captures their object and does not go beyond its scope, no overlap of the two measures would occur, and accordingly, no double remedies would occur.

4. In certain situations, however, as the matter of dumping margin calculation methodology set forth in Article VI:1 of the *GATT 1994*, the dumping margin captures not only the dumping behaviour of exporters, but also the effects of financial contributions by the government. In such a situation, if the importing Member also imposes a countervailing duty, the Member would counteract the effects of the financial contribution by the government twice. Such a double remedy unavoidably occurs in the case of export subsidies. Article VI:5 of the *GATT 1994* therefore explicitly prohibits the simultaneous imposition of antidumping and countervailing duties on export subsidies.

5. Although Article VI:5 of the *GATT 1994* does not prohibit the simultaneous application of antidumping and countervailing duties in any other situations in which a double remedy may occur, Japan believes that Members should give due regards to the underlying concept to avoid the imposition of double remedies.

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[1] The Appellate Body report, *US – Zeroing (Japan)* (WT/DS322/AB/R), para. 156.

B. SELECTION OF BENCHMARKS UNDER ARTICLE 14 OF THE *SCM AGREEMENT*

6. The second issue is the requirements that the *SCM Agreement* imposes on investigating authorities in their selecting benchmarks to calculate the amount of subsidy.

7. Article 14 of the *SCM Agreement* sets forth "guidelines", which provide "the 'framework within which this calculation is to performed'."[2] The Appellate Body found that "calculating benefit consistently with the guidelines is mandatory".[3] It also found that "the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstances'". [4] In a case of the provision of goods by a government, for example, investigating authorities are required to find benchmarks, which "related or referred to, or were connected with, prevailing market conditions" in an exporting country,[5] as the Appellate Body has stated, "any comparative advantage would … have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration." [6] The reference to "any" method in the chapeau of Article 14, on the other hand, "provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit." [7]

8. The interpretation of Article 14 must also be made "in the light of its object and purpose" as Article 31.1 of the Vienna Convention provides. In this connection, the Appellate Body has correctly stated that Part V of the *SCM Agreement* is "aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so."[8] The guidelines as provided in paragraph (a) though (d) must be interpreted in a manner that does not upset this delicate balance. For example, an interpretation of Article 14(d) that it requires an investigating authority to replicate market conditions prevailing in the exporting country at a level practically too high to comply, would ignore this delicate balance.

9. Japan does not take any specific position on whether the USDOC's choices of benchmarks in the specific factual settings in the disputed investigations are consistent with the provisions of Article 14. Japan respectfully requests this Panel to review whether the USDOC's choices were reasonable in light of the latitude given to investigating authorities under Article 14.

III. CONCLUSION

10. In conclusion, Japan respectfully requests the Panel to examine carefully the facts presented by the parties in this dispute in light of the arguments presented in Japan's submission and this oral statement. Japan is happy to answer any questions that the Panel or parties in dispute may have.

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[2] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[3] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[4] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[5] Appellate Body Report, *US – Softwood Lumber IV*, para. 116.
[6] Appellate Body Report, *US – Softwood Lumber IV*, para. 109.
[7] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 191. Also see, Appellate Body Report, *US – Softwood Lumber IV*, paras. 91 and 92.
[8] Appellate Body Report, *US – Carbon Steel,* para. 74.

ANNEX B-18

THIRD PARTY ORAL STATEMENT OF MEXICO

(7 July 2009)

1. In its submission as a third party, Mexico set out its views on the interpretation of certain provisions of the GATT 1994, the Protocol of Accession of the People's Republic of China (the "Protocol"), the Anti-dumping Agreement ("AD Agreement") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), given the systemic importance the Panel's conclusions will have.

2. As regards the **simultaneous application of anti-dumping and countervailing duties**, Article VI.5 of the GATT 1994 prohibits the simultaneous application of anti-dumping duties and countervailing duties to offset export subsidies insofar as both duties are intended to remedy the "same situation". In Mexico's view, this prohibition does not apply to countervailing duties that offset domestic subsidies because these do not result in dumping. Consequently, when countervailing duties offset domestic subsidies, simultaneous application is consistent with the rules of the WTO.

3. In this dispute, we are not faced with a case of double remedies for the same situation. On the contrary, in this case anti-dumping duties were imposed in order to offset the effect of dumping by Chinese exporters, and countervailing duties to offset the effect of the domestic subsidies granted by China, which artificially lower prices both within China and for export. We are, therefore, not facing a single situation, affected by two types of remedy, but rather two prejudicial situations offset through the remedy applicable to each of them.

4. Moreover, we consider that if China had succeeded in negotiating a prohibition on applying simultaneous duties to its products, this would have been specified in the Protocol. As this is not the case, the Protocol does allow the combined application of anti-dumping and countervailing duties. In addition, when the negotiators of the WTO Agreements considered it necessary to prohibit the simultaneous application of different mechanisms, they said so expressly. As there is no prohibition on simultaneous application of duties, we must thus conclude that such application is consistent with WTO rules.

5. As regards the provisions of Article 19.3 and 19.4 of the SCM Agreement, Mexico considers that they do not regulate the simultaneous application of duties, therefore China's claim in this respect has no basis at all. We consider that China has not proved *prima facie* violation of these provisions by the United States. Claiming that Article 19.3 and Article 19.4 regulate simultaneous application is tantamount to negating Article VI.5 of the GATT 1994 and Article 15 of the Protocol, which would be contrary to the principle of effectiveness recognized in *United States – Gasoline*.

6. With regard to the **surrogate country methodology** in anti-dumping investigations, contrary to what China and Norway[1] assert, Mexico considers that this methodology does not enable prices and costs adjusted for the distorting effects of the subsidy to be obtained. We do not therefore agree with their claim that the simultaneous application of countervailing duties and anti-dumping duties determined using this methodology is inconsistent with the WTO rules. Once again, we consider that China has not proved *prima facie* violation by the United States in this respect.

[1] Submission by Norway as third party, paragraph 46.

7. In an anti-dumping investigation, the authority has no way of knowing – precisely because it is an anti-dumping investigation – whether the prices or costs for a surrogate country do or do not reflect the effects of the subsidization that may have been granted in this surrogate country. Consequently, when calculating the normal value in accordance with the surrogate country methodology, the authority takes the prices or costs in that country just as they are and does not adjust them to take into account these subsidies because, as we have stated, it does not know whether these prices and cost reflect the subsidies.

8. Let us suppose that the authority is certain that the surrogate country does not grant subsidies and, therefore, its prices and costs have not been "contaminated" by this concept. Even in this case, the prices and costs of the surrogate country would be "subsidy free" only as far as the surrogate country itself is concerned, but would not reflect the prices or costs of the exporting country, already free of the subsidies granted by the exporting country. In other words, the surrogate country methodology would yield the prices and costs which the exporting country would have if it had a market economy and did not grant subsidies, but does not reflect the prices and costs of the exporting country already adjusted upwards in order to offset the subsidies granted by this exporting country.

9. Regarding the question of "**public body**", China bases itself on *United States – DRAMs* to claim that for a company owned by the State to be termed a "public body", the requirements in the *Draft Articles*[2] of the United Nations International Law Commission must be met, namely (1) the enterprise must be authorized by the State to exercise functions normally exercised by the State, and (2) the conduct of the entity must concern governmental activities.

10. Mexico does not agree. The definition of the term "public body" was not addressed in *United States – DRAMs*. In this case, the Appellate Body examined whether an act by a private entity could be considered as being instructed by a government to make a financial contribution and based itself on the *Draft Articles*. At no time did it determine whether the public character of a body depended on the form in which the body acted. For Mexico, the action of the entity is not relevant for the purpose of determining whether this entity is a public body. In any event, ascertaining whether or not it acted consistently with market principles could be important when concluding whether a benefit was granted, but this is irrespective of the public character of the body.

11. Mexico shares the view of Argentina, Australia, Canada and Japan that, as found in *Korea – Commercial Vessels*, an entity is a public body when it is controlled by the government or by another public entity. The fact that the government has control of a company is sufficient justification to consider it to be a "public body", provided that there is proof[3] that the government has in practice exercised control over the enterprise rather than playing the role of a passive investor.

12. Obviously, the degree of control is not always directly in proportion to the degree of ownership. This depends on the way in which the shares have been organized.[4] Nevertheless, China does not question the United States determination that the Chinese Government controls certain companies because it holds the majority. What China questions is that the determination that the Chinese Government controls these companies has led to a subsequent determination that these companies are "public bodies" within the meaning of the SCM Agreement. To put it another way, China agrees that these companies are controlled by its Government, but claims that this does not

[2] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries.*

[3] For example, the government has appointed the members of the Board of Directors, the chief executives, the enterprise's activities and/or budget are subject to government approval, or the State enterprises must follow industrial development plans that set growth targets. Any of these factors by itself suffices to determine this status.

[4] In some schemes, majority ownership may result in minority control, or *vice versa* (as in the case of the so-called "*golden shares*").

make them "public bodies". So the key point is whether the fact that the Government controls a company suffices to consider the company to be a "public body" according to the SCM Agreement. We recall that, in *Korea – Commercial Vessels*, control by the government was indeed sufficient to consider a company to be a "public body".

13. The purpose of Article 1.1(a)(1)(iii) of the SCM Agreement is to prevent the granting of financial contributions in the form of goods or services – through entities that are not "government" entities – remaining outside the scope of the SCM Agreement. Consequently, in our view the definition to be adopted by this Panel in relation to the term "public body" must be sufficiently broad to enable Article 1.1(a)(1)(iii) of the SCM Agreement to be applied to State enterprises which produce goods and/or services.

14. The standard proposed by China, Brazil, Norway and Saudi Arabia would prevent Article 1.1(a)(1)(iii) of the SCM Agreement from being applied to State enterprises which produce goods or services, which is contrary to the purpose of this Article. In effect, such enterprises would be unable to meet the criteria of being established by "the law of the State to exercise functions of a public character normally exercised by State organs"; to "perform functions and exercise powers of a governmental character"; to "exercise powers vested in it by the government to … regulate, restrain, supervise or control the conduct of individuals"; or that their sales of goods should not be governmental activities "unconnected with private or commercial activity". Because it cannot fulfil these criteria according to the standard proposed by these countries, Article 1.1(a)(1)(iii) of the SCM Agreement could not apply to State enterprises which produce goods or services, which is unacceptable.

15. We note that Saudi Arabia holds that in *Canada – Dairy*, the Appellate Body interpreted "public body" in accordance with Article 9.1(a) of the Agreement on Agriculture and that this is the line of reasoning that the Panel should follow in interpreting the term "public body" under the SCM Agreement. Mexico does not agree. The fact that an expression appears in several WTO Agreements does not imply that its meaning is the same in all the Agreements. According to the rules of interpretation adopted by the WTO, if the ordinary meaning of a term is not conclusive, the context and purpose of the rule in which it appears must be taken into account. For example, the words "like product" have different meanings in Articles 2.1, 3.1 and 5.8 of the AD Agreement. Similarly, "like product" has other meanings in Articles I, III, IX and XIII of the GATT 1994. If we accept Saudi Arabia's approach, the term "like product" would have to be interpreted in the same way in all these provisions, irrespective of the context and purpose of each provision.

16. To summarize, in Mexico's view an entity is a "public body" according to the SCM Agreement if: (1) the government controls the entity (because it holds the majority); and (2) there is evidence that the government has not played the role of passive investor but has in practice exercised control. Likewise, we consider that any definition of "public body" adopted by this Panel should be sufficiently broad to enable Article 1.1(a)(1)(iii) of the SCM Agreement to apply to State enterprises supplying goods and services.

17. As regards the **analysis of pass-through of the benefit**, Mexico does not agree with China. As can be seen from several precedents in both the GATT and the WTO[5], it is clear that this analysis is only needed when the subsidies are given for the production of a good that is an input for the product under investigation (in other words, upstream). As in this case the subsidies were granted for the production of the goods investigated themselves (the industries which produced the exported goods received subsidies in the form of inputs at prices lower than the market price), the pass-through analysis was not required.

[5] *United States – Pork; United States – Softwood Lumber IV;* and *Mexico – Olive Oil*.

18. Regarding the determination of the **existence of benefit for the trading companies**, it should be pointed out that the Appellate Body determined[6] that a financial contribution may be granted to a company indirectly. In this case, because the private trading companies were only the vehicle through which the contribution reached the companies under investigation, they received the contribution indirectly. It was thus not necessary to undertake a pass-through analysis.

19. Concerning the **benchmark used by the United States**, Mexico considers that the standard applicable is that indicated by the Appellate Body in *United States – Softwood Lumber IV*, according to which an investigating authority may indeed use a reference point other than prices in the country under investigation provided that it is determined that the prices are distorted by the role played by the government. Consequently, in order to determine whether the benchmark is contrary to the WTO rules, the essential factor to be analysed is the presence or absence of distortions caused by the role of the Chinese Government. The points raised by China in order to claim that the benchmark was contrary to the WTO rules, however, are in **no way** related to this essential factor.

20. Mexico considers that, if the United States had sufficient evidence that the Government **played a predominant role** in Chinese markets, then the internal prices of suppliers in China could be rejected as a point of reference when determining the existence of the benefit. As we do not know whether this evidence existed, Mexico cannot express an opinion on whether in this case the United States could use this benchmark or whether it was properly determined.

21. Mexico thanks the Panel for this opportunity to express the foregoing comments.

[6] *United States – Countervailing Measures on certain EC Products*.

ANNEX B-19

THIRD PARTY ORAL STATEMENT OF SAUDI ARABIA

(7 July 2009)

Mr. Chairman, members of the Panel,

1. The Kingdom of Saudi Arabia welcomes this opportunity to express our views on some of the key systemic issues raised in this dispute. We affirm all of the positions that were set out in our written Third Party submission, although we need not repeat them today. Instead, we wish to reiterate some of the essential points that the Panel should keep in mind when interpreting the relevant provisions of the SCM Agreement.

I. A PUBLIC BODY IS AN ENTITY THAT IS VESTED WITH GOVERNMENTAL AUTHORITY AND FUNCTIONS LIKE A GOVERNMENTAL ENTITY

2. We begin with the "public body" issue. For the reasons explained in our Third Party submission, the Kingdom considers that for an entity to be considered a "public body", it must:

- be vested with governmental authority, thus allowing the government to control its activities; and

- function as a governmental entity that serves a public policy objective rather than a commercial objective.

3. It follows from this basic proposition that the mere fact of State ownership – even majority ownership – cannot determine whether an enterprise is a public body.

4. In its ordinary meaning, "public body" denotes a **governmental function**, not merely State ownership. The Spanish version of the SCM Agreement, which is equally authentic, is instructive on the ordinary meaning of "public body." The Spanish version uses the term "organismo público" to refer a "public body" in Article 1.1. The Appellate Body has interpreted this term in the context of the Agreement on Agriculture to mean an entity that exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character. The Appellate Body has made clear that there is a very close relationship between the subsidies disciplines of the Agreement on Agriculture and the SCM Agreement.

5. The relevant question is whether there is anything in the context of the SCM Agreement that would argue in favour of a different, broader interpretation to be given to the same terms based on mere State ownership. The answer is demonstrably no.

6. Article 1.1 of the SCM Agreement equates "public body" with "government" when it expressly references both by the use of the term "**government.**" This common reference is consistent with an understanding that both terms (government and public body) share the same essential characteristics of entities that possess or act under governmental authority and perform governmental functions. It is consistent with the conclusion that the drafters considered the terms to be equivalent − the two terms refer to different aspects of governmental authority.

7. The SCM Agreement provides that public bodies can entrust or direct private bodies to provide a financial contribution. That means that public bodies, by definition, are vested with governmental authority. A private body cannot be "entrusted or directed" by any entity that does not have governmental authority itself.

8. There is no support in the SCM Agreement or in the other WTO Agreements for an interpretation of the term "public body" based on mere government ownership. Those who claim otherwise have essentially advanced a single argument to support their position: that this Panel should follow the approach supposedly taken by the Panel in *Korea – Commercial Vessels*. As this is the only Panel ruling on the "public body" issue in the SCM context, it is of critical importance to be clear about what the *Korea – Commercial Vessels* Panel did – and did not – decide.

9. First, the criterion actually applied by the *Korea – Commercial Vessels* Panel was "control", not ownership. The Panel did not find that an entity owned by the government was necessarily a public body. None of the Korean entities were considered by that Panel to be public bodies merely by virtue of governmental ownership.

10. Second, in applying the test of government "control", the *Korea – Commercial Vessels* Panel considered a range of factors, including – but by no means limited to – government ownership. Other equally relevant factors taken into consideration by the Panel included the extent of government involvement in the operational policy of the entities, in their day-to-day operations, and in the direction of their investments. All of this the Panel considered relevant under the test of "control."

11. Third, it is not correct to say that the Panel rejected the relevance of the public policy objective when examining an entity's "public body" nature. The Panel did not accept the argument of Korea that where a specific transaction was commercially reasonable and not motivated by a public policy objective, the providing entity was not a "public body." The Panel correctly noted that the question of whether an entity was a "public body" went to the nature of the entity, and was not determined on a case-by-case basis, or whether the particular financial contribution was commercially reasonable.

12. Indeed, the Panel was right to point out that a public policy objective alone does not suffice. It is the combination of a governmental authority with the governmental function and public policy objective of the entity that determines the entity's nature as a "public body." This is consistent with the two-part test that the Kingdom has offered for the identification of a public body and is in line with the Appellate Body's definition of this term.

13. Mr. Chairman, the determination of whether an entity is a public body is of crucial importance to the first part of the definition of a subsidy - whether a financial contribution has been provided by the government. The next issue of systemic importance that the Kingdom wishes to highlight today concerns the second part of the subsidy definition – the determination of benefit.

II. THE USE OF ALTERNATIVE BENCHMARKS FOR THE DETERMINATION OF BENEFIT IS PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, AND IS SUBJECT TO STRICT DISCIPLINES

14. Article 14(d) of the SCM Agreement is quite clear in establishing that the principal benchmark for calculating a benefit is the domestic market price in the country of provision. The use of an alternative benchmark is permissible only in very exceptional circumstances and only after *actual* distortion of the domestic market is found. Presumptions based on indirect evidence or on theoretical economic deductions are insufficient to meet this requirement. This includes any

presumption of distortion based on the mere fact that the government is a significant supplier or has a major presence in the market in question.

15. If exceptional circumstances necessitating the use of an alternative benchmark have been established, then the cost of production of the goods in the country of provision serves as the most appropriate alternative to domestic market prices. First, the cost of production is a direct result of the "prevailing market conditions… in the country of provision", consistent with the language of Article 14(d). Second, cost of production avoids the inevitable practical pitfalls of an out-of-country benchmark. The cost of production benchmark is not only the most reliable possible alternative, but it has also been supported and endorsed in previous Appellate Body jurisprudence.

III. AN INVESTIGATING AUTHORITY MUST BASE LOAN BENCHMARKS ON THE ACTUAL COMMERCIAL BORROWING EXPERIENCE OF A FIRM

16. With respect to the loan benchmark under Article 14(b), the Kingdom is of the view that a "comparable commercial loan that the firm could actually obtain" should be a loan that is expressed in the same currency, and subject to the same generally-applicable financial regulations of the country providing the government loan. By this explicit standard, constructed out-of-country loan benchmarks that are only theoretically available are not a permissible benchmark under Article 14(b).

IV. IN CASES OF ALLEGED SUBSIDIZED INPUTS, THE INVESTIGATING AUTHORITY MUST CONDUCT A "PASS-THROUGH" ANALYSIS TO DETERMINE IF THE DOWNSTREAM PRODUCER HAS RECEIVED A BENEFIT

17. Finally, we would like to comment briefly on the issue of "pass-through." This issue relates to a basic principle of WTO disciplines with respect to the use of countervailing measures. A countervailing duty may be levied on a product only where an investigating authority determines that a subsidy has been granted, directly or indirectly, on the product subject to the duty.

18. The Kingdom wishes to underline the fundamental rule that in case of "arm's length" sales between unrelated parties, the Agreement does not permit an investigating authority to **presume** that all or part of the benefit has been passed through.

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19. Mr. Chairman, this concludes the Kingdom's intervention at today's meeting. We would be pleased to respond to any questions the Panel or any of the parties may have for us. Thank you.

ANNEX B-20

THIRD PARTY ORAL STATEMENT OF TURKEY

(7 June 2009)

Esteemed Panelists,

Distinguished Representatives of the Parties to the Present Panel Hearing,

1. I am glad to present you with the views of Turkey at this stage of the panel proceedings regarding the complaint launched by People's Republic of China. I will summarize Turkish position on the subject, to the extent possible, by refraining from repetition of details presented in our written submission.

2. Although the dispute covers many issues, I will focus on three major subjects namely "public body determination", use of out-of country benchmark" and "pass through of a benefit" arise from this dispute.

3. Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains two separate terms "government" and "public body". Therefore in order to accept that a subsidy is granted, it is clear that a financial contribution must be provided either by "government" or a "public body".

4. Since the SCM Agreement used two terms, in Turkey's view, the meanings of these terms should be construed differently. However, SCM Agreement does not provide any definition with regard to these two terms. Therefore, what constitutes "government" or "public body" under the article in question needs to be interpreted. This interpretation should be made in accordance with the ordinary meanings taken into account in the context, object and the purpose of the SCM Agreement pursuant to Article 31.1 of the Vienna Convention.

5. China argued that in order to accept an entity as a public body, both an entity should perform governmental functions and the powers to perform these functions should be vested by the state. However China's claim to take governmental character as a prerequisite to determine an entity as a public body narrows the actual meaning of the "public body" and equates it to "government". Such an interpretation would annul the distinction between the two terms and render the "public body" meaningless.

6. In Turkey's views, Paragraph 5(c)(i) of the Annex on Financial Services to the GATS is not the relevant legal basis to interpret the term public body used in the SCM Agreement. Firstly, while the SCM Agreement states "public body", the referred paragraph of the Annex in question provides the definition of "public entity", so it is clear that these two terms are not the same. Secondly, it is clear from the "For the purpose of this Annex…" expression mentioned in the same paragraph that, the "public entity" definition is only for the scope of the Annex in question.

7. On the other hand Turkey also considers ILC Articles as an irrelevant legal basis for interpreting the term "public body" for several reasons. First of all ILC Articles are not among the annexes of the Marrakesh Agreements. In addition, the scope and the application of the ILC Articles

are totally distinct from the SCM Agreement. Furthermore due to the *lex specialis* clause contained in the Article 55 of the ILC Articles, it is not possible to apply the ILC Articles to this dispute.

8. Consequently, Turkey is of the view that "government control" criterion set forth by the Korea-Commercial Vessels Panel is the most proper criteria for determining whether an entity is a public body and Turkey also considers that the ownership is the main indicator of the control of an entity.

9. During its accession to the WTO China acknowledged the fact that it had a centrally-planned economy and undertook some commitments in its Accession Protocol including commitments on the application of trade remedies by other Members.

10. Specifically, in the Article 15(b) of the Accession Protocol, China accepted to be subject to special rules with regard to subsidies. It is clear from this article that, the Members are allowed to use appropriate ways to ensure applicability of the rules against subsidies.

11. Besides, Turkey is of the view that the Accession Protocol is not the only source which allows using external benchmark. Pursuant to Article 14 of the SCM Agreement external benchmarks may be used in some cases.

12. Similarly, the Appellate Body also ruled that, even for market economies the primary benchmarks provided in the Article 14(d) of the SCM Agreement may not work. If the investigating authority determines that private prices in that country are distorted because of the predominant role of the government, it may use another benchmark. Turkey considers that in cases where the prevailing market conditions in a Member do not provide an appropriate base to make a meaningful comparison to determine whether a benefit has been conferred due to the predominance of the government in the economy, the rules of the SCM Agreement will still be applicable.

13. In the Accession Protocol, China has already accepted that the prevailing terms and conditions in China may not always be available as appropriate benchmarks. If the investigating authority uses the private prices as the benchmark while the predominance of the government is a fact, benefit will probably be artificially low or even zero. As a result, the full extent of the subsidy would not be captured and the rights of Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the SCM Agreement" would be injured.

14. In Turkey's view, the SCM Agreement does not require that the recipients of a benefit and a financial contribution should be the same. This approach is also in line with the reasoning stated in *Mexico - Olive Oil* Panel Report. Acceptance of the opposite would lead to the circumvention of the disciplines on subsidization by including a private party to the chain.

15. Turkey wishes to thank the Panel for the opportunity to submit its views during this hearing.

ANNEX C

EXECUTIVE SUMMARIES OF SECOND WRITTEN SUBMISSIONS OF THE PARTIES

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ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

(24 August 2009)

I. INTRODUCTION

1. This submission presents China's rebuttal to the arguments advanced by the United States in its first written submission and at the first meeting of the Panel in defence of the measures under challenge in this proceeding. This submission also incorporates China's comments on the United States' answers to the questions posed by the Panel following the first meeting.

II. COMMERCE'S "PUBLIC BODY" FINDINGS IN THE FOUR CVD INVESTIGATIONS UNDER CHALLENGE CANNOT BE RECONCILED WITH A PROPER APPLICATION OF THE INTERPRETIVE PRINCIPLES OF THE VIENNA CONVENTION TO ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

2. In its first submission, the United States confirmed that Commerce applied a *per se* rule of majority government ownership to determine whether SOEs were public bodies. It now offers the same *per se* rationale to defend Commerce's treatment of SOCBs as public bodies, even though this was not the rationale adopted by Commerce in the underlying investigations.

3. The first issue before the Panel with respect to the interpretation of the term "public body" is whether the United States' *per se* rule can be sustained when the term "public body" is interpreted in accordance with the principles set forth in Articles 31-33 of the Vienna Convention. China submits that this is not a close question, as evidenced by the virtual absence of third-party support for the United States' extreme position. As China has shown, the term "public body" must be interpreted to mean an entity that exercises authority that has been vested in it by the government for the purpose of performing functions of a governmental character.

4. In its first written submission, China set forth a number of definitions of the adjective "public," the common theme of which was that when used with the noun "body," it conveyed the meaning of acting on behalf of a nation or community as a whole, and under the authority of or officially on behalf of the nation or community as a whole. However, the United States argues that because one general definition of public is "the opposite of private," and one definition of "private" is "provided or owned by an individual rather than the State or a public body", that "if an entity is owned by the state … such entity *can be* 'a public body' under the SCM Agreement."

5. From this flawed syllogism, the United States then makes the interpretative leap that because a public body *can be* owned by the government, it "*is* an entity that is owned by the government." Needless to say, the mere fact that the term "public body" *may include* within its scope an entity owned by the government does not support the United States' categorical rule that such entities *necessarily are* public bodies *in all circumstances*.

6. The equally authentic Spanish and French texts of Article 1.1 also refute the ordinary meaning interpretation advanced by the United States and unequivocally support the one proposed by China. In Article 1.1(a)(1) of the SCM Agreement, where the English text uses the term "public body", the French text uses the term "organisme public," and the Spanish text uses the term

"organismo público." The French term "public" and the Spanish term "público" each carries a connotation of "governmental".

7. It is instructive to consider the Appellate Body's interpretation of the term "government agency" in *Canada – Dairy*. In this decision, the terms "organismo público" and "organisme public" are expressly equated with the English term "government agency," which the Appellate Body interpreted to mean "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character". It follows that when the identical terms – "organismo público" and "organisme public" – are used in Article 1.1(a)(1) of the SCM Agreement, they should be given the same meaning. A public body, like a government agency, therefore must be "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental character'".

8. The second issue before the Panel is the United States' persistent rejection of the relevance of the ILC Draft Articles. The United States is unable to explain away what it characterizes as the many "unhelpful" cases endorsing the general proposition that the ILC Draft Articles are an appropriate interpretative tool when interpreting the covered agreements generally, or the Appellate Body's express reliance on them when interpreting Article 1.1(a)(1) of the SCM Agreement in particular. Accordingly, the United States effectively has conceded that the question before the Panel is not *whether* the ILC Draft Articles should inform the Panel's interpretation of the term "public body", but *how* they should do so. On this subject, the United States literally has had nothing to say.

9. In contrast, China has demonstrated that the attribution of financial contributions to Members under Article 1.1 of the SCM Agreement when they are provided by (1) "a government", (2) any "public body within the territory of a Member", or (3) a "private body" that is "entrusted or directed" by government, closely parallels the three categories of attribution set forth in Articles 4, 5, and 8, respectively, of the ILC Draft Articles. The only logical inference is that Article 1.1 of the SCM Agreement was drafted against the normative background formed by the customary international law rules on attribution known to all Members of the WTO. The Appellate Body's reliance on the Commentary to ILC Draft Article 8 when interpreting the meaning of the term "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement is an unambiguous confirmation of this reality.

10. The United States' interpretation of the term "public body" flies in the face of each of these customary rules of international law codified in the ILC Draft Articles. Conversely, these provisions unambiguously support the interpretation of the term "public body" advanced by China on the basis of ordinary meaning, context and object and purpose.

11. China will not dwell on the final issue – Commerce's input subsidy findings in respect of purchases from private trading companies – because Commerce's unlawful conclusion that SOEs are public bodies within the meaning of Article 1.1 of the SCM Agreement renders *all* of its input subsidy determinations unlawful. China will just note two additional bases for concluding that Commerce's findings with respect to purchases from private trading companies were inconsistent with the United States' obligations under the covered agreements. First, in the CWP and LWR investigations, Commerce relied on "facts available" to determine the amount of HRS purchased from the private trading companies that allegedly had been produced by SOEs, even though it did not seek such information from the respondents in the investigations. The United States has essentially conceded that in doing so, Commerce acted inconsistently with Articles 12.1 and 12.7 of the SCM Agreement. Needless to say, subsidy findings predicated on an unlawful resort to facts available cannot stand.

12. Second, Commerce made no findings in the CWP, LWR or OTR investigations that the private trading companies *themselves* had made a financial contribution within the meaning of Article 1.1. As China previously has demonstrated, absent a finding of entrustment or direction, there was no basis for Commerce to conclude that the producers under investigation purchased "government-*provided* goods" when they acquired inputs from the trading companies.

13. For all of these reasons, the Panel should find that the United States' *per se* rule of majority government ownership is inconsistent with the proper interpretation of the term "public body". Without a valid finding that the SOEs and SOCBs were public bodies, Commerce's financial contribution findings in each of the four CVD investigations with respect to the alleged provision of inputs and loans are inconsistent with Article 1.1 of the SCM Agreement.

III. COMMERCE'S DETERMINATIONS OF "BENEFIT" IN THE FOUR CVD INVESTIGATIONS UNDER CHALLENGE VIOLATE THE UNITED STATES' OBLIGATIONS UNDER THE COVERED AGREEMENTS

14. The United States' statements at the first meeting of the Panel and its answers to Panel questions have usefully clarified the issues before the Panel with respect to whether Commerce's benefit determinations in the four CVD investigations under challenge were consistent with the covered agreements.[1]

15. *First*, the United States' defence of Commerce's input and land benefit calculations are predicated on the remarkable assertion that an investigating authority has no legal obligation under Article 14(d) of the SCM Agreement to perform an analysis establishing that private prices are distorted before resorting to out-of-country benchmarks.

16. This is tantamount to a frontal assault on one of the central tenets of the Appellate Body's decision in *US – Softwood Lumber IV*. As the Appellate Body emphasized, the rejection of private prices as potential benchmarks is permissible only "when it has been *established* that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." That determination, in turn, "must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."

17. *Second*, consistent with its flawed legal interpretation of Article 14(d), the United States now concedes that Commerce relied on nothing more than the purported predominance of SOEs as suppliers of inputs – determined *exclusively* by reference to their relative share of Chinese production – to reject Chinese private prices as benchmarks in the CWP, LWR and LWS investigations. Similarly, the United States apparently seeks to defend Commerce's rejection of land-use prices as potential benchmarks in China solely on the grounds that the Government of China is the ultimate owner of all land in China. The United States' position is fundamentally at odds with the Appellate Body's ruling that the mere fact that the government is the predominant supplier of goods for a particular market "*does not, in itself*, establish that all prices for the good are distorted" so as to justify rejection of private prices.

18. *Third*, the United States now concedes that it made no adjustments whatsoever to the Thailand benchmark it used as a proxy for private land prices in China, let alone "all necessary adjustments" the Appellate Body deemed required to ensure that a benchmark based on prices in one country "relates or refers to, or is connected with, prevailing market conditions" in another country. Thus, even if Commerce's decision to reject Chinese land prices and resort to an out-of-country benchmark were consistent with Article 14(d) (and it was not), its failure to make any adjustments whatsoever to the land price it selected in Thailand establishes that its chosen benchmark does not relate to prevailing market conditions in China, as Article 14(d) requires.

[1] China wishes to note that the United States has now confirmed in its answers to the Panel's questions that it seeks to defend Commerce's benefit calculations in these cases exclusively on the basis that they are consistent with Article 14 of the SCM Agreement. In no instance does the United States ask the Panel to assess the conformity of Commerce's determinations with Article 15 of China's Protocol of Accession. For this reason, and for the reasons set forth in China's responses to the Panel's questions, Article 15 of China's protocol has no relevance to this proceeding.

19. *Fourth*, with respect to loans, the United States makes only a perfunctory (and incredible) argument that the interest rate benchmark Commerce derived from its 33-country regression model represented a "comparable commercial loan which the firm could actually obtain on the market," as required by Article 14(b).

20. Fundamentally, Article 14(b) is about comparing interest rates. Consistent with the definition of "benefit", the Appellate Body has said that the purpose of making this comparison is to determine whether the recipient of the government loan is "'better off' than it would otherwise have been" in the absence of the government loan. In this context, a benchmark loan cannot be "comparable" if it is denominated in a different currency than the currency in which the government-provided loan is denominated, because interest rates differ by currency. As a consequence, comparing a loan denominated in one currency to a loan denominated in another currency will necessarily measure *the factors that cause interest rates to be different in different currencies.* This is not a measurement of the extent to which the recipient of the government loan is "better off" as a result of the financial contribution.

21. The United States' real defence of its fictitious benchmark is predicated on its contention that Commerce was free to disregard the actual requirements of Article 14(b) based on its finding that interest rates in China were "distorted" by government "intervention". The United States' effort to assimilate the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV* into the entirely different benefit standard of Article 14(b) is misguided. But even accepting, *arguendo*, the relevance of the Appellate Body's interpretation of Article 14(d) to the interpretation of the benefit standard for loans under Article 14(b), the Appellate Body's decision in *US – Softwood Lumber IV* makes clear that any benchmark chosen by an investigating authority must conform to the relevant standard under Article 14.

22. Further, China notes that the "benefit" that Commerce purported to measure for the alleged "policy lending" subsidy – the difference between interest rates in China and the interest rates that it derived from its multi-country regression model – bears no relationship to the *ex post* "access to credit" rationale that the United States has advanced in these proceedings in support of Commerce's "policy lending" determinations.

23. *Finally*, with respect to China's claim that Commerce was required to take into account those transactions that were above the benchmark price when calculating the alleged "benefit" from rubber inputs purchased by the respondent producers during the POI, the United States does not dispute the facts presented by China in its first written submission. Rather, the U.S. argues that even though these producers in the aggregate paid *more than* the benchmark price for inputs purchased from SOEs, this fact is "irrelevant" when calculating the alleged "benefit" because Article 14(d) provides Commerce with the "leeway" and "latitude" effectively to choose whatever methodology it wishes when determining adequacy of remuneration.

24. In making this argument, the United States ignores the import of the text of Articles 10, 14(d), 19.1, 19.4, and 32.1 of the SCM Agreement, as well as Article VI:3 of the GATT 1994. Article 14(d) itself says that "adequacy of remuneration shall be determined in relation to prevailing market conditions for *the good* … in question". Where there are multiple transactions for the same "good", adequacy of remuneration must be calculated on an aggregated basis over the entire period of investigation, taking into account not just the transactions involving the "good" that are below the benchmark price, but those that are above it as well. This is nothing more than a straightforward application of the plain text of Article 14(d).

25. China's interpretation of Article 14(d) is also the only one compatible with the definition of a subsidy in Article 1.1 of the SCM Agreement. In *Canada – Aircraft*, the Appellate Body observed that a benefit within the meaning of Article 1.1 exists if a government's financial contribution "makes the recipient 'better off' than it would otherwise have been, absent that contribution." A producer is

not "better off" over a period of investigation if it ends up paying, on average, more than the market price for any "good" that it purchases from the government.

26. Where an investigating authority imposes a countervailing duty to offset an alleged "subsidy" calculated using a benefit methodology that produces a purported "benefit" when none exists, as Commerce did in OTR, it necessarily has acted inconsistently with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.4 and 32.1 of the SCM Agreement.

IV. COMMERCE'S SPECIFICITY DETERMINATIONS IN RESPECT OF "POLICY LENDING" AND LAND-USE RIGHTS WERE NOT IN ACCORDANCE WITH THE REQUIREMENTS OF ARTICLE 2 OF THE SCM AGREEMENT

A. POLICY LENDING

27. In its first written submission, China demonstrated that Commerce had failed to clearly substantiate, on the basis of positive evidence, that the alleged "policy lending" subsidy was "explicitly limit[ed]" to "certain enterprises" within the meaning of Article 2.1(a) of the SCM Agreement. Apparently unable to rebut China's arguments, the United States found it necessary to invent an entirely new rationale for Commerce's specificity determination. Notwithstanding the fact that Commerce unmistakably considered the "subsidy" to involve the provision of loans at "preferential, non-commercial" rates of interest, and notwithstanding the fact that Commerce measured the "benefit" of the alleged subsidy on this basis, the United States now contends that interest rates have nothing to do with the alleged "policy lending" programme.

28. Under the new U.S. theory, which China will call the "access to credit" theory, the alleged "policy lending" subsidy involves the "allocation" or "availability" of credit at ordinary commercial interest rates. The United States apparently considers that the "preference" or "non-commerciality" of these "policy loans" arises merely from the fact of obtaining a loan, at *any* interest rate. Surprisingly, though, the *ex post* "access to credit" rationale did nothing to improve the conformity of Commerce's "policy lending" determination with the requirements of Article 2.1(a) of the SCM Agreement.

29. The U.S. has made clear in its answer to Question 61 from the Panel that it intends to stand by its assertion that the 539 "encouraged" industries listed in the *Guiding Catalogue of Industrial Restructuring*, which are organized into 26 broad economic sectors, collectively constitute "certain enterprises" within the meaning of Article 2. China has explained in response to Panel Question 54 why this assertion is wholly untenable and, indeed, not even credible.

30. The U.S. argument on specificity now comes down to the notion that the alleged "access to credit" subsidy is "explicitly limited to certain enterprises" because China's economic planning documents "prohibit" various types of enterprises from receiving the alleged "subsidy". The U.S. reasoning, it seems, is that because the economic planning documents purport to *prohibit* lending to one group of enterprises or industries, it follows that the category of "encouraged" industries must constitute "certain enterprises" within the meaning of Article 2.

31. It is beyond any reasonable dispute that the 539 "encouraged" industries in 26 broad economic sectors represent more than a "discrete segment" of the Chinese economy, and therefore do not constitute "certain enterprises" within the meaning of Article 2. The purported existence of a "prohibited" group of industries does nothing to alter this conclusion. Moreover, the United States has effectively conceded that the alleged "policy lending" subsidy was not specific, because the U.S. now admits that "Commerce did not make any particular findings in the OTR Tires CVD investigation regarding the rates paid by borrowers from SOCBs as compared to the rates paid by borrowers from other banks in China."

32. Article 14(b) of the SCM Agreement provides that "a loan by a government *shall not be considered as conferring a benefit*" unless there is a "difference" between the interest rate that the company pays on a loan from the government and the interest rate that it would pay on a "comparable commercial loan which the firm could actually obtain on the market". Thus, a government loan can only confer a benefit under Article 14(b) to the extent that there is a difference in *interest rates*. It follows, by definition, that "access to credit" at ordinary commercial interest rates is not, by itself, a "subsidy" that can be specific under Article 2.

B. LAND-USE RIGHTS

33. There is little left to say concerning Commerce's determination that the alleged land-use rights subsidy that it identified in the LWS investigation was "regionally specific" under Article 2.2 of the SCM Agreement. The United States has effectively conceded that companies paid the same (or lower) prices for land-use rights whether or not they were located within the New Century Industrial Park, which Commerce considered to be a "designated geographical region". There is no conceivable interpretation of Article 2.2 under which this alleged subsidy could be "limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority".

34. In the underlying investigations, Commerce found that "the *provision of land-use rights* [is] specific because the *provision of land-use rights* in an industrial park within the county's jurisdiction is *limited to* an enterprise or industry or group thereof located within a designated geographical region …", but Article 2.2 requires the investigating authority to determine that *the subsidy* is specific to certain enterprises located within a designated geographical region. If the investigating authority has found only that the *financial contribution* was limited to certain enterprises located within the designated geographical region, it has not found that the subsidy is specific under Article 2.2.

35. The subsidy that Commerce determined to be countervailable in the LWS investigation was the "government provision of land for less than adequate remuneration." While the United States now claims that this subsidy was "unique" and "only available to enterprises investing within the park", it fails to identify a *single aspect* of this alleged subsidy that was "only available" to companies located within the New Century Industrial Park. The subsidy that Commerce identified was the provision of land by the government at a price that Commerce considered to represent less than adequate remuneration. The same government – Huantai County – provided land to enterprises located *outside* of the "designated geographical region" at the same or lower prices. The subsidy that Commerce identified was therefore not "unique" or "only available" to companies located within the New Century Industrial Park, as the United States now claims.

36. For these reasons, the Panel should find that Commerce's determination of specificity in respect of the alleged land-use rights subsidy in the LWS investigation was not in accordance with the requirements of Article 2 of the SCM Agreement.

V. THE UNITED STATES ACTS INCONSISTENTLY WITH THE COVERED AGREEMENTS BY IMPOSING COUNTERVAILING DUTIES WITHOUT ESTABLISHING WHETHER THERE REMAINS A SUBSIDY TO OFFSET FOLLOWING THE USE OF ITS NME METHODOLOGY TO CALCULATE ANTI-DUMPING DUTIES

37. The U.S. position on the issue of double remedies remains as impenetrable and internally contradictory as ever. On the one hand, the United States does not dispute that the methods by which an investigating authority calculates anti-dumping duties can have the effect of offsetting subsidies, both domestic and export. Nor does the United States dispute that, when Commerce has encountered these situations in the past, it has taken all necessary steps to ensure that it does not offset the same subsidies through the imposition of two different duties. The United States does not even contradict Commerce's *own acknowledgement* that the use of an NME methodology to determine normal value

is a circumstance in which the method of calculating anti-dumping duties can have the effect of offsetting subsidies – an outcome that Commerce once proclaimed it was "determined to prevent".

38. In its answers to Panel questions, however, the United States now makes the remarkable claim that Members are under *no legal obligation* to ensure that they do not offset the same domestic subsidies twice. The United States asserts that "WTO rules do not contemplate the existence of, or an adjustment for double remedies in the context of domestic subsidies." This is a breathtaking assertion – that nothing in the covered agreements prevents a Member from offsetting a domestic subsidy through the manner in which it calculates anti-dumping duties, and then offsetting the same domestic subsidy again through the imposition of countervailing duties. The United States appears to suggest that, when Commerce has taken steps to avoid double remedies in the past, it has done so as an act of altruism in the exercise of its benign discretion.

39. The United States maintains that China's argument in respect of double remedies is that a WTO Member "must *choose* between using the AD remedy and using the CVD remedy" if it designates China as a non-market economy. This is a caricature of China's argument that the United States invented in its first written submission as a litigation tactic to avoid addressing the arguments that China actually made. China's contention, which the United States has either misunderstood or mischaracterized, is that the United States acts inconsistently with the covered agreements by imposing anti-dumping duties determined under its NME methodology simultaneously with the imposition of countervailing duties on the same imported products, *without accounting for the fact that it thereby offsets the same subsidies twice.*

40. China has explained why the use of the U.S. NME methodology to determine normal value in an anti-dumping investigation has the effect of offsetting the benefit of any subsidies that the producer in the NME country may have received. Fundamentally, this is because the effect of the U.S. NME methodology is to place the producer in the position of having market-determined costs of production. Having brought the producer's costs of production "to the market", and having calculated a duty on this basis, the United States necessarily offsets any benefit or advantage that the producer obtained by receiving financial contributions from the government on terms more favourable than those available in the market. China considers that this circumstance is broadly similar to the privatization of a subsidized enterprise in an arm's-length transaction for fair market value, or the sale of subsidized inputs to an unrelated downstream producer.

41. The U.S. continues to assert that China "has failed to provide the Panel with any evidence" that the effect of the U.S. NME methodology is to offset the same subsidies that are the subject of countervailing duties. China does not believe that the existence of a double remedy is an "evidentiary question." That said, it is undisputed that China has, in fact, provided the Panel with evidence, in both its first written submission and at the first meeting of the Panel, demonstrating conclusively that "the effect of the U.S. NME methodology is to offset the same subsidies that are the subject of countervailing duties."

A. THE UNITED STATES IS LEGALLY OBLIGATED TO AVOID OFFSETTING THE SAME SUBSIDIES TWICE THROUGH THE APPLICATION OF TWO DIFFERENT DUTIES

42. The United States has an affirmative legal obligation under the covered agreements to ensure that it imposes countervailing duties solely for the purpose of offsetting subsidies that exist in respect of imported products.

43. Article 10 of the SCM Agreement provides that "Members shall take *all necessary steps* to ensure that the imposition of a countervailing duty … is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement." Article VI:3 of the GATT 1994, referenced in Article 10, provides that Members shall not levy a countervailing duty "*in excess* of an

amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export" of the product under investigation. In accordance with these Articles, the Appellate Body has said that "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation." As China noted in response to Question 76 from the Panel, this obligation is further reinforced by Articles 19.3 and 19.4 of the SCM Agreement.

44. As they pertain to the issue of double remedies for domestic subsidies, these provisions establish: (1) that Members may not impose CVDs to offset subsidies that they simultaneously offset through the methods by which they calculate anti-dumping duties; (2) that Members must take "all necessary steps" to ensure that this does not occur; and (3) that investigating authorities must investigate and make a determination as to the "precise amount of a subsidy attributed to the imported products under investigation", taking into account the simultaneous use of an anti-dumping methodology that has the effect of offsetting the same subsidies.

45. By its own admission, Commerce did not take *any* steps, let alone "all necessary steps", to ensure that it imposed countervailing duties for the purpose of offsetting a subsidy that continued to exist in respect of the imported products. We know this because Commerce stated, unequivocally, that it has no authority under U.S. law to examine in the context of a countervailing duty investigation whether the use of an NME methodology in a parallel anti-dumping investigation has the effect of offsetting the same alleged subsidies.

46. Commerce therefore proceeded to impose countervailing duties in all four investigations without any examination of whether the amount of the countervailing duties would be in excess of the amount of the subsidies that accrued to the imported products, taking into account the simultaneous imposition of anti-dumping duties calculated under a methodology that had the effect of offsetting the same subsidies. Commerce did not "ascertain the precise amount of a subsidy attributed to the imported products under investigation", as it took no steps to determine "whether, and in what amount" the use of market-determined costs of production in the parallel anti-dumping investigations had the effect of offsetting the same subsidies that it identified in the countervailing duty investigations.

47. Commerce's failure to investigate and avoid the imposition of double remedies in the determinations at issue was inconsistent with the obligations of the United States under Article 10 of the SCM Agreement, Article VI:3 of the GATT 1994, Article 19.3 of the SCM Agreement, and Article 19.4 of the SCM Agreement. As a consequence, the "specific action against a subsidy" taken by the United States in these investigations was not "in accordance with the provisions of GATT 1994, as interpreted by the [SCM] Agreement", in contravention of Article 32.1 of the SCM Agreement.

48. The foregoing violations are both "as applied" and "as such". As detailed in response to Question 90 from the Panel, China has clearly demonstrated the precise nexus between Commerce's lack of legal authority to avoid the imposition of double remedies in parallel AD/CVD investigations of imports from NME countries (which the United States has effectively admitted in response to Question 78), and how this absence of legal authority is the source of the impairment of benefits that China has claimed in this dispute.

49. By effectively confirming Commerce's lack of legal authority to avoid double remedies in NME investigations, the United States has also confirmed the "as such" violation of Article I:1 of the GATT 1994. As China has demonstrated, Commerce has consistently avoided offsetting domestic subsidies through the application of two different duties, whether or not it had a legal obligation to do so. This is, undoubtedly, an "advantage, favour, privilege or immunity" that the United States has granted to imports from other countries with respect to the "methods of levying" charges imposed "on or in connection with importation", as well as a "rule or formalit[y] in connection with importation".

By refusing to take steps to avoid offsetting the same subsidies twice in connection with imports from countries that Commerce designates as NMEs, and by conditioning the avoidance of a double remedy upon the presentation of "evidence" that it has never required in any other circumstance, the United States has acted inconsistently with Article I:1 of the GATT 1994.

B. EVEN UNDER THE ALTERNATIVE THEORIES ADVANCED BY THE UNITED STATES AS TO WHEN A DOUBLE REMEDY WILL OCCUR, THE MEASURES AT ISSUE ARE INCONSISTENT WITH THE COVERED AGREEMENTS

50. The United States has presented various theories as to why the use of an NME methodology may "not constitute a *complete* remedy" for subsidies, or will "not necessarily capture *the full amount*" of any subsidies. The United States has alternatively argued that the existence of a double remedy depends on (1) whether there is "evidence" that "domestic subsidies pass through, *pro rata*, to U.S. prices"; (2) whether the normal value determined pursuant to the NME methodology is greater than or equal to the producer's actual (subsidized) cost of production plus the amount of any subsidies that the producer is determined to have received; or (3) whether the NME AD margin is greater than the corresponding CVD margin.

51. Theses theories do not detract from the fundamental point that Commerce uses its NME methodology to place the producer in the position of having market-determined costs of production, thereby offsetting the benefit of any subsidies that the producer might have received. Nonetheless, the U.S. theories all point in the direction of several important conclusions: (1) that the United States does not deny the existence of the double remedy problem (as, in fact, Commerce had already acknowledged); (2) that the United States appears to consider the existence of a double remedy to be a question of degree that depends on certain "factual circumstances"; and (3) that Commerce undertook no investigation whatsoever based on the theories that the United States now advances as to when a double remedy could occur.

52. For these reasons, the determinations at issue were inconsistent with the obligations of the United States under the covered agreements, even accepting the various U.S. theories.

VI. ARTICLE 12.1.1 OF THE SCM AGREEMENT ENTITLED CHINA AND RESPONDENT PRODUCERS AT LEAST 30 DAYS TO RESPOND TO ALL QUESTIONNAIRES ISSUED IN THE CVD INVESTIGATIONS

53. The plain language of Article 12.1.1 presents an insurmountable obstacle to the United States' position that Article 12.1.1 of the SCM Agreement only imposed an obligation to provide 30 days to respond to the initial questionnaire Commerce issued in the four CVD investigations, and not to the multiple subsequent ones Commerce issued in each case. Article 12.1.1. does not distinguish between the first questionnaire issued in a countervailing duty investigation, and any subsequent questionnaires.

54. Even under the United States' flawed interpretation, it is difficult to understand how the New Allegations Questionnaires provided by the U.S. in response to Panel Question 104 do not qualify as the "initial" questionnaire in these newly-initiated "investigations." In each instance, Commerce informs the relevant interested party that Commerce is "initiating an investigation" into one or more "new" programmes, and requests the party to submit its responses to the attached "New Allegations Questionnaire" within a certain period, ranging from 7 days to 14 days. Further, in virtually every case, the New Allegations Questionnaires contain, as Appendix 1, a list of "Standard Questions" for respondents to answer about the newly initiated programmes. This is the same Appendix that respondents must fill out with respect to the subsidy programmes initiated at the outset of the investigation.

55. Because the new subsidy allegations questionnaires and the supplemental questionnaires are "questionnaires" under 12.1.1, the United States has failed to comply with its obligation to give respondents a minimum of thirty days to reply to all "questionnaires used in a countervailing duty investigation."

VII. CONCLUSION

56. China respectfully requests that the Panel recommend that the United States bring the challenged measures into conformity with its obligations under the relevant covered agreements.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(24 August 2009)

I. REQUEST FOR PRELIMINARY RULINGS

1. The United States has demonstrated that China's "as such" claims are not within the Panel's terms of reference because China failed to consult on the "measure" at issue, as required by the DSU. The United States has explained how China's reliance on the Appellate Body Report in *US - Continued Zeroing* is misplaced. The United States has observed, moreover, that contrary to China's understanding, nothing in any Appellate Body or panel report, or, more importantly, the DSU, suggests that a Member may forego the prerequisite of consultations if the Member deems the new measure to be "sufficiently related" to the measures identified in the consultations request.

2. The United States has also demonstrated that the "measure" China seeks to challenge "as such" does not constitute an "omission" cognizable for purposes of WTO dispute settlement proceedings because it has not been connected to any affirmative WTO obligation to take a particular action. Furthermore, by avoiding any reference to specific aspects of U.S. law that result in the double remedies giving rise to the alleged WTO-inconsistency at issue, China has failed to "identify the specific measures at issue in this dispute," as required by Article 6.2 of the DSU. Rather than supporting China's argument under Article 6.2, the Appellate Body Report in *EC - Selected Customs Matters* highlights the inadequacy of China's panel request.

II. COMMERCE'S FINANCIAL CONTRIBUTION DETERMINATIONS ARE CONSISTENT WITH THE SCM AGREEMENT

3. An analysis of the ordinary meaning of the term "any public body," in its context and in light of the object and purpose of the SCM Agreement, demonstrates that Commerce's financial contribution determinations were consistent with the SCM Agreement. The U.S. First Written Submission discussed why the term "public" means that a "public body" can be an entity that is owned or controlled by the government. In addition, the use of the term "any" before "public" indicates that there can be different *kinds* of public bodies. Contrary to China's argument, not all public bodies must be vested with governmental authority to entrust or direct a private body.

4. China is incorrect that the SCM Agreement's reference to "a government" or "any public body" collectively as "government" means the two separate terms must possess similar characteristics and should be functional equivalents. To interpret the term "public body" to refer to entities that "possess characteristics similar to those that define a government" would be to reduce the term "public body" to redundancy or inutility.

5. China argues that Article 1.1(a)(1)(iv) of the SCM Agreement requires that an entity responsible for entrusting or directing a private body must itself be vested with government authority. The SCM Agreement, however, defines the term "government" as "government or any public body," so Article 1.1(a)(1)(iv) does not relate strictly to "governmental authority." China also wrongly conflates the standard under Article 1.1(a)(1)(iv) with the question of whether an entity is a "public body." An entrustment or direction analysis involves an analysis of the actions of the government or

public body and the *actions* of the private body or bodies at issue. A public body analysis, on the other hand, involves an analysis of the *nature* of the entity or entities at issue.

6. The term "public body" is properly understood as an entity owned or controlled by the government, but not necessarily authorized by the government to perform government functions. The *Korea – Commercial Vessels* panel adopted this approach, rejecting an argument by Korea that was substantially similar to China's. That panel also rejected the contextual argument China makes here, which is based upon the definition of "public entity" in the GATS Annex on Financial Services. That definition, which applies only for purposes of the Annex on Financial Services, is not relevant to an interpretation of "public body" in the SCM Agreement. An analysis of similar terms in other covered agreements cannot outweigh the ordinary meaning and immediate context of a term in the SCM Agreement.

7. China's arguments related to the Spanish and French versions of the Agreement on Agriculture are unavailing. The issue here is the interpretation of the term "public body," or "organismo publico," or "organisme public" in the SCM Agreement. There is no need to look to the Agreement on Agriculture to determine the meaning of this term, and there is no discrepancy between the English and Spanish versions of the SCM Agreement.

8. An interpretation of Article 1 of the SCM Agreement that treats the government-owned entity as a public body ensures that governments will not be able to hide behind their ownership interests to escape the disciplines of the SCM Agreement. Such a reading of Article 1 is consistent with the object and purpose of the SCM Agreement.

9. The Working Party Report on China's Accession further confirms the correctness of the U.S. interpretation with respect to the entities at issue in this dispute. Paragraph 172 of the Working Party Report reflects that the representative of China did not dispute the understanding of some Members that "when state owned enterprises (including banks) provided a financial contribution, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement." China thus indicated its own recognition that its state owned enterprises and state owned commercial banks are "public bodies."

10. China incorrectly argues that the Draft Articles on Responsibility of States for Internationally Wrongful Acts are relevant rules of international law that should be used to interpret the term "public body," and that the Appellate Body in *US – DRAMS* endorsed the use of the Draft Articles in interpreting Article 1 of the SCM Agreement. In *US – DRAMS*, the issue was whether the Korean government had entrusted or directed private bodies within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. The issue in this dispute is the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. The Appellate Body did not decide in *US – DRAMS* that government-owned entities cannot be "public bodies."

11. The Draft Articles are not relevant rules of international law applicable in the relations between the parties in this dispute, within the meaning of Article 31(3)(c) of the Vienna Convention. The threshold question is whether the Draft Articles, and particularly the attribution guidelines in Chapter II of Part One of those articles, are relevant and applicable. They are *not* relevant and *not* applicable, and the Panel is *not* required to rely upon them. The Draft Articles concern "the secondary rules" of state responsibility, and the "general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom." The Draft Articles say nothing about *whether* a breach occurred.

12. The question of whether goods or loans were provided by the "government or any public body" in China is not one of attribution of wrongful acts to China. That is, it is not a "secondary rule" question of attribution. It relates to the substantive conditions for something to be a subsidy, which, even if it is, is not prohibited as such. China is trying to graft secondary rules of general international

law (limited to wrongful conduct) onto one of several conditions under primary rules of international law that do not even define wrongful conduct.

13. Additionally, Article 55 of the Draft Articles contains a *lex specialis* clause. The SCM Agreement is a "special rule of international law" that supersedes the Draft Articles. Contrary to China's argument, the Draft Articles are not parallel to, or "fully aligned" with, the SCM Agreement and it is not clear that the detailed distinctions in those articles are "applicable in the relations between the parties" as customary international law. The panel in *Korea – Commercial Vessels* declined to read the Draft Articles into an interpretation of the term "public body."

14. With respect to sales through trading companies, Commerce concluded that the public bodies made financial contributions to the trading companies, and these financial contributions conferred benefits to the respondent subject merchandise producers. This was a proper application of the SCM Agreement. No entrustment or direction analysis was required.

III. COMMERCE'S DETERMINATIONS TO RELY UPON OUT OF COUNTRY BENCHMARKS WERE CONSISTENT WITH ARTICLE 14 OF THE SCM AGREEMENT

15. The United States and China appear to agree, although for different reasons, that it will not be necessary for this Panel to make any findings with respect to paragraph 15(b) of China's Accession Protocol. However, the United States notes that China incorrectly argues that Commerce was required to reference paragraph 15(b) of the Accession Protocol in its CVD determinations. The Appellate Body has explained that proceedings before a national authority, such as the CVD investigations at issue in this dispute, may properly focus solely on "the requirements of the national law, regulations and procedures."

16. Contrary to China's mischaracterization of the U.S. position, the United States underscores that the Accession Protocol sets forth *additional* terms and conditions to which China agreed as a condition for its accession to the WTO. Paragraph 15(b) was included in China's Accession Protocol because the "special difficulties" associated with the transitional nature of China's economy may justify the use of out-of-country benchmarks. The text of paragraph 15(b) does not impose on Members any obligation to make any particular factual findings or determinations, and does not impose restrictions on the use of out-of-country benchmarks beyond those contained in Article 14 of the SCM Agreement. Additionally, because the methodologies the United States used to identify and measure a benefit under paragraph 15(b) are the same as those used under Article 14, and are provided for under the laws and regulations the United States has already notified to the SCM Committee, the United States is in full compliance with paragraph 15(c) of China's Accession Protocol.

17. Contrary to China's argument, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber CVD Final* require a separate price distortion analysis before a Member may rely upon an out-of-country benchmark. The Appellate Body's analysis in *US – Softwood Lumber CVD Final* reflects the economic theory commonly referred to as the "Dominant Firm Model." Consistent with this theory, the Appellate Body noted that "[w]hen private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers *will align* their prices with those of the government provided goods, it will not be possible to calculate benefit having regard exclusively to such prices." The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.

18. In the investigations China challenges, Commerce applied the Appellate Body's reasoning in *US – Softwood Lumber CVD Final* to the facts before it. Commerce determined, based on record

evidence, in the case of the markets for hot-rolled steel and BOPP, that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's distortions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market determined prices to measure the adequacy of remuneration." Likewise, for loans and land-use rights, based on the evidence on the administrative record, Commerce determined that, due to the government's predominant role, it was necessary to use out-of-country benchmarks to measure the benefit.

19. In addition to the market distortion inherent in the fact that the government was the predominant supplier in the markets, Commerce also found evidence of direct government intervention in the lending and land-use rights markets that would further impact prices, rendering those prices inappropriate for determining the amount of the benefit. China incorrectly argues that the Appellate Body found in *US – Softwood Lumber CVD Final* that "the possibility of rejecting private prices was deemed to exist only when the 'government's role in providing the financial contribution' was predominant." The Appellate Body did not address and, consequently, did not exclude the possibility that other types of government intervention would also distort the market and render prices unreliable.

20. Available evidence showed that China owned *96 per cent* of the producers in the hot-rolled steel market and at least *90 per cent* of the producers in the BOPP market. Thus, private suppliers consisted of only a small portion of the sales in those markets. Despite complaining that Commerce applied a *per se* rule, China does not explain what other factors Commerce should have addressed in determining whether the government had a predominant role and which relevant record evidence was not assessed. Also, during the investigation, China declined numerous requests to provide additional information. Thus, Commerce determined that China had a predominant role in the hot-rolled steel and BOPP markets and, therefore, used out-of country benchmarks to measure the benefit conferred by government-provided inputs. Commerce reached its determination by assessing all record evidence, not simply government ownership of domestic production.

21. In the CWP, OTR Tires, and LWS CVD investigations, Commerce relied upon record evidence that indicated that not only did China have a predominant role as an owner of the majority of the banks in China, it also directly controlled interest rates through its regulation of the market. Commerce did not "sit in judgment upon [China's] monetary policies. . . ." Commerce's concern with China's direct control over interest rates was that it created distortion in the lending market. Commerce properly evaluated the extent to which China's invasive control over interest rates distorted the lending market, such that it was inappropriate to rely upon any in-country interest rates as benchmarks.

22. For RMB-denominated loans, the regression analysis Commerce used is based upon actual interest rates available to borrowers in China. A regression analysis is essentially an average of interest rates that takes more factors into account than a simple average, and Article 14(b) of the SCM Agreement does not state a preference for the use of one interest rate rather than an average of interest rates. Commerce calculated comparison interest rates that were tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market." For dollar-denominated loans, Commerce used a yearly average LIBOR rate rather than a daily LIBOR rate to measure the benefit. Article 14(b) of the SCM Agreement contains no preference for a daily rate over a yearly average.

23. In the OTR Tires and LWS CVD investigations, Commerce found that China "exercises control over the supply side of the land market in China as a whole so as to distort prices in the primary and secondary markets." Commerce found China not only owns all of the land, but retains and exercises significant control over the supply of land-use rights for private industrial use, and can therefore influence price. China essentially argues that Members should never be able to resort to an

out-of-country benchmark when determining the benefit for land-use rights. China's position is incompatible with the Appellate Body's findings in *US – Softwood Lumber CVD Final*.

24. Because prices for land-use rights within China were inappropriate for use as benchmarks, Commerce compared the prices respondents paid for land-use rights to the sales of certain industrial land in Thailand. In arriving at this determination, Commerce evaluated several criteria to ensure that the comparison prices would "relate or refer to or be connected with" China's prevailing market conditions, consistent with Article 14(d) of the SCM Agreement.

IV. CHINA HAS FAILED TO DEMONSTRATE THAT COMMERCE WAS REQUIRED TO PROVIDE A CREDIT IN THE BENEFIT CALCULATIONS FOR INSTANCES IN WHICH CHINA PROVIDED RUBBER INPUTS FOR ADEQUATE REMUNERATION IN THE OTR TIRES CVD INVESTIGATION

25. China has shifted away from its contextual argument based on the term "product" in various provisions of the SCM Agreement and the GATT 1994 *other than* Article 14 of the SCM Agreement, and now posits a new and different "textual" basis for its invented credit/offset obligation, suggesting that the use of the term "good" in Article 14(d) of the SCM Agreement establishes the obligation and limits its application to situations under Article 14(d). This is a complete shift in China's position. Moreover, contrary to China's argument, the mere use of the "singular term ‘good'" in Article 14(d) cannot establish an obligation to aggregate the benefits of all transactions during the entire period of investigation involving the provision of a good and provide credit in such an aggregate benefit calculation for transactions in which the good was sold for more than the established benchmark, and also limit this obligation to the unique situation of government-provided goods or services. China's argument is simply not credible.

26. The correct, and far more plausible, reading of the text of Article 14(d) of the SCM Agreement is that term "good" is in the singular, and associated with the terms "in question," because, while a government may provide a variety of goods and services, to determine the adequacy of remuneration for a particular good provided by the government, Members must look at the "prevailing terms and conditions" for *that* good, and not some other good. Furthermore, the prevailing terms and conditions would be expected to vary over time; in many cases, they would be unique to each given transaction. In such cases, each transaction would have to be analyzed independently to determine whether any benefit is conferred as a result of that transaction, and consequently if a subsidy exists.

27. The context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. The SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction by transaction basis. However, the ability of a Member to investigate more than one subsidy in a single proceeding is not disputed. When analyzing multiple subsidies, though, there is no obligation to provide a credit in that analysis when an investigating authority determines that a granting authority did not provide a subsidy.

28. While China's Answers to First Panel Questions appear to abandon the concept of "product as a whole" in favor of an entirely new textual argument based on the term "good" in Article 14(d) of the SCM Agreement, China nevertheless continues to emphasize the flawed analogy it attempts to make to the Appellate Body's reports on zeroing. As the United States has explained, however, the Appellate Body's zeroing reports examine the calculation of margins of dumping under the AD Agreement and certain provisions of the GATT 1994 that relate solely to AD proceedings. There are no provisions in the SCM Agreement, nor in the CVD provisions of the GATT 1994, that are analogous to the provisions relied upon by the Appellate Body in its zeroing reports, and there is certainly no analogous text in Article 14(d), which China now argues is the source of the obligation it proposes.

29. Additionally, there is simply no analytical connection between the calculation of margins of dumping and the calculation of a subsidy benefit that would justify extending the Appellate Body's reasoning in the zeroing reports to this dispute. In the CVD context, benefit and the existence of a subsidy can be calculated at the level of an individual transaction. An individual transaction, which itself is a financial contribution by the government, can confer a benefit and a subsidy would therefore be determined to exist as a result of that transaction. In addition, aggregation in the CVD context occurs *after* the benefit has been measured and the existence of a subsidy or subsidies has been determined.

30. China has not explained how the United States acted inconsistently with any of the provisions to which China makes reference. A string citation is not a substitute for a legal argument. China has failed to establish that the United States acted inconsistently with any of provision of any covered agreement.

31. Furthermore, with respect to Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because the SCM Agreement defines "levy" as "the definitive or final legal assessment or collection of a duty or tax," and the United States does not levy duties in a CVD investigation, there is simply no basis for China to claim a violation of these provisions based on the challenged CVD investigations. While China cites to the Appellate Body and panel reports in *US – Countervailing Measures* in support of its argument, neither the Appellate Body nor the panel in that dispute addressed the textual argument the United States has raised in this dispute. To be clear, the United States is not arguing that the obligations found in these provisions are inapplicable to the United States. Rather, the United States is explaining that these obligations are only applicable *when the United States actually levies duties*. Here, China's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are premature and must be rejected.

V. COMMERCE'S SPECIFICITY DETERMINATIONS IN THE OTR TIRES AND LWS CVD INVESTIGATIONS WERE CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

32. Commerce's specificity determinations for the policy lending subsidy and land-use rights subsidy were clearly substantiated by positive evidence and otherwise in accordance with the covered agreements. China argues that Commerce was required to determine that the benefits of these subsidy programmes, rather than the subsidy programmes themselves, were specific. China's reading of Article 2 of the SCM Agreement is not supported by the text or structure of the SCM Agreement, and must be rejected by this Panel. Neither Article 2.1(a) nor Article 2.2 requires an investigating authority to revisit the benefit determination to determine specificity. Prior WTO panels have recognized the separate and independent nature of a specificity determination. This is reflected in the structure of Article 1 of the SCM Agreement, which identifies three criteria for a countervailable subsidy: financial contribution, benefit, and specificity.

33. With respect to the OTR Tires CVD investigation, China complains that the legislation on which Commerce relied for its specificity determination does not "define[] the elements of the subsidy." But this is not required by the SCM Agreement. Instead, Article 2.1(a) of the SCM Agreement requires an investigating authority to determine only whether legislation explicitly limits access to the subsidy to certain enterprises. Here, national, provincial, and municipal legislation and policy documents, viewed as a whole, explicitly limited access to the policy lending subsidy to a group of industries including the tire industry.

34. Contrary to China's argument, the United States has not offered the Panel an ex post rationalization for Commerce's specificity determination for the policy lending subsidy. The U.S. rationale in this dispute and in the OTR Tires CVD Final Determination is that Chinese policies "call upon the banks to make credit available to tire companies, and the policies instruct agencies to direct or allocate that credit to the tire producers."

35. Additionally, China argues that the legislation on which Commerce relied for specificity listed such a broad range of industries as encouraged that policy lending must have been generally available and not specific. However, the policy documents on which Commerce relied were very specific, naming, for example, an investigated producer and its tire production facilities as a priority. Furthermore, lending was expressly prohibited to particular categories of industries. Thus, the policy lending subsidy was specific and not generally available. China's references to U.S. statements in the Large Civil Aircraft dispute ("the Boeing Dispute") and *US – Upland Cotton* are merely a distraction. China mischaracterizes the U.S. statements in those disputes and the U.S. position here.

36. With respect to the LWS CVD investigation, China argues that Article 2.2 of the SCM Agreement requires that a regional subsidy be limited to a subset of enterprises or industries within a designated geographical region. China's interpretation would require that, in order for a subsidy to be specific under Article 2.2, it would also have to be specific under Article 2.1 – limited to certain enterprises. China's interpretation renders Article 2.2 redundant with Article 2.1. This is contrary to customary international law rules of treaty interpretation.

37. China cites to the 1990 Dunkel draft of the SCM Agreement in support of its argument. However, recourse to such supplementary means is permissible only in limited circumstances. In this case, interpretation of Article 2.2 of the SCM Agreement in its context and in light of the object and purpose of the agreement does not lead to a manifestly absurd or unreasonable result or leave the meaning of Article 2.2 ambiguous or obscure. Consequently, there is no need to have recourse to the material that China has proffered. In any event, however, a much more reasonable explanation for the change in the text identified by China supports the U.S. understanding of regional specificity. That is, a subsidy that goes to every enterprise or industry in a region is regionally specific, but Article 2.2 does not require that all enterprises in the region receive the subsidy to find the subsidy regionally specific.

38. China argues that the land-use rights subsidy in the LWS CVD investigation was not regionally specific because enterprises both inside and outside the Park paid the same price for land-use rights. China conflates the benefit and specificity analyses. The text of Article 2 makes no reference to a subsidy benefit and the structure of Article 1 demonstrates that a specificity determination is separate and independent from a benefit determination. In addition, China's theory that a benefit must also be specific to find a subsidy regionally specific must be rejected because it would allow a granting authority to circumvent the disciplines of Article 2.2 simply by ensuring that at least one enterprise outside the region receives a similar benefit.

VI. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH THE SCM AGREEMENT OR THE GATT 1994 BY CONCURRENTLY APPLYING CVD AND AD MEASURES TO CERTAIN PRODUCTS FROM CHINA

39. The real locus of China's challenge is the concurrent application of AD and CVD measures. China's attempts to suggest that concurrent application would still be permissible where the investigating authority takes "steps" to ensure that the same subsidies are not offset twice are unavailing. Under China's own theory, the "steps" that an investigating authority would have to take would necessarily result in being required to *choose* between imposing AD duties on the basis of an NME methodology and imposing CVDs.

40. China's theory as to the existence of a so-called double remedy is premised on its view of the "overlapping rationales" of an NME methodology and the imposition of CVDs. China argues that a double remedy is created because the NME normal value "necessarily captures any trade-distorting effects of alleged subsidies." This theory contains multiple flaws.

41. Incorrect Rationales for NME Methodology and CVDs: China incorrectly asserts that subsidization is among the market distortions that the NME methodology is "meant to counteract."

The use of an NME methodology, however, is meant to replace unreliable costs and prices in the NME with surrogate values from a market economy, in order to calculate normal value to assess whether price discrimination exists. Commerce determines whether a country should be considered an NME based on a number of statutory criteria, none of which concerns subsidization. China relies on a statement by the U.S. Congress in support of its view that Commerce generally does not use factor values that may be subsidized. However, rather than ensuring that subsidized factor values are not used, Commerce considers subsidization only in a limited set of circumstances, as evidenced by the determinations in the investigations at issue.

42. China also asserts that the purpose of imposing CVDs is to offset any "competitive advantage" a firm may receive by virtue of a subsidy, or to correct any economic "distortions" that result from that subsidy, and in so doing, also erroneously suggests that the level of CVDs imposed is connected to and somehow reflective of the degree of "competitive advantage" or "distortions." The SCM Agreement, however, does not require any demonstration by an investigating authority, when considering the level at which CVDs may be imposed, that subsidies confer a "competitive advantage" upon their recipients or create economic "distortion." Article VI:3 of the GATT 1994 and Article 19.2 of the SCM Agreement make plain that CVDs may be imposed to offset the full amount of subsidies.

43. Normal Value is Not a "Remedy": China's theory obscures the basic point that the remedies at issue are AD duties and CVDs, while China's argument addresses NME normal values. Normal values, of course, are not in and of themselves AD duties. China's exclusive focus on normal value explains why China errs in emphasizing the similarity between some of the factor values selected by Commerce in determining normal value in the AD investigations, and the benchmarks that Commerce used to value subsidies in the concurrent CVD investigations. According to China, this demonstrates that the resulting AD duties and CVDs address the same economic "distortion," and, therefore, that the AD duties remedy subsidies. China, however, fails to actually compare the two *remedies* at issue, basing its conclusion instead on the antecedent determination of normal value.

44. Faulty Economic Logic: Even assuming, *arguendo*, that normal values, by themselves, could create a double remedy, China's theory about NME normal values is unsound because it is based on the assumption that NME normal values are completely unaffected by subsidies. This is simply not true. First, put simply, NME subsidies may easily affect the *quantity* of factors consumed by the NME producer, which, when multiplied by the surrogate factor *values*, results in lower normal values and, hence, lower dumping margins. Second, in determining normal value in NME cases, Commerce may use factor values based on the prices of inputs imported into China from market economy countries, which inputs may well be priced lower as the result of competing with subsidized products *in China*. Finally, in at least some cases where increased NME exports of the product account for a large enough share of the world market to lower world prices, these lower prices would reduce profits for producers selling in these markets, which would then reduce profit rates Commerce derives from their financial statements to add to normal value.

45. GATT Article VI:5 prohibits such concurrent application only in the circumstance where imposing both remedies would "compensate for the same situation of dumping or export subsidization." No other provisions of the covered agreements preclude the concurrent application of AD and CVD measures under any other circumstances. That other rules did not so preclude the concurrent application is confirmed by the adoption and ultimate elimination of Article 15 of the Tokyo Round Subsidies Code, which imposed upon Signatories the obligation to choose between AD investigations and CVD investigations when examining allegations of injury caused by imports from an NME country. Members did not include this requirement when they adopted the SCM Agreement, which contains no provision similar to Article 15 on concurrent application of AD and CVD measures. Nor did Members include in China's Protocol any limitation on a Member's right to concurrently apply CVDs and AD duties calculated on the basis of an NME methodology. Therefore,

the covered agreements do not contain the prohibition on concurrent application that China seeks to have this Panel effectively create.

46. Articles 19.3 and 19.4 of the SCM Agreement: China's claims under Articles 19.3 and 19.4 must be based on a CVD that has been "levied." However, no CVDs have been "levied" yet under the U.S. retrospective system. Furthermore, China erroneously asserts that the *AD duty* calculated under the NME methodology must be understood to somehow constitute a CVD within the meaning of the SCM Agreement. Moreover, because China considers such an AD duty to also be a CVD, a Member must first make the requisite findings of a CVD investigation. Accepting China's theory would mean that imposition of such an AD duty, without conducting a CVD investigation, would necessarily violate the SCM Agreement.

47. GATT Article I:1: The United States has explained that China's MFN complaint centers on the application of the NME methodology, and that because such application is expressly authorized by paragraph 15(a) of China's Protocol, it does not contravene Article I:1. With respect to China's "as applied" claims under Article I:1, the United States has noted China's failure to identify how the United States did not accord to products from China the same "advantage" accorded "like products" from market economies. The sole basis for China's conclusion that Commerce has accorded certain treatment to "like products" is mere speculation.

48. "As Such" Claims: China has failed to meet its burden as a threshold matter of establishing the existence of the "absence of legal authority" that it seeks to challenge "as such." None of the sources cited by China supports the conclusion China would need to establish, namely, that *no legal authority* exists for Commerce to take whatever (undefined) actions China considers necessary to "avoid a double remedy." Furthermore, because China does not challenge a "measure" that mandates any WTO-inconsistent action, but challenges how Commerce chooses to exercise its discretion, the so-called "absence of legal authority" is not inconsistent with U.S. obligations under the WTO Agreement.

VII. PROCEDURAL CLAIMS UNDER THE SCM AGREEMENT

49. In its written responses to the Panel's questions about its claim under Article 13.1 of the SCM Agreement, China states that, in the light of the U.S. confirmation that it would continue to afford a reasonable opportunity for consultations throughout an investigation, as required by Article 13.2, China "does not believe the Panel needs to address this issue further." The United States agrees that it is unnecessary for the Panel to make any findings on this claim.

50. With respect to China's claim under Article 12.1.1 of the SCM Agreement, the United States has explained that the thirty-day requirement in that provision applies only to the questionnaire issued at the outset of each investigation. China disputes this view, arguing that initial questionnaires and new subsidy allegation questionnaires are "indistinguishable."

51. China's argument ignores the conceptual difference between the initial questionnaire and subsequent requests for information, including new subsidy allegation questionnaires. The initial questionnaire, by its very nature, asks not only about specific programmes, but also general questions on a variety of other relevant issues. A new subsidy allegation questionnaire tends to include questions only on a specific programme and does not include general questions that have already been asked in the initial questionnaire. This critical difference, overlooked by China, is reflected in the full range of questionnaires issued to *all* interested parties, including respondent companies, in *all four* CVD investigations at issue.

52. The United States disagrees with China's assertion that reading Article 12.1.1 to apply only to initial questionnaires would provide investigating authorities "unfettered discretion" and would place interested Members and parties "entirely at the mercy of the demands of investigating authorities."

This hyperbolic concern ignores the other provisions of the SCM Agreement, in particular, the other sub-paragraphs of Article 12, which collectively ensure that interested Members and parties are given rights in proceedings before investigating authorities.

ANNEX D

ORAL STATEMENTS OF THE PARTIES, FIRST AND SECOND PANEL MEETINGS

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ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA – FIRST MEETING

(20 July 2009)

Introduction

1. In its first written submission, the United States vacillates between two extremes. For the most part, it chooses to repeat the rationales set forth in Commerce's final determinations without amplification. Alternatively, in a number of critical areas, the U.S. abandons entirely the rationales Commerce adopted in its final determinations, offering up wholly new ones in their place. For example, while Commerce clearly did *not* apply a per-se rule of majority ownership in finding that state-owned commercial banks are "public bodies", the United States now claims that it did. And while the predicate of Commerce's "policy lending" subsidy was the provision of loans at preferential, non-commercial interest rates, the U.S. now disavows that characterization entirely, and claims that the real "subsidy" was the "allocation" of credit at ordinary commercial interest rates. These abrupt shifts in the U.S. position reflect the basic lack of coherence in Commerce's determinations, and the inability of the United States to defend these determinations based on their stated rationales.

2. It is well-established that a panel's "critical and searching" examination of an investigating authority's conclusions must "be based on the information contained in the record and the explanations given by the authority in its published report", not on *ex post* rationalizations. In light of the large number of *ex post* rationalizations contained in the U.S. submission, we will have to be vigilant in holding the United States to the rationales that Commerce actually set forth in its published determinations.

3. I will now turn to the four key issues that I would like to address in this opening statement. These are: (1) the interpretation of the term "public body"; (2) Commerce's benefit calculations and the use of non-Chinese benchmarks; (3) Commerce's specificity determinations in respect of "policy lending" and land; and (4) the issue of double remedies.

Financial Contribution / Public Body

4. I would first like to turn to the proper interpretation of the term "public body" in Article 1.1 of the SCM Agreement. As the panel is aware, the overwhelming majority of the financial contributions that Commerce found in the CVD investigations at issue were provided by State Owned Enterprises (SOEs) and State Owned Commercial Banks (SOCBs). In every instance, Commerce found that SOEs were public bodies, applying what the United States concedes is a *per se* rule of majority government ownership. It now offers the same *per se* rationale to defend Commerce's treatment of SOCBs as public bodies, even though Commerce offered a different justification in the determinations at issue.

5. The United States' exclusive focus on government ownership finds no support in the text or context of Article 1.1. Article 1.1 explicitly defines "government" and "public body" *collectively* under the single heading of "government". The only reasonable inference to draw from this is that the drafters considered that a public body must possess characteristics similar to those that define a government. In *Canada Dairy*, the Appellate Body explained that the "essence of government" flows

from the *functions* it performs and the *authority* it possesses to perform them. This led it to conclude that a "government agency" is an "entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character".

6. I would like to emphasize that the term for "government agency" in the Spanish text of the Agreement on Agriculture – "organismo público" – is *identical* to the term used for "public body" in Article 1.1 of the SCM Agreement. The French versions of the two Agreements likewise use essentially identical language for the phrases "government or any public body" and "governments or their agencies". In light of the obligation of the treaty interpreter "to seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language", the English terms "public body" and "government agency" should be treated as functional equivalents, just as the comparable terms in the Spanish and French texts are. The interpretation of the term "public body" that China advocates is consistent with all three authentic texts of the SCM Agreement; the U.S. interpretation is directly in conflict.

7. As China has shown, the ILC Articles on State Responsibility are relevant rules of international law that have frequently have been relied upon by panels and the Appellate Body when interpreting the covered agreements. They make clear that mere government ownership is legally insufficient to attribute the conduct of a state-owned entity to a State. Remarkably, the United States asks the panel to disregard this internationally accepted principle, stating that the Appellate Body in *US – DRAMS* only cited the ILC Articles when addressing Article 1 of the SCM Agreement for the "unremarkable proposition that the conduct of private parties is presumptively not attributable to the State", a proposition that the United States "does not dispute".

8. As the language from the Appellate Body determination makes clear, the "unremarkable proposition" the Appellate Body endorsed, and that the United States now "does not dispute", is that the "private bodies" whose conduct presumptively is not attributable to the State include "*corporate entities ... owned by and in that sense subject to the control of the State*". What the United States apparently fails to appreciate is that SOEs are precisely the type of state-owned corporate entities whose conduct the Appellate Body recognized is presumptively not attributable to the State "*unless they are exercising elements of governmental authority*". Commerce's *per se* rule is irreconcilably in conflict with the international law rule the United States now concedes it "does not dispute".

Benefit / Article 14

9. China notes that the United States' entire defence of Commerce's resort to out-of-country benchmarks relies on its assertion that "the Appellate Body has found that Article 14 of the SCM Agreement affords Members a great deal of flexibility in the calculation of benefit". This is a gross mischaracterization of the relevant Appellate Body decisions.

10. The chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the recipient ... *shall be consistent* with the following guidelines". The Appellate Body has said that use of "the term 'shall' in the last sentence of the chapeau" together with the term "guidelines" establish "*mandatory parameters* within which the benefit *must be calculated*". The mandatory parameters for determining whether the provision of goods has conferred a benefit are set forth in Article 14(d). It provides that "the adequacy of remuneration *shall be determined* in relation to *prevailing market conditions* for the good … in question *in the country of provision* … (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".

11. All parties agree that the Appellate Body's decision in *US – Softwood Lumber IV* is the touchstone for evaluating compliance with this provision. However, the Appellate Body *did not* provide the unqualified endorsement of out-of-country benchmarks that the U.S. repeatedly attributes

to it in its first submission. To the contrary, the Appellate Body said that the "possibility" of resorting to a benchmark other than private prices is "very limited".

12. According to the Appellate Body, resorting to an out-of-country benchmark is permissible only "when it has been *established* that those private prices have been distorted by the predominant role of the government in the market as a provider of the same or similar goods". That determination cannot be presumed, and "must be made on a case-by-case basis, according to the underlying facts of each countervailing duty investigation". The fact that the government is the predominant supplier of goods for a particular market "*does not, in itself*, establish that all prices for the good are distorted" so as to justify rejection of private prices.

13. In each of the CWP, LWR, and LWS investigations, Commerce rejected private prices on the grounds that they were distorted merely by virtue of the extent of state-ownership in the relevant markets. By employing a *per se* rule of distortion based on nothing more than the extent of SOE involvement in the input markets, Commerce did precisely what the Appellate Body said it could not do, under any circumstance: it presumed distortion.

14. Turning next to land, Commerce again found that prices were distorted based largely on the mere fact that the government was a significant supplier in the market. But Commerce went further, and cited a number of factors wholly unrelated to the government's role as a provider of the financial contribution at issue, that, in its view, justified resort to an external benchmark because "property rights remain poorly defined and weakly enforced" in China. With respect, Commerce's subjective characterization of the legal status of property rights in China is no basis for rejecting Chinese land prices as a benchmark under Article 14(d).

15. The practical problems the Appellate Body identified in *Softwood Lumber IV* are so severe in the context of land-use rights as to preclude resort to an external benchmark in any circumstance. But whether the Panel agrees or disagrees with this point, there can be no dispute that the Thailand benchmark Commerce chose in this case does not begin to meet the standards the Appellate Body established in *Softwood Lumber IV*.

16. Commerce's use of out-of-country benchmarks for loans raises equally alarming implications for the proper operation of Article 14. Under Article 14(b), the benchmark for determining whether a government-provided loan confers a benefit is a "comparable commercial loan which the firm could actually obtain on the market". Yet Commerce's benchmark for loans was an "interest rate" it derived from a 33-country regression model. It barely needs mention that no borrower in China could "actually obtain" a loan at this fictitious interest rate. But China's principal objection to Commerce's application of Article 14(b) is the *premise* that led Commerce to undertake its search for an interest rate outside of China. Namely, that because of the purported predominant role of the Chinese government in the banking sector, there are no "fully market-determined" interest rates in China.

17. Commerce's rationale is based on the false premise that interest rates ordinarily are determined in the absence of significant government intervention, but they are not. Not in China, not in the United States, nor anywhere else in the world. As explained by an expert on monetary economics, "[g]overnment intervention in the credit market to affect the level of interest rates is … observed in almost all economies, being the central tool of monetary control by central banks around the world".

Specificity

18. In OTR, Commerce found that "policy lending" – which it defined as the provision of loans by SOCBs on a "preferential, non-commercial basis" – was *de jure* specific to producers in the tyre industry. Under Article 2.1(a), a subsidy is *de jure* specific if "the granting authority, or the

legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises …". The United States previously has recognized that a finding of *de jure* specificity must be based on "the actual words of the law" pursuant to which the subsidy is provided. China agrees.

19. In this case, the "legislation" that Commerce relied upon for its finding of *de jure* specificity was a series of national and provincial economic planning documents. The question under Article 2.1(a) is whether the "actual words" of these measures "explicitly limit access" to "preferential, non-commercial" loans by SOCBs to companies in the tyre industry, or at least to a "group of enterprises or industries" that includes the tyre industry.

20. However, the United States now *concedes* that producers in the tyre industry did *not* obtain loans from SOCBs at "preferential, non-commercial" rates of interest. The United States instead appears to contend that the mere fact that an industry is *mentioned* somewhere in an economic planning document gives it access to credit that it could not otherwise obtain, and that this alone is a "subsidy", even when the borrower pays the same interest rate as other borrowers. Even more remarkably, the United States now alleges that the hundreds of different industries referred to in the planning documents *collectively* constitute "certain enterprises" within the meaning of Article 2.1(a), and that the alleged subsidy (whatever it might be) is "explicitly limited" to these industries.

21. The United States has argued in DS353, the Boeing subsidies dispute, that programs available to "diverse industry sectors that cover a significant portion of the ... economy" are not *de jure* specific under Article 2.1(a). In light of this argument, it is hard to see how the United States can maintain in the present dispute that the "diverse industry sectors" referred to in China's economic planning documents, which likewise cover "a significant portion" of the Chinese economy, can collectively constitute "certain enterprises". Moreover, the *ex post* rationale advanced by the United States in support of a finding of *de jure* specificity no longer bears any relationship to the subsidy benefit that Commerce purported to measure, which was clearly premised on the notion that borrowers in the tyre industry received loans from SOCBs at preferential, non-commercial rates of interest.

22. Turning to land, I'll make two brief points about Commerce's finding in LWS that the alleged provision of land-use rights for less than adequate remuneration was "regionally specific" to the New Century Industrial Park in Huantai County, Shandong Province.

23. First, the United States maintains that, under Article 2.2, Commerce was not actually required to find that the alleged *subsidy* was limited to the "designated geographical region". Rather, it was sufficient for Commerce to find only that the *financial contribution* was limited to the designated geographical region. The United States blatantly disregards the text of Article 2.2, which clearly requires *the subsidy* to be limited to certain enterprises located within the designated geographical region. It is not adequate under Article 2.2 to find that something *other* than a "subsidy", as defined in Article 1, is limited to certain enterprises located within a designated geographical region.

24. Secondly, the United States does not dispute that companies paid the same amounts for land-use rights in Huantai County whether they were located inside or outside of the industrial park. However, the U.S. still seeks to defend Commerce's finding that the alleged subsidy was "limited to certain enterprises" *within* the industrial park. It would stand the notion of regional specificity on its head to conclude that a subsidy is regionally specific even though it is provided to enterprises located *outside* of the "designated geographical region".

Double Remedies

25. Contrary to what the United States claims in its first submission, China does not contend that the United States must "choose" between the use of countervailing duties and the use of an NME

methodology. Rather, China's contention is that *when* Commerce chooses to apply the two remedies simultaneously, it must do so in a manner that takes into account the fact that it offsets the same alleged subsidies through the manner in which it calculates anti-dumping duties.

26. Once this mischaracterization of China's argument is corrected, the United States has remarkably little to say on what China considers to be the fundamental issues in dispute. These issues are: (1) Whether the double remedy problem *exists*; (2) If so, what are the circumstances in which a double remedy would *arise*; (3) Whether the United States has a *legal obligation* under the covered agreements to avoid the imposition of double remedies in these circumstances; and (4) Whether Commerce has *authority* under U.S. law to avoid the imposition of a double remedy where one arises.

27. As to the existence of double remedies, there can be little room for disagreement. Commerce has explicitly acknowledged that "a possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from NME countries, and it proclaimed that it was "determined to prevent any double remedies from arising". Moreover, the double remedy problem has been the subject of extensive consideration by the U.S. Congress, the U.S. Government Accountability Office, and by Commerce itself.

28. With respect to the circumstances in which a double remedy would arise, the United States does not appear to dispute that subsidies are among the distortions that the use of an NME methodology is meant to address. The essence of the U.S. response is that the use of an NME methodology may "not constitute a *complete* remedy" for the subsidies, and that it will "not necessarily capture the *full amount*" of any subsidies. If it is solely a matter of *degree*, as the United States now seems to suggest, then it should explain what steps Commerce takes to determine the *extent* of the double remedy, and why it did not take these steps in the investigations at issue, where the problem of double remedies unquestionably arose.

29. This leads to the third question, namely, whether it is consistent with the covered agreements to offset the same subsidies through the application of two different duties. Article VI:3 of the GATT 1994 says, countervailing duties are "levied for the purpose of offsetting … any subsidy bestowed … upon the manufacture, production or export of … merchandise". In light of this purpose, it is hard to see what legal justification there could be for offsetting the same alleged subsidy twice. However, the United States does not take a position on whether it would have a legal obligation to prevent the imposition of a double remedy were one to occur in the case of NME imports.

30. The final question is whether Commerce has authority under U.S. law to avoid the imposition of a double remedy where one arises. Commerce has proclaimed that it lacks legal authority to address the problem of double remedies, and it is reasonable to infer that it is this absence of legal authority that explains Commerce's failure to avoid the imposition of double remedies in the investigations at issue in this dispute. But it is up to the United States to explain to the Panel whether Commerce possesses authority to avoid double remedies in NME investigations, what the nature of this authority is, and why Commerce did not apply this authority in the investigations at issue.

ANNEX D-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES – FIRST MEETING

(7 July 2009)

1. Instead of addressing all of the issues raised by China in its First Written Submission, we will focus this morning on China's arguments relating to Commerce's subsidy determinations and conclude with China's challenge to a Member's right to make full use of both the anti-dumping and countervailing duty remedies available under WTO rules.

2. At the outset, it is important to have a clear understanding of exactly what China is asking the Panel to do in this dispute. Unhappy with the rules it accepted when it acceded to the WTO in 2001, China now advances interpretations of those rules that have little connection with how those rules are properly understood in light of the customary rules of interpretation of public international law. The only solution for China's complaint, if it wants to avoid anti-dumping and countervailing duties, is to cease the dumping and subsidization that gave rise to the duties in the first place.

3. **Financial Contribution:** Commerce based its "public body" determinations in the challenged CVD investigations on a proper interpretation of the SCM Agreement. Instead of properly applying the rules of interpretation reflected in the Vienna Convention to interpret the term "public body", China seeks to graft onto the SCM Agreement certain provisions of the ILC Draft Articles, which are not covered agreements, not context, nor otherwise relevant to the interpretation of the term "public body". China ignores commitments it made in the Working Party Report on its accession to the WTO that confirm that Chinese state-owned enterprises, including banks, are public bodies. The Panel should reject China's effort to avoid the ordinary meaning of the term "public body", import provisions of the ILC Draft Articles into the SCM Agreement, and evade commitments it made as part of its accession to the WTO.

4. The Panel should find that the ordinary meaning of the term "public body", read in its context and in light of the object and purpose of the SCM Agreement, indicates that a public body is an entity that is owned or otherwise controlled by the government, but not necessarily one that is authorized to exercise, or is in fact exercising, government functions. There is no need to look to the Spanish version of the Agriculture Agreement to determine the meaning of the term "public body" in the SCM Agreement.

5. The adopted panel report in the *Korea – Commercial Vessels* dispute supports the U.S. interpretation and weighs against China's interpretation. The panel there concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)". Majority government ownership can demonstrate control.

6. No entrustment or direction analysis, which is relevant only when an investigating authority seeks to determine if a financial contribution has been provided by a private body, was required, including for transactions involving trading companies.

7. **Benchmark**: With respect to benchmarks, Commerce determined that interest rates for loans and domestic prices in China were distorted because of the predominate role of the Chinese government in these markets, rendering these interest rates and domestic prices unsuitable as

benchmarks. China nonetheless argues that only in-county benchmarks may be used. If this position were accepted, Members would never be able to measure the benefit of these financial contributions because, as the Appellate Body has previously explained, the government price for the loan or land would be compared to itself.[1] Such an outcome would be inconsistent with the flexible nature of Article 14 of the SCM Agreement, which China ignores.

8. China also ignores paragraph 15(b) of its Accession Protocol and paragraph 150 of the Working Party Report which confirm the permissibility of using out-of-country benchmarks to measure any benefit in CVD investigations concerning imports from China. Paragraph 15(b) expressly recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks". China argues that the United States may not make reference to its Accession Protocol and Working Party Report in this dispute, claiming that doing so constitutes an *ex post* rationalization. This contention is utterly without support.

9. In determining to use external benchmarks, Commerce did not apply a "*per se* rule" that only considered the degree of state ownership of the industries. Where the facts demonstrated that Chinese prices and interest rates were distorted by the government's predominant role in a market and unsuitable as commercial benchmarks, Commerce used market-derived prices from outside China. Commerce relied on benchmarks for inputs and land-use rights that reasonably reflected "prevailing market conditions" in China, and benchmarks for loans tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market". China's assertion that Commerce did not "make any effort whatsoever to ensure that these benchmarks related to prevailing market conditions in China" is simply without foundation.

10. **Providing Credits in Benefit Calculations:** Commerce was not required to provide a credit in the subsidy benefit calculation for those instances in which China provided rubber to tire producers for adequate remuneration, that is, when China did not provide a subsidy. China does not suggest that its invented obligation to provide a credit can be located in Article 14, but instead argues that the use of the term "product" in other provisions of the SCM Agreement and the GATT 1994 requires a credit. Accepting China's argument would mean that the mere use of the term "product" in these other provisions overrides the "latitude" and "leeway" that panels and the Appellate Body have found in the guidelines set forth in Article 14 of the SCM Agreement, and would elevate context above the text.

11. China's argument cannot be reconciled with the definition of a subsidy in Article 1 of the SCM Agreement. Any time a government provides a financial contribution and a benefit is thereby conferred, a subsidy is "deemed to exist". Instances of "non-subsidies" cannot eliminate or diminish the benefits conferred when a government provides a financial contribution that confers a benefit.

12. The calculation of a subsidy benefit under Article 14 of the SCM Agreement is in no way related to "zeroing", and the invocation of the term "zeroing" in this dispute is merely a distraction. The Appellate Body's findings in the "zeroing" disputes are of no assistance to this Panel, as they concern a different type of calculation under a different agreement. There is no analytical connection between the calculation of a subsidy benefit and the calculation of margins of dumping that would justify extending the Appellate Body's reasoning.

13. If China's interpretation were accepted, it would necessarily apply to all of Article 14 and would require that credit be provided whenever an investigating authority found that a financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even different types of subsidies. China's interpretation would result in a benefit calculation that is artificially low, or even zero, preventing the United States from

[1] *US – Softwood Lumber CVD Final (AB)*, para. 93.

fully offsetting the effect of subsidies found to exist. It therefore fails to read Article 14 in light of the object and purpose of the SCM Agreement.

14. **Benefit Where Inputs Purchased from Trading Companies:** With respect to China's argument that, where production inputs were purchased from trading companies, Commerce was required to measure the benefit conferred upon trading companies in addition to the benefit conferred upon respondent producers, China has not identified any provision of the SCM Agreement or the GATT 1994 with which Commerce's benefit determinations are purportedly inconsistent. It was not necessary to measure any benefit that may have been received by the trading companies. The amount or portion of any benefit received by the trading companies is irrelevant for the purpose of determining the benefit conferred upon the subject merchandise producers.

15. **Specificity:** Contrary to China's claims, Commerce's specificity determinations were consistent with the SCM Agreement. China misreads the agreement. With respect to the specificity of policy lending, China asks the Panel to apply an approach not set forth in Article 2.1(a) of the SCM Agreement. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether: (i) the granting authority explicitly limits access to a subsidy to "certain enterprises"; or (ii) the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to "certain enterprises". Nothing in Article 2.1(a) requires Members to identify legislation that defines the "elements of a subsidy". The elements of a subsidy are the financial contribution and benefit, which are analyzed separately from specificity.

16. Central, provincial, and municipal policy documents clearly substantiate that the various levels of government in China guided lending to a *group* of industries, which included the OTR tire industry. Article 2.1 of the SCM Agreement defines "certain enterprises" to include a group of industries.

17. China's challenge of Commerce's land-use rights specificity determination relies on a misreading of Article 2.2 of the SCM Agreement. Pursuant to Article 2.2, a subsidy is specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. China argues that if a subsidy is available to *all* enterprises within a designated geographical region, it is not specific pursuant to Article 2.2 of the SCM Agreement. China's interpretation would render Article 2.2 redundant, contrary to the rules of treaty interpretation. China's interpretation of Article 2.2 is also contrary to Articles 8.1(b) and 8.2(b) of the SCM Agreement. China's argument cannot be accepted.

18. Commerce properly determined in the *LWS* CVD investigation that New Century Industry Park fits the ordinary meaning of a designated geographical region. As demonstrated in the record, the land-use rights subsidy at issue was used as an incentive to relocate producers to the industrial park and was tied to the level of investment within the park. Therefore, the subsidy is unique and only available to enterprises investing within the industrial park. The fact that Huantai County may have granted other types of land-use rights to other leaseholders outside of the industrial park is irrelevant. Article 2.2 does not require an investigating authority to determine that a benefit was unavailable to all enterprises outside of the designated geographical region before finding a subsidy geographically specific. China's interpretation could lead to circumvention of the subsidy disciplines, which is both illogical and inconsistent with the object and purpose of the SCM Agreement.

19. **Concurrent Application of CVD and AD Measures:** We turn now to China's claim that a Member is not permitted to avail itself of both anti-dumping and countervailing duty remedies in respect of imports from China when the anti-dumping duty is calculated on the basis of a non-market economy methodology.

20. In its Oral Statement, China said that it "does not contend that the United States must 'choose' between the use of countervailing duties and the use of an NME methodology", only that when applying both, "it must do so in a manner that takes into account the fact that it offsets the same alleged subsidies through the manner in which it calculates antidumping duties".[2] This is simply a distinction without a difference. The logic of China's theory, under which the so-called double remedy inheres in the concurrent application of NME anti-dumping duties and countervailing duties, necessarily suggests that the United States must *choose* between the use of countervailing duties and the use of an NME methodology.

21. That Members have long recognized the right to apply anti-dumping duties and countervailing duties concurrently to imports that are both dumped and subsidized is reflected in GATT Article VI:5, which provides the only limitation on that right, solely in the context of export subsidies. This right is confirmed by the fact that the Tokyo Round Subsidies Code required an express provision in order to impose a choice upon Code signatories between the anti-dumping and countervailing duty remedy in respect of imports from non-market economies. When drafting the SCM Agreement, however, Members chose not to maintain this limitation.

22. China's Accession Protocol was negotiated against this backdrop of the well-established right to apply both anti-dumping and countervailing duties concurrently. The Protocol affirms Members' right to apply NME anti-dumping duties to imports from China, and their right to apply countervailing duties to imports from China. Nowhere in the Protocol is there any limitation on the resort to either of these remedies.

23. Without textual support for its view that Members do not have this right, China resorts to quasi-economic theories, unsubstantiated by any facts, arguing that an NME anti-dumping margin captures domestic subsidies in their entirety, rendering any application of a countervailing duty a so-called "double remedy". Whatever the merits of China's quasi-economic theories – with which we have strong disagreements, as explained in the U.S. First Written Submission[3] – the text of the covered agreements, which is the only legally binding evidence of Members' intent, does not reflect those theories.

24. Even a cursory examination of China's three narrow claims reveals that China has failed to establish any violation. China's claims under Articles 19.3 and 19.4 of the SCM Agreement – provisions that limit the amount of *countervailing duties* that may be imposed – are premised on the most fundamental of errors, namely, that a portion of the NME anti-dumping duty should be understood to be a "countervailing duty" under the SCM Agreement. An NME anti-dumping duty, however, is not imposed "for the purpose of offsetting any subsidy".[4] In addition, the alleged discrimination underlying China's MFN claim stems from the fact that imports from China, unlike those form market economies, are subject to an NME methodology. This differential treatment, however, is necessitated by the nature of China's economy itself, as recognized in the explicit authority given under China's Protocol to employ such a methodology.

25. We continue to wonder exactly what China proposes that a Member do when faced with dumped and subsidized imports from China. Is a Member expected to forego the countervailing duty remedy, specifically provided for in China's Protocol, in favour of the exclusive application of an *anti-dumping duty* calculated under the non-market economy methodology? Or is a Member expected

[2] Opening Statement of China, para. 75.
[3] U.S. First Submission, paras. 445-462.
[4] Footnote 36 of the SCM Agreement.

to forego the non-market economy methodology, also specifically provided for in China's Protocol, in favour of the exclusive application of a *countervailing duty*? These questions go to the heart of what rights, under China's argument, Members retain in respect of their trade remedy disciplines.

ANNEX D-3

ORAL STATEMENT OF THE UNITED STATES REGARDING THE U.S. PRELIMINARY RULING REQUEST – FIRST MEETING

(7 July 2009)

1. We begin this morning with an examination of China's "as such" challenge. The purpose of the WTO dispute settlement system, in the words of the DSU, is "to secure a positive solution to a dispute". To this end, the DSU contemplates a series of events that generally must occur for a dispute to be properly brought to a WTO panel. This includes a Member (i) ascertaining what measure taken by another Member is impairing its benefits under the WTO agreements[1]; (ii) consulting on that measure with the responding Member, with a view to reaching an agreed solution; and (iii) absent such a solution, then requesting a panel to examine the complaint on that measure.

2. Rather than follow the proper path leading to the establishment of a panel, China has decided that it can chart its own course by neglecting the general requirement to consult on a measure before it can become the subject of a panel request and presenting for the first time in its panel request an "as such" challenge that identifies something that is not even a "measure" for purposes of WTO dispute settlement.

A. ALLEGED "FAILURE ... TO PROVIDE LEGAL AUTHORITY" IS NOT A "MEASURE"

3. The DSU recognizes the importance of the "prompt settlement of situations" in which a Member considers that its benefits under the covered agreements "are being impaired by *measures taken* by another Member".[2] China submits that the "failure of the United States to provide legal authority" is a "measure" for purposes of WTO dispute settlement by virtue of being an "omission".[3] China characterizes the "omission" in this dispute as "[t]he failure of a Member to enact legislation that would permit its investigating authority to avoid acting inconsistently with the covered agreements".[4]

4. Not every "failure ... to enact legislation", however, is subject to challenge as an "omission". Unlike a measure "taken" by a Member[5], an "omission" or "failure" presents a special case for purposes of WTO dispute settlement. An "omission" in its ordinary meaning would not be a "measure taken". Rather, an omission can only be considered a "measure taken" if there is an affirmative obligation on a Member to take the action that the Member is accused of not having taken. In order for an "omission" to be a "measure" subject to WTO dispute settlement proceedings, a complaining party must connect such "omission" to the relevant legal obligation that requires the particular action that the responding party is alleged to have failed to take.

5. In this light, China has not established that the "failure ... to provide legal authority" is an "omission" that constitutes a "measure". At no point in its consultations request, panel request, or

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[1] *See, e.g.,* DSU Article 3.3.

[2] Article 3.3 of the DSU. (Emphasis added)

[3] See Panel Request, WT/DS379/2, p. 3; China's Response to Request for Preliminary Rulings, para. 20.

[4] China's Response to Request for Preliminary Rulings, para. 20.

[5] *See e.g.,* DSU Article 3.3 and 4.2.

even its First Written Submission, has China pointed to any WTO rule requiring the enactment of legislation to provide Commerce with particular authority. Indeed, it cannot do so because no such rule exists. None of the provisions cited by China as the legal basis of its claims provide support for the existence of the separate and distinct obligation that the United States was required to enact particular legislation. In the absence of such provisions, the assertion that the United States did not enact that legislation, even if true, does not constitute an "omission" subject to challenge in WTO dispute settlement proceedings.

B. LACK OF CONSULTATIONS ON THE ALLEGED "FAILURE ... TO PROVIDE LEGAL AUTHORITY"

6. In the U.S. First Written Submission, the United States noted that China had identified the alleged "failure ... to provide legal authority" as an entirely new measure in its panel request, notwithstanding its failure to do so in its consultations request. China does not dispute this fact. Rather, China seeks to excuse its actions on the ground that the new "measure" in the panel request "relate[s] to essentially the same dispute", seeking to find support in the Appellate Body report in *US – Continued Zeroing*.[6]

7. Unfortunately for China, that Appellate Body report does not take China where it would like to go. The Appellate Body noted several specific features of the additional measures in the *US – Continued Zeroing* dispute that led it to conclude that the additional measures did not expand the scope of the dispute. First, the Appellate Body relied on the fact that the periodic reviews and sunset reviews added by the EC in its panel request in that dispute concerned the same antidumping duties at issue in the proceedings identified in the consultations request. The Appellate Body further relied on the fact that the proceedings listed in the panel request were "successive stages subsequent to the issuance of the same anti-dumping duty orders" as the proceedings listed in the consultations request.[7] Furthermore, the Appellate Body stated that all of the measures in *US – Continued Zeroing* "derive from the same underlying legal basis", namely the anti-dumping duty order established following the respective original investigation.[8]

8. In contrast, the measures listed in the consultations request and the new "measure" alleged by China are distinct and have fundamentally different legal bases. The first is a group of affirmative determinations by the Department of Commerce, an agency of the executive branch, in furtherance of its delegated regulatory authority. The second, however, is styled as an "omission", that is, an alleged failure of the Congress to exercise its legislative function to enact a statute. The latter is clearly not a "successive stage" of the former.

9. Moreover, the measures in *US – Continued Zeroing* all involved "as applied" challenges based on the same legal claims. China suggests that the fact that it is introducing an "as such" challenge for the first time in its panel request is "not relevant".[9] This ignores the plain effect of such a challenge on a dispute that, until that moment, was based purely on "as applied" claims. As the United States observed in its First Written Submission, the Appellate Body has clearly recognized the effect of "as such" challenges, noting that "the implications of such challenges are *obviously more far-*

[6] China's Response to Request for Preliminary Rulings, para. 30 (quoting Appellate Body Report, *US – Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing*"), WT/DS350/AB/R, adopted 19 February 2009, para. 235).

[7] *US – Continued Zeroing*, para. 228.

[8] *US – Continued Zeroing*, para. 231.

[9] China's Response to Request for Preliminary Rulings, para. 36.

reaching than 'as applied' claims".[10] Given these "far-reaching" implications – which, in all likelihood, are precisely what motivated China to add its "as such" challenge in the panel request in the first place – China's attempts to downplay this sudden addition lack credibility.

10. Finally, and perhaps most significantly, China in this dispute completely ignores the importance of consultations. As discussed in the U.S. First Written Submission[11], consultations serve a critical role not only in providing the responding party with notice of the scope of the dispute, but also in allowing for the exchange of views on areas of disagreement or misunderstanding with a view to resolving the dispute, which is, after all, the objective of the dispute settlement system.

11. China has alleged that the "failure ... to provide legal authority" was "evident on the face of the determinations" it identified in the consultations request.[12] We disagree. As is evident from a closer reading of these determinations, Commerce did not make any broad pronouncement as to whether it had legal authority to adjust anti-dumping duties to avoid any so-called double remedy. Indeed, it is precisely because the Government of China and Chinese respondents made absolutely no attempt to offer any evidence of how a double remedy might occur in any of the investigations at issue that the Department has not yet been presented with a situation in which it must determine whether such legal authority exists.

12. In any event, if China finds this "failure ... to provide legal authority" to be "evident on the face of the determinations", it follows that the alleged existence of this "measure" was as evident to China at the time it read those determinations as China claims it should be to the Panel today. In other words, China appears to acknowledge that it was well aware of such a "failure ... to provide legal authority", and any consequent impairment of benefits, long before it requested consultations in this dispute. China neglected to include this "measure" in its consultations request but appears to have realized at some point that it wanted to include the "measure" within the scope of this dispute.

13. Under these circumstances, rather than simply add the new measure to its *panel* request, the correct response would have been for China to have filed a new or supplemental *consultations* request. Filing a new or supplemental consultations request is something with which China has first-hand knowledge. The United States has previously filed supplemental consultations requests in disputes with China.[13] In refusing to do so, notwithstanding these very concerns raised by the United States during two DSB meetings[14], China appears to have concluded that it would not devote

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[10] U.S. First Submission, para. 85 (quoting Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – OCTG from Argentina*"), WT/DS268/AB/R, adopted 17 December 2004, para. 172). (Emphasis added)

[11] U.S. First Submission, paras. 82-83.

[12] China's Response to Request for Preliminary Rulings, footnote 28.

[13] See *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1/Add.1; *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1/Add.1.

[14] WT/DSB/M/261, p. 11 (minutes of 22 December 2008 DSB meeting); WT/DSB/M/263, p. 15 (minutes of 20 January 2009 DSB meeting).

time to consulting on the measure to seek a solution, but rather preferred to skip the consultations phase. China, however, is not free to choose the course it deems most convenient – the DSU *requires* Members to consult first before proceeding to a panel.

ANNEX D-4

CLOSING STATEMENT OF THE UNITED STATES – FIRST MEETING

(8 July 2009)

1. The United States has only a few brief closing comments. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted by joining the WTO. China seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement. At the same time, China seeks to avoid its own obligations to engage in consultations prior to initiating panel proceedings, and to have its exports subjected to the rules-based trade remedy disciplines of the AD and SCM Agreements.

2. In short, having agreed to join the WTO and submit itself to the rules and obligations of the covered agreements, subject to the terms and conditions of its Accession Protocol, China now asks this Panel to change the rules and obligations, and void the terms and conditions.

3. This Panel's charge, however, is to make an objective assessment of the matter before it and to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. At the beginning and at the end of the panel's analysis is the text of the covered agreements. The question before the Panel is: Is there an obligation in the text that requires what China contends the United States is obligated to do? For each claim China has made, the answer is no. China has failed to establish that the United States has acted inconsistently with any provision of any covered agreement. In numerous cases, as we have explained, China has failed on the most basic level to even identify the provisions of the covered agreements that it alleges the United States has violated. In other cases, when it has cited to various provisions, China has not explained how the United States has contravened them.

4. Indeed, rather than engage the Panel on the most relevant issues of substance with respect to each of its claims, China has presented nothing but distractions in an attempt to mask its failure to establish any WTO violations. A few examples from the past two days will suffice to make this point:

- Measure not consulted upon: In response to the direct question posed yesterday by Ms. Brown, China talked about everything *other than* why it refused to include in the consultations request its "as such" challenge, despite knowing full well when it requested consultations that this was an issue about which it had concerns. Nothing in the DSU authorizes such disregard for the prerequisites to initiating a dispute.

- *Ex post* rationalization: China has asserted several times that the United States is introducing *ex post* rationales in its arguments in this dispute. That is not the case. The United States stands by the findings and determinations made by Commerce, all of which were based on record evidence. Our discussion of those findings and determinations in relation to the text of the WTO agreements may involve different terminology but that does not change the underlying rationales on which the determinations were based. Additionally, China has introduced arguments based on WTO rules that were not raised during the administrative proceedings below, and the United States must now respond to these arguments for the first time.

- Subsidy Offsets: China exerts tremendous energy arguing about "zeroing", which we all know to be a concept related to the calculation of a *dumping* margin, and citing to Appellate Body decisions under the *Anti-Dumping Agreement*. China's claim in this dispute, of course, is about *countervailing duty* investigations under the *SCM Agreement*.

- Concurrent application of AD and CVD measures: China insists on seeking a definitive statement of Commerce's domestic legal authority, which we have already explained is not possible. This is simply a transparent attempt to shift the focus away from China's failure to substantiate its grand quasi-economic theories with any facts, either before Commerce or this Panel. We would imagine that if Commerce had made a downward adjustment to export price based solely on *theories* put forward by the U.S. industry, China would be here complaining of such an improper adjustment.

5. These and the other attempts by China to distract the Panel away from the real issues in this dispute naturally reflect the fact that, when the focus is properly placed on those real issues, the shortcomings of China's claims become readily apparent. The text of the covered agreements, from which China flees, is determinative of the issues in this dispute, and damning to China's case.

6. But, the United States recognizes that the Panel is only at the beginning of its work. We hope that our First Written Submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavour to provide responses that bring clarity and understanding to the myriad complex issues in this dispute. Ultimately, we seek to aid the Panel in arriving at the correct conclusions, based on proper interpretations of the covered agreements. We are confident that, if we are successful in that effort, the Panel will find in our favour and dismiss China's claims.

7. Once again, the United States thanks the Panel members for their time and attention to this matter.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA – SECOND MEETING

(23 November 2009)

Introduction

1. There are many different issues before the Panel at this stage of the proceedings. I will not review all of those issues here, but instead make a number of key points with respect to financial contribution, benefit, specificity, and the issue of double remedies.

Financial Contribution / Public Body

2. I do not intend to recount this morning all of the reasons why the United States' *per se* rule of majority government ownership cannot be reconciled with a proper interpretation of the term "public body" in Article 1.1 of the SCM Agreement. Instead, I would like to focus on one aspect of the "ordinary meaning" analysis, then turn to the relevance of the ILC Draft Articles and the Appellate Body's reliance on them in *US – DRAMS*. Finally, I will conclude with some observations concerning the systemic implications of the U.S. interpretation.

3. With respect to ordinary meaning, the United States myopically focuses on the English term "public body", without confronting the meaning of the French term "organisme public" and the Spanish term "organismo público". Yet all three of these terms are presumed to have the same meaning under Article 33(3) of the Vienna Convention. The official *OECD Economics Glossary* equates "organisme public" with the English term "government agency". The Spanish term "organismo público" is expressly equated to the English term "government agency" in the Agreement on Agriculture. Indeed, paragraph 97 of the Appellate Body's decision in *Canada – Dairy* establishes unequivocally that the Spanish and French terms at issue in Article 1.1 of the SCM Agreement have the same meaning as the English term "government agency".

4. A straightforward application of Article 33 requires the Panel to interpret the English terms "public body" and "government agency" as functional equivalents, just as they are treated in the French and Spanish languages. A government agency, as the Appellate Body has said, is *not* defined by its ownership structure, but rather by the *functions* it performs and the *authority* it possesses to perform them. Under Article 33, the same must therefore be true of a public body.

5. The U.S. Second Submission fares no better when trying to convince the Panel that "neither the [ILC] Draft Articles Nor the Appellate Body's Footnote Reference to Them in *US – DRAMS* Is Relevant to this Dispute". The U.S. has argued that the cases cited by China that refer to the Draft Articles are distinguishable on the grounds that they did not involve the interpretation of the term "public body". China, of course, cited these cases not for their interpretative guidance on the meaning of the term "public body", but for the *general proposition* that prior panels and the Appellate Body have considered the Draft Articles "relevant rules of international law" when interpreting the covered agreements. The United States' unwillingness to challenge that basic proposition means that it is now common ground that the Draft Articles may be relevant to the interpretation of the covered agreements, depending on the circumstances.

6. The question, then, is whether those circumstances include the interpretation of Article 1.1 of the SCM Agreement. We know that the Appellate Body certainly thought so when it cited to the Draft Articles in *US – DRAMS*, twice no less, in the section of its report entitled "The Meaning of the Terms 'Entrusts' and 'Directs'" under "Article 1.1(a)(1)(iv) of the SCM Agreement". If it was lawful for the Appellate Body to consider the Draft Articles relevant to the interpretation of one phrase within Article 1.1(a)(1) – and the United States is not prepared to claim otherwise – there is no obstacle to this Panel considering the Draft Articles relevant to the interpretation of another phrase *within the very same provision* of the SCM Agreement.

7. I'd like to turn now to some of the systemic implications of the United States' *per se* test. Recall that, under subparagraph (iv) of Article 1.1, "government ownership *in and of itself*, is not sufficient to establish entrustment or direction". Yet under the United States' interpretation of "public body", mere majority government ownership, by itself, *would be* sufficient to find the actions of government-owned entities to be financial contributions *in all cases*. There simply is no textual or contextual basis for the anomalous results that the U.S. interpretation would produce – that the same *per se* government ownership test could be legally impermissible under one provision of Article 1.1, but determinative under another. If the U.S. position is accepted, subparagraph (iv) henceforth will become a dead letter for entities with majority government ownership – a category of entities to which subparagraph (iv) was previously considered applicable by both panels and WTO Members alike.

Benefit / Article 14

8. The United States applies the same cavalier interpretative approach to the standards set forth in the SCM Agreement in its effort to justify Commerce's benefit determinations with respect to inputs, land, and loans under Article 14. The United States' defence of Commerce's adequate remuneration determinations is predicated on a direct challenge to the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV*.

9. First, the U.S. asserts that "there is no obligation in Article 14 of the SCM Agreement for Members to perform a 'price distortion' analysis before resorting to an out-of-country benchmark" because price distortion exists, *per se*, whenever "the Department finds that the government provides the majority or a substantial portion of the market for a good or service". But this *per se* test was squarely rejected in *US – Softwood Lumber IV*. There, the Appellate Body stated "the fact that the government is a significant supplier of goods *does not, in itself,* establish that all prices for the goods are distorted" so as to justify rejection of private prices.

10. Second, with respect to land-use rights, Commerce not only relied upon its unlawful *per se* rule in rejecting private prices in China, but also its conclusion that "property rights remain poorly defined and weakly enforced" in China as a basis for doing so. The Appellate Body in *US – Softwood Lumber IV* emphasized that the term "prevailing market conditions in the country of provision" does not "refer to a 'pure' market" or "a market 'undistorted by government intervention'". The Appellate Body identified a *single situation* where private prices might be rejected: when the "government's role in *providing the financial contribution* is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods".

11. The United States asks you to jettison this reasoning as well, and allow investigating authorities to decide for themselves, unbound by any objective standards, that private prices are "unsuitable" because prevailing market conditions do not comport with their own subjective characterization of how any given market should operate. This is precisely the kind of second-guessing of the "purity" of market conditions in the country of provision that the Appellate Body expressly concluded was inconsistent with Article 14(d).

12. Third, the United States has conceded that Commerce did not make *a single adjustment* to the purported land "price" in Thailand that it used as a benchmark for measuring the adequacy of remuneration for land-use rights in China despite the fact that in *US – Softwood Lumber IV*, the Appellate Body made clear that investigating authorities had an obligation "to ensure" that "*all necessary adjustments are made to prices in one country* in order to develop a benchmark that relates or refers to, or is connected with, prevailing market conditions in another country".

13. With respect to loans, there is little more that China need say about the fictitious interest rate benchmark that Commerce derived from its multi-country regression model. The benefit standard under Article 14(b) requires investigating authorities to measure the difference between the interest rate on a government-provided loan, and the interest rate on a "comparable commercial loan which the firm could actually obtain on the market". The benchmark that Commerce concocted in these cases does not meet these criteria, and the United States' strained efforts to claim otherwise border on the frivolous.

14. Ironically, while ignoring the Appellate Body's reasoning in *Softwood Lumber IV* in the very instance where it applies – Article 14(d) – the United States simultaneously seeks to graft it onto Article 14(b), where it has no application whatsoever. As China has demonstrated, the predicate that the Appellate Body identified for rejecting private prices for goods as "distorted" simply does not apply in the case of interest rates.

15. At bottom, the United States finds it too inconvenient to comply with the requirements of Article 14 as written, and would prefer that the Panel do it the favour of sweeping these requirements away. The Panel should reject this attempt to rewrite Article 14.

Specificity

16. The parties' respective positions on the issue of specificity are now clearly defined. In China's view, it comes down to this: either the words of Article 2 matter, or they don't.

17. Article 2 requires the investigating authority to determine that a "subsidy" is specific. The term "subsidy" is defined in Article 1 as a financial contribution that confers a benefit. The United States, however, believes that it is sufficient for an investigating authority to find that a *financial contribution* is specific, without considering whether the subsidy is specific. The U.S. position is based entirely on its belief that it would be "cumbersome" for investigating authorities to have to determine that a "subsidy" is specific, and that this would make it "more difficult to … impose countervailing duties". Needless to say, there is no basis in the Vienna Convention for this results-oriented approach to treaty interpretation.

18. For this reason alone, the Panel must reject the U.S. defence of Commerce's specificity determinations concerning the alleged land-use rights and "policy lending" subsidies. With respect to land-use rights in the LWS investigation, it is undisputed that Commerce made no determination that the alleged provision of land-use rights for less than adequate remuneration – the "subsidy" that Commerce identified – was regionally specific under Article 2.2. Moreover, the U.S. defence of Commerce's specificity determination is based entirely on the notion that Commerce was free to disregard the undisputed evidence that Huantai County provided the same "subsidy" to companies located *outside* of the New Century Industrial Park.

19. As for "policy lending" in the OTR investigation, the United States has effectively conceded that borrowers obtained loans from SOCBs at "preferential, non-commercial" rates of interest – the "subsidy" that Commerce identified under its policy lending programme – *without regard* to whether the borrower was a beneficiary of that programme. Again, the U.S. argues that it is irrelevant that borrowers in other industries obtained the same alleged subsidy. But it is not irrelevant. It is

fundamental to whether Commerce clearly substantiated, on the basis of positive evidence, that the alleged subsidy was "explicitly limited" to "certain enterprises".

20. Finally, China considers that there is little left to be said about the U.S. "access to credit" theory. Even setting aside its *ex post* nature, the U.S. argument is based entirely on the notion that the 539 "encouraged" industries in 26 different industry sectors constitute "certain enterprises" within the meaning of Article 2. This argument is implausible on its face.

Double Remedy

21. Much has already been said and written on the topic of double remedies, but I want to focus this morning on two key areas: (1) the recent decision of the U.S. Court of International Trade (CIT) in *GPX International Tire v. United States*, which held that Commerce is obligated to avoid offsetting the same subsidies twice; and (2) the fundamental issue in this dispute – whether the U.S. has an obligation under the covered agreements to avoid these double remedies.

22. On 18 September, the Chief Judge of the CIT issued a decision in the *GPX* case holding that Commerce is legally obligated to avoid the imposition of double remedies when it uses its NME methodology in conjunction with countervailing duties. The CIT gave Commerce until 17 December to issue a new determination in which it "adopt[s] additional policies and procedures" to avoid double remedies. In the *GPX* litigation, the U.S. advanced all of the same arguments that it has made in these proceedings, and the CIT considered and rejected all of them.

23. The CIT recognized, correctly, that Commerce addresses subsidization of NME producers "through the NME AD methodology", that it is fundamentally incompatible with the purpose of the countervailing duty laws to offset the same subsidies twice, and that it is *Commerce's* obligation to investigate and avoid these double remedies. With the CIT's decision, all three branches of the U.S. Government have now recognized what Commerce *itself* recognized at the time of *CFS Paper* – that "a possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from NME countries.

24. Which brings us to the matter at hand: whether the United States has the same obligation under the covered agreements that it has under U.S. law – namely, to ensure that it does not offset the same subsidies twice. The U.S. asserts, unequivocally, that the "WTO rules do not contemplate the existence of, or an adjustment for double remedies in the context of domestic subsidies". Under the U.S. position, an investigating authority can ***knowingly*** and ***deliberately*** offset the same subsidies twice, as long as they aren't export subsidies. Clearly, this is wrong.

25. As China has explained, the obligation of Members to avoid offsetting the same subsidies twice is evident in the key operative provisions of Part V of the SCM Agreement. It is evident in Article 19.4, which prohibits Members from imposing countervailing duties in excess of the amount of the total subsidy accruing to the imported product. It is evident in Article 19.3, which requires Members to impose countervailing duties in the "appropriate amounts". It is evident in Article 10 and in the very definition of a "countervailing duty".

26. The extreme U.S. position on the issue of double remedies is based on nothing less than a complete disregard for the object and purpose of the SCM Agreement. The Appellate Body has repeatedly observed 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". It is hard to conceive of anything more antithetical to the object and purpose of the SCM Agreement than to offset the same subsidies twice. Part V of the SCM Agreement is meant to impose ***disciplines*** on the use of countervailing measures. For a Member to obtain *twice* the remedy to which it is entitled is no discipline at all. If this is true in the case of prohibited export subsidies, which are considered the

most trade-distorting subsidies, then surely it must be true in the case of subsidies that are merely actionable.

27. For these reasons, the last bastion of the U.S. defence – that it has no legal obligation to address a problem that Commerce, the U.S. Congress, and the U.S. courts have all acknowledged – is entirely untenable. Commerce must ensure that it does not offset the same subsidies twice.

28. I'd like to address two final points on the issue of double remedies, both of which have been elucidated by the CIT's decision in *GPX*. The first is the U.S. contention that China is trying to force the United States to "choose" between its use of an NME methodology in AD proceedings and its application of countervailing duties to imports from China.

29. Let me be perfectly clear on this point: China has *never* maintained that the United States is prohibited from applying its NME anti-dumping methodology concurrently with the imposition of countervailing duties on the same products. Of course, the United States is free to return to its previous policy of applying countervailing duties only to industries that it designates as market-oriented industries, but the U.S. also has the option to apply the two remedies simultaneously to the same products if it ensures that its methodologies do not offset the same subsidies twice. This is exactly what the CIT held in *GPX*: Commerce may choose either to "forego the imposition of CVDs" on products to which it applies its NME methodology, or "**adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVD** remedies on merchandise from the PRC". This is *not* a choice between applying the NME methodology or foregoing its use altogether.

30. Finally, we come to the question of whether Commerce has authority under U.S. law to take the necessary steps to avoid double remedies. The CIT expressly withheld judgment on this issue, but on 17 December Commerce will finally be forced to take a definitive position on whether it has authority under U.S. law to avoid the imposition of double remedies in NME investigations and, if so, what the nature of that authority is. In light of this impending deadline, the United States should simply identify to the Panel the legal authority, if any, that Commerce has to avoid double remedies in NME investigations. If the United States is able to identify any such authority, it can then explain to the Panel why Commerce did not apply that authority in the investigations at issue in this dispute.

31. That concludes China's opening statement. We look forward to answering the Panel's questions over the next two days.

ANNEX D-6

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES – SECOND MEETING

(23 November 2009)

1. China has largely failed to articulate how the U.S. actions it challenges are inconsistent with any express obligations contained in the covered agreements. China has not provided a proper interpretive analysis of the provisions it has referenced. China's arguments do not provide a basis on which the Panel can sustain China's allegations that the United States has acted inconsistently with its WTO obligations, and China's claims must be rejected.

2. **Financial Contribution:** An analysis of the ordinary meaning of the term "any public body", in its context and in light of the object and purpose of the SCM Agreement, demonstrates that Commerce's financial contribution determinations were consistent with the SCM Agreement. The ordinary meaning of the term "public" includes the notion of belonging to the government or the nation. In addition, the term "public body" is modified by the term "any". Thus, there might be different *kinds* of public bodies. To interpret the term "public body" to refer to entities that "possess characteristics similar to those that define a government", as China does, would be to reduce the term "public body" to redundancy or inutility.

3. The use of the term "government" in place of "a government or any public body" in the SCM Agreement is merely a shorthand drafting technique used for convenience. China erroneously finds significance in the use of this technique and attempts to impart a meaning that is simply not supported by the text.

4. Contrary to China's argument an entrustment or direction analysis involves the *actions* of a government or public body and the *actions* of a private body or bodies. A public body analysis, on the other hand, involves an analysis of the *nature* of the entity or entities at issue.

5. The *Korea – Commercial Vessels* panel rejected the arguments China makes here with respect to the ILC Draft Articles and the GATS Annex on Financial Services. As that panel reasoned, "[i]n all cases, ... public body status can be determined on the basis of government (or other public body) control".[1] This Panel should follow a similar approach.

6. China's arguments related to the Spanish and French texts of the Agreement on Agriculture are unavailing. The issue here is the interpretation of the SCM Agreement. There is no discrepancy between the English, Spanish, and French texts of the SCM Agreement, and there is no need to look to the Agreement on Agriculture to determine the meaning of the term "public body". Additionally, the text of the Agriculture Agreement does not support China's arguments as the relevant text in the Agriculture Agreement is different than in the SCM Agreement.

7. An interpretation of Article 1 of the SCM Agreement that treats the government-owned entity as a public body ensures that governments will not be able to hide behind their ownership interests to escape the disciplines of the SCM Agreement, which is consistent with the object and purpose of the SCM Agreement.

[1] *Korea – Commercial Vessels*, para. 7.55.

8. Whether or not China now concedes that it made a commitment in paragraph 172 of the Working Party Report that allows Members to treat China's state-owned enterprises and banks as government actors for purposes of Article 1.1(a) of the SCM Agreement, at the very least, China indicated in that paragraph its own recognition that its SOEs and SOCBs are "public bodies".

9. China incorrectly argues that the ILC Draft Articles are relevant rules of international law that should be used to interpret the term "public body". The Draft Articles are *not* relevant and *not* applicable within the meaning of Article 31(3)(c) of the Vienna Convention, and the Panel is *not* permitted to take them into account in interpreting the relevant SCM Agreement text. The scope of the Draft Articles is limited to secondary rules of international law and explicitly excludes primary rules of international law. Moreover, the detailed distinctions in those articles are not "applicable in the relations between the parties", as there is no consensus that the ILC provisions have attained the status of customary international law.

10. With respect to sales through trading companies, Commerce properly applied the SCM Agreement. No entrustment or direction analysis was required, and China has not substantiated its claim that Commerce's analysis was improper.

11. **Benchmarks:** Commerce based its determinations to use benchmarks other than prices or interest rates available in China on findings that the predominant role of the Chinese government in various markets distorted prices and interest rates in China. Commerce made each benchmark determination on a case-by-case basis, based on the facts of each investigation. Commerce's determinations were consistent with Article 14 of the SCM Agreement, as interpreted by the Appellate Body in *US – Softwood Lumber CVD Final*.

12. Contrary to China's argument, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber CVD Final* requires a separate price distortion analysis before a Member may rely upon an out-of-country benchmark. The Appellate Body's analysis reflects the economic theory commonly referred to as the "Dominant Firm Model". The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.

13. In the investigations China challenges, Commerce applied the Appellate Body's reasoning in *US – Softwood Lumber CVD Final* to the facts before it. In the case of the markets for hot-rolled steel and BOPP, Commerce determined that, based on record evidence, "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's distortions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration". Likewise, for lending and for land-use rights, based on the evidence on the administrative record, Commerce determined that, due to the government's predominant role, it was necessary to use out-of-country benchmarks to measure the benefit.

14. In the markets for lending and land-use rights, in addition to the market distortion inherent in the fact that the government was the predominant supplier of loans and land, Commerce also found evidence of direct government intervention in those markets that would further impact prices, rendering those prices inappropriate for determining the amount of the benefit. Contrary to China's argument, the Appellate Body in *US – Softwood Lumber CVD Final* did not address and, consequently, did not exclude the possibility that other types of government intervention would also distort the market and render prices unreliable.

15. **Providing Credits in Benefit Calculations:** China has not shown that Commerce was required to provide a credit in the subsidy calculation for non-subsidized transactions. China has

entirely changed its argument and now asks this Panel to find that the use of the term "good" in Article 14(d) establishes several obligations on WTO Members and limits the application of those obligations to situations under Article 14(d). China's argument is not credible.

16. The context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. Article 1 of the SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction by transaction basis. When a Member analyzes multiple subsidies, there is no obligation to provide a credit in that analysis for non-subsidized transactions.

17. The Appellate Body's zeroing reports examine the calculation of margins of dumping under the AD Agreement and certain provisions of the GATT 1994 that relate solely to AD proceedings, and there is simply no analytical connection between the calculation of margins of dumping and the calculation of a subsidy benefit that would justify extending the Appellate Body's reasoning in the zeroing reports to this dispute.

18. Because China has failed to establish any violation of Article 14(d), it is not necessary for the Panel to address China's other consequential claims under Article VI:3 of the GATT 1994, and Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement.

19. **Specificity:** Commerce's specificity determinations for the policy lending subsidy and land-use rights subsidy were substantiated by positive evidence and otherwise in accordance with the covered agreements. Contrary to China's arguments, neither Article 2.1(a) nor Article 2.2 requires an investigating authority to revisit the benefit determination to determine specificity.

20. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether legislation explicitly limits access to the subsidy to certain enterprises. Here, national, provincial, and municipal legislation and policy documents, viewed as a whole, explicitly limited access to the policy lending subsidy to a group of industries, including the tire industry.

21. China's interpretation of Article 2.2 of the SCM Agreement would require that, in order for a subsidy to be specific under Article 2.2, it would also have to be specific under Article 2.1, that is, it would have to be limited to certain enterprises. China's interpretation renders Article 2.2 redundant with Article 2.1, contrary to customary rules of treaty interpretation.

22. **Concurrent Application of CVD and AD Measures:** The import of China's argument before this panel, although China denies it, is that Members may not apply CVDs and NME AD duties concurrently to the same merchandise, under any circumstances, because doing so automatically results in a so-called double remedy. Indeed, China is unable to identify any concrete circumstances, under China's theory, when the concurrent application of AD duties and CVDs would be permitted. In this respect, China's reliance on the court's opinion in *GPX v. United States* is unavailing.

23. The covered agreements fully reflect Members' consideration of what limits, if any, should be placed on concurrent application of AD duties and CVDs. GATT Contracting Parties identified *one instance* in which the AD and CVD regimes intersect – in the limited circumstance of export subsidization set out in GATT Article VI:5. Furthermore, China's Protocol explicitly reflects the right of Members to apply the NME AD methodology as well as the right to apply CVDs, with no conditions placed on concurrent application. Finally, China cannot avoid the significance of the fact that, during the Uruguay Round, Members decided *not* to carry Article 15 of the Tokyo Round Subsidies Code forward into the SCM Agreement. The agreements, therefore, are not silent, or, in other words, contain no gap that can be filled by reading a prohibition on concurrent application into WTO provisions addressing other specific issues.

24. Turning to China's claims under Article 19.3 and 19.4 of the SCM Agreement, the United States notes, first, that both provisions impose obligations in respect of the *levying* of CVDs, yet it is undisputed that the CVDs in the investigations at issue were not levied at the time of panel establishment. In respect of Article 19.3, China does not allege, much less demonstrate, that the CVDs levied exceed the subsidization rate calculated for each "source[] found to be subsidized and causing injury". Similarly, in respect of Article 19.4, China does not allege, much less demonstrate, that the CVDs levied exceed the amounts of the subsidies actually found by Commerce. Therefore, China has not established any inconsistency with Article 19.3 or 19.4.

25. Turning to China's claims under Article 12.1 and 12.8 of the SCM Agreement, the United States notes that, even if a double remedy could be shown to exist (a premise the United States strongly contests), Commerce's actions were not inconsistent with either provision. First, contrary to China's suggestion, at no point has Commerce ever agreed that a double remedy would likely arise from the concurrent application of CVDs and NME AD duties. Rather, Commerce signalled that it would keep an open mind to allow parties with a concrete interest to present their views supported by facts from particular investigations. Commerce itself saw no basis *ex ante* to believe that double remedies would be a problem. Under these circumstances, it was for interested parties who sought an adjustment from the normal application of CVDs and AD duties to explain, *with supporting evidence*, why their proposed course of action was appropriate. Neither Chinese respondents nor the Government of China did so.

26. China has failed to demonstrate the existence of a "double remedy", much less where that "double remedy" is found in Commerce's separate calculations of dumping margins and subsidy rates. First, China advances its argument as to the existence of a double remedy solely by reference to the *normal value* obtained under the NME methodology and its alleged relationship to subsidization. However, examination of only *one* of the elements of the AD remedy without the other (i.e., export price) does not inform the inquiry as to the existence of a double remedy.

27. Second, China's theory – premised on the extraordinary proposition that an NME *anti-dumping* methodology, by its very nature, offsets *subsidization* – reflects an understanding of the NME methodology that has no basis in, and is contradicted by, the text of the covered agreements and the operation of the NME methodology under U.S. law. China has not cited, and indeed cannot cite, any provision of the GATT 1994, Anti-Dumping Agreement or SCM Agreement that would support its proposition. Furthermore, accepting the view that the NME methodology is designed to offset subsidization would render any AD duty calculated under that methodology a CVD within the meaning of footnote 36 to the SCM Agreement. As a result, that AD duty, as required by Article 10 of the SCM Agreement, could "only be imposed pursuant to [an] investigation[] initiated and conducted in accordance with [the SCM Agreement]". In the absence of such an investigation, any NME AD duty, under China's theory, would appear to be inconsistent with Article 10 of the SCM Agreement.

28. China's view that the NME methodology counteracts subsidization also finds no support in the text of the U.S. law governing the NME methodology. U.S. law identifies an exporting country as an "NME" based on an examination of multiple statutory factors, none of which references subsidization. U.S. legislative history also confirms the exclusive focus of the NME methodology on making a price comparison for the purpose of calculating the *dumping* margin. There is thus no basis to contend, as China does, that subsidization is one of the "'distortions' in the market that the NME construct was designed to address" when it is not even a factor examined when considering whether a country constitutes an NME.

29. With respect to China's challenge based on a so-called "absence of legal authority", the United States recalls that Commerce has not been presented with the concrete factual circumstances in which it was *required* to make a determination as to the scope of its legal authority. This follows

directly from the failure of Chinese respondents and the Government of China to adduce any evidence relating to double remedy in the investigations at issue. China's statement this morning about the relevance of the *GPX* opinion to the issue of Commerce's legal authority reflects China's misunderstanding of the implications under U.S. law of that decision.

30. Finally, the United States submits that the *GPX* opinion should have no bearing on the Panel's consideration of this dispute for four reasons: (1) the *GPX* opinion is not instructive for this dispute because it is an opinion of a U.S. court interpreting U.S. law, whereas this dispute concerns the interpretation of the WTO agreements; (2) the *GPX* opinion is not the final judgment of the U.S. courts; (3) the *GPX* opinion is in error; and (4) even on its own terms, the decision does not support the position taken by China here – that, where a WTO Member is applying AD duties determined under a NME methodology to Chinese goods, it may not apply any CVDs to those same imports.

31. **Requests for Information Following the Original Questionnaire:** With respect to China's claim under Article 12.1.1 of the SCM Agreement, the United States notes that China now appears to agree with the proper interpretation of that provision as set out by the United States in these proceedings. In the context of an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, China has issued one new subsidy allegation questionnaire and five supplemental questionnaires for the U.S. Government. For *none* of these six questionnaires did China provide an initial period of 30 days to respond, as it would have done if acting consistently with the understanding of Article 12.1.1 it urges upon this Panel.

ANNEX D-7

CLOSING STATEMENT OF CHINA – SECOND MEETING

(12 November 2009)

On behalf of the delegation of China, I would like to thank you for your service on this Panel. I would also like to thank the Secretariat for its hard work assisting in these proceedings.

All of the issues that have been raised by the parties during these proceedings deserve your careful consideration. This dispute concerns the first group of anti-dumping and countervailing duty investigations conducted by the United States on imports from China, but there have been dozens of subsequent anti-dumping and countervailing duty investigations on Chinese imports following those at issue here. The same issues that China has identified with respect to the challenged investigations have arisen in many of the subsequent investigations as well. There is a large amount of trade at stake – I understand more than US$6 billion. The resolution of these issues is of great importance to China.

What is equally, or perhaps more significant than the trade interests at stake in this dispute, is the impact that the Panel's findings will have on the subsidy disciplines set forth in the SCM Agreement. The aim of the dispute settlement system is to ensure a positive resolution of disputes between Members. China believes it has demonstrated that the measures at issue in this dispute are inconsistent in many respects with the SCM Agreement and other covered agreements. China asks the Panel to examine the issues in this dispute very carefully to ensure that the rules negotiated by the Members are upheld. The proper interpretation of these rules is essential to upholding the security and predictability of the multilateral trading system. In the present economic environment, it is more important than ever to ensure that the disciplines on trade remedies are correctly interpreted and applied by Members.

In closing, China would like to thank the Panel again for its hard work during these proceedings, and China looks forward to responding to the Panel's written questions.

ANNEX E

PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION

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ANNEX E-1

PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION

(7 April 2009)

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

(DS379)

Additional Working Procedures of the Panel Concerning Business Confidential Information

1. These procedures apply to any business confidential information ("BCI"), defined as information previously submitted to the U.S. Department of Commerce as confidential information protected by Administrative Protective Order in the course of the anti-dumping and countervailing duty investigations at issue (investigation nos. A-570-910, C-570-911, A-570-912, C-570-913, A-570-914, C-570-915, A-570-916 and C-570-917), that a party wishes to submit to the Panel. However, these procedures do not apply to information that is available in the public domain. In addition, these procedures do not apply to any such BCI if the person who provided the information in the course of the aforementioned investigations agrees in writing to make the information publicly available.

2. The first time that a party submits to the Panel BCI as defined above from an entity that submitted that information in any of the investigations cited in paragraph 1, the Panel requests that party also to provide, with a copy to the other party, an authorizing letter from the entity. That letter shall authorize both the United States and China to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of those investigations.

3. If an entity refuses to grant the authorization referred to in paragraph 2, a party may bring the situation to the attention of the Panel. The Panel shall consider what steps to take, which may include requesting information pursuant to Article 13 of the DSU.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, and an outside advisor for the purposes of this dispute to a party or third party. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the investigations cited in paragraph 1.

5. A party or third party having access to BCI shall treat it as confidential, i.e., shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors used for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

6. Any party or third party submitting or referring to BCI in any document, including written submissions and oral statements, shall mark the cover page and each page of such document with the

notice "Contains Business Confidential Information" at the top of the page. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]].

7. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel in advance that the statement will contain BCI, and the Panel shall ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement.

8. The Panel shall not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information.

9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

ANNEX F

REQUEST FOR THE ESTABLISHMENT OF A PANEL

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ANNEX F-1

REQUEST FOR THE ESTABLISHMENT
OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS379/2
12 December 2008

(08-6132)

Original: English

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

Request for the Establishment of a Panel by China

The following communication, dated 9 December 2008, from the delegation of China to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 19 September 2008, the People's Republic of China requested consultations with the United States of America pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). This request for consultations concerned the anti-dumping and countervailing duties imposed by the United States pursuant to certain final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce, as described below.

Consultations were held on 14 November 2008 with a view to reaching a mutually satisfactory solution. These consultations clarified certain issues pertaining to this matter, but failed to resolve the dispute.

Therefore, China respectfully requests, pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 30 of the SCM Agreement, and Article 17 of the AD Agreement, that the Dispute Settlement Body ("DSB") establish a Panel to examine this matter. China asks that this request be placed on the agenda of the DSB meeting to be held on 22 December 2008. China further requests that the Panel have the standard terms of reference, as set forth in Article 7.1 of the DSU.

A. SPECIFIC MEASURES AT ISSUE

This request for establishment of a Panel concerns the following measures, which include the definitive anti-dumping and countervailing duties imposed pursuant to their authority, the conduct of the underlying anti-dumping and countervailing duty investigations, and the combined effect of the anti-dumping and countervailing duty determinations and duties in each of the specified investigations:

Investigations A-570-910 and C-570-911 ("CWP")

- Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Federal Register 31970 (5 June 2008).

- Notice of Antidumping Duty Order: *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Federal Register 42547 (22 July 2008).

- Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 Federal Register 31966 (5 June 2008).

- *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 Federal Register 42545 (22 July 2008).

Investigations A-570-912 and C-570-913 ("OTR")

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Final Affirmative Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Federal Register 40485 (15 July 2008).

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 Federal Register 51624 (4 Sept. 2008).

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 Federal Register 40480 (15 July 2008).

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China:* Countervailing Duty Order, 73 Federal Register 51627 (4 Sept. 2008).

Investigations A-570-914 and C-570-915 ("LWRP")

- Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: *Light–Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 Federal Register 35652 (24 June 2008).

- Light–Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders, 73 Federal Register 45403 (5 Aug. 2008).

- *Light-Walled Rectangular Pipe and Tube From People's Republic of China*: Final Affirmative Countervailing Duty Investigation Determination, 73 Federal Register 35642 (24 June 2008).

- *Light–Walled Rectangular Pipe and Tube from the People's Republic of China*: Notice of Countervailing Duty Order, 73 Federal Register 45405 (5 Aug. 2008).

Investigations A-570-916 and C-570-917 ("LWS")

- *Laminated Woven Sacks from the People's Republic of China*: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Federal Register 35646 (24 June 2008).

- Notice of Antidumping Duty Order: *Laminated Woven Sacks From the People's Republic of China*, 73 Federal Register 45941 (7 Aug. 2008)

- *Laminated Woven Sacks from the People's Republic of China*: Final Affirmative Countervailing Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 Federal Register 35639 (24 June 2008).

- *Laminated Woven Sacks From the People's Republic of China*: Countervailing Duty Order, 73 Federal Register 45955 (7 Aug. 2008).

In certain of the investigations specified above, the US Department of Commerce stated that US law provides no basis to make any adjustment to either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy for the same unfair trade practice, where such a double remedy arises from the use of the US non-market economy (NME) methodology to impose anti-dumping duties simultaneously with the imposition of countervailing duties on the same product. The measures therefore include, as an omission, the failure of the United States to provide legal authority for the US Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the US NME methodology simultaneously with the imposition of countervailing duties on the same product.

B. LEGAL BASIS OF THE COMPLAINT

China considers that the measures specified above are inconsistent with the obligations of the United States under, *inter alia*, Articles I and VI of the GATT 1994, Articles 1, 2, 10, 12, 13, 14, 19, and 32 of the SCM Agreement, Articles 1, 2, 6, 9, 18, and Annex II(1) of the AD Agreement, and Article 15 of the *Protocol on the Accession of the People's Republic of China* (the Protocol of Accession).

1. As Applied Claims

China considers that the CWP, OTR, LWRP, and LWS anti-dumping and countervailing duty investigations, determinations and orders, the definitive anti-dumping and countervailing duties imposed pursuant thereto, as well as the combined effect of the anti-dumping and countervailing duty

determinations, orders, and duties in each such investigation, are inconsistent, at a minimum, with the following obligations of the United States under the covered agreements:[1]

(a) in connection with the alleged provision of goods for less than adequate remuneration –

(i) the US authorities' determination that certain state-owned enterprises (SOEs) are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement;

(ii) in the absence of a valid determination that certain SOEs are public bodies, the US authorities' failure to make a determination that China "entrusts or directs" SOEs to provide goods to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;

(iii) even assuming a valid determination that certain SOEs are public bodies, the US authorities' failure to make a determination that SOEs "entrust or direct" trading companies to provide goods to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;[2]

(iv) the US authorities' determination that the sale of goods by trading companies to producers of subject merchandise confers a countervailable subsidy within the meaning of Article 1 of the SCM Agreement and a benefit under the guidelines set forth in Article 14(d) of the SCM Agreement;

(v) the US authorities' failure to determine whether the alleged benefit received by trading companies was passed through to producers of subject merchandise, in violation of Article VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement;

(vi) the US authorities' inclusion in subsidy benefit calculations of only those transactions that produced a positive benefit, while excluding transactions that yielded no benefit, in violation of Article VI:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement;

(b) in connection with the alleged provision of land and land use rights for less than adequate remuneration –

(i) the failure of the US authorities to demonstrate specificity under Articles 2.1 and 2.2 of the SCM Agreement, and to clearly substantiate these determinations of specificity on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;[3]

(c) in connection with the alleged provision of loans on preferential terms –

[1] Unless otherwise noted, all inconsistencies relating to the GATT 1994, the SCM Agreement, and the Protocol of Accession arise in connection with each of the CVD measures in the four identified investigations, while all inconsistencies relating to the AD Agreement arise in connection with each of the anti-dumping measures in the four identified investigations.

[2] The inconsistencies set forth in paras. a(iii) – a(v) do not arise in connection with the LWS CVD measures.

[3] The inconsistency set forth in para. b(i) does not arise in connection with the CWP CVD measures.

(i) the US authorities' determination that certain state-owned commercial banks (SOCBs) are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement;[4]

(ii) in the absence of a valid determination that certain SOCBs are public bodies, the US authorities' failure to make a determination that China "entrusts or directs" SOCBs to provide loans to producers of subject merchandise, within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;

(iii) the failure of the US authorities to demonstrate specificity under Articles 2.1 and 2.2 of the SCM Agreement, and to clearly substantiate these determinations of specificity on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

(d) in connection with each instance in which the US authorities resorted to a benchmark outside of China for the purpose of determining the existence and amount of any alleged subsidy benefit –

(i) the US authorities' rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, subject producers received a subsidy benefit under the methodologies set forth in Article 14 of the SCM Agreement;

(ii) the US authorities' rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, producers of subject merchandise received a subsidy benefit, without making a finding of "special difficulties" as required under Article 15 of the Protocol of Accession;

(iii) the US authorities' use of benefit methodologies that the United States did not notify to the Committee on Subsidies and Countervailing Measures, as required by Article 15(c) of the Protocol of Accession;

(e) in connection with all countervailing duty investigations, determinations and orders specified above –

(i) the failure of the US authorities to take all necessary steps to ensure that the imposition of countervailing duties was in accordance with Article VI of the GATT 1994 and the SCM Agreement, as required by Article 10 of the SCM Agreement;

(ii) the use of a specific action against alleged subsidies other than in accordance with the provisions of the GATT 1994, as interpreted by the SCM Agreement, in violation of Article 32.1 of the SCM Agreement;

(iii) the imposition of countervailing duties in a manner inconsistent with the requirements of Article VI:3 of the GATT 1994;

(f) in connection with the US authorities' use of its NME methodology for the purpose of a determination of dumping and the imposition of anti-dumping duties under Article

[4] The inconsistencies set forth in paras. c(i) – c(iii) do not arise in connection with the LWRP CVD measures.

VI of the GATT 1994 and the AD Agreement, simultaneously with a determination of subsidization and imposition of countervailing duties on the same product –

(i) the US authorities' levying of countervailing duties in excess of the amount of the subsidy found to exist, in violation of Article 19.4 of the SCM Agreement;[5]

(ii) the use by the US authorities of a specific action against subsidization that is not in accordance with the GATT 1994, as interpreted by the SCM Agreement, in violation of Article 32.1 of the SCM Agreement;

(iii) the US authorities' failure to take all necessary steps to ensure that the imposition of countervailing duties was in accordance with Article VI of the GATT 1994 and the SCM Agreement, as required by Article 10 of the SCM Agreement;

(iv) the US authorities' levying of anti-dumping and countervailing duties in excess of the "appropriate amounts," in violation of Article 9.2 of the AD Agreement and Article 19.3 of the SCM Agreement, respectively;

(v) the US authorities' failure to make a fair comparison between the export price and normal value, in violation of Article 2.4 of the AD Agreement;

(vi) the US authorities' imposition of anti-dumping duties in excess of the amount of dumping found to exist, in violation of Article 9.3 of the AD Agreement;

(vii) in violation of Article I of the GATT 1994, the failure of the United States to accord to imports from China, immediately and unconditionally, the same unconditional entitlement to the avoidance of a double remedy for the same unfair trade practice that it accords to imports of like products from the territories of other WTO Members. This benefit is evidenced, *inter alia*, by the presumption that the US Department of Commerce has consistently applied concerning the effects of domestic subsidies on export prices, and by the consistent position of the US Department of Commerce that it will adjust neither the costs of production nor the export prices in an anti-dumping duty investigation in a manner that would produce a double remedy for the same unfair trade practice.

(g) in connection with the conduct of the underlying anti-dumping and countervailing duty investigations –

(i) the US authorities' failure to invite China for consultations regarding new subsidy allegations, as required by Article 13.1 of the SCM Agreement;

(ii) the US authorities' failure to allow 30 days for responses to questionnaires issued in connection with subsidy allegations made after the initiation of the investigation, as required by Article 12.1.1 of the SCM Agreement;

[5] The inconsistencies set forth in paras. f(i) – f(vii) relate to each of the CVD and AD measures in the four identified investigations, as well as to the combined effect of the CVD and AD measures in each of the identified investigations.

(iii) the US authorities' failure to take due account of any difficulties experienced by interested parties in supplying information requested in questionnaires, as required by Article 12.11 of the SCM Agreement;

(iv) the US authorities' failure to provide notice to interested parties of the information which the US authorities required to make a determination with respect to whether certain entities are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement, as required by Article 12.1 of the SCM Agreement;

(v) the US authorities' failure to inform interested parties of the essential facts under consideration with respect to whether certain entities are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement, as required by Article 12.8 of the SCM Agreement;

(vi) the US authorities' failure to provide notice to interested parties of the information which the US authorities required to determine whether the simultaneous application of anti-dumping and countervailing duties results in a double remedy for the same unfair trade practice, as required by Article 12.1 of the SCM Agreement and Articles 2.4 and 6.1 of the AD Agreement, as well as Annex II(1) of the AD Agreement;

(vii) the US authorities' failure to inform interested parties of the essential facts under consideration with respect to whether the simultaneous application of anti-dumping and countervailing duties results in a double remedy for the same unfair trade practice, as required by Article 12.8 of the SCM Agreement and Article 6.9 of the AD Agreement; and

(viii) the US authorities' use of adverse inferences and facts available in a manner inconsistent with Article 12.7 of the SCM Agreement, including, in particular, those instances in which the US authorities drew "adverse inferences" or relied upon "neutral" or "adverse" facts available, having failed to request information from interested parties concerning the factual issue in question.

2. As Such Claims

Pursuant to Section 773(c) of the Tariff Act of 1930, 19 U.S.C. 1677b(c), the US Department of Commerce determines normal value in anti-dumping investigations involving products from countries it has designated as non-market economies using the values of factors of production in countries it has designated as market economies (so-called "surrogate values").

In those circumstances in which the US Department of Commerce uses surrogate values for a producer's costs of production in an anti-dumping investigation conducted in accordance with its NME methodology, the resulting price comparison under Article 2 of the AD Agreement will necessarily offset any subsidy received by the producer, at a minimum in those circumstances where the surrogate values are higher than a respondent producer's putatively subsidized costs of production. The United States has not provided the Department of Commerce with any legal authority to adjust either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to its NME methodology simultaneously with the imposition of countervailing duties on the same product. The Department of Commerce has acknowledged the absence of any such legal authority.

China considers that the absence of any legal authority for the Department of Commerce to avoid the imposition of a double remedy is an omission that, as such, is inconsistent with the following obligations under the covered agreements:

- Article 19.4 of the SCM Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to levy countervailing duties in excess of the amount of subsidy found to exist;

- Article 32.1 of the SCM Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to make use of a specific action against subsidization that is not in accordance with the GATT 1994, as interpreted by the SCM Agreement;

- Article 10 of the SCM Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to fail to take all necessary steps to ensure that the imposition of countervailing duties is in accordance with Article VI of GATT 1994 and the SCM Agreement;

- Article 9.2 of the AD Agreement and Article 19.3 of the SCM Agreement, respectively, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to levy anti-dumping and countervailing duties in excess of the "appropriate amounts";

- Article 2.4 of the AD Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities not to make a fair comparison between the export price and normal value; and

- Article 9.3 of the AD Agreement, insofar as the absence of legal authority to avoid a double remedy necessarily will lead the US authorities to impose anti-dumping duties in excess of the amount of dumping found to exist.

In addition, the United States, in all cases, ensures that it avoids the imposition of a double remedy for the same unfair trade practice in parallel trade remedy investigations involving imports from WTO Members that the United States has designated as market economies.[6] The United States extends this benefit automatically and unconditionally to imports from WTO Members that it has designated as market economies. To the extent that US law does not permit the Department of Commerce to avoid the imposition of a double remedy for the same unfair trade practice in parallel anti-dumping and countervailing duty investigations involving imports from WTO Members that the United States has designated as non-market economies, China considers that US law is, as such, inconsistent with Article I of the GATT 1994. This is because the United States fails to accord to imports from China, immediately and unconditionally, an advantage, favour, privilege or immunity with respect to the method of levying import duties or charges, and with respect to rules and formalities in connection with importation, that it accords to like products originating in the territories of other WTO Members.

[6] *See, e.g., Tool Steel from the Federal Republic of Germany; Correction to Early Determination of Anti-dumping Duty*, 51 Fed. Reg. 10071 (24 March 1986); *Notice of Final Results of Antidumping Administrative Review: Low Enriched Uranium from France*, 69 Fed. Reg. 46501 (3 August 2004); *Certain Cut-to-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 18390 (15 April 1997); *U.S. Steel Group v. United States*, 15 F.Supp. 2d 892 (Ct. Int' l Trade 1998); *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19153 (12 April 2004); *Wheatland Tube Co v.United States*, 495 F.3d 1355 (Fed. Cir. 2007).

For these reasons, China considers that the measures specified above nullify and impair benefits accruing to China under the GATT 1994, the SCM Agreement, the Protocol of Accession, and the AD Agreement.