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

(WT/DS379)

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS TO THE PARTIES

July 28, 2009

TABLE OF REPORTS CITED

Short Form	Full Citation
Canada – Dairy (Article 21.5 II) (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
Canada – Wheat Exports (Panel)	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
China – Auto Parts (Panel)	Panel Report, *China – Measures Affecting Imports of Automobile Parts* WT/DS339/R, WT/DS340/R, WT/DS340/R, adopted 12 January 2009, as modified by the Appellate Body Report, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS340/AB/R
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EEC – Parts and Components	GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
Japan – DRAMS (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R, adopted 17 December 2007
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
Thailand – Cigarettes	GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R, BISD 37S/132, adopted 7 November 1990
Thailand – H-Beams (AB)	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
US – Argentina OCTG (AB)	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

US – Corrosion-Resistant Steel Sunset Review (AB)	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
US – Countervailing Measures (Article 21.5)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005
US – Customs Bond Directive (India) (AB)	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 – DRAMS (AB)	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 – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001
US – Lamb Meat (AB)	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
US – Non-Rubber Footwear	GATT Panel Report, *United States – Denial of Most-Favoured Nation Treatment as to Non-Rubber Footwear from Brazil*, DS18/R, BISD 39S/128, adopted 19 June 1992
US – Softwood Lumber CVD Final (AB)	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
US – Softwood Lumber CVD Prelim	Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted 1 November 2002
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, adopted 17 June 1987

I. US REQUEST FOR PRELIMINARY RULINGS

A. IDENTIFICATION OF THE MEASURE AT ISSUE

1. (United States) Concerning the US argument under Article 6.2 of the DSU: Is the US argument that it is the negative formulation of the measure that obscures its identification? Does the United States consider that Article 6.2 of the DSU acts as a filter on the types of claims or measures that are susceptible to review by a panel?

1. It is not the negative formulation as such that leads to China's failure to meet Article 6.2 of the DSU. The United States agrees that both certain acts and certain omissions can be challenged under the DSU.[1] For example, to the extent that the WTO Agreement imposes a clear obligation to take a specific action, the failure to take that action could properly be challenged as a measure in the nature of an "omission."[2] In this dispute, however, China's negative formulation of its "as such" claim did not specifically identify any WTO obligation to take specific action or any U.S. legal provision that gave rise to the alleged impairment of China's benefits under the covered agreements.[3]

2. The essential problem with China's negative formulation is that, by using a double negative ("*failure* of the United States to provide legal authority … to *avoid* the imposition of a double remedy"), China is actually challenging a *positive* act, in this case, an action taken by Commerce that China believes necessarily results in a "double remedy."[4] It is Commerce's positive action to impose an antidumping duty using the NME methodology and a countervailing duty on the same product which China argues results in a double remedy and thereby gives rise to the nullification and impairment alleged by China.

3. Yet, China's panel request does not make any reference to any U.S. measure requiring or authorizing the positive action that it claims necessarily results in a "double remedy". As a result, China's panel request fails to "identify the specific measure at issue" in violation of Article 6.2. If China's panel request were found to comply with Article 6.2, any WTO Member would be able to "identify" the "specific measure" at issue in relation to actions authorized under the law of another WTO Member by simply challenging a "failure … to provide legal authority … to avoid" that which is allegedly authorized by the other Member, and do so *without identifying the legal source or origin of this alleged requirement*.

4. Article 6.2 of the DSU acts as a filter on the types of claims or measures that a panel can review, in particular to the extent that it requires the measure to be capable of being "identified" as a "specific" measure, and that the "legal basis" can be presented in a manner that is "sufficient to present the problem clearly." China's obscure double negative, without any reference to where

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[1] See, e.g., *US - Corrosion-Resistant Steel Sunset Review (AB)*, para. 81.

[2] See U.S. Statement at First Substantive Meeting of the Panel Regarding U.S. Preliminary Ruling Requests, para. 4.

[3] See U.S. First Written Submission, para. 72.

[4] See China Response to U.S. Request for Preliminary Rulings, para. 16.

the alleged basis for the action that necessarily results in a "double remedy" can be found, does not meet this threshold.

2. (United States) What is your legal reasoning as to how Article 6.2 of the DSU would preclude China's claim regarding the omission at issue in this dispute?

5. As explained more fully in response to question 1, by failing to make any reference to the alleged measures pursuant to which Commerce applies AD duties and CVDs in such a way so as to result in a "double remedy," China's "as such" claim fails to identify the "specific" measure at issue at all and thus fails to meet the specificity requirement in Article 6.2 of the DSU.

6. More fundamentally, by challenging an "omission" without identifying any WTO obligation requiring the enactment of legislation providing the authority China alleges to be unavailable to Commerce, China has failed to identify a "measure" challengeable as such in WTO dispute settlement proceedings.[5]

3. (Both parties) Please discuss whether, in your view, a request for the establishment of a panel must list all provisions of national law implicated in the "measure" challenged. Please refer to any prior WTO decision that you consider relevant in this respect. With respect to the present dispute, was China under an obligation to cite to the US legal provisions providing for the conduct of AD and CVD investigations (including the use by the USDOC of the "NME methodology")?

7. No. There is no requirement under the DSU for every panel request to list all provisions of national law *implicated* in a "measure" challenged. Article 6.2 requires the complaining party to "identify the *specific measures* at issue." The "specific measures" must be *identified* so as to provide notice of the nature and scope of the dispute.

8. As the complaining party, China is responsible for setting out its challenge clearly in the panel request so that the United States and potential third parties may be sufficiently informed of the dispute so as to, respectively, begin preparing a defense and determine the extent of their interest in participating in the proceedings.[6] The Appellate Body has recognized that this responsibility is particularly serious in the context of "as such" challenges:

> [W]e would expect that "as such" claims state unambiguously the specific measures of municipal law challenged by the complaining party and the legal basis for the allegation that those measures are

[5] See U.S. Statement at First Substantive Meeting of the Panel Regarding U.S. Preliminary Ruling Requests, paras. 3-5.

[6] See *Canada - Wheat Exports (Panel)*, para. 6.10 (para. 24 of panel preliminary ruling) ("Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge.").

> not consistent with particular provisions of the covered agreements. Through such straightforward presentations of "as such" claims, panel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures, as such, in WTO dispute settlement proceedings.[7]

9. In the circumstances of this dispute, as the United States has observed,[8] the "specific measure at issue," that is, the measure that gives rise to the alleged nullification and impairment, is found, under China's own explanation, in aspects of U.S. law that authorize the concurrent application of AD duties and CVDs, which China argues inevitably produces "double remedies." To thus "identify" the "specific measure" challenged in its "as such" claim, China was under an obligation to specify at least those U.S. measures that "identify" where Commerce is authorized or required to take actions that result, in China's view, in a "double remedy." Specifically, as we understand China's argument now, China should not have cited to an "omission" but rather should have formulated its claim and cited to the specific U.S. measures that resulted in calculations producing a "double remedy" in the circumstances described by China.

10. China's panel request fails to do this. Indeed, while China may not have been obliged "to list *all* provisions of national law *implicated* in the 'measure' challenged," in this dispute, China did not even list *any* provision of national law where the "specific measure at issue" *itself* could be found. Rather than identify the U.S. measures, China has constructed a "measure" it describes as a "failure to provide legal authority to avoid double remedies." China cannot evade its obligations under Article 6.2 to identify the measures giving rise to the alleged nullification and impairment by simply assuming the existence of the nullification and impairment and challenging the failure to prevent it.

5. (*United States) What is the US response to the argument of China that 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 US government, and that the USDOC has specifically identified in the investigations at issue? (China's Response to US request for preliminary rulings, para. 25).*

11. The United States notes at the outset that the requirement for a complaining Member under Article 6.2 of the DSU to "identify the specific measures at issue" is not conditioned upon a showing of prejudice by the responding Member. Article 6.2 establishes this requirement as an absolute precondition to the inclusion of any measure in the Panel's terms of reference. Therefore, under the terms of Article 6.2, once a panel concludes that a complaining Member

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[7] *US - Argentina OCTG (AB)*, para, 173.

[8] See U.S. First Written Submission, para. 67; U.S. Answer to Question 1.

failed to "identify the specific measures at issue," the alleged measure is not within the panel's terms of reference and the panel lacks jurisdiction to examine the alleged measure.

12. In any event, the United States was prejudiced by the failure of China to identify the specific measures at issue in its panel request.[9] On the face of the panel request, the reference to "adjustments" needed to "avoid the imposition of a double remedy" is vague, leaving the United States at a loss to understand exactly what actions of Commerce led to a "double remedy" and consequently what adjustments might be necessary to avoid such actions. Without such information, the United States is left to hypothesize what China precisely intended to challenge as the real source of its concerns in U.S. law. Indeed, it was not until China's first written submission that the United States began to understand that China's concern about a "double remedy" was in fact a challenge to the very application of both AD duties and CVDs to Chinese imports based on a theory of "overlapping rationales"[10] for the NME methodology and CVDs, a theory the Panel recognizes as significantly different from what China advanced in the investigations.[11] In these circumstances, China's panel request failed to provide the United States adequate notice of the nature of its challenge and thereby hampered the ability of the United States to begin preparing its defense in this dispute.[12]

13. More fundamentally, the United States is prejudiced by China's attempt to avoid its obligation to identify the measures of the United States that have allegedly nullified or impaired benefits accruing to China under the covered agreements and to instead force the United States to identify measures that provide the United States the authority to eliminate the nullification or impairment that China simply asserts exists. By asserting a legal deficiency of the United States, China attempts to paper over the deficiencies of its own complaint and to shift the burden of proof to the United States.

14. China's assertion of "extensive discussion within the U.S. Government" in respect of this alleged absence of legal authority cannot justify its failure to comply with Article 6.2. The United States disagrees with China's factual assertion but notes in any event that whatever discussions may have broadly taken place within the U.S. Government cannot substitute for setting forth in the panel request the precise nature of the challenge being brought by a complaining party. Those discussions were directed at U.S. domestic law, not at U.S. WTO obligations. Even more significantly, China's approach would appear to mean that whenever a

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[9] The panel request suggests that Commerce itself indicated that U.S. law provides no basis to make an adjustment to AD duties or CVDs to "avoid the imposition of a double remedy." (WT/DS379/2, p. 3). As the United States has explained, this is simply an incorrect reading of what Commerce said in the respective determinations. To date, Commerce has not concluded whether it has legal authority to make the adjustments requested by the Government of China and the respondent Chinese firms in the investigations at issue. It is the failure of those interested parties to substantiate their requests with any evidence of a so-called double remedy that has prevented the question of legal authority from being squarely presented before Commerce.

[10] China First Written Submission, para. 366.

[11] See Panel Question 73.

[12] See *Canada - Wheat Exports (Panel)*, para. 6.10 (paras. 24 and 28 of panel preliminary ruling).

Member is aware of a measure, that Member cannot suffer prejudice from a failure to consult on that measure. Yet a Member would always be presumed to be familiar with its own measures. China's approach would therefore mean that there is never a need for consultations, a result clearly contradicted by the agreed text of the DSU.

15. The panel in *Canada - Wheat Exports* rejected an attempt by the complaining party to rely similarly on discussions that the parties to the dispute themselves had engaged in over fifteen years on the issue that was the subject of the dispute:

> The United States argues that Canada knows what is at issue in this dispute from the discussions at the consultations preceding the panel request and, indeed, from 15 years of previous discussions between the two countries on this issue. Even assuming that this was correct, Article 6.2 requires that a panel request provide the necessary information, regardless of whether the same information, or additional information, is already available to the responding party through different channels, *e.g.*, previous discussions between the parties. Moreover, the fact that Canada would know or should know which laws and regulations the United States meant to be covered by the panel request would not relieve the United States of its obligation to establish, in its panel request, the identity of the laws and regulations at issue. In our view, it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.[13]

16. Furthermore, discussions within the U.S. Government do not assist potential third parties in understanding the nature of China's challenge. As numerous Appellate Body Reports have recognized,[14] the requirements in Article 6.2 of the DSU are not there only to protect due process rights of responding Members, but also to notify potential third parties of the measures at issue so that they can make an informed decision as to whether they have a substantial interest in the dispute and want to reserve their third party rights. Thus, the panel request does not provide third parties with the understanding of the dispute they would need.

B. MEASURE NOT INCLUDED IN THE REQUEST FOR CONSULTATIONS

7. (Both parties) In footnote 28 of its Response to the US request for preliminary rulings, China argues that "[t]his absence of legal authority was evident on the face of the determinations that were the subject of consultations and was specifically invoked by

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[13] *Canada - Wheat Exports (Panel)*, para. 6.10 (para. 25 of panel preliminary ruling). (Footnote omitted)

[14] See, e.g., *Thailand - H-Beams (AB)*, para. 88.

Commerce as a rationale for its inaction." If the Panel were to agree with China that the absence of legal authority (alleged by China) was "evident on the face of the determinations", what would be the relevance of this fact to the correspondence between the request for consultations and the request for establishment of a panel?

17. The United States recalls at the outset that the conclusion China draws from the statements made in the determinations is incorrect. The United States has explained that to date Commerce has made no definitive statement about any such legal authority, much less relied on any absence of legal authority as the basis for any decision, including those made in respect of the investigations at issue in this dispute.[15]

18. Even assuming that the "absence of legal authority" alleged by China were reflected in the specific investigations at issue, it would not follow that by consulting on the specific investigations, the obligation to consult on the alleged general lack of authority to impose a "double remedy" had somehow been fulfilled. As China itself acknowledges, China intends the alleged "measure" to be a distinct and separate measure from the investigations challenged.[16] The DSU requires that consultations have been requested on *every* measure challenged in a panel request. The failure to request consultations on a given measure places that measure outside a panel's terms of reference. This procedure applies equally to measures challenged "as such" and cannot be ignored simply because the complaining party has concluded that the measure it seeks to challenge "as such" has been mentioned in the text of the measures it challenges "as applied." The United States notes that higher-order measures such as statutes and regulations are often referenced in rulings and determinations that apply those measures to a given set of facts. 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; it would be sufficient to consult on "as applied" matters.

19. In any event, the United States continues to find particularly relevant, for the resolution of this issue, China's statement that, at least in its view, the "absence of legal authority was evident on the face of the determinations." In this respect, it is clear that:

- the first determination at issue was published *fifteen weeks* before China filed its consultations request;[17]

[15] See U.S. Statement at First Substantive Meeting of the Panel Regarding U.S. Preliminary Ruling Requests, para. 11;. U.S. Answer to Question 78.

[16] See China Response to U.S. Request for Preliminary Rulings, para. 31.

[17] See 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) (Exhibit CHI-7). China filed its consultations request on 19 September 2008.

- *since that date*, China has been of the view that Commerce lacked this legal authority because, in China's words, this "absence of legal authority was evident on [its] face";

- *since that date*, China has been of the view that this "absence of legal authority" was a source of nullification and impairment of its benefits under the covered agreements, given its assertions about the relationship between this "absence of legal authority" and the determinations at issue;[18]

- China filed a consultations request on the specific determinations at issue but did *not* include any reference to an "absence of legal authority" or to any other "as such" challenge;

- China filed a panel request including, for the first time, an "as such" challenge based on the "absence of legal authority", and notwithstanding U.S. concerns raised in two DSB meetings about the failure to consult on this "measure,"[19] China made no attempt to seek consultations on the "absence of legal authority."

20. In sum, China appears to have made a conscious decision at the time it filed its consultations request that, notwithstanding concerns it had about the "evident" absence of legal authority, it would *not* seek to consult with the United States on that "measure." That, of course, is China's perogative. Having done so, however, China may not then avoid the consequences of its decision, namely, the fact that such "absence of legal authority" could not be brought within the scope of this dispute without filing a new consultations request. China has yet to offer any plausible explanation – indeed, any explanation at all – as to why it did not consult on this "measure" that it believed to be of concern at the time it filed its consultations request, and on what basis the Panel should be expected to overlook this failure to consult in light of the unambiguous requirement under the DSU.

8. (Both parties) Please comment on the Appellate Body's observation, 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." (Appellate Body Report, US – Continued Zeroing, para. 179, cited by China in its Response to the US Request for preliminary rulings, para. 36). Based on the facts of this dispute, how is this statement relevant to the Panel's consideration of the US claim that the "omission" identified by China does not fall within the scope of this proceeding because it was not included in China's request for consultations.

[18] See, e.g., China Response to U.S. Request for Preliminary Rulings, paras. 33-34.

[19] See Minutes of 22 December 2008 DSB Meeting, WT/DSB/M/261, circulated 6 March 2009, para. 50; Minutes of 20 January 2009 DSB Meeting, WT/DSB/M/263, circulated 25 March 2009, para. 69.

21. The Appellate Body's statement 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" was addressing the substantive type of "measures" subject to WTO dispute settlement in the first place. In this dispute, under the U.S. request for a preliminary ruling sought to be addressed by China in paragraph 36 of its submission (i.e., regarding the failure to consult on a measure), the question is not whether the "measure" referred to by China in its "as such" claim is a "measure" subject to WTO dispute settlement.[20] Rather, what is before this Panel at this juncture is a subsequent and, as far as the United States is aware, a novel question: whether a "measure" identified for the first time in a panel request, which the complaining Member has acknowledged it was aware of as a source of concern but declined to include in its consultations request, may fall within the Panel's terms of reference consistent with the obligation in the DSU to consult on any measure challenged. The statement quoted by the Panel from the Appellate Body Report in *US - Continued Zeroing* therefore has no relevance to the specific question about China's failure to consult on the "measure" challenged as such.

22. The United States does consider it important, however, to note that the "one additional measure"[21] in China's panel request in this dispute was the basis of an "as such" claim, as it underlines that the introduction of this "one additional measure" did, indeed, amount to "an expansion of the scope" and "change in the essence of the dispute."[22] As the Appellate Body in *US – Argentina OCTG* stressed, "[t]he implications of ["as such"]challenges are obviously more far-reaching than 'as applied' claims."[23] Expansion of a dispute from exclusively "as applied" claims to also include a much broader "as such" claim is at least *prima facie* evidence of an "expansion of the scope" or "change in the essence" of the dispute, which, when viewed together with the other circumstances of this dispute,[24] compel a conclusion that the "measure" challenged "as such" is outside the Panel's terms of reference.

9. (Both parties) In US – Customs Bond Directive (para. 294), the Appellate Body stated that:

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[20] The United States does contest, in its request for a separate preliminary ruling, the characterization of the so-called "omission" as a "measure" subject to challenge in WTO dispute settlement proceedings. In that context, however, the United States does not argue that the "as such" nature of the challenge is the source of the problem. Rather, the United States argues that the "measure" China seeks to challenge as an "omission" has not been established to be an "omission" subject to challenge because China has failed to identify an affirmative WTO obligation to enact legislation providing any particular legal authority. See U.S. Statement at First Substantive Meeting of the Panel Regarding U.S. Preliminary Ruling Requests, paras. 4-5; U.S. Answer to Question 90.

[21] China Response to U.S. Request for Preliminary Rulings, para. 35.

[22] *US – Customs Bond Directive (India) (AB)*, para. 294.

[23] *US - Argentina OCTG (AB)*, para. 172. See also U.S. First Written Submission, para. 85; U.S. Statement at First Substantive Meeting of the Panel Regarding U.S. Preliminary Ruling Requests, para. 9.

[24] See U.S. First Written Submission, paras. 82-84; U.S. Statement at First Substantive Meeting of the Panel Regarding U.S. Preliminary Ruling Requests, paras. 10-13

> *"A responding Member would not be in a position to anticipate reasonably the scope of a dispute if, by reason only of the inclusion of a specific measure in a consultations request, any legal instrument providing a general authority or legal basis for the specific measure would be deemed to be part of a panel's terms of reference."*

Is there an analogy between the factual situation before the Appellate Body in US – Customs Bond Directive and the facts before the Panel in the present dispute? In particular, can it be said that the "omission" identified by China provides the general authority for the USDOC refusal to avoid the imposition of double remedies in the investigations at issue?

23. The specific factual elements in this dispute are largely different from those confronting the Appellate Body in *US - Customs Bond Directive*, but nevertheless compel the same legal conclusion that the "measure" introduced in the Panel request is outside the Panel's terms of reference.

24. First, it should be noted that, in contrast to *US - Customs Bond Directive*, the United States in this dispute does not agree with China that the "one additional measure"[25] included in the panel request is, in fact, a "measure" subject to challenge in WTO dispute settlement proceedings.[26] Second, the parties here do not agree on the very existence of the "measure" included for the first time in the panel request. The "absence of legal authority" alleged by China has not been established by China, notwithstanding its numerous invocations of passages that simply confirm, as Commerce has acknowledged, that no specific statutory provisions articulate the precise actions Commerce must take when concurrently applying AD and CVD measures in the context of domestic subsidies.

25. Third, unlike the codified texts sought to be introduced into the scope of the dispute by the complaining party in *US - Customs Bond Directive*, the new "measure" here, as China has set it out in the panel request, is amorphous and its content and parameters have not been defined other than by unsubstantiated assertions by China.

26. Notwithstanding these factual differences with *US - Customs Bond Directive*, the facts in this dispute point directly to the same legal conclusion. That the United States could not "reasonably anticipate the scope" of China's "as such" challenge reflects the fact that the inclusion of the "absence of legal authority" as a "measure" in the panel request had notably changed the dispute from what had been presented in the consultations request.

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[25] China Response to U.S. Request for Preliminary Rulings, para. 35.

[26] See U.S. Statement at First Substantive Meeting of the Panel Regarding U.S. Preliminary Ruling Requests, paras. 4-5.

27. Finally, and perhaps most importantly, one additional factual difference with *US - Customs Bond Directive* bears mention. In that dispute, the complaining party claimed that it had become aware of the relevance of certain statutory and regulatory provisions because of statements made by the complaining party in the course of consultations. Accordingly, what is critical is that in that dispute – as in every other dispute that the United States is aware of where this issue has been raised – the complaining party did not plainly acknowledge that it had been aware of its concerns with the "new" measure long before consultations. This stands in stark contrast to the position of China in this dispute. This dispute therefore presents the Panel with a question fundamentally different from that previously addressed by panels and the Appellate Body: should a complaining party's decision to exclude a "measure" of concern from the consultations request, but then include that "measure" in the panel request, be countenanced in light of the well-understood DSU obligation to request consultations on every measure? The United States respectfully submits that the answer must be in the negative.

II. FINANCIAL CONTRIBUTION BY A GOVERNMENT OR ANY PUBLIC BODY

16. (United States) What is the relevance, and the legal significance, of the footnote in the Appellate Body Report in EC-DRAMs that refers to the Draft Articles on State Responsibility?

28. We understand the Panel to be referring to footnote 179 in the Appellate Body Report in *US – DRAMS*. That footnote is not relevant to the resolution of this dispute.

29. As an initial matter, as explained the U.S. First Written Submission, the ILC Draft Articles are not relevant rules of international law within the meaning of the customary rules of interpretation reflected in Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*, and are not otherwise relevant to the interpretation of the covered agreements.[27]

30. As to the footnote, the issue in *US – DRAMS* was the interpretation and application of Article 1.1(a)(1)(iv) of the SCM Agreement. Article 1.1(a)(1)(iv) covers situations in which the government or any public body entrusts or directs a private body to carry out one or more of the type of functions in Article 1.1(a)(1)(i)-(iii). In paragraph 112 of its report in *US – DRAMS*, the Appellate Body noted that "there must be a demonstrable link between the government and the conduct of the private body." Then, in footnote 179, the Appellate Body referred to the ILC Draft Articles after noting "that the conduct of private bodies is presumptively not attributable to the State."

31. The issue in the present dispute is *not* whether there was government entrustment or direction of a private body, such that the conduct of the private body was attributable to the state. The issue in the present dispute is the interpretation of the term "public body" in Article

[27] *See* U.S. First Written Submission, paras. 110-120.

1.1(a)(1). Because the Appellate Body was addressing a different issue in *US – DRAMS* than the Panel is addressing here, the reference to the ILC Draft Articles in footnote 179 is not relevant.

17. (United States) Please comment on the relevance to this dispute of the other cases cited by China which contain references to the Draft Articles. What in your view are the implications of these references for the status of the Draft Articles as a basis for interpreting the WTO Agreement?

32. The ILC Draft Articles are not relevant for purposes of interpreting the term "public body" in Article 1.1 of the SCM Agreement, for the reasons described in the U.S. First Written Submission and in the answer to Question 16. Moreover, in *Korea – Commercial Vessels*, the panel was squarely faced with the question of whether it should rely upon the ILC Draft Articles, and particularly Article 5, for purposes of interpreting the term "public body." In that dispute, Korea argued that Article 5 of the ILC Draft Articles establishes a two-step test for determining whether an entity is a public body.[28] Korea argued, first, that a public body must be "empowered by the law of the State to exercise elements of governmental authority,"[29] and second, that the acts in question "will be considered acts of State only if such entities are acting pursuant to such authority in the particular instance."[30] The *Korea – Commercial Vessels* panel did not adopt the approach that Korea proposed. Rather, the panel reasoned that an entity will be a "public body" if it is controlled by the government.[31]

33. With respect to the other disputes cited by China, these disputes do not involve the interpretation of the term "public body." Accordingly, they are neither helpful nor instructive in the present dispute.

18. (United States) It appears from the texts of the respective USDOC determinations that in the case of inputs, the USDOC established that the SOE producers were public bodies exclusively on the basis of majority government ownership, while for SOCBs in the OTR investigation, the main focus of the analysis (the cross-referenced portion of the discussion in CFS Paper) appears to have been government control. Please explain this apparent difference in approach.

34. As demonstrated in the U.S. First Written Submission, the meaning of the term "public body" includes entities that are owned or controlled by the state. Majority government ownership normally demonstrates government control. Commerce relied upon such majority government ownership to find that SOE producers are public bodies. Commerce relied upon ownership, as well as other evidence demonstrating control, to find that SOCBs are public bodies. To the extent there is a difference between Commerce's SOE finding and its SOCB

[28] *Korea – Commercial Vessels*, para. 7.39.
[29] *Korea – Commercial Vessels*, para. 7.39.
[30] *Korea – Commercial Vessels*, para. 7.39.
[31] *Korea – Commercial Vessels*, para. 7.50.

finding, it is immaterial, because both findings are consistent with the meaning of the term "public body," which refers to an entity owned or controlled by the government, and both findings were based on the evidence on the record, which differed as between SOEs and SOCBs.

35. As noted in the U.S. First Written Submission, China's characterization of Commerce's financial contribution finding with respect to SOCBs in the OTR Tires investigation is incorrect.[32] The basis for Commerce's financial contribution finding was not that there was a policy in place to provide preferential lending and that the SOCBs acted pursuant to this policy. The basis for this finding was that the government owned or controlled the SOCBs, as explained in *CFS Paper*.[33]

19. (United States) The United States has argued before the Panel that the criterion for identifying a public body is government ownership or control.

(a) What in the view of the United States is the relationship between these two concepts? Are these independent concepts?

36. Ownership, particularly majority ownership, normally demonstrates control. Thus, the two concepts are related but independent, in the sense that the words "ownership" and "control" have different definitions.

37. The ordinary meaning of the term "public body" includes entities majority-owned by the government.[34] As the panel in *Korea – Commercial Vessels* found, it also includes entities controlled by the government.[35] This is logical, given that a majority owner can control that which it owns. The majority owner of a firm normally can appoint a majority of the firm's board of directors, who in turn can select the firm's managers. This gives the owner control over the firm's actions. Even if the owner does not interfere in day-to-day operations, the managers of the firm ultimately are accountable to the owner.

(b) Does a certain percentage of government ownership of an entity (i.e., the 51% alleged by China) create a presumption of control? If so, would such a presumption be rebuttable, and on the basis of what evidence?

38. As just mentioned, majority ownership normally demonstrates control. There may be rare situations in which this is not the case and where other possible indicators of control may need to be considered. Such situations are not before the Panel in this dispute.

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[32] *See* U.S. First Written Submission, paras. 165-166.

[33] *See CFS CVD Final Decision Memorandum*, at Comment 8 at 55-61 (analyzing government "control").

[34] *See* U.S. First Written Submission, paras. 95-97.

[35] *Korea – Commercial Vessels*, para. 7.55.

21. (Both parties) What is the legal basis for your view that the term "public entity" in the GATS Financial Services Annex, referred to at para. 62 of China's FWS, is or is not relevant context for interpreting the term "public body" in the SCM Agreement?

39. The GATS Annex on Financial Services expressly indicates that the definition of "public entity" contained therein applies only "[f]or purposes of this Annex."[36] Therefore, this definition should not be used to interpret the meaning of a term, such as "public body," in an entirely different agreement. The panel in *Korea – Commercial Vessels* "question[ed] the relevance of the *GATS Annex on Financial Services* to an interpretation of Article 1.1(a)(1) of the *SCM Agreement*."[37] That panel stated that relying upon the definition in the GATS Annex on Financial Services would introduce "considerations of benefit into the analysis of the private/public status of an entity."[38] China's attempt to lift the definition of "public entity" in the GATS Annex on Financial Services and read it into the meaning of the term "public body" therefore must fail.

22. (United States) How in practice does the USDOC determine that an entity is or is not a public body? Does the USDOC still apply the five-factor test in certain cases? If so, under what circumstances?

40. In the four investigations at issue, Commerce analyzed whether input producers and banks were owned or controlled by the government to determine whether they were public bodies. Although Commerce in the past has used a "five-factor test," it has not been Commerce's only approach to analyzing public body issues. Prior to the four investigations at issue in this dispute, Commerce last applied the five-factor test in the countervailing duty investigation of coated free sheet paper from Korea.[39] Commerce also applied the five-factor test in an administrative review and the countervailing duty investigation involving DRAMS from Korea,[40] the countervailing duty investigation of hot-rolled carbon steel flat products from South Africa,[41] and in an initiation of a countervailing duty investigation of steel wire rod from various

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[36] GATS Annex on Financial Services, para. 5 (chapeau).

[37] *Korea – Commercial Vessels*, para. 7.47 (footnote omitted).

[38] *Korea – Commercial Vessels*, para. 7.47.

[39] *See Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60639 (Dep't of Commerce Oct. 25, 2007) (final determination) and attached Issues and Decision Memorandum at Comment 11.

[40] *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 71 Fed. Reg. 14,174 (Dep't of Commerce March 21, 2006) (final results) and attached Issues and Decision Memorandum at 6-7 (Exhibit US-111); *Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 37122 (Dep't of Commerce July 23, 2003) (final determination) (Exhibit US-58) and attached Issues and Decision Memorandum at 16-17 (Exhibit US-59).

[41] *Certain Hot-Rolled Carbon Steel Flat Products from South Africa*, 66 Fed. Reg. 50412 (Dep't of Commerce Oct. 3, 2001) (final determination) (Exhibit US-112).

countries.[42] As explained in the U.S. First Written Submission, the five-factor test stemmed from factors analyzed in older cases.[43]

41. In other cases, Commerce took a different approach, analyzing primarily ownership or control. In an administrative review of hot-rolled carbon steel flat products from India, Commerce found that an entity in which the government owned 98 percent of the shares, and which was governed by the Ministry of Steel, was a public body.[44] In an investigation involving PET film from India, Commerce determined that government owned and/or controlled banks were public bodies.[45] In an investigation involving stainless steel sheet and strip from Korea, Commerce examined whether a Korean steel company was a government-controlled company.[46]

42. This non-exhaustive summary indicates that Commerce approaches public body issues on a case-by-case basis, without one approach governing all cases. As Commerce has recently stated, the five-factor test tends to arise in situations where there is not clear evidence of government ownership or control.[47] This makes sense, given that most of the five factors relate to ownership or control over an entity. When there is majority government ownership, it normally is not necessary for Commerce to apply the five-factor test.[48] This is because majority ownership is indicative of control.

23. (Both parties and third parties) Please comment on Saudi Arabia's argument (Saudi Arabia's Oral Statement, para. 7) that because the SCM Agreement provides that public bodies can entrust or direct private bodies to provide a financial contribution, public bodies are, by definition, vested with governmental authority.

43. Saudi Arabia's argument, which China has also advanced,[49] is without merit. Nothing in Article 1.1(a)(1) requires that all public bodies be vested with the authority to entrust or direct

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[42] *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Trinidad and Tobago, and Turkey*, 66 Fed. Reg. 49931, 49936 (Dep't of Commerce Oct. 1, 2001) (initiation of investigation) (Exhibit US-113).

[43] *See* U.S. First Written Submission, paras. 139-140 (describing fresh cut flowers from Netherlands and pure magnesium and alloy magnesium from Canada).

[44] *Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 1512, 1516 (Dep't of Commerce Jan. 10, 2006) (preliminary determination; unchanged in final) (Exhibit US-56).

[45] *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India*, 67 FR 34905, at Comment 3 (Dep't of Commerce May 16, 2002) (final determination) and attached Issues and Decision Memorandum at Comment 3 (Exhibit US-114).

[46] *Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 Fed. Reg. 30636, 30642 (Dep't of Commerce June 8, 1999) (final determination) (Exhibit US-115).

[47] *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*, 74 Fed. Reg. 36656 (Dep't of Commerce 2009) (final determination) and attached Issues and Decision Memorandum at Comment 4 (Exhibit US-116).

[48] *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*, 74 Fed. Reg. 36656 (Dep't of Commerce 2009) (final determination) and attached Issues and Decision Memorandum at Comment 4 (Exhibit US-116).

[49] *See, e.g.*, China Opening Statement at the First Meeting of the Panel, para. 25.

private bodies, and nothing precludes the possibility that some public bodies may possess such authority while others do not. Indeed, it may be the case that not all "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement have the capacity to entrust or direct a private body. Consequently, the only "governmental authority" that a "public body" would need to possess is the authority to make a financial contribution. The public body would not necessarily need to possess, in addition, the authority to entrust or direct a private body to make a financial contribution.

44. The argument advanced by Saudi Arabia and China relies upon the language in Article 1.1(a)(1)(iv) of the SCM Agreement, which requires that the function performed by a private body "normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." The argument appears to be that because there is an *explicit* government function requirement in cases of entrustment or direction, there is an *implicit* government function requirement in cases involving public bodies. This is incorrect. To read the requirement in Article 1.1(a)(1)(iv) into the rest of Article 1.1(a)(1) would be to conflate the test for entrustment or direction with the question of whether an entity is a public body. The Appellate Body has stated that the term "'entrusts' connotes the action of giving responsibility to someone for a task or an object."[50] The term "directs" connotes the exercise of authority over another entity.[51] Thus, an analysis of entrustment or direction entails an analysis of the *actions* of the government and/or public body and the *actions* of the private body. The question of whether an entity is a public body, on the other hand, is a question of the *nature* of that entity, which is a different question entirely.

24. (Both parties and third parties) Please comment on Mexico's argument (Mexico's Oral Statement para. 14 and Mexico's TPS, para. 43) that a narrow interpretation of the term "public bodies" in Article 1.1(a)(1) of the SCM Agreement would exclude public enterprises that provide goods and services as provided for in Article 1.1(a)(1)(iii) of the SCM Agreement.

45. Mexico is correct that China's proposed interpretation of the term "public body" is so restrictive that it would cover only regulatory or government agencies, and exclude public bodies that sell goods or services. In paragraph 76 of its First Written Submission, China characterizes the second element in its proposed standard, drawn from Article 5 of the ILC Draft Articles, as requiring that "'the conduct of an entity must accordingly concern governmental activity and *not other private or commercial activity in which the entity may engage*.'"[52] China's argument is problematic for at least two reasons. First, selling goods or services is generally "commercial activity." Thus, entities that engage in such commercial activity and sell goods or services could not be "public bodies," thereby rendering Article 1.1(a)(1)(iii) of the SCM Agreement inoperative in most situations. Second, the "public body" determination would, under China's

[50] *US – DRAMS (AB)*, para. 110.

[51] *US – DRAMS (AB)*, para. 111.

[52] China First Written Submission, para. 76 (quoting Draft Articles, Commentary to Article 5, para. 5).

argument, turn entirely on the question of whether there is a benefit (that is, whether the activity is non-commercial such that the entity may be deemed a "public body"). This would mean that the question of whether an entity is a public body would depend on whether the entity has actually made a financial contribution that confers a benefit. In other words, only after it is concluded that there is a subsidy would it be possible to determine if the entity was a public body. This would collapse the question of the nature of the entity with the question of whether there is a subsidy. The SCM Agreement should not be interpreted in a manner that would lead to either of these results.

III. BENCHMARKS TO CALCULATE THE AMOUNT OF THE SUBSIDY

A. GENERAL CONSIDERATIONS

25. (Both parties and third parties) Please provide your views on (i) the interpretation of Section 15(b) of China's Protocol of Accession; and (ii) the relationship of that Section with Article 14 of the SCM Agreement. In particular, please explain:

(a) The extent to which the terms "special difficulties", "where practicable" and "should" in Section 15(b) of China's Protocol of Accession should be read as effectively imposing conditions on the use of out-of-country benchmarks by investigating authorities in situations where the use of such benchmarks is not permitted under Article 14 of the SCM Agreement.

(b) Whether Section 15(b) imposes certain requirements as to, e.g., factual findings that must be made before an investigating authority can resort to any additional flexibility afforded by Section 15(b).

(c) Once it has been determined, pursuant to Section 15(b) of the Protocol, that an out-of-country benchmark may be used, whether the Protocol imposes any limit on what that benchmark should be, different from any obligations imposed by Article 14 of the SCM Agreement.

(d) Whether Section 15(b) of China's Protocol provides an autonomous basis for a finding of inconsistency – in other words, if the Panel were to find that the USDOC could "invoke" Section 15(b) of China's Protocol of Accession, could it: (i) make a finding of violation under Article 14 of the SCM Agreement, (ii) would it have to conclude that China did not rely on the appropriate legal basis in its claim, or (iii) would it have to interpret Article 14 in light of Section 15(b) of China's Protocol of Accession?

46. As provided in the Accession Protocol itself, the "Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part

of the WTO Agreement."[53] Hence, as with any other covered agreement, the terms of the Protocol, including the terms of paragraph 15(b), must be interpreted in accordance with customary rules of interpretation of public international law.[54]

47. However, in this dispute, it is not necessary for the Panel to reach paragraph 15(b) of the Accession Protocol because, as explained in the U.S. First Written Submission, Commerce's determinations to use out-of-country benchmarks are consistent with Article 14 of the SCM Agreement, and the Panel can dispose of China's claims on that basis.

48. Accordingly, the United States does not agree that paragraph 15(b) of the Accession Protocol "provides an autonomous basis for a finding of inconsistency" in this dispute. As a general matter, however, if a Member were to rely on paragraph 15(b) as a justification for a measure that would otherwise not be justified under Article 14 of the SCM Agreement, the conditions under paragraph 15(b) would need to be met.

49. Paragraph 15(b) of the Accession Protocol reflects that, in addition to agreeing to be bound by the text of the SCM Agreement, China also agreed to additional terms and conditions concerning the use of out-of-country benchmarks in CVD investigations. Paragraph 15(b) addresses a specific concern that certain Members had regarding their ability to find reliable benchmarks within China. These Members explained in paragraph 150 of the Working Party Report that out-of-country benchmarks are particularly important in the case of China because "China was continuing the process of transition towards a full market economy" and thus, "special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations." Therefore, paragraph 15(b) was included in the Accession Protocol because the "special difficulties" associated with the transitional nature of China's economy may justify the use of out-of-country benchmarks.

50. Finally, the United States notes that China has not made arguments concerning claims it included in its request for the establishment of a panel that were based on the paragraph 15(b) of the Accession Protocol.[55]

26. (United States) Does the US agree with China's characterization of the US position in para. 14 of China's Opening Statement, that "According to the United States, Article 15(b) of the Protocol, concerning the potential recourse to external benchmarks, does nothing more than restate ... when their use is permissible under Article 14 of the SCM Agreement. ... the United States apparently does not consider that China's Protocol

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[53] *China Accession Protocol*, para. 1.2.

[54] DSU, article 3.2; *see also China – Auto Parts (Panel)*, para. 7.741 (On appeal, the Appellate Body noted that "The Panel proceeded, therefore, on the basis that the commitment made by China in paragraph 93 of its Accession Working Party Report is enforceable in WTO dispute settlement proceedings and should be interpreted in accordance with the customary rules of interpretation as codified in Articles 31 and 32 of the *Vienna Convention*. Neither of these propositions has been disputed at any point in these proceedings, including in this appeal.").

[55] China First Written Submission, para. 31.

commitments are materially different than the standards that apply to all other Members under the SCM Agreement"?

51. The United States does not agree with China's characterization. The Accession Protocol sets forth additional terms and conditions to which China agreed as a condition for its accession to the WTO, as explained in the answer to question 25.[56] Specifically, in addition to agreeing to be bound by the text of the SCM Agreement, which itself justifies the use of out-of-country benchmarks in certain circumstances, China also agreed to *additional* terms and conditions concerning the use of out-of-country benchmarks in CVD investigations.

52. However, the extent to which the rules applicable to China under paragraph 15(b) of the Accession Protocol differ from the standards that apply pursuant to Article 14 of the SCM Agreement is not relevant to the resolution of this dispute. As the United States has explained, Commerce's determinations were consistent with Article 14 of the SCM Agreement. Additionally, China has not made arguments concerning claims it included in its request for the establishment of a panel that were based on the paragraph 15(b) of the Accession Protocol, so it is not necessary for the Panel to address those claims.[57]

27. (Both parties) Does the Panel need to take Section 15(b) of China's Protocol of Accession into consideration in resolving China's claims under Article 14 of the SCM Agreement?

53. No. As explained, Commerce's determinations to use out-of-country benchmarks are consistent with Article 14 of the SCM Agreement, the provision under which China is pursuing claims. It is not necessary to take paragraph 15(b) of China's Accession Protocol into consideration in resolving China's claims under Article 14 of the SCM Agreement.

28. (Both parties and third parties) What, if any, is the legal force / relevance of the Working Party Report in interpreting Section 15(b) of the Protocol. Assuming that you consider the Working Party Report to be relevant in interpreting Section 15(b) of the Protocol, please explain how para. 150 of the Working Party Report affects the application of Section 15(b).

54. In addition to containing certain specific commitments made by China,[58] the Working Party Report is context for the interpretation of China's Accession Protocol, including paragraph 15(b) of the Accession Protocol. Article 31(2)(b) of the Vienna Convention reflects the customary rule of interpretation that "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: ... any instrument which was made by one or more parties in connection with the conclusion of the treaty and

[56] *Working Party Report*, para. 9.

[57] China First Written Submission, para. 31.

[58] *Accession Protocol*, para. 1.2.

accepted by the other parties as an instrument related to the treaty." The Working Party Report is such an instrument made by the WTO Members and China in connection with China's Accession Protocol. This is confirmed by the Preamble of China's Accession Protocol, which "tak[es] note of the Report of the Working Party on the Accession of China," and by the consensus adoption of the Working Party Report by the Ministerial Conference.[59]

55. Paragraph 15(b) of the Accession Protocol must be read in light of the context provided by the Working Party Report. For example, paragraph 150 of the Working Party Report explains that Members may find it "necessary to take into account the possibility that strict comparisons with domestic costs and prices might not always be appropriate." In other words, the transitional nature of China's economy may necessitate use of an alternative methodology in order to make an appropriate comparison – that is, a comparison that reflects the full value of the benefit of subsidies.

29. (United States) Please respond to the points made at para. 14 of China's Opening Statement, that the US has not explained how the commitments in China's Protocol would have affected the analysis conducted by USDOC, had it relied upon these provisions. In the view of the United States, did the USDOC rely on these provisions?

56. The Department of Commerce based its determinations upon U.S. law. As the Appellate Body has explained, proceedings before a national authority, such as the countervailing duty investigations at issue in this dispute, may properly focus solely on "the requirements of the national law, regulations and procedures."[60] Accordingly, for U.S. law purposes, Commerce's determinations are justified by the administrative records and the relevant provisions of U.S. law. As a matter of U.S. law, it was neither necessary nor appropriate for Commerce to seek to justify its determinations on the basis of the SCM Agreement, China's Accession Protocol, or any other WTO Agreement, rather than on the relevant provisions of U.S. law.

57. Of course, in some instances, where parties to the underlying investigations raised arguments based on China's Accession Protocol, the Department addressed these arguments as part of its determination. For example, in three of the investigations at issue the Department responded to those arguments by noting that a case-by-case approach to the question of whether internal or external benchmarks provided the appropriate comparison is the approach China agreed to in its Accession Protocol.[61]

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[59] *Ministerial Conference, Fourth Session, Doha, 9 - 14 November 2001, Summary Record of the Third Meeting, Held at the Sheraton Convention Centre, Doha, Qatar, on Saturday 10 November 2001 at 3 p.m.*, WT/MIN(01)/SR/3 (10 January 2002), p. 4.

[60] *US – Lamb Meat (AB)*, para. 136.

[61] *See OTR Tire CVD Final Decision Memorandum*, at 42; *LWS CVD Final Decision Memorandum*, at 40; *LWRP CVD Final Decision Memorandum*, at 17.

30. (Both parties and third parties) What are the disciplines/limits that apply to an investigating authority's selection of a benchmark, under Article 14 of the SCM Agreement? In other words, are there any limits to the "flexibility" afforded to investigating authorities to choose a methodology that is consistent with the specific subparagraphs of Article 14? In answering this question, please discuss the statement of the EC – DRAMs panel that "[i]n light of [...] problems dealing with the prescribed methodology for calculating benefit in Article 14 of the SCM Agreement, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology" (para. 7.213, quoted by the Appellate Body in Japan – DRAMS, footnote 379), noting that in that case, the panel found that the methodology used by the investigating authority did not pass "this basic reasonableness test". How do you see the relationship between this line of reasoning and that of the Appellate Body in US - Softwood Lumber IV?

58. The particular "guidelines" in the subparagraphs of Article 14 of the SCM Agreement provide the "'framework within which [the benefit] calculation is to [be] performed', although the 'precise detailed method of calculation is not determined.'"[62] The Appellate Body has explained that the use of the term "shall" in the chapeau of Article 14 "suggests that calculating the benefit consistently with the guidelines is mandatory."[63] However, the Appellate Body also explained that the guidelines are not rigid,[64] but provide flexibility to the investigating authority to determine an appropriate method for calculating the benefit.

59. The Appellate Body further reasoned that "[t]he 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."[65] The Appellate Body reiterated in *Japan – DRAMS* that 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."[66] Finally, in the passage quoted in this question, the panel in *EC – DRAMS* recognized that investigating authorities may face difficulties in determining benchmarks under the guidelines of Article 14 and explained that, "[i]n light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the SCM Agreement, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology."[67] This reasoning of the panel in *EC – DRAMS* is consistent with the finding of

[62] *US – Softwood Lumber CVD Final (AB)*, para. 92 (quoting the underlying panel report, at para. 7.49).

[63] *US – Softwood Lumber CVD Final (AB)*, para. 92.

[64] *US – Softwood Lumber CVD Final (AB)*, para. 92.

[65] *US – Softwood Lumber CVD Final (AB)*, para. 91.

[66] *Japan – DRAMS (AB)*, para. 191.

[67] *EC – DRAMS*, para. 7.213 . When analyzing Commerce's benefit analysis in a privatization case, the Article 21.5 panel in *US – Countervailing Measures* (Article 21.5) concluded that Article 14 provides no "legal basis to require [Commerce] to conduct its analysis in a particular manner." (*US – Countervailing Measures* (Article

the Appellate Body in *US – Softwood Lumber CVD Final*, which recognized that the guidelines in Article 14 provide flexibility in the selection of the methodology for determining the benefit.

60. In *EC – DRAMS*, the panel ultimately determined that the EC's decision to treat both loans and debt-to-equity conversion as grants because it was "financing which no reasonable investor would have provided" was not consistent with the guideline in Article 14.[68] The panel explained that "a loan, a loan guarantee, a debt-to-equity swap that requires the recipient to repay the money or to surrender an ownership share in the company is not the same as a grant and can not reasonably be considered to have conferred the same benefit as the provision of funds without any such obligation."[69] The facts of that dispute, however, are not analogous to the investigations at issue in this dispute. For each out-of-country benchmark used here, Commerce selected a price or interest rate consistent with the guidelines in Article 14. Commerce did not, for example, treat all of the loans received as grants, but selected a comparable interest rate to use as the benchmark. Therefore, the *EC – DRAMS* panel's concerns about the benchmark selected in that dispute are not applicable to the investigations at issue in this dispute.

31. (United States) Please clarify whether, with respect to China's claims on each of inputs, loans, and land-use rights, it is the US position that the USDOC determinations at issue are consistent with Section 15(b) of China's Protocol of Accession.

61. As explained in the U.S. First Written Submission and as noted in answer to question 26 above, contrary to China's claims, Commerce's determinations with respect to the decision to use out-of-country benchmarks to calculate the benefit of government-provided inputs, loans, and land-use rights are consistent with the WTO obligations of the United States, including in particular Article 14 of the SCM Agreement.

62. China has not made arguments concerning the claims it included in its request for the establishment of a panel that were based on paragraph 15(b) of the Accession Protocol.[70] Therefore, it is not necessary for the Panel to address China's now abandoned claims that Commerce's determinations were inconsistent with paragraph 15(b) of the Accession Protocol.

32. (Both parties) Does the predominance of the government as a supplier of a good suffice to establish "distortion" under Article 14(d), as interpreted by the Appellate Body in US - Softwood Lumber IV? What, if any, other factors are or may be relevant in establishing distortion of private prices?

63. The Appellate Body agreed that a Member may use an out-of-country benchmark consistent with Article 14(d) of the SCM Agreement in situations where the role of the government in the market is predominant. The Appellate Body explained that:

21.5), paras. 7.121-7.122).

[68] *EC – DRAMS*, para. 7.211.

[69] *EC – DRAMS*, para. 7.212.

[70] China First Written Submission, para. 31.

> there may be situations in which there is no way of telling whether the recipient is "better off" *absent the financial contribution*. This is because 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.[71]

The Appellate Body recognized the market reality that when the government plays a predominant role in a market, private prices will be impacted.

64. Indeed, in the underlying *Softwood Lumber* CVD investigation, Commerce never performed an analysis of the private prices in Canada to determine whether they were distorted. Instead, Commerce relied upon economic theory. Specifically, Commerce found that:

> A large government presence in the market will tend to make much smaller private suppliers price-takers. While it is not unusual for small suppliers to be price-takers even in a market with no government involvement, the government-dominated market will distort the market as a whole if the government itself does not sell at market-determined prices. In such a situation, true market prices may not exist in the country, or it may be difficult to a find a market price that is independent of the distortions caused by the government's action.[72]

This economic theory is commonly referred to as the "Dominant Firm Model."[73]

65. In addition to the government's predominant role, other factors that also impact whether private prices may be relied upon concern actions the government takes to directly impact the market. A government can, for example, distort prices directly by setting price controls or indirectly by restricting exports, which would increase domestic supply and lower prices. These factors were not present in the challenged investigations, but are examples of other government actions that could distort a market.

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[71] *US—Softwood Lumber CVD Final (AB)*, para. 93 (emphasis in original).

[72] *See Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 15,545 (April 2, 2002), and accompanying Issues and Decision Memo., at "Provincial Stumpage Programs Determined to Confer Subsidies: Benefit" (citing Dr. Robert Stoner and Dr. Matthew Mercurio, "Economic Analysis of Price Distortions in a Dominant-Firm/Fringe Market" (Jan. 4, 2002), Exhibit 4 of Letter from Dewey Ballantine to Department of Commerce (Feb. 14, 2002)).

[73] *See id.*

33. (Both parties) Please comment on Saudi Arabia's argument that the cost of production of the goods in the country of provision serves as the most appropriate alternative to domestic prices in calculating the amount of benefit under Article 14(d) of the SCM Agreement (Saudi Arabia's Oral Statement, para. 15 and Third Party Submission, paras. 78-88).

66. Saudi Arabia simply proposes an alternative methodology for calculating the benefit, but does not establish that the cost of production is the only permissible methodology for determining the benefit of a subsidy. In *US – Softwood Lumber CVD Final*, the Appellate Body explained that using the cost of production was just one "alternative method[ ]" and that it would not "suggest alternative methods that would be available to investigating authorities" because determining the consistency of an alternative method with the Agreement "will depend on how any such method is applied in a particular case."[74] Moreover, in that same paragraph, the Appellate Body also referenced reliance on "prices for similar goods quoted on world markets" as another possible alternative method.

67. Saudi Arabia attempts to analogize the Appellate Body's finding related to Article 9.1(c) of the Agreement on Agriculture to Article 14(d) of the SCM Agreement.[75] In the *Canada – Dairy 21.5 II* report, the Appellate Body explained that:

> The issue is whether Canada, on a national basis, has respected its WTO obligations and, in particular, its commitment levels. It, therefore, seems to us that the benchmark should be a single, industry-wide cost of production figure, rather than an indefinite number of cost of production figures for each individual producer. The industry-wide figure enables cost of production data for producers, as a whole, to be aggregated into a single, national standard that can be used to assess Canada's compliance with its international obligations.[76]

The Appellate Body's finding in that dispute is not relevant to the resolution of this dispute. The Appellate Body was interpreting the word "payments" and Article 9.1 of the Agriculture Agreement, which relates to Members' national export subsidy commitments. In contrast, the issue before this Panel is whether Commerce's determination that individual producers received goods at less than adequate remuneration was consistent with Article 14 of the SCM Agreement. Therefore, although Members may rely upon cost of production information in determining a benchmark, they are not required to do so by Article 14 of the SCM Agreement.

B. INPUTS

[74] *US—Softwood Lumber CVD Final (AB)*, para. 106.

[75] Third Party Submission of the Kingdom of Saudi Arabia, at 19-20 (June 5, 2009).

[76] *Canada Dairy (Article 21.5 II) (AB)*, para. 96.

36. (United States) What "price distortion" analysis - other than with respect to the predominance of the government as supplier of inputs - did the USDOC conduct in the investigations at issue? Please identify that analysis in the relevant documents on the record.

68. 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. Moreover, when discussing the use of out-of-country benchmarks, the Appellate Body did not find that the Agreement requires a "price distortion" analysis. Instead, the Appellate Body analyzed a situation in which the government's participation in the market 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."[77] The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority is not required to forego the ability to determine a benchmark and measure the benefit. Instead, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement if it looks outside the country of provision.

69. In the investigations China challenges, Commerce made precisely such determinations. In the *OTR Tires* CVD investigation, Commerce explained that:

> The Department recognizes that government involvement in a market may have an impact on the price of the good or service in that market, especially if the government provides a majority or, in certain circumstances, a substantial portion of the good or service. See CVD Preamble at 65377. The Department has found that, in certain circumstances, the government's presence in a market for a particular good or service so dominates that market that the Department will consider the market to be significantly distorted. Under these circumstances, prices stemming from private transactions within the market cannot give rise to a price that is sufficiently free from the effects of the GOC's actions 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. See e.g., CWP from the PRC and IDM at Comment 7. If the Department determines that a particular market is distorted, the remaining private prices in that country cannot be considered to be independent of the government price. See e.g., Softwood Lumber from Canada and IDM at 38 and 39. In such situations, the regulations state that the Department will not use private prices in the country in question as the basis for a

[77] *US—Softwood Lumber CVD Final (AB)*, para. 93.

> benchmark in determining a benefit. See CVD Preamble at 65377.[78]

70. Likewise, in the *CWP*, *LWRP*, and *LWS* CVD investigations, Commerce referenced the prior *Softwood Lumber* CVD investigation, explaining that:

> Where the market for a particular good or service 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.[79]

Based upon this reasoning, Commerce determined, 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."[80]

37. (United States) Please address China's argument (China's Opening Statement, paras. 37-38) that the USDOC rejected private prices merely on the basis of a per se rule that government's predominant role in the market actually distorted those private prices.

71. Contrary to China's assertions, Commerce looked at all the evidence on the record in making its determinations to use out-of-country benchmarks. Of course, in light of China's overwhelming position in the markets Commerce evaluated, it is natural that that fact played a central role in Commerce's analysis. For example, for the hot-rolled steel market, Commerce determined on the available facts that the Government of China owned *96 percent* of the hot-rolled steel production in China.[81] China has not challenged this determination. Commerce also considered what role imports played in the market, and determined that they were small relative to the government-owned production of hot-rolled steel, accounting for only three percent of total Chinese hot-rolled steel production.[82] Thus, import prices were inappropriate because they reflected a market dominated by the government's role as a supplier of *96 percent* of the hot-

[78] *OTR Tires CVD Final Decision Memorandum*, at 79 (Exhibit CHI-4).

[79] *CWP CVD Final Decision Memorandum*, at 64-65 (Exhibit CHI-1); *see also LWRP CVD Final Decision Memorandum*, at 36 (Exhibit CHI-2); *LWS CVD Final Decision Memorandum*, at 72 (Exhibit CHI-3).

[80] *CWP CVD Final Decision Memorandum*, at 64-65 (Exhibit CHI-1); *see also LWRP CVD Final Decision Memorandum*, at 36 (Exhibit CHI-2); *LWS CVD Final Decision Memorandum*, at 72 (Exhibit CHI-3).

[81] A more detailed discussion is provided in paragraphs 206-208 of the U.S. First Written Submission.

[82] U.S. First Written Submission, at para. 208 (citing *LWRP CVD Final Decision Memorandum*, at Comment 7, p. 36) (Exhibit CHI-2).

rolled steel.[83] Therefore, Commerce concluded that the Government of China played a predominant role as a supplier of hot-rolled steel.[84] China has not cited to any record evidence that contradicts Commerce's finding that the government owns the producers of *96 percent* of the hot-rolled steel in China.[85]

72. Likewise, when assessing the role of the government in the BOPP market, Commerce considered all record evidence and did not stop after assessing government ownership. However, Commerce's analysis was impaired by the Government of China's failure to supply requested information. The Government of China failed to provide information on the percentage of production in the domestic BOPP market owned by the government, so Commerce relied upon available record evidence and determined that *one* government-owned producer accounted for *90 percent* of the petrochemical industry.[86] Additionally, Commerce could not assess the viability of the private sector for the BOPP market because the Government of China failed to provide requested information regarding the size of the private sector.[87] Therefore, Commerce determined that the Government of China played a predominant role in the market as a supplier of BOPP.[88] The Government of China has not pointed to any record evidence to counter the facts available determination that the government played a predominant role in the BOPP market.[89]

C. LOANS

38. (United States) The United States asks the Panel to find that the benchmarks used by the USDOC to determine the benefits provided by loans were consistent with Article 14(b) of the SCM Agreement. The United States also argues that China's "position that Members may only use in-country benchmarks to measure the benefit of RMB-denominated loans is also inconsistent with the terms of its Accession Protocol." (US FWS, para. 254)

(a) Is it the US position that the benchmarks used by the USDOC were consistent with Article 14(b) of the SCM Agreement (irrespective of para. 15(b) of China's Protocol of Accession)?

(b) Or is the US asking the Panel also to assess the conformity of the USDOC's benefit calculations under the additional rules of para. 15(b) of China's Protocol of Accession.

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[83] *LWRP CVD Final Decision Memorandum*, at Comment 7, p. 36-37 (Exhibit CHI-2).

[84] *Id*.

[85] U.S. First Written Submission, at paras. 209-211.

[86] U.S. First Written Submission, at paras. 222-223 (citing *LWS Final Decision Memorandum*, at 19 (Exhibit CHI-3)).

[87] *Id*. at Comment 13, at 69-70 (Exhibit CHI-3).

[88] *Id*.

[89] U.S. First Written Submission, at paras. 224-225.

73. Commerce's use of an external benchmark to measure the benefit conferred by loans is consistent with Article 14(b) of the SCM Agreement, and it is not necessary for the Panel to take into account the additional flexibility provided by paragraph 15(b) of China's Accession Protocol.

39. (United States) Please explain in detail, how each of the benchmarks used by the USDOC to determine the benefit conferred by loans (GTC's dollar-denominated loans, RMB-denominated loans) met the requirements of Article 14(b) of the SCM Agreement.

74. Article 14(b) sets the guideline for investigating authorities to measure the benefit of a government-provided loan by comparison to "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market." Investigating authorities are entitled to considerable leeway in adopting a reasonable methodology, including the use of out-of-country benchmark rates where alternatives are inappropriate.[90]

75. In determining a benchmark interest rate for government-provided short-term lending, Commerce relied upon a group of interest rates, rather than just one out-of-country interest rate because there are various factors that might impact national average interest rates.[91] This is a benchmark for a "comparable commercial loan" because it is based upon lending rates from countries with similar GNIs and institutional quality as measured by the World Bank governance indicators.[92] The benchmark rates also accounted for loan maturity (short-term lending rates), contemporaneity (lending rates reported for that year), and were adjusted for inflation as a proxy for exchange rate expectations.[93] This benchmark was also a rate from "the market" because it was based on a regression of actual average lending rates reported by each country in the group. Therefore, Commerce's benchmark for government-provided short-term loans was consistent with Article 14(b) of the SCM Agreement.

76. The benchmark Commerce relied upon to measure the benefit of the government-provided dollar-denominated loans was based on the one-year average of the daily interest rates for lending from the London Interbank Offering Rate ("LIBOR"), and included the average spread between the LIBOR rate and the one-year U.S. corporate bond rates for companies with a

[90] *EC – DRAMS*, para. 7.213 . When analyzing Commerce's benefit analysis in a privatization case, the Article 21.5 panel in *US – Countervailing Measures* (Article 21.5) concluded that Article 14 provides no "legal basis to require [Commerce] to conduct its analysis in a particular manner." (*US – Countervailing Measures* (Article 21.5), paras. 7.121-7.122).

[91] *CWP CVD Final Decision Memorandum*, at 7-8 (Exhibit CHI-1); *LWS Final Decision Memorandum*, at 12 (Exhibit CHI-3); and *OTR Tires CVD Final Decision Memorandum*, at 8 (Exhibit CHI-4). The full discussion of the benchmarks chosen and their consistency with Article 14(b) is provided in paragraphs 244-261 of the U.S. First Written Submission.

[92] *CFS CVD Final Decision* Memorandum, at Comment 10 (Exhibit CHI-93); CWP *CVD Final Decision Memorandum*, at 7-8 (Exhibit CHI-1); *LWS Final Decision Memorandum*, at Comment 20 (Exhibit CHI-3); and *OTR Tires CVD Final Decision Memorandum*, at Comment E.4 (Exhibit CHI-4).

[93] *Id*.

BB rating.[94] This benchmark interest rate also had a similar structure to the government-provided dollar-denominated loans, which were also based on LIBOR, plus an additional spread.[95] Moreover, the benchmark rate accounted for the duration of the loans, used contemporaneous data, and matched the currency denomination of the loan. Therefore, the benchmark represented a "comparable commercial loan." Additionally, this benchmark was also from "the market" because it was based on an average of actual LIBOR interest rates.

77. China's objection to Commerce's dollar-denominated long-term lending benchmark is limited. China does not argue that the benchmark as a whole is inconsistent with Article 14(b), nor does it object to using the LIBOR lending rates with an additional spread. Instead, China only objects to the use of annual averages rather than daily rates.[96] However, there is no obligation in Article 14(b) that requires the use of daily rates over annual average rates. Moreover, China did not raise this argument in the underlying proceeding, nor did China request that Commerce depart from its regulation, which generally provides for the use of annual averages, and, instead, place the daily interest rate data on the administrative record.[97]

40. (United States) Does the US concede, as argued by China at para. 63 of its Opening Statement, that producers in the tire industry did not obtain loans from SOCBs at "preferential, non-commercial" rates of interest within China?

78. No, the United States does not concede that producers in the tire industry did not obtain loans from SOCBs at preferential, non-commercial rates of interest within China. China argues that the United States conceded this point in the U.S. First Written Submission at para 354-355. In these paragraphs, the United States explained that Commerce's specificity determination was not premised on tire producers receiving loans at a certain mandated rate. Instead, the specificity determination was based on the fact that national, provincial and municipal planning documents made policy lending expressly available to a group of industries, including the tire industry.[98] This is the analysis prescribed by Article 2.1(a) of the SCM Agreement, *e.g.*, whether the legislation pursuant to which the granting authority operates expressly limits access to the subsidy to certain enterprises. Further supporting this determination was evidence that lending was expressly unavailable to other industries.[99]

79. With respect to Commerce's benefit analysis, as explained in the U.S. First Written Submission, Commerce properly determined that the investigated tire producers received loans at a non-commercial rate. Specifically, Commerce established a commercial benchmark for loans and compared the interest rate the tire producers received to this commercial benchmark. This is

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[94] *See, e.g., Memorandum to the File, Calculation for the Preliminary Determination: Guizhou Tire Company Limited*, at 3 (Dec. 7, 2007) (unchanged in final results) (Exhibit US-73).

[95] China First Written Submission, at para. 201.

[96] China First Written Submission, at paras. 240-243.

[97] U.S. First Written Submission, para. 261.

[98] *See, e.g.,* U.S. First Written Submission, para. 336-343.

[99] *See, e.g.,* U.S. First Written Submission, para. 352-253.

the benefit analysis prescribed by Article 14(b) of the SCM Agreement. Commerce ultimately determined that the investigated tire producers received loans at non-commercial rates.

41. (Both parties and third parties) What is your view of China's argument (China's FWS para. 274) that the USDOC's rejection of China's interest rates might be a second-guessing of the monetary policy choices of China?

80. Contrary to China's assertion, Commerce only assessed the role of the government in China's banking sector to determine if it could rely upon lending rates in China to measure the benefit from the government-provided loans, consistent with the Appellate Body's determination in *US – Softwood Lumber*.[100] China's position that investigating authorities are prohibited from examining interest rates of other Members[101] is not supported by the SCM Agreement. China would require an investigating authority to use only in-country interest rates, regardless of the extent of government control of and intervention in the banking sector. China, however, provides no legal support for this reading of Article 14(b), a reading that is at odds with prior panel and Appellate Body findings.[102]

81. Commerce *refrained* from judging China's monetary policies when it rejected arguments by domestic producers that Commerce should eliminate the interest rate adjustment to the lending benchmark. In the *OTR Tires* CVD investigation, the domestic producers argued that the Government of China had monetary policies that distorted the inflation rate in China and, therefore, Commerce should not adjust for inflation in its lending benchmark.[103] Commerce did not seek to determine whether China's policies impacted the inflation rates, and instead continued to adjust for inflation in its benchmark calculation to ensure a "fair and meaningful cross-country comparison of interest rates."[104] Commerce's analysis was directed at determining a comparable commercial interest rate, not at second-guessing China's monetary policies.

D. LAND-USE RIGHTS

42. (United States) With respect to the calculation of the benefit conferred by the provision of land-use rights:

(a) What limits circumscribe an investigating authority's choice of a benchmark under Section 15(b) of China's Protocol of Accession with respect to land-use rights?

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[100] *US—Softwood Lumber CVD Final (AB)*, para. 101.

[101] China asserts that it "is not the role of WTO Members to reject the interest rates prevailing in the territory of another Member as 'unsuitable.'" China First Written Submission, para. 275.

[102] *See, e.g.*, *US—Softwood Lumber CVD Final (AB)*, para. 103.

[103] *OTR Tires CVD Final Decision Memorandum*, at Comment E.4, at 106 (Exhibit CHI-4).

[104] *Id*. at 109.

82. The United States recalls that its measures are consistent with Article 14 of the SCM Agreement, the provision under which China is pursuing claims. Thus, it is not necessary for the Panel to assess what, if any, limits circumscribe an investigating authority's choice of a benchmark under paragraph 15(b) of China's Accession Protocol with respect to land-use rights.

83. While it is not necessary for the Panel to evaluate paragraph 15(b) of the Accession Protocol to identify limits that may be imposed by that provision on an investigating authority's choice of a benchmark, the United States notes that nothing in paragraph 15(b) suggests any limit that circumscribes an investigating authority's choice when "there are special circumstances." Rather, after confirming the general application of the SCM Agreement to the determination of benefits under Article 14 of the SCM Agreement with respect to China, paragraph 15(b) of the Accession Protocol expressly articulates the additional flexibility available regarding the use of out-of-country benchmarks with respect to goods from China. Paragraph 15(b) simply provides that, when "there are special circumstances," the investigating authority "may then use methodologies . . . which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks." Paragraph 15(b) has nothing further to say about the particular choice of an out-of-country benchmark by an investigating authority, with respect to land-use rights or any other financial contribution.

(b) Does the special nature of land-use rights in China have any impact on the benchmarks used / adjustments that have to be made?

84. Not only is the Government of China the source of all land-use rights in the country, it retained the power to effect conversion of allocated land-use rights to granted land-use rights.[105] Therefore, the government had control over the supply of land that was available for use by private companies, providing it with significant control over the prices in the secondary market. Moreover, local governments most often transfer land-use rights through non-transparent negotiations with investors despite guidance that land-use rights should be transferred through a transparent bidding or auction process.[106] This has led to widespread corruption where much of the compensation is retained by local government officials.[107] For these reasons, among others, the record evidence demonstrated that China retains a predominant role in the primary market for land-use rights, which also distorts the supply and pricing of land-use rights in the secondary

[105] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4); *and NME Status Memo*, at 42-43 (Exhibit US-69).

[106] *See LWS CVD Final Decision Memorandum*, at 16 (Exhibit CHI-3); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

[107] *See LWS CVD Final Decision Memorandum*, at 16 (*citing Law to Expose Illegal Land Deal*, China Daily (Aug. 1, 2006)) (Exhibit CHI-3); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

market.[108] The distortions in the land-use rights market were systemic and impossible to nullify by simply adjusting in-country prices. Therefore, Commerce determined that it could not rely on Chinese land-use rights prices to measure the benefit of the land-use rights provided to the producers in the *OTR Tires* and *LWS* CVD investigations and selected an out-of-country benchmark.

43. (Both parties) Please comment on the argument at para. 45 of China's Opening Statement. Please indicate specifically what the standards are "that define the line separating permissible from impermissible rejection of actual market conditions" for land prices in the country in favour of external benchmarks.

85. In paragraph 45 of its Opening Statement, the Government of China is arguing for a defining line – a *per se* rule – delineating which government interventions in the market are permissible, yet China argues with respect to government ownership that such *per se* rules are not consistent with the SCM Agreement. We agree that these decisions "must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."[109] It would be inappropriate to impose a *per se* rule regarding which types of government intervention are permissible without assessing them in light of the totality of evidence on the record.

86. In paragraph 45 of China's Opening Statement, China questions whether certain types of inquiries are appropriate, and refers to consideration of environmental laws and tax and investment policies. Commerce, however, made no such findings relating to China's environmental laws nor on the effect of the tax policies on land values.[110] Instead, Commerce's land analysis focused on the extent to which the Government of China intervened in the market to impact the supply of land-use rights available for industrial use and failed to follow its own reforms on the sale of land-use rights.[111] Commerce's highly fact-specific analysis of the Chinese Government's land-use actions that were considered in the investigations at issue in this dispute, and the consequent impact on the suitability of Chinese land prices as a benchmark, implicate none of the hypothetical concerns that China has raised. To the contrary, in these investigations Commerce properly examined the relevant factors when assessing whether the Chinese Government's role rendered Chinese land-use rights prices inappropriate as benchmarks.

44. (United States) What "price distortion" analysis - other than with respect to the predominance of the government as supplier of land-use rights - did the USDOC conduct

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[108] *See LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

[109] *US—Softwood Lumber CVD Final (AB)*, para. 102.

[110] *See LWS CVD Preliminary Determination*, 72 FR at 67,905-909 (Exhibit CHI-34); *See LWS CVD Final Decision Memorandum*, at 14-18 and Comments 10-11 (Exhibit CHI-3); and *OTR Tires CVD Final Decision Memorandum*, at 20 and Comment H.7 (Exhibit CHI-4).

[111] U.S. First Written Submission, para 265-271.

in the investigations at issue? Please identify that analysis in the relevant documents on the record.

87. 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. Moreover, when discussing the use of out-of-country benchmarks, the Appellate Body did not find that the Agreement requires a "price distortion" analysis. Instead, the Appellate Body analyzed a situation in which the government's participation in the market 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."[112] The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority is not required to forego the ability to determine a benchmark and measure the benefit. Instead, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement if it looks outside the country of provision.

88. As described in the U.S. First Written Submission, in the investigations China challenges, Commerce made precisely such determinations with respect to land-use rights.[113] For example, in the *LWS* CVD investigation, Commerce explained that:

> Noting that the GOC, either at the national or local level, is the ultimate owner of all land in China, in the Preliminary Determination, we examined whether the GOC 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. We continue to find that a first tier benchmark [(market prices from actual transactions within the country under investigation)] is not appropriate because Chinese land prices are distorted by the significant government role in the market. Preamble, 63 FR at 65377, which states 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 the next alternative in the hierarchy." On the basis of the evidence on the record, we continue to determine that there are no usable first tier in-country benchmarks to measure the benefit from the transfer of land-use rights during the POI. See Preliminary Determination,72 FR at 67908.[114]

[112] *US – Softwood Lumber CVD Final (AB)*, para. 93.

[113] U.S. First Written Submission, paras. 263-271.

[114] *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (Exhibit CHI-4).

45. (United States) In US - Softwood Lumber IV, the Appellate Body, at para. 106 indicated that it agreed with the submissions of the parties and third parties 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." Yet the Appellate Body "emphasized" that "where an investigating authority proceeds in this manner, it 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)." With respect to land-use rights, please discuss how the USDOC ensured that the out-of-country benchmark it used "related to", "referred to" or was "connected with" the prevailing market conditions in China. Specifically, please discuss whether the USDOC "replicate[d] reliably market conditions" prevailing in China on the basis of market conditions prevailing in Thailand.

89. Article 14(d) of the SCM Agreement lists some factors that may form part of the "prevailing market conditions for the good or service in question." These include: price, quality, availability, marketability, transportation,[115] and other conditions of purchase or sale. Commerce's extensive analysis supporting its selection of the land-use rights benchmark addressed each of these enumerated factors.

90. To ensure similar quality and marketability of the land, Commerce selected a benchmark from what it determined to be a comparable market – Thailand. As an alternative to China, Thailand is a market that producers consider for diversifying their production bases in Asia.[116] Additionally, Commerce used prices for industrial land in Thailand because the land-use rights in China were also marked for industrial use.[117] Finally, Commerce selected benchmarks for similar types of land transactions. For example, Commerce used dividend yields from real estate investment trusts to measure the benefit of the allocated land-use rights because they more closely resembled a lease or rental arrangement than a one-time purchase.[118] Conversely, Commerce used the sales prices of industrial land in Thailand to measure the benefit of granted land-use rights because they are similar to a purchase of land.[119]

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[115] Transportation was not a factor in selecting the benchmark because land is not transported.

[116] *See LWS CVD Preliminary Determination*, 72 FR at 67,909 (*citing Asian Industrial Property Market Flash*, CB Richard Ellis (Q1 2007), at 3; *and Asian Industrial Property Market Flash*, CB Richard Ellis (Q2 2007), at 3) (Exhibit CHI-34).

[117] *See LWS CVD Final Decision Memorandum*, at 17 (*citing LWS CVD Preliminary Determination*, 72 FR at 67909 (Exhibit CHI-34)) (Exhibit CHI-3); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4) (*citing OTR Tires CVD Preliminary Determination*, 72 FR at 71,369 (Exhibit CHI-50)).

[118] *See OTR Tires CVD Preliminary Determination*, 72 FR at 71,370 (Exhibit CHI-50) (cited by *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4)).

[119] *See LWS CVD Final Decision Memorandum*, at 17 (*citing LWS CVD Preliminary Determination*, 72 FR at 67909 (Exhibit CHI-34)) (Exhibit CHI-3); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4) (*citing OTR Tires CVD Preliminary Determination*, 72 FR at 71,369 (Exhibit CHI-50)).

91. Availability was accounted for by selecting benchmark prices from an urban area, Bangkok, where population densities were higher than on average for Thailand.[120] This is because the land-use rights at issue in the *OTR Tires* and *LWS* CVD investigations were also from urban areas of China.[121] Finally, price was accounted for by selecting a comparable market for land, Thailand, which has a similar GNI and population density to China.[122]

46. (United States) Please address China's argument, (China's Opening Statement, in para. 49), that "[t]he fact that it would be impractical to adjust for all the factors in Article 14(d) was precisely why the Appellate Body seriously questioned whether out-of-country benchmarks could ever lawfully be used. But this did not dissuade it from nonetheless requiring strict adherence to the plain text of that provision". In this connection, please also clarify your statement in para. 286 of your FWS, that "it may not always be possible to adjust for all of the items listed in Article 14(d) of the SCM Agreement. However, that should not preclude a Member from selecting a comparison price".

92. The additional point the United States made in paragraph 286 of the U.S. First Written Submission addresses the inherent conflict between China's position – that all conceivable adjustments must be made,[123] regardless whether any data is on the record to make such adjustments – and the object and purpose of the SCM Agreement to permit Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[124] If the bar for selecting an out-of-country benchmark is set so high that it requires the use of data that is not available, investigating authorities will be required to use in-country prices, even if they contain the very subsidy that they are trying to measure. Such measurement would not capture properly the benefit of the subsidy due to the predominant role of the government. It was for this reason that the Appellate Body in *US–Softwood Lumber CVD Final* reversed the panel decision that had required the use of in-country prices because using a benchmark price from a market in which the government played a predominant role would be circular.[125] China's arguments ignore the inherent flexibility in the Article 14 guidelines.[126] This flexibility is necessary because of the practical difficulties faced by administering authorities resulting, in part, from the limited availability of information from which to select a benchmark.

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[120] *See LWS CVD Preliminary Determination*, 72 FR at 67,909 (relying upon *OTR Tires Memo to File: Tires: Land Benchmark Information*, at Atts. 9 and 13 (Dec. 7, 2007)); and *LWS Memo to File: Land Benchmark Information*, at Atts. 8 and 9 (Nov. 26, 2007)) (Exhibit CHI-34); and *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4) (*citing OTR Tires CVD Preliminary Determination*, 72 FR at 71,369 (Exhibit CHI-50)).

[121] *Id*.

[122] *See LWS CVD Preliminary Determination*, 72 FR at 67,909 (*citing Agriculture for Development*, World Bank World Development Report (2007), at 334) (Exhibit CHI-34), *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (*citing OTR Tires CVD Preliminary Determination*, 72 FR 71,368-71,369) (Exhibit CHI-4).

[123] China First Submission, para. 314.

[124] *US–Softwood Lumber CVD Final (AB)*, para. 95 (citing *US-German Steel (AB)*, paras. 73-74).

[125] *US–Softwood Lumber CVD Final (AB)*, para. 93.

[126] *See* Response to Question 30, above.

IV. "OFFSETS" FOR UNSUBSIDIZED TRANSACTIONS

47. (Both parties and third parties) China refers to the Appellate Body jurisprudence on zeroing in support of its argument with respect to "offsets". Please comment on the analogy drawn by China with this jurisprudence, which relates to the treatment of subcategories of investigated products.

93. As explained in the U.S. First Written Submission, Appellate Body reports regarding the denial of offsets in the antidumping context, otherwise known as "zeroing," are of no relevance to this dispute.[127] The Appellate Body reports in this regard offer the Panel no assistance, whatsoever, in examining China's claims. The 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 analogous provisions in the SCM Agreement, nor in the CVD provisions of the GATT 1994, to the provisions relied upon by the Appellate Body in its zeroing reports. There is simply 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 in the zeroing reports to this dispute.

94. Moreover, as the Panel's question indicates, the Appellate Body's zeroing findings relate to subcategories of *investigated products*. The offset/credit obligation for which China argues relates, in this dispute, to subcategories of rubber input products that are used to manufacture the investigated product, OTR Tires. More generally, the credit obligation for which China argues relates to all the various subcategories of financial contributions that may be investigated to determine whether they confer any benefit. China does not allege that Commerce treated any subcategories of *OTR Tires*, whether different models or different export transactions, differently from one another. In fact, Commerce calculated only one countervailing duty rate for each exporter by summing the benefits of subsidies found to exist under Article 14 of the SCM Agreement and calculating the amount of subsidization on a per unit basis, as required by Article 19.4 of the SCM Agreement.

48. (United States) What is the US response to the argument by China and some of the third parties that when goods are purchased frequently over the period of investigation, determining whether remuneration was adequate requires an aggregate analysis that takes into account all purchases over the entire period of investigation?

95. Article 14 of the SCM Agreement addresses the methods used to calculate a benefit in a countervailing duty proceeding. As noted by the Appellate Body, the guidelines in Article 14 permit authorities to use a range of methods depending on the facts of each case, and they give authorities substantial latitude and leeway in selecting the proper benefit calculation methodology.[128]

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[127] *See*, *e.g.,* U.S. First Written Submission, paras. 291 & 292.

[128] *See, e.g., US – Softwood Lumber CVD Final (AB)*, paras. 91-92; *Japan – DRAMS* (AB), para. 191.

96. China attempts to create an obligation to provide a credit for those instances where a government provides a good for adequate remuneration in order to reduce the benefit when a government provides a good for less than adequate remuneration. However, there is no basis in Article 14 of the SCM Agreement for this obligation. Accordingly, while China may purport to limit its proposed credit to cases in which inputs are purchased frequently over a period of investigation,[129] because there is no textual basis for this proposed credit at all, there is also no textual basis to apply the credit only in the limited situation identified by China.

97. To the contrary, if an the argument is that an investigating authority must provide a credit for instances where a government provides a particular input for adequate remuneration, then it could be argued that such a credit should apply against any good provided by a government for less than adequate remuneration. In fact, China's own example assumes such a result because it provides a credit across distinct inputs.[130] Moreover, this credit principle would necessarily be extended beyond goods to the other types of benefits enumerated in Article 14 of the SCM Agreement (e.g., loans and equity infusions). It is unclear how it would be logical, for example, to provide a credit for a subsidized loan because a government-provided good was sold for adequate remuneration. Such an unlimited credit principle would prevent Members from fully countervailing the effect of subsidies found to exist. China's proposed rule therefore fails to read Article 14 in light of the object and purpose of the SCM Agreement and it must be rejected.[131]

49. (Both parties and third parties) Can it be argued that determinations of benefit pursuant to SCM Article 14(d) that do not reflect or take into account normal fluctuations or variations in the price of a good or service do not reflect "prevailing market conditions"?

98. Article 14(d) of the SCM Agreement states as follows:

> 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,

[129] China explained during the first meeting with the Panel, in response to a question from the Panel, that it considers that the credit obligation for which it argues is limited to the measurement of the benefit of the provision of goods and services by a government or public body for less than adequate remuneration under Article 14(d) of the SCM Agreement.

[130] *See, e.g.,* U.S. First Written Submission, para. 305 (explaining how China constructed an example across distinct inputs).

[131] *See, e.g.,* U.S. First Written Submission, para. 306 (discussing how the Appellate Body has described the object and purpose of the SCM Agreement).

availability, marketability, transportation and other conditions of purchase or sale).

99. As the Appellate Body has explained, Article 14(d) requires that the benchmarks for adequate remuneration must relate or refer to, or be connected with, the prevailing market conditions in the country of provision.[132] Prevailing market conditions include, *inter alia*, price and "other conditions of purchase or sale." Thus, it could be argued that normal price fluctuations would constitute one of the prevailing market conditions referred to in Article 14(d).

100. In fact, Commerce's determination of benefit considered such price fluctuations by comparing monthly purchase prices to monthly benchmark prices that varied over the period of investigation. However, even assuming *arguendo* that a benchmark for adequacy of remuneration should relate or refer to the pattern of price fluctuations in the country of provision, this assumption does not support China's contention that instances in which a government sells a good for adequate remuneration should lower the benefit conferred when a government provides a good for less than adequate remuneration. Regardless of whether an investigating authority seeks to reflect the pattern of price fluctuations for a good in its benchmark, and regardless of whether an authority uses daily, weekly, monthly, or annual benchmark prices to measure adequacy of remuneration,[133] China argues that any instance in which the price paid for a good exceeds the benchmark price must reduce the benefit conferred when a good was provided for less than adequate remuneration.

101. Ultimately, whether and how the benchmark reflects prevailing conditions in the market of provision is irrelevant to China's claim. That is, China's proposed rule would require that non-subsidized transactions reduce any benefit that is found to exist for subsidized transactions regardless of the extent to which the benchmark selected reflects the patterns of price fluctuations for the relevant good in the relevant market.

102. In sum, China's subsidy credit argument is not based on the "prevailing terms and conditions" language in Article 14(d), and that language does not assist the Panel in evaluating the legitimacy of China's claims.

50. (United States) What is the US response to the EC's argument that an investigating authority's calculation of the amount of benefit must correspond to the subsidy (financial contribution) that it identified, and the period of investigation it selected? (EC Third Party Submission, para. 32).

103. In its Third Party Written Submission, the EC asserts that "[o]nce 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

[132] *US – Softwood Lumber Final CVD (AB)*, para. 103.

[133] In this regard, the United States recalls that China is not challenging Commerce's use of monthly benchmarks. *See* China First Written Submission, para. 150.

product concerned through that subsidy practice in the selected period."[134] The EC cites no textual basis or other authority for this proposition. The EC does, however, recognize that the SCM Agreement neither contains any reference to how investigating authorities should identify and define "subsidy schemes" in a particular case nor does it impose a particular period of investigation that must be used in an investigation.[135]

104. The EC's assertion does not correspond to an obligation that Members have undertaken under the SCM Agreement, and it is not at all clear what the principles included in that assertion would mean in effect. Therefore, the United States does not believe that the EC's statement in this regard is helpful to the Panel as it evaluates the claims made by China in this dispute.

IV. SPECIFICITY

53. (Both parties and third parties) What is the relevance to your arguments concerning de jure specificity of the approach of the panels in EC-DRAMs, US-DRAMs and Korea-Commercial Vessels, i.e., that these panels considered the question of specificity as a separate and independent condition from financial contribution and benefit?

105. The United States agrees that an investigating authority's consideration of the specificity of a subsidy is an inquiry that is separate and independent from the evaluation of financial contribution and benefit. Article 1 of the SCM Agreement provides that a subsidy must meet three criteria in order to be countervailable. First, there must be a financial contribution.[136] Second, the financial contribution must confer a benefit.[137] If the first and second criteria are met, a subsidy is deemed to exist.[138] Finally, to be potentially subject to countervailing duties, the subsidy must be specific within the meaning of Article 2 of the SCM Agreement.[139] Thus, the structure of Article 1 of the SCM Agreement confirms that specificity is "a separate and independent condition from financial contribution and benefit."

106. China argues that the covered agreements require an investigating authority to conduct a specificity analysis that is focused on the "elements" of a subsidy – financial contribution and benefit.[140] Thus, China is arguing for a specificity analysis that is integrally linked with the benefit and financial contribution analyses rather than being separate and independent. This is contrary to the structure established in Article 1 of the SCM Agreement.

55. (Both parties and third parties) Both parties acknowledge that an explicit limitation is necessary for a subsidy to be de jure specific in the sense of Article 2.1 of the SCM

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[134] EC Third Party Submission, para. 32.
[135] EC Third Party Submission, para. 31.
[136] Article 1.1(a)(1) of the SCM Agreement.
[137] Article 1.1(b) of the SCM Agreement.
[138] Chapeau of Article 1 of the SCM Agreement.
[139] Article 1.2 of the SCM Agreement.
[140] China First Written Submission, para. 217.

Agreement. What must be explicitly limited, the financial contribution, the benefit, both, or either one?

107. The specificity determination is separate and independent from the financial contribution and benefit analyses. Article 2.1(a) of the SCM Agreement provides that the relevant question is whether the granting authority or legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to certain enterprises. Thus, it is "access to a subsidy" that is limited to certain enterprises. Legislation need not define nor set out each of the elements of a subsidy, that is, financial contribution and benefit, in order to expressly limit access to that subsidy. In the *OTR Tires* CVD investigation, Commerce conducted the analysis prescribed by Article 2.1(a) of the SCM Agreement. Commerce determined that the national, provincial and municipal planning documents explicitly limited access to the policy lending program to a group of industries that included the tire industry.[141]

57. (United States) Please respond to China's statement at para. 64 of its Opening Statement that there is no reference in the USDOC's final determination to the "access to credit" rationale presented to the Panel. Please identify in the pertinent analytical and decision-related documents of the USDOC the sections setting forth the USDOC's determinations (and underlying reasoning) that the SOCB loans conferred benefits and were specific.

108. China argues that the United States has advanced an "access to credit" argument in the U.S. First Written Submission that is an *ex post* rationalization. The relevant passage of the U.S. First Written Submission states, "[i]nstead, the 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."[142] Commerce made this determination in the *OTR Tires* CVD Final Determination. For example, Commerce explained that "the totality of the information on the record . . . shows that the government is directing policy lending to the tire industry or to specific enterprises in the tire industry."[143] Additionally, Commerce found that "the Guizhou [9th] Five Year Plan states, explicitly . . . the general directive that policy loans should be allocated according to the plans."[144] Furthermore, evidence from the *CFS Paper* CVD investigation submitted in the *OTR Tires* CVD investigation further supports this point. For example, the bank officials' statements in that investigation include: the People's Bank of China "guided financial institutions to grant loans at a proper pace;"[145] the People's Bank of China briefs bank officers on

[141] *See, e.g.,* U.S. First Written Submission, paras. 336-343.

[142] U.S. First Written Submission, para. 355.

[143] *OTR Tires CVD Final Decision Memorandum* at 98.

[144] *OTR Tires CVD Final Decision Memorandum* at 99. As noted in the U.S. First Written Submission, para. 339 & n. 518, this quotation incorrectly cites to the Guizhou 10th Five Year Plan instead of the Guizhou 9th Five Year Plan. This incorrect citation was the result of China's translation errors. *Id*.

[145] *People's Bank of China 2006 Annual Report*, at 37, submitted in *OTR Tires GOC Questionnaire Response*, Exhibit GOC-3 (Oct. 15, 2007) (Exhibit US-93).

"how credit should be guided;"[146] the Bank of China takes industrial policies into account "in assessing a company's total credit limit;"[147] and "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies."[148] Thus, the United States has not offered an *ex post* rationalization in this dispute.[149]

109. With respect to the Panel's request for the analytical and decision-related documents setting forth Commerce's determination and underlying reasoning that the SOCB loans conferred a benefit and were specific, the United States generally refers the Panel to the following pages of the *OTR Tires* CVD Final Decision Memorandum and the underlying documents cited therein:

Specificity	*OTR Tires* CVD Final Decision Memorandum pp. 13-15; 98-100.
Benefit	*OTR Tires* CVD Final Decision Memorandum pp. 15; 104; 109-111.
SOCBs Provided Policy Lending	*OTR Tires* CVD Final Decision Memorandum pp. 15; 101.

60. (Both parties) What were the facts of record on land use rates outside the Industrial Park elsewhere in Huantai County? Did all land users within and outside the Park pay the same rates?

110. There is very little information on the record of the *LWS* CVD investigation pertaining to land-use rates inside Huantai County and outside of the Industrial Park and what little record information that exists is incomplete. The record of the *LWS* CVD investigation contains only five such land-use rights contracts.[150] At least with respect to these five contracts, the price for

[146] *CFS CVD GOC Verification Report*, at 5 (Aug. 20, 2007), submitted in *OTR Tires CVD Petitioners' Pre-Prelim Comments*, Exhibit 5 (Nov. 29, 2007) (Exhibit US-89).

[147] *CFS CVD GOC Verification Report*, at 17 (Aug. 20, 2007), submitted in *OTR Tires CVD Petitioners' Pre-Prelim Comments*, Exhibit 5 (Nov. 29, 2007) (Exhibit US-89).

[148] *CFS CVD Final Decision Memorandum*, at 58 (Exhibit CHI-93).

[149] In this regard, the Appellate Body has unequivocally stated that, in defending a measure, a Member may rely on evidence on the record even if that evidence was not expressly relied on in making the underlying determination. *See, e.g., US – DRAMS (CVD) (AB),* paras. 164-165 (finding a panel was incorrect to decline to consider evidence on the record of the underlying decision but not cited in the published determination and reliance on such evidence was not an *ex post* rationalization).

[150] *See LWS* CVD investigation, Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Provincial and Local Government, p. 14 (Mar. 4, 2008) (CHI-43) (The United States is in possession of additional information evidencing this point, but has not included the document as an exhibit with this response to the Panel's questions because the document contains BCI submitted during the investigation by the Government of China. While China submitted GOC BCI with China's First Written Submission, China did not provide the United States with an authorizing letter from the Government of China. Consequently, the United States is uncertain whether the Government of China has consented to the provision of GOC BCI to the Panel by the United States. The United States will verify with the GOC that the United States may

land use rights outside the Industrial Park varied.[151] Ultimately, however, Commerce did not make any factual findings regarding land-use rates within the county and outside the Industrial Park because such a finding was not necessary.

111. Land-use rates outside of the Industrial Park are not relevant to the regional specificity determination in the *LWS* CVD investigation. Under Article 2.2 of the SCM Agreement, the correct analysis is whether the subsidy is limited to companies within the designated geographic region. That is, once a granting authority identifies a designated geographic region and creates a subsidy that is limited to that region, the subsidy is regionally specific within the meaning of Article 2.2. The facts on the record clearly substantiated that this was the case. That is, Huantai County maintained a program to locate companies within the Industrial Park and, in order to do this, Huantai County provided these companies with land use rights for less than adequate remuneration.[152] Whether Huantai County maintained other programs through which it provided land-use rights for less than adequate remuneration to companies located outside the Industrial Park is irrelevant to the regional specificity determination. Otherwise, a granting authority that creates a regionally specific subsidy could easily circumvent the disciplines in Article 2.2 of the SCM Agreement simply by ensuring that at least one company outside a region benefits from a subsidy program similar to the regionally specific program.

61. (United States) Concerning de jure specificity:

(a) Is it the US position that if there is an explicit list of enterprises, industries or sectors eligible for a given subsidy, this fact alone would be sufficient for a finding of de jure specificity?

(b) Or could there be a case where such a finite list existed, but was so broad and diverse as not to give rise to de jure specificity?

(c) Where the list of eligible recipients is accompanied by a list of enterprises, industries or sectors that are prohibited from receiving the subsidy, would this fact by itself be determinative of de jure specificity?

(d) What if the list of eligible enterprises, industries or sectors was very broad and diverse, while the list of prohibited enterprises, industries or sectors was very narrow - would this make a difference for a finding of de jure specificity?

112. A number of factors may be pertinent to a specificity determination, which, in any event, must be made on a case-by-case basis according to the facts and evidence before the investigating

provide GOC BCI to the Panel, and once authorization has been provided, will submit the document to the Panel.).

[151] *See LWS* CVD investigation, Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Provincial and Local Government, p. 14 (Mar. 4, 2008) (CHI-43) (noting three land use rights contracts outside the Park which were not all for the same price).

[152] *See, e.g.,* U.S. First Written Submission, para. 365.

authority. Accordingly, it is difficult to say that one particular fact, alone, will or will not support a finding of specificity. In general, if the granting authority or legislation pursuant to which a granting authority operates limits the subsidy to a list of enterprises, industries, or sectors, such a subsidy would be *de jure* specific within the meaning of Article 2.1(a) of the SCM Agreement.

113. If a list of eligible recipients includes a very broad array of enterprises, industries or sectors, this could lead to a determination that the subsidy is, in fact, generally available, and thus not specific. On the other hand, if the list of eligible recipients is accompanied by a list of enterprises, industries or sectors that are prohibited from receiving the subsidy, this would provide strong support for a determination that the subsidy is limited to "certain enterprises" within the meaning of the SCM Agreement, and is therefore specific. It is not possible to speculate, in the abstract, whether a broad list of eligible recipients accompanied by a narrow list of prohibited enterprises would or would not support a finding of specificity. The specificity determination would, as in any case, depend on the actual nature and content of the lists and would necessarily be based on the particular facts and evidence before the investigating authority.

114. In the *OTR Tires* CVD investigation, there can be no question that policy lending was *de jure* specific. The national, provincial and municipal planning documents demonstrated that policy lending was limited to a group of industries, including the tire industry. For example, the national planning documents showed that the tire industry was an encouraged industry.[153] The provincial and municipal planning documents were even more specific, for example, naming an investigated tire producer and its tire production facilities as a priority.[154] Further, implementing regulations demonstrated that the government guided the banks to provide lending to encouraged industries.[155]

115. In addition, in the *OTR Tires* CVD investigation the national planning documents prohibited policy lending to restricted industries and abolished projects.[156] The list of prohibited industries and projects was not narrow but, instead, quite extensive.[157] This further supported Commerce's specificity determination and contradicts China's argument that policy lending was generally available.

63. (United States) Does the record evidence show that borrowers from SOCBs paid the same rates on their loans that borrowers from other banks in China paid? Please explain in detail and cite to the relevant evidence from the record of the investigation.

116. 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

[153] *See, e.g.,* U.S. First Written Submission, para. 337.

[154] *See, e.g.,* U.S. First Written Submission, para. 339-340.

[155] *See, e.g.,* U.S. First Written Submission, paras. 337, 339-340, 342.

[156] *See, e.g.,* U.S. First Written Submission, para. 353.

[157] *See, e.g.,* NDRC, *The Guiding Catalogue of the Industrial Restructuring (2005),* Order No. 40, pp. 22-43 (Dec. 2, 2005) (CHI-70).

from other banks in China. As noted above in Questions 40 and 57, the issue was not relevant to the specificity determination made by Commerce. However, evidence on the record of the investigation indicated that the interest rates of most loans in China are near the government-set benchmark rate, and the government floor on lending rates is not far below the benchmark.[158] Accordingly, the primary means of differentiating among borrowers in China are not the rates at which loans are made, but whether or not credit will be made available to borrowers.

117. As discussed above, with respect to Questions 40 and 57, the rate at which the tire producers received loans from SOCBs is not pertinent to Commerce's specificity determination. The rate is pertinent to the benefit calculation which is separate and independent from the specificity determination. Commerce's specificity determination properly focused on the national, provincial, and municipal planning documents to determine whether these planning documents explicitly limited access to policy lending to a group of industries including the tire industry. Because, as discussed above,[159] these planning documents explicitly limit access to policy lending in this manner – in fact, the planning documents prohibited policy lending to an extensive list of industries and projects – Commerce correctly determined that policy lending was specific within the meaning of Article 2.1(a) of the SCM Agreement.

65. *(United States) Assume that a municipal government owns all of the land in its territory, and that all users of land must lease it from that government. Assume that the government charges all users of land the same price, and that that price is indisputably a better-than-market price. Assume further that the same government creates an industrial park somewhere within its territory. All businesses operating in the park receive a tax break, and all pay the (same) subsidized land price as the businesses outside the park. Is it the US argument that the land use subsidy for businesses in the park would be regionally specific?*

118. As an initial matter, the United States notes that this hypothetical question assumes a factual scenario different from that considered by Commerce in the *LWS* CVD investigation. The Government of China, through its provincial and municipal land bureaus, does not charge all users of industrial land-use rights the same price either nationally or in the respective jurisdictions of the bureaus. With respect to the Panel's question, there is no information provided in the hypothetical scenario to suggest that any "land use subsidy" is limited to certain enterprises within a designated geographical region, as required by Article 2.2 of the SCM Agreement, so it is not clear that there would be evidence to support a determination of regional specificity. On the other hand, the question provides that "[a]ll businesses operating in the park receive a tax break," which suggests that this tax break may be limited to "businesses operating in the park," and therefore may be a regionally specific subsidy. However, the provision of another type of subsidy to entities located within the designated geographical region, the "tax

[158] *See, e.g., CFS CVD Final Decision Memorandum*, at 68-70 (CHI-93).

[159] *See, e.g.,* Question 61(a) *supra*.

break," is irrelevant to the issue of specificity with regard to the "land use subsidy," and, again, this hypothetical situation is distinct from the factual situation in the *LWS* CVD investigation.

V. DOUBLE REMEDY

70. (Both parties and third parties) Do the negotiations that led to the conclusion of the Uruguay Round – and in particular the adoption of the SCM Agreement – provide any information as to the reasons why Article 15 of the Tokyo Round Subsidies Code was not replicated in the SCM Agreement? Please provide any relevant documentary evidence to the Panel.

119. The United States is not aware of any information from the negotiations that led to the adoption of the SCM Agreement that provides *reasons* why Members declined to maintain Article 15 of the Tokyo Round Subsidies Code in the SCM Agreement. A review of the relevant negotiating history shows, however, that no Contracting Party proposed keeping Article 15 or a similar provision limiting the concurrent application of AD and CVD measures to imports from non-market economy countries. Furthermore, although the Secretariat prepared four lists of issues for discussion in the course of the subsidies negotiations, none of those lists identified the issue of "double remedies" or the concurrent application of AD and CVD measures to imports from non-market economy countries.[160]

120. The negotiating history does make clear that Contracting Parties specifically discussed non-market economies in the course of the negotiations. At the meeting of 12-13 July 1990, one of the new topics identified for discussion was the "treatment of measures taken in the context of transforming non-market economies into market economies."[161] This discussion appears to have resulted in text that first appeared as Article 29 of the Cartland III draft,[162] which subsequently became Article 29 of the SCM Agreement. Article 29 of the SCM Agreement reflects the attention Contracting Parties paid to the applicability of the provisions of the SCM Agreement to non-market economies.

121. The negotiating history thus reveals that Contracting Parties gave consideration to whether and how the rules of the future SCM Agreement would apply to non-market economies. The fact that participants in the Uruguay Round negotiations considered this issue, along with the fact that Article 15 of the Tokyo Round Subsidies Code remained in force through the negotiations, support the interpretation that emerges from the fact that the SCM Agreement contains no provision expressly limiting the right of Members to concurrently apply AD and CVD measures to imports from non-market economies, namely, Members did not include any such limitation in the WTO Agreement.

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[160] See MTN.GNG/NG10/W/9 and Revs. 1-4 (Exhibit US -118).

[161] See MTN.GNG/NG10/21 (Exhibit US-119).

[162] See MTN.GNG/NG10/23, page 27 (Exhibit US-120).

71. (United States) Concerning the issue of the "pass through" of the subsidy to the export price the US provides examples seeking to illustrate that producers may do several things with the subsidy other than lowering their export price, for instance, investing in reducing their costs of production.

(a) Can it not be plausibly argued that even in such cases, the subsidy would ultimately be reflected in a lower export price?

122. To begin with, it is important to note that China's claim to the Panel is not based on the theory that domestic subsidies lower export prices, which is the theory that the Government of China and Chinese respondents posited in certain of the AD investigations conducted concurrently with the CVD investigations at issue. China has now stated that whether (and to what extent) domestic subsidies may pass through into export prices is "an entirely irrelevant issue."[163]

123. Rather, China posits a separate theory that "the NME methodology to determine normal value in an anti-dumping investigation subsumes the rationale for imposing countervailing duties".[164] The analytical underpinnings of this theory are unclear. The core proposition of China's new theory appears to be that the "use of market-determined surrogate values in the NME methodology would necessarily address any subsidization of those producers."[165] In other words, China appears to suggest that the NME factor values taken from a surrogate country and used to determine normal value under the NME methodology are *conceptually* the equivalent of the sum of (i) the costs that the Chinese producers would have if China were a market economy country plus (ii) an amount that fully reflects the value by which those costs presumably would be lowered by virtue of Chinese subsidization. It is presumably because of this conceptual equivalence that, in China's view, "Commerce necessarily captures any trade-distorting effects of alleged subsidies *in the anti-dumping margin*."[166]

124. It is the position of the United States, of course, that these two theories and other competing theories about the effects of domestic subsidies do not alter the required legal analysis. As the United States has argued, as a legal matter, nothing in the text of the covered agreements, including China's Accession Protocol, limits or conditions a Member's right to apply AD and CVD remedies concurrently in the context of domestic subsidies.

125. In any event, there is no substantiation for the theory that all domestic subsidies – regardless of how the recipient makes use of those subsidies – are ultimately reflected in lower export prices. First, as the United States has explained, subsidies often come with conditions attached that reduce any cost savings to the producer below the nominal amount of the subsidy

[163] China First Written Submission, para. 363. See also *id.* at paras. 330, 366, 392, and 400.
[164] China First Written Submission, para. 323. See also *id.* at paras. 326, 329, 366 and 373.
[165] China First Written Submission, para. 340. See also *id.* at paras. 330 and 372.
[166] China First Written Submission, para. 330 (original emphasis).

received.[167] Second, even making the assumption that a subsidy inevitably lowers the recipient's cost of production, *pro rata*, below what it would have been absent the subsidy, the degree of pass-through to prices will depend on market conditions. Under certain conditions, it is quite possible that the producer would elect to keep increased profits, and use them to pay higher dividends and salaries, or invest them in additional production capacity for other products, research and development activities, or to meet any number of other objectives.

126. Moreover, there could well be a very long time lag between the time a subsidy was received and any effect on export prices attributable to the effects of the subsidy. In practice, prices do not adjust continuously to changes in the cost of production, but are set in light of conditions in the marketplace. For example, if producers that receive a subsidy collectively account for a small share of the market and are essentially price-takers, then these producers cannot individually or collectively change aggregate market prices.

(b) Can it be argued that an implicit rationale for CVDs is to remedy price advantages resulting from subsidies. Would this position contradict such a rationale?

127. As explained above, China's claim before this Panel is not predicated on the implicit rationale that CVDs remedy price advantages resulting from subsidies. Rather, the GOC posits a separate theory that the factor values taken from a surrogate country under the NME methodology conceptually reflect what would be the market costs of Chinese respondents adjusted upwards to "correct" for the effect of subsidies, thereby offsetting Chinese subsidization.[168]

128. In any event, the basic rationale for the CVD remedy is that subsidized imports can cause injury to a domestic industry, as confirmed by Article 15 of the SCM Agreement. In this regard, the SCM Agreement focuses on a number of ways in which this injury can occur and therefore requires an investigating authority to consider several enumerated factors. One of those factors does involve prices, but the focus is on how the subsidized imports affect prices of the like product in the importing country, not on how subsidies affect the price of the exported merchandise. Again, it is only in the context of the injury determination, not when determining the amount of the subsidies or the duties that can be applied. Moreover, the price-related factor in the injury determination is different from the inquiry that China argues in this dispute an investigating authority must undertake when determining the duties that can be applied.

129. Thus, the rationale, implicit or otherwise, for CVDs is not to remedy directly and precisely the price advantages that may result from subsidies. If WTO Members had intended to countervail not subsidies, but only any price advantages attributable to subsidies, they could have made remedies for subsidies part of antidumping measures, by requiring that the amount of any

[167] See U.S. First Written Submission, para. 456.
[168] See U.S. Answer to Question 71.

countervailable subsidies to the investigated product be added to the cost of production in cases where normal value was based on the cost of production. They did not do so.

130. As explained in the U.S. First Written Submission, the WTO agreements recognize that the CVD remedy is independent of the AD remedy and addresses a distinct unfair trade practice. In addition, the WTO agreements do not tie the level of CVDs that may be imposed is not tied to the effects of investigated subsidies examined on the prices of the subsidized products. Rather, Article 19.2 of the SCM Agreement explicitly states that CVDs may be levied in an amount equal to the "full amount of the subsidy." Similarly, GATT Article VI:3 provides that "[n]o countervailing duty shall be levied on any product [of a contracting party] . . . in excess of an amount equal to the estimated bounty or subsidy determined to have been granted . . on the manufacture, production or export of such product . . . ." It provides that "'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any [such] bounty or subsidy . . . ." [169] Thus, Article VI:3 recognizes Members' right to apply CVDs equal to (but not in excess of) the amount of the subsidy granted with respect to that product.

131. Furthermore, GATT Article VI:3 and Article 19.2 of the SCM Agreement do not require a Member to try to determine precisely in what way a subsidy may have benefitted the subsidy recipient. These provisions are not concerned with whether the recipient used the subsidy funds to purchase capital equipment, pay off debts, fund pension liabilities, increase dividend payments or lower prices in a particular market or in all markets. Some of these actions may have more immediate effects on prices than others, or may have little or no effects on prices. Rather, the only requirement is to find that a benefit exists in the first place, as set forth in Articles 1.1(b) and 14 of the SCM Agreement. There is no further inquiry under the SCM Agreement as to how a subsidy benefits the recipient.

132. In short, nowhere in the GATT or the SCM Agreement is there any suggestion that the effect of subsidies on costs or prices is relevant to the amount of CVDs that may be imposed.

72. (Both parties and third parties) Please explain and discuss the actual and potential effects on export prices of the different subsidies and types of subsidies countervailed by the USDOC in the investigations at issue.

133. The United States notes at the outset that China's claim is not based on the theory that any of the domestic subsidies countervailed by Commerce in the investigations at issue had any particular effect on the export prices of that merchandise. China does not claim either that Commerce made a determination about this issue or that Commerce should have made such a determination. Nor does any provision of the WTO agreements require investigating authorities to analyze the effects of domestic subsidies on export prices.

[169] Similarly, footnote 36 of the SCM Agreement defines a CVD as "a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise."

134. In any event, there is no basis for any presumption that the various types of domestic subsidies encountered by Commerce in these proceedings[170] automatically lower export prices, still less the presumption that such subsidies automatically lower export prices, *pro rata*, as the Government of China and Chinese respondents argued before Commerce. As explained above and in more detail below, the effect of domestic subsidies upon domestic and export prices can depend upon many factors. Thus, Commerce has correctly refused to assume that domestic subsidies automatically reduce prices. There is substantial support for the Department's position in the economic literature.[171]

135. In considering the impact of domestic subsidies upon export prices, the form of the subsidy would be important because some domestic subsidies would seem to give producers a greater incentive to increase production than others. A production subsidy (for example, the provision of raw materials at reduced prices) could be viewed as reducing the unit cost of producing merchandise and therefore increasing the producer's profit on sales of that product. This gives the producer an incentive to increase production of that merchandise. More general subsidies (such as general grants or debt forgiveness) may not provide such a direct incentive to increase production. A producer might use a general subsidy to pay higher dividends, fund research and development, clean up the environment, or make severance payments. Finally, a producer could waste the money. Consequently, these more general subsidies will not necessarily result in any increase in production.

136. Thus, to the extent a subsidy affects export prices, the type of subsidy will also influence how quickly the prices are affected. It certainly is not reasonable to assume that domestic subsidies found to be countervailable automatically lower export prices, *pro rata*, much less that any such reduction would occur during the period in which the dumping margin is calculated in a concurrent AD investigation.

137. Even if producers would like to utilize domestic subsidies exclusively by increasing production, they might not be able to do so, at least in the short or medium term. Various constraints (such as limits on the supply of raw materials, energy, or transportation, and the time required to add capacity) might limit their ability to do so.

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[170] Four general types of PRC government subsidies investigated in the four cases: (1) policy lending, (2) government provision of land, (3) government provision of production inputs (including energy and water) and (4) (direct) tax benefits.

[171] See, e.g., World Trade Organization, World Trade Report 2006, p. 57 ("Domestic prices are unaffected by producer subsidies."); Dennis R. Appleyard, Alfred J. Field, Jr., and Steven L. Cobb, International Economics, pp. 284-285 (2008) ("the domestic market price … remains equal to the international price in the case of a domestic producer subsidy"). For a graphical presentation of the circumstances under which a production subsidy would affect export prices by means of a prior effect on the world price, see Alex F. McCalla and Timothy E. Josling, Agricultural Policies and World Markets, pp. 126-127 (1985).

138. Even if all producers in an NME country do respond to domestic subsidies by increasing production, that does not mean that the increase would result in lower export prices.[172] Increased export sales would theoretically reduce the world or aggregate market price of the investigated product on world markets only to the extent that the producer or producers in question supply a substantial share of the world market, so that the additional production will cause prices to fall in that market. Even this will take time.

73. (Both parties) The GOC indicates that, in its view, the issue of the double remedy occurs entirely on the "cost" side of the equation and not on the export side. Please discuss the similarities and differences of this argument with China's arguments on double remedy before the USDOC.

139. Before Commerce, and in the context of the AD investigations that were conducted concurrently with the CVD investigations at issue, the Government of China and Chinese respondents argued that Chinese producers (like producers in market economy countries) automatically responded to domestic subsidies by lowering their export prices, *pro rata.*[173] They argued that, in a market economy country, this would have no effect on the dumping margin because the reduction in the export price would be matched by an equal reduction in normal value (regardless of whether normal value was based on home market prices or constructed value). However, in an NME proceeding, the Chinese respondents argued, normal value effectively is imported from the surrogate, market economy, country selected by Commerce for that purpose. Because this normal value would not be reduced in any way by the domestic subsidies in China, the decline in the export price would not be offset by an equivalent decline in normal value. Thus, the dumping margins would increase by the amount of the subsidy.[174]

140. This argument logically required some evidence to support the two theoretical propositions – that subsidies in NME countries would: (1) automatically cause export prices to drop, *pro rata*; and (2) have no effect whatsoever on normal value. The Chinese respondents offered no evidence to support either proposition, but chose to rely on their theoretical assertions.

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[172] Notably, even if it were assumed that all of the (domestic) subsidies at issue were invested, and that this enabled the subsidized company to lower its prices, including its export prices, for consistency one would also have to assume that such subsidies, precisely by reason of having been channeled into investment, would have enhanced the production efficiencies of the subsidized company, and lowered its factor usage, cost of manufacture, and calculated normal value. Normal value would also have reduced in additional ways, for instance, in terms of the calculation of profit. Thus, the provision of domestic subsidies would not have resulted in a wedge between the NME normal value and export prices that would have accounted for either part or the totality of the calculated dumping margin.

[173] The description "*pro rata*" is used to describe the supposed "dollar-for-dollar" effect of subsidies on prices. In other words, a ten dollar subsidy bestowed upon a producer of ten widgets and expensed in one year supposedly would lower the price of each widget by one dollar.

[174] The Government of China and Chinese respondents argued that, as a matter of U.S. law, the relevant provision of the statute, which specifically requires the addition to the export price of CVDs imposed to offset export subsidies, should be read as if it also required such an adjustment for domestic subsidies, in the case of NME countries. See, e.g., *CWP AD Issues and Decision Memorandum*, Comment 6, pp. 19-20 (Exhibit CHI-9).

The United States has explained in the U.S. First Written Submission and in these answers why Commerce was correct to reject, even on a theoretical level, these two propositions.[175]

141. Before this Panel, China has dropped the export price-based argument. China now states that the effect of domestic subsidies on export prices is "entirely irrelevant".[176] China's new cost-based or normal value-based, argument is even more hypothetical and presumes that there is a conceptual overlap between the dumping margin determined under the NME methodology and the subsidy rate.[177] Consequently, under China's theory, the NME dumping margins necessarily offset the full amount of any domestic subsidies, so that also imposing CVDs to remedy those same subsidies constitutes a double remedy.

142. China has failed to provide the Panel with any evidence supporting its new theory, just as it failed to provide Commerce with any evidence supporting its old theory. China's proof is limited to generally asserting that the rationale for the NME AD methodology "subsumes" the rationale for applying CVDs by "addressing" some of the same economic "distortions."[178] As explained above,[179] however, this general assertion does not withstand even a cursory examination of the theoretically possible effects of subsidies. Furthermore, there is no necessary overlap between the dumping margin determined under the NME methodology and the subsidy rate. Indeed, China has not even articulated why the factor values taken from a surrogate country would have anything to do with the costs of Chinese respondents "corrected" for subsidization.

143. In sum, China's two theories differ in that the first focuses on the alleged effects of domestic subsidies on export prices, while the second focuses on the alleged overlap between the NME dumping margin and the subsidy rate. The two arguments are alike in that they: (1) lack any legal basis in the WTO agreements, including China's Protocol of Accession; (2) rest on theoretical economic premises that are unsound; and (3) were proffered without submitting any concrete evidence, either in the administrative proceedings before Commerce or in the proceedings before the Panel.

74. (Both parties and third parties) Please discuss whether, in your view, the issue of "double remedies" potentially arises in the context of simultaneous AD and CVD investigations involving producers from a "market-economy" member, and in which (I) the normal value is determined on the basis of a constructed normal value, in totality or in part; and (ii) the subsidies countervailed are domestic subsidies. If you consider that several scenarios may arise, please discuss. Please indicate whether, in your view, the importing Member would, in such a scenario, be required under the covered agreements, to ensure that no "double remedy" is imposed.

[175] See U.S. First Written Submission, paras. 450-456 and footnote 612; U.S. Answer to Question 72.
[176] China's First Written Submission, para. 363.
[177] See U.S. Answer to Question 71.
[178] See China First Written Submission, paras. 323, 326, 330, 372-374, 378, and 392.
[179] See U.S. Answer to Question 72.

144. The United States notes at the outset that, as China formulates its argument in this dispute,[180] "double remedies" are a question of whether the economic distortions caused by subsidization, which is intended to be addressed by CVDs, is also addressed by the concurrent imposition of an AD duty. We understand the Panel's use of the term "double remedies" to be based on the same meaning. The United States therefore uses the term in the same manner.

145. The United States believes that whether the imposition of concurrent AD duties and CVDs against imports from a market economy country could theoretically result in a "double remedy" for domestic subsidies in the country would depend in large part on whether those subsidies lower the export price of the investigated product, relative to its normal value. However, notwithstanding such theoretical potential in the market economy context, WTO Members have apparently concluded that such potential was insignificant enough to permit the continued imposition of AD and CVD measures on a concurrent basis in the situation of domestic subsidies.

146. Since the earliest days of the GATT, Contracting Parties have given serious consideration to the theoretical potential for overlap in the economic distortions addressed by AD and CVD measures. GATT Article VI:5 reflects the view of Contracting Parties that circumstances of export subsidization presented significant potential for double remedies. This significant potential appears to have been based on the understanding at that time that export subsidies would have a direct and proportionate effect of lowering export price without lowering home market price commensurately. Under this vew, the concurrent application of AD and CVD measures in certain circumstances could "compensate for the same situation of dumping or export subsidization" and was therefore prohibited in those circumstances.

147. Having come to this view about the situation of *export subsidies*, Contracting Parties necessarily discounted the existence of any meaningful potential for double remedies in respect of *domestic subsidies* in market economies. The view that such potential was significantly less likely, if at all, in situations involving domestic subsidies appears to follow from an understanding that any reduction in export prices as the result of domestic subsidies was sufficiently likely to be offset by a symmetrical reduction in home market prices, so that any potential for double remedies was too small to warrant the limitation on the concurrent application of AD and CVD measures that was imposed in respect of export subsidies in GATT Article VI:5. The concurrent application of AD and CVD measures in the circumstances of domestic subsidies, therefore, was subject to the general rules permitting each remedy to be applied, respectively, to the level of the dumping margin and the amount of the subsidy.

75. (Both parties and third parties) Would the legal analysis of the WTO-consistency of "double remedies" imposed with respect to imports from other NMEs differ from that of the WTO-consistency of "double remedies" imposed with respect to Chinese imports?

[180] China First Written Submission, para. 326.

148. No. The United States recalls that the imposition of "double remedies" complained of by China "is inherent in the simultaneous application of the NME methodology and countervailing duties."[181] Therefore, although ostensibly styled as a claim about so-called "double remedies," China fundamentally challenges the right of Members to apply NME AD measures and CVDs concurrently.

149. As the United States discussed in the U.S. First Written Submission and in its oral statement at the first substantive meeting of the Panel,[182] GATT Contracting Parties and WTO Members have had occasion to consider specifically whether limitations should be placed on this right, and the texts of the covered agreements reveal their conclusion that such limitations were appropriate only in the circumstances of export subsidization under GATT Article VI:5. When presented with the opportunity during the Uruguay Round to apply such limitations in respect of imports from NMEs, Contracting Parties declined to do so. (See answer to Q70.) Nothing in these provisions applies differently to Chinese imports than to imports from other NMEs.

150. In the light of the permissibility of concurrent application of AD and CVD measures, including specifically in the context of imports from NMEs, one would expect the limitation that China claims on this right to be set out in China's Protocol. Instead of such a limitation, however, the Protocol simply confirms that no such limitation exists. As the United States explained in the U.S. First Written Submission, paragraph 15(a) of Part I of the Protocol recognizes explicitly the possibility that in AD investigations the normal value for China may be determined under the NME methodology, while paragraph 15(b) acknowledges the possibility that in CVD investigations the benchmark for determining benefit may be determined based upon prices outside China. If the drafters had intended to limit the concurrent application of NME AD duties and CVDs on Chinese imports, paragraph 15 would have so stated because the *express purpose* of this provision is to set out the rules China agreed to regarding the application of the Anti-Dumping Agreement and the SCM Agreement to such imports.

76. Both parties and third parties) Please discuss whether, in your view, it is for the investigating authority to examine the question of the double remedy on its own initiative or, instead, it is for an interested party to justify the need for an adjustment to avoid double remedies.

151. The United States recalls that, as China has used the term in these proceedings, "double remedy" does not necessarily refer to instances where the investigating authority has imposed AD duties and CVDs at levels beyond the dumping margins and subsidy amounts that would be

[181] China First Written Submission, heading VI.E.1. See also *id.* at para. 329 ("[A]s 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.") and 374 ("A double remedy will therefore arise in all cases in which Commerce applies the two remedies simultaneously.").

[182] See U.S. First Written Submission, paras. 395-417; U.S. Opening Statement at the First Substantive Meeting of the Panel, paras. 41-43.

found by the investigating authority in the course of independent investigations. Instead, China has used the term to refer to situations where AD duties and CVDs might both address the same economic distortions arising from subsidization, a concept not required to be evaluated by an investigating authority when establishing the level of duties to be imposed.[183]

152. In this light, as discussed in response to question 74, the text of the relevant provisions of the covered agreements reveals that Members have considered the factual circumstances under which there was significant potential for double remedies and, accordingly, have required an investigating authority to make an adjustment. Under WTO rules, those circumstances are set out exclusively in GATT Article VI:5. It follows, therefore, that where there is the "same situation of dumping or export subsidization," it is incumbent upon the investigating authority on its own initiative not to apply both AD and CVD remedies. Where export subsidies are *not* at issue in concurrent AD and CVD proceedings, and an interested party seeks an adjustment on the grounds of a double remedy that will result from both remedies being applied, it is for that interested party to justify the need for an adjustment, including with supporting evidence as necessary.

153. In the investigations at issue, notwithstanding that WTO rules do not contemplate the existence of, or an adjustment for double remedies in the context of domestic subsidies, Commerce afforded the Government of China and Chinese respondents ample opportunity to articulate their basis for requesting an adjustment and to offer any evidence demonstrating, on the facts of the respective records, the need for an adjustment. Neither the Government of China nor Chinese respondents made any attempt to do so, relying exclusively, as China does before this Panel, on assertions of theory.

154. Because China's claim is not based on any identifiable requirement in the WTO agreements and is, in fact, inconsistent with the structure of WTO rules that reveal that domestic subsidies are not among the precise circumstances under which such a claim should be entertained, it could not be the responsibility of investigating authorities around the world to surmise what information is needed to evaluate such a claim or otherwise disprove China's theory. The Government of China and Chinese respondents appropriately bear the burden of establishing both its factual and legal validity, which requires more than assertions of theory.

78. (United States) Does the US consider that the USDOC has the legal authority to avoid imposing a double remedy in simultaneous NME/CVD cases? Please explain.

155. The United States is not in a position to state whether such legal authority exists in connection with the provision of a domestic subsidy unless and until the need for making that determination is squarely presented before Commerce by the specific factual circumstances of a concrete case. That situation has not yet occurred.

[183] See U.S. Answer to Question 74.

156. Consistent with Article VI:5 of the GATT 1994, Section 772(c)(1)(C) of the Tariff Act of 1930 prevents the imposition of "double remedies" where an AD duty is applied concurrently with a CVD offsetting *an export subsidy*. In the investigations at issue, however, the Government of China and Chinese respondents claimed that U.S. law requires Commerce to take certain actions to avoid "double remedies" in connection with *domestic subsidies*. In those administrative proceedings, the Government of China and the Chinese respondents advanced a novel theory, which lacked any clear basis under the U.S. statute, and that would have required Commerce to forego its right under the covered agreements to apply the CVD law to China under the present circumstances. Neither the Government nor respondents produced any evidence to support the existence of a double remedy or the offset they claimed. Commerce accordingly rejected their theory as the basis for making the requested adjustment.

157. As a result, in the absence of information requiring such a decision, Commerce did not reach the question of whether it would have authority to make any offset of some type in different factual circumstances, or pursuant to other legal theories. It simply resolved the case before it. Whether Commerce would have the authority to make some type of offset in another case on the basis of a different administrative record will have to wait for a future proceeding. Commerce cannot decide future issues in advance.

79. What was the legal basis under U.S. law and the covered agreements, for the USDOC allegedly refusing to impose a double remedy in the Tool Steel from Germany and LEU from France cases cited by the GOC in the context of its claim under Article 1:1 of the GATT 1994?

158. In its 1986 determination in *Tool Steel from Germany*, a German respondent, Saarstahl, argued that subsidies were "irrelevant" to an antidumping proceeding and, therefore, should not be added to normal value. Commerce agreed, explaining that it would be "inappropriate to add subsidies to actual expenses recorded in the company's books and records." Thus, the crux of Commerce's decision was that subsidies are not costs. The notice of the determination does not contain any discussion of double remedies. Commerce's decision was upheld by the U.S. Court of International Trade.[184]

159. In *LEU from France*, the specific legal issue decided by Commerce was whether the U.S. antidumping law required Commerce to deduct CVDs from export prices in the United States because they constituted "United States import duties" within the meaning of that provision of the statute. Commerce decided that the CVDs do not constitute U.S. import duties within the meaning of that statute because they were special remedial duties rather than ordinary import duties. The U.S. Court of Appeals for the Federal Circuit upheld this position.[185]

[184] See *Al Tech Specialty Steel Corp. v. United States,* 651 F. Supp. 1421 (Ct. Int'l Trade 1986).

[185] See *Wheatland Tube Co. V. United States*, 495 F.3d 1355 (Fed. Cir. 2007) (reversing *Wheatland Tube v. United States*, 414 F. Supp. 2d at 1271 (Ct. Int'l. Trade 2006).

160. In its decision in *LEU from France*, Commerce explained that simply deducting the CVDs from the export price in calculating the dumping margins effectively collected them twice. This was not the result of some speculative hypothesizing about the effects of subsides on export prices or normal value in AD proceedings; nor was it premised on some unexplained examination and measure of economic distortions. It was simple subtraction of duties. Subtracting the CVDs themselves from the export price had exactly the same effect as would have adding the CVDs to the dumping margin after it had been calculated. The requested adjustment would have, quite literally, collected the CVDs twice – once as CVDs and a second time as a direct increase in the AD duties. This simple mathematical certainty cannot be compared to the theoretical arguments about overlapping economic distortion advanced by China here.

161. In its determinations on *Tool Steel* and *LEU*, Commerce based its analysis entirely on the relevant provisions of U.S. law and did not interpret or cite as authority any WTO provisions.

80. (United States) Please comment on the relevance for this dispute of the following statements contained in pages 28 - 29 and 45 of the GAO Report (Exhibit CHI - 121), cited to by the GOC in its first written submission, paras 348-349:

(a) The GAO's recognition that the concurrent imposition of CVDs and the use of the NME methodology would result in at least some double counting (p.28)

162. The question does not accurately characterize the GAO Report. The relevant passage from the report actually concludes that:

> As a result, *it appears* that some double counting of actionable domestic subsidies *could occur* if the USDOC used third-country information to calculate antidumping duties on the same products against which it also applied CVDs.[186] (Emphasis added.)

Thus, even if the GAO's conclusion is accepted at face value, GAO's report does not support China's claim that double remedies are inherent in the concurrent application of CVDs to offset domestic subsidies and AD margins calculated under the NME methodology. Rather, the report agrees with Commerce's stated position the concurrent imposition of AD and CV duties could create some potential for overlapping remedies.

(b) The GAO's indication, on p. 29 of the report, that "U.S. law does not provide The USDOC with any specific authority to avoid double counting. . . ." and the USDOC's recognition on p. 45 of the Report that "U.S. law does not currently

[186] *U.S. - The China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, GAO-05-474m at 27-28 (June 2005A).

> *allow for any adjustments to be made to the export price in an antidumping case for the amount of any countervailing duties to offset domestic subsidies."*

163. Again, the GAO's report is appropriately cautious. It states that: "U.S. law does not provide Commerce with any *specific* authority to avoid double counting..." and that Commerce has recognized that U.S. law does not currently allow for any adjustments to be made *to the export price* in an antidumping case ...." (Emphasis added) Thus, like Commerce, the GAO has not stated that Commerce lacked authority to make an adjustment in the course of calculating dumping duties that would offset a clearly identified double remedy for domestic subsidies in the exporting country. Its statement is that there is no "specific" authority for such an adjustment. With regard to the position attributed to Commerce, GAO appropriately reports that U.S. law does not provide for an adjustment to be made to the "export price." This statement does not mean that Commerce necessarily lacks legal authority to make an adjustment in some other way.

164. In any event, the GAO Report should have no relevance for this dispute for at least two reasons. First, GAO does not appear to have conducted its own legal analysis of the issue. Instead, it based its report on consultations with practitioners representing domestic industries, foreign respondents, government agencies (including Commerce), and economists. Moreover, to the extent the GAO provides any rationale for its statements on ths issue, it seems to reference the position advanced by China in the investigations before Commerce, which China has abandoned in this dispute.[187] Second, the GAO Report is not authoritative. GAO is not, and does not claim to be, an expert in this area of U.S. law. Under U.S. law, Commerce is the executive agency charged with implementing and applying the U.S. AD and CVD laws and, accordingly, is the only entity authorized to make definitive pronouncements of Commerce's legal authority in the first instance.

82. (United States) The US argues that the AD NME methodology has a different purpose than CVDs, in that CVDs intend to countervail the extent to which the subsidized company benefitted as compared to unsubsidized companies in the same countries. Is this argument valid given that in several instances in the four investigations at issue, the USDOC calculated the amount of benefit on the basis of out-of-country benchmarks?

165. Yes, the argument is valid in the investigations before the Panel. In making that statement in paragraph 457 of the U.S. First Written Submission, the United States sought to highlight certain errors that flowed from China's portrayal of the rationale behind the CVD remedy. Under China's view, CVDs are applied to offset the advantage given to a company where "a government has provided productive resources to [that] company on terms that were not market-determined."[188] With that premise, China concludes that "the use of market-determined surrogate values in the NME methodology would necessarily address any subsidization."[189]

[187] See, e.g. GAO Report, footnote 50 (Exhibit CHI–121).
[188] China First Written Submission, para. 325.
[189] China First Written Submission, para. 340.

166. The United States noted that China's conclusion rests on a number of incorrect suppositions. First, the use of surrogate values to measure price discrimination in an antidumping calculation says nothing about a subsidy benefit that a producer in China may have received. Second, the fact that external benchmarks are used to measure the extent of a subsidy benefit does not mean that the benefit calculation no longer measures the extent to which the recipient is better off than unsubsidized companies in the same country. The benefit calculation still measures the extent to which recipients are "better off" than they would be in the absence of the subsidy. Therefore, the use of surrogate values, in and of itself, does not compel the conclusion that the subsidization to be addressed by CVDs was "necessarily" addressed, as assumed by China's theory.

84. (Both parties and third parties) Is the term "situation of export subsidization" in Article VI:5 of the GATT to be equated with "export subsidies"? Is it conceivable that it may also cover certain situations in which a domestic subsidy is provided to an exported good?

167. The term "situation of ... export subsidization" in GATT Article VI:5 has the same meaning as the term "export subsidies" in the GATT 1994 and the SCM Agreement. Accordingly, it is not conceivable that the "situation ... of export subsidization" also covers certain situations in which a domestic subsidy is provided to an exported good.

168. As discussed in the U.S. First Written Submission,[190] the context of GATT Article VI:5 confirms its limited application to export subsidies. Specifically, GATT Article VI:3 identifies subsidies granted "on the ... export" of a product as distinct from subsidies granted on the "manufacture [or] production" of a product, while recognizing that all of those subsidies may be counteracted by a countervailing duty. Section B of Article XVI of the GATT 1994, titled "Additional Provisions on Export Subsidies," characterizes an export subsidy as "a subsidy on the export of any product."[191] Furthermore, the SCM Agreement identifies "subsidies contingent ... upon export performance" as "export subsidies."[192] Thus, the term "export subsidization" in GATT Article VI:5, understood in its context, refers specifically to "export subsidies" and does not include simply any exported good that has received a domestic subsidy.

169. This understanding is further confirmed in the French and Spanish texts of the covered agreements. The term "export subsidization" is translated in the French and Spanish versions of GATT Article VI:5 as "*subventions à l'exportation*" and "*subvenciones a la exportación*," respectively. These same French and Spanish terms are also used in place of the English term "export subsidies" in other provisions of the GATT 1994 and the SCM Agreement.[193] The

[190] U.S. First Written Submission, paras. 398-399.

[191] Article XVI:1 of the GATT 1994.

[192] See Article 3.1(a) and Annex I of the SCM Agreement.

[193] See, e.g., Section B of Article XVI of the GATT 1994, Article 27 of the SCM Agreement and Annexes I and III thereto.

French and Spanish texts confirm the fact that "export subsidization" in GATT Article VI:5 should be understood as "export subsidies."

85. (Both parties and third parties) Assuming that, as acknowledged by China, China's Protocol of Accession contemplates the simultaneous use of the NME methodology and of CVDs, does the Protocol contain any limitation on the imposition of "double remedies"?

170. No. Recalling that the essence of China's argument on the existence of "double remedies" is that Members are not permitted to apply NME AD duties and CVDs concurrently (see answer to Q75), the United States finds no limitation on such concurrent application in China's Protocol. To the contrary, as discussed in the U.S. First Written Submission,[194] paragraph 15 of Part I of China's Protocol specifically authorizes the use of an NME AD methodology and explicitly authorizes the imposition of CVDs calculated on the basis of benchmarks outside China. If Members believed the concurrent application of both these remedies were likely to give rise to "double remedies," they would have provided a limitation on the concurrent application in paragraph 15 itself, much as Members did for export subsidies in GATT Article VI:5.

86. (Both parties and third parties) Please discuss whether it is possible to challenge under Article 19.4 of the SCM Agreement not only whether the CVDs imposed as a result of an investigation exceed "the amount of the subsidy found to exist" in that investigation, but also whether the "amount of the subsidy" that was "found to exist" in the investigation was determined in accordance with the provisions of the SCM Agreement or Article VI of the GATT.

171. No. Article 19.4 of the SCM Agreement prohibits the levying of CVDs in excess of the "amount of the subsidy found to exist." An evaluation of any claim under this provision requires a comparison between the CVD levied and amount of the subsidy found to exist by the investigating authority in the course of a CVD proceeding. Whether that amount was properly determined in accordance with WTO rules is an issue not governed by this provision. Article 19.4 calls for a comparison with the amount of the subsidy *actually* found to exist by the investigating authority, not the amount that *should have been* found had the investigating authority complied with other WTO rules. Those other WTO rules, such as Articles 1, 2 or 14 of the SCM Agreement, provide a basis themselves for evaluating the investigating authority's compliance with those provisions, rendering it redundant to read Article 19.4 as permitting challenges to whether the amount of the subsidy was determined in accordance with other WTO rules. This redundancy would be compounded by the fact that the SCM Agreement already contains in Article 10 a provision requiring Members to ensure that CVDs are imposed only in accordance with GATT Article VI and the SCM Agreement.[195]

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[194] See U.S. First Written Submission, paras. 410-416.

[195] Article 10 of the SCM Agreement provides:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on

172. Finally, the United States notes that China does not base its claim under Article 19.4 on Commerce's failure to have properly calculated the "amount of the subsidy." Rather, as discussed elsewhere,[196] the basis for China's claim in the context of its double remedy argument is a straightforward comparison between, on the one hand, the amount of the subsidy Commerce *did* find and, on the other hand, the sum of the countervailing duty and anti-dumping duty. In this light, the United States respectfully submits that the Panel need not determine, for the purposes of assisting the resolution of this dispute, whether Article 19.4 does permit challenges to the consistency of an investigating authority's calculation of the amount of the subsidy with other WTO rules.

87. (United States) Please comment on China's argument that if the subsidy has already been offset by an AD duty pursuant to the NME methodology, there is no subsidy left to offset, such that any CVD imposed would be inconsistent with Article 19.4 of the SCM Agreement.

173. The United States disagrees with the theoretical premise and legal conclusion of China's argument.

174. China's argument is premised on its assertion that an NME normal value, because it is based on costs and prices outside China rather than actual Chinese data, captures the entire subsidy granted on the product under investigation and is therefore artificially inflated.[197] The United States has explained the errors underlying this premise in its First Written Submission and in other answers.[198]

175. China also errs in concluding that the United States has acted inconsistently with Article 19.4 of the SCM Agreement. First, Article 19.4 imposes an obligation with respect the amount of the countervailing duty "levied" by a Member. Footnote 51 of the SCM Agreement defines "levy" as "the definitive or final legal assessment or collection of a duty or tax." However, no countervailing duty has been "levied" in respect of any of the investigations at issue because, under the U.S. retrospective system, the "final legal assessment" does not take place until the conclusion of an assessment review or, if no assessment review is requested, until the end of the

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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)

[196] See U.S. First Written Submission, paras. 419-423; U.S. Opening Statement at the First Substantive Panel Meeting, para. 47.

[197] See, e.g., China First Written Submission, para. 374 ("Having made this [NME] determination and calculation anti-dumping duties on this basis, Commerce has necessarily addressed any allocation of productive resources that was not determined by market forces, including the provision of subsidized resources.").

[198] See U.S. First Written Submission, paras. 451-454, 456; U.S. Answers to Questions 73 and 74.

one-year time period following the issuance of a CVD order during which a review may be requested.[199]

176. Second, an evaluation under Article 19.4 requires a comparison between the "countervailing duty" and the "amount of the subsidy found to exist." China does not claim that the "countervailing duty" resulting from each of the investigations exceeded the amounts of the subsidies found to exist in those investigations. Instead, China claims that the amount of the subsidy is exceeded by *the sum of* the anti-dumping duty in each AD investigation *and* the CVD in each corresponding CVD investigation. The respective AD duties, resulting from a comparison of home market and export prices in each of the four AD investigations, cannot simply be re-labeled "countervailing duties," as China would have this Panel believe, because those AD duties are not "levied for the purpose of offsetting any subsidy."[200]

88. (United States) During the Q&A session of the first substantive meeting with the parties, China quoted from the Appellate Body's decision in US – CVDs on Certain EC Products (WT/DS212, para. 139) in support of its argument that "double remedies" are inconsistent with Article 19.4 of the SCM Agreement. Please discuss China's reading of the Appellate Body Report in that case in light of the US' argument on the scope of Article 19.4 of the SCM Agreement.

177. The United States recalls that during the first substantive meeting of the Panel with the parties, China quoted from paragraph 139 of the Appellate Body Report in *US - Countervailing Measures on Certain EC Products* in the course of the parties' discussion responding to a Panel question about the scope of Article 19.4 of the SCM Agreement.[201] Nothing in paragraph 139 supports China's view that a Member may challenge under Article 19.4 an investigating authority's failure to determine the "amount of the subsidy" in accordance with WTO rules. Paragraph 139 tracks the language of multiple provisions cited therein before concluding that "these provisions set out the obligation of Members to limit countervailing duties to the amount and duration of the subsidy *found to exist by the investigating authority* (emphasis added). Thus, by its terms, the Appellate Body in paragraph 139 appears to recognize that the "amount of the subsidy" that is the focus of Article 19.4 is *not* the amount that should have been properly determined under WTO rules, but is the amount that was *in fact* determined by the investigating authority in the relevant proceeding.

178. More broadly, nothing stated by the Appellate Body in that Report supports China's argument on the scope of Article 19.4, or China's claim under that provision. First, at no point in the Report does the Appellate Body examine the meaning of the obligation in Article 19.4 *per se*. The Appellate Body's references to Article 19.4 are made exclusively in conjunction with other provisions in support of an obligation to be drawn from the collective operation of those

[199] See 19 C.F.R. § 351.212 (Exhibit US-121).

[200] Footnote 36 of the SCM Agreement.

[201] That oral Panel question has been reproduced in writing as question 86 in this set of questions.

provisions.[202] Second, the measure in that dispute that was alleged to have exceeded the amount of the subsidy was unquestionably a *countervailing duty*. That dispute did not confront the situation here, where the complaining party seeks to base its claim under Article 19.4 on the *sum of a countervailing duty and an anti-dumping duty.*[203] Finally, although the Appellate Body generally made reference to the applicability of various obligations to original investigations, the Appellate Body did not address the fact that the obligation in Article 19.4 applies to the "levying" of CVDs and, under the U.S. retrospective system, CVDs are not "levied" immediately following an original investigation.[204]

179. In terms of the scope of Article 19.4, the Appellate Body Report in *Japan - DRAMS* provides a more relevant example of the Appellate Body's application of that provision. In that dispute, the investigating authority had made a determination about the duration of a non-recurring subsidy in connection with a particular debt restructuring, concluding that the benefit would not be conferred beyond 2005. Nevertheless, CVDs were levied in respect of that debt restructuring in 2006, that is, a time when the investigating authority's own analysis concluded the amount of the subsidy would be zero. This situation fell squarely within the parameters of Article 19.4:

> [I]n the case of a non-recurring subsidy, a countervailing duty cannot be imposed if the investigating authority has made a finding in the course of its investigation as to the duration of the subsidy and, according to that finding, the subsidy is no longer in existence at the time that the Member makes a final determination to impose a countervailing duty. This is because, in such a situation, the countervailing duty, if imposed, would be in excess of the amount of subsidy found to exist, contrary to the provisions of Article 19.4.[205]

Thus, in that dispute, the Appellate Body recognized that the inconsistency with Article 19.4 needed to be connected to what the investigating authority *actually found* to be the amount of the subsidy in the investigation. This recognition should be juxtaposed with the Appellate Body's upholding of the Panel's finding that the calculation of the amount of benefit in respect of the same non-recurring subsidy was inconsistent with Articles 1 and 14 of the SCM Agreement – a consideration not mentioned by the Appellate Body in its discussion of Article 19.4.

90. (Both parties and third parties) Regarding China's "as such" claims, given China's formulation of the measure at issue as an omission, please explain what China needs to demonstrate in order to meet its burden of establishing the violations of the covered agreement that it alleges with respect to its claims concerning the alleged "failure".

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[202] 139, 149, 161. The Panel Report similarly reflects no examination of the scope of the obligation in Article 19.4 by itself, instead referring to Article 19.4 only in conjunction with other provisions. See paras. 7.44, 7.86, 7.100, 7.116-7.117, and 8.1(a)-8.1(c).

[203] See U.S. First Written Submission, paras. 419-423; U.S. Answer to Question 87.

[204] See U.S. Answer to Question 87.

[205] *Japan - DRAMS (AB)*, para. 210.

180. As a threshold matter, China must establish that the so-called "omission" is a measure subject to challenge in WTO dispute settlement proceedings. As the United States explained in its opening statement at the first substantive meeting of the Panel with the parties,[206] an "omission" does not constitute a "measure taken"[207] by a Member unless an affirmative obligation exists under the covered agreements to take the action that the responding Member allegedly failed to take. China alleges that the United States failed to "enact legislation" that would provide Commerce with certain legal authority.[208] China must therefore identify the provision that, in its view, requires a Member to enact such legislation.

181. Turning to the relevant legal provisions, assuming the alleged "failure" is an "omission" challengeable in WTO dispute settlement proceedings, China claims that the United States acted inconsistently with Articles 19.3 and 19.4 of the SCM Agreement and Article I:1 of the GATT 1994.[209] Given that none of these provisions refers to an "omission" or to actions that WTO Members must take, it is difficult to see how China could prevail under any of these claims for the reasons set out in the previous paragraph. Moreover, it is for China to set out the evidence and argumentation in support of its *prima facie* case, not for the United States to do so. However, in response to the Panel's questions, the United States notes that – assuming *arguendo* that the "omission" were a measure – China could seek to establish that the "omission" mandates a breach of the provisions that China has cited. That is, under the first sentence of Article 19.3 of the SCM Agreement, which appears to be the basis for China's allegation of inconsistency with that provision, China would need to demonstrate that the alleged failure of the United States to enact certain legislation will necessarily result in the levying of CVDs on imports from only a *subset* of exporters from the relevant exporting Members, or result in some other form of discrimination among exporters. With respect to Article 19.4 of the SCM Agreement, China would need to demonstrate that the failure of the United States to enact certain legislation will necessarily result in the levying of a CVD in respect of a foreign producer/exporter that exceeds the amount of the subsidy determined by Commerce for that foreign producer/exporter, calculated in terms of subsidization per unit of the subsidized and exported product. Finally, under Article I:1 of the GATT 1994, China would need to demonstrate that the failure of the United States to enact certain legislation will necessarily result in an advantage, favor, privilege or immunity being given to the products of one WTO Member, in respect of the subject matters set out at the beginning of Article I:1, which will not be accorded to the products of another WTO Member.

182. As reflected in the previous paragraph, with respect to each of its "as such" claims, China must establish that the challenged measure will *necessarily* result in a violation of the relevant WTO obligation. Numerous WTO and GATT 1947 panels have noted the distinction between, on the one hand, measures that *mandate* action inconsistent with WTO or GATT 1947

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[206] U.S. Opening Statement, para. 4.

[207] Article 3.3 of the DSU. See also Article 4.2 of the DSU.

[208] China Response to U.S. Request for Preliminary Rulings, para. 20.

[209] China also raises clams of consequential violations or Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994. See China First Written Submission, para. 385.

obligations, and, on the other hand, measures that merely give a Member *discretion* to take action that could result in a breach of a WTO or GATT 1947 obligation. These panels have recognized that a measure that mandates future WTO-inconsistent action can be challenged in WTO dispute settlement even before such a violation actually occurs.[210] Conversely, a measure that neither constitutes present action that violates WTO obligations nor mandates future action that violates those obligations is not inconsistent with the WTO Agreement, even if the measure might otherwise permit such action.[211]

183. China's argument makes clear that, notwithstanding the effort to construct an "as such" claim based on a supposed "failure ... to provide legal authority," the source of China's complaint is Commerce's exercise of discretion to apply NME AD duties and CVDs concurrently to imports from China. China acknowledges that Commerce has this discretion under U.S. law,[212] and further recognizes that "a *necessary consequence* of that choice is the imposition of a double remedy for the same alleged acts of subsidization."[213] There is thus no legally relevant distinction between, on the one hand, Commerce's discretion to apply both NME AD duties and CVDs and, on the other hand, the alleged failure to provide legal authority to avoid the imposition of "double remedies." Under these circumstances, China's claim cannot succeed: even under China's presentation, nothing *mandates* that Commerce take the actions of which China complains. China's "as such" claims can succeed only if the discretion afforded Commerce under U.S. law is itself inconsistent with the obligations contained in Articles 19.3 and 19.4 of the SCM Agreement and Article I:1 of the GATT 1994. Yet, nothing in any of those provisions prohibits the existence of such discretion.

91. (United States) Please explain the meaning of the parenthetical phrase in para. 70 of the US First Written Submission (FWS): "(i.e., to apply concurrent AD and CVD measures)". Is the United States arguing that for its "as such" claims to prevail, China would need to demonstrate that US law requires concurrent application of AD and CVD measures?

184. In the context of paragraph 70 of the U.S. First Written Submission, the United States discussed the failure of China to identify the "specific measure at issue" in this dispute by characterizing the focus of its challenge as a "failure ... to provide legal authority" when the real basis for China's complaint was the imposition of a so-called double remedy. The United States had understood China's "as such" concerns about the imposition of this double remedy to stem from a requirement under U.S. law. China subsequently clarified that the source of its concerns

[210] See, e.g., *Thailand - Cigarettes (GATT Panel)*, para. 84.

[211] *See e.g.*, *Korea – Commercial Vessels*, paras. 7.57-67; *US – Softwood Lumber CVD Prelim*, paras. 7.116-159; *US – Section 129*, paras. 6.27-134; *US – Export Restraints*, paras. 8.4-8.9, 8.77-8.79; *EEC – Parts and Components*, para. 5.25; *US – Superfund*, para. 5.2.9.

[212] China Response to U.S. Request for Preliminary Rulings, paras. 15-16.

[213] China Response to U.S. Request for Preliminary Rulings, para. 16 (emphasis added). The United States has explained that a double remedy does not necessarily result when NME AD duties and CVDs are applied concurrently. See U.S. First Written Submission, paras. 445-459; U.S. Answers to Questions 73 and 74.

regarding the imposition of a double remedy was *not* a *requirement* under U.S. law that mandated certain action, but instead was Commerce's exercise of *discretion*. For purposes of the U.S. argument in the context of paragraph 70, this clarification is of no consequence. Under either scenario, China has avoided identifying the "specific measure at issue" by styling its "as such" claim around a supposed "omission." Rather than explain how, after Commerce has exercised its discretion, the interaction of various laws and regulations governing the calculation of anti-dumping and countervailing duties result in the imposition of a double remedy, China presented as a "measure" a description that presumed the double remedy resulting from this interaction and deprived the United States of an adequate opportunity to begin preparing a defense on the "as such" challenge.

185. Separately, however, China's clarification that it is actually challenging Commerce's exercise of discretion is significant. As explained above, to prevail on its "as such" claims, China would need to demonstrate that U.S. law required concurrent application of AD and CVD measures, which is the action that, according to China, necessarily results in a double remedy in violation of WTO obligations.

92. (Both parties and third parties) For the GOC to succeed in demonstrating that a double remedy exists as a result of the USDOC's simultaneous application of the NME methodology and CVDs (irrespective of the WTO-consistency of such a "double remedy") is it necessary for the GOC to establish that the totality of the of the subsidy is so "double remedied" or is it sufficient for the GOC to demonstrate that there is some overlap when the tow remedies are used together.

186. Under the terms of its own theory – the only argument advanced by China to explain how a double remedy arises – China must demonstrate that the *entire* subsidy countervailed by a CVD is remedied by the NME AD duty, resulting in a complete double remedy. China cannot demonstrate that there is only "some" overlap between the AD and CVD remedies without abandoning its basic argument. The sole basis offered by China in these proceedings for the existence of a double remedy is its theory that the rationale for an NME AD methodology "necessarily subsumes"[214] the rationale for imposing CVDs and, as a result, the application of NME AD duties "necessarily addresses *any* potential subsidization of the respondent producer."[215] More specifically, China asserts that, because the NME AD duties "inherently" offset the entire amount of the subsidy, any CVDs imposed would necessarily result in the *totality* of the subsidy being double remedied.[216]

187. It follows that, if China fails to establish that the entire subsidy would be "double remedied," the premise of the "overlapping rationales"[217] could no longer support China's theoretical framework. Without that framework, the Panel would be left with no basis provided

[214] China First Written Submission, para. 373.
[215] China First Written Submission, para. 329.
[216] See, e.g., China First Written Submission, paras. 323, 326 330, and 378.
[217] China First Written Submission, paras. 326, 366, and 374.

by China to conclude that a double remedy exists. The existence of a double remedy being the premise of its "as applied" and "as such" claims, China will have failed to establish that the United States acted inconsistently with any of its obligations in this respect.

94. (Both parties and third parties) Does China, to succeed in its "as applied" claim under Article I:1 of the GATT 1994, need to establish "like products"?

188. Yes, China must address the "like product" elements of its claims under Article I:1 of the GATT 1994. That article provides that, with respect to several types of measures, "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country ... be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties." Inherent in the evaluation of any claim under this provision, therefore, is a comparison between treatment accorded one product ("any product") and treatment accorded the "like product", whether those two products are imported or exported. The Chinese products relevant to this claim are those four products that were the subject of the investigations at issue. However, by failing to identify the "like products" imported from any other WTO Member that have been accorded the"advantage" of not facing so-called "double remedies," China has not made out its claim under Article I:1.

189. China appears to be of the view that "[i]n any investigation of the same like products from a country that the United States designates as a market economy, Commerce would apply ... policies and practices ... to avoid the imposition of a double remedy."[218] China offers no proof whatsoever for this allegation – this single sentence is a naked assertion, speculating about what Commerce might do on the basis of specific actions taken in two particular proceedings discussed by China.[219] (Among other things, it founders on the fact that it assumes that Commerce imposes a "double remedy" in investigations of Chinese products.) China cannot prevail through mere speculation.

190. The United States notes that a similar situation has arisen in the past. In the *Non-rubber Footwear* dispute under the GATT 1947, Brazil claimed that the United States had failed to apply its countervailing duty law on an MFN basis to certain Brazilian products. Brazil sought to support that claim by pointing to U.S. treatment of certain Indian, Mexican and Trinidadian products – but none of those products were "like" the Brazilian products at issue. The panel therefore did not consider Brazil's claim as applied to the products at issue.[220]

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[218] China First Written Submission, para. 427.

[219] See China First Written Submission, paras. 405-411.

[220] See *US - Non-rubber Footwear*, paras. 6.11-6.12. The panel in that dispute did consider Brazil's "as such" claim against the relevant U.S. legislation, finding it inconsistent with GATT Article I:1. See *id.* at para. 6.12. That consideration is not relevant to this dispute, however: in that dispute, the panel was examining an action of a responding party that was neither authorized nor contemplated by other GATT rules, whereas the actions that give rise to the discriminatory treatment that China alleges here, namely, the use of an NME methodology, are expressly provided for in paragraph 15(b) of China's Protocol. See U.S. First Written Submission, paras. 441-444.

VI. CONSULTATIONS

98. (Both parties) Please clarify whether and when consultations were held between the parties in respect of each new subsidy allegation ultimately included in one of the investigations at issue in this dispute.

191. As noted in the U.S. First Written Submission,[221] the records of the investigations at issue reveal that China availed itself of consultations with the United States in only one instance in respect of new subsidy allegations. Even in this instance, when China met with the United States on September 10, 2007, in respect of new subsidy allegations in the *Tires* investigation, China discussed the timeliness, but not the substance, of the allegations.[222] As also reflected in the U.S. First Written Submission, however, China did continue consultations with the United States following the filing of new subsidy allegations in each investigation.[223] China had the opportunity during each of these consultations to raise any questions or concerns in respect of new subsidy allegations, but the records reveal no such discussion initiated by China other than the aforementioned question of timeliness in the *Tires* investigation.

99. (Both parties) Do both parties confirm, as indicated orally, that China was informed of the new subsidy allegations by being served copies of these allegations when they were filed? What steps did the USDOC then take, and when, in respect of these allegations, both before and after deciding to investigate them?

192. Pursuant to 19 CFR § 351.303(f), any interested party that files new subsidy allegations must serve all other interested parties with copies of those allegations at the time they are filed with Commerce.[224] The new subsidy allegations filed in each of the investigations at issue contain certifications that the other interested parties, including the Government of China, were served accordingly.[225] The United States recalls that China confirmed during the first substantive meeting of the Panel that, consistent with this requirement under U.S. law, China had been made aware of the new subsidy allegations in each investigation.

193. After receiving each new subsidy allegation, Commerce examined the information contained in each allegation to determine whether it sufficiently alleged the subsidy elements necessary for the imposition of a duty (i.e., financial contribution, benefit, and specificity) and it was supported by reasonably available information. When an allegation did not satisfy these requirements, Commerce did not include that alleged subsidy in the scope of the ongoing

[221] U.S. First Written Submission, para. 466.

[222] September 18, 2007 Memo to File from Susan Kuhbach, p. 2 (Government of China representative noting the timing of filing of new subsidy allegations in the Tires investigation) (Exhibit US-94).

[223] U.S. First Written Submission, para. 466.

[224] See Exhibit US-122.

[225] See Exhibit US-123.

investigation of the relevant product.[226] Commerce announced its determination to accept or not accept an allegation in a memorandum that was placed on the respective record.

194. For those allegations that Commerce accepted, it sought information regarding the allegation from the Government of China and the appropriate respondent firm. The United States then examined the information received as well as other relevant information pertaining to the allegation. Subsequently, the United States issued its findings regarding the allegation in the respective preliminary determinations (or post-preliminary determination, if relevant).[227] After issuance of the respective preliminary determinations, Commerce continued to examine each allegation and, following written and oral submissions of interested parties, issued its findings in the respective final determinations.[228]

100. (United States) The documentary evidence provided by China as to the initiation of investigations by the USDOC with regard to the new subsidy allegations contains (i) excerpts from the Federal Register and, (ii) memoranda issued by the USDOC. In all of these documents, the USDOC uses terms and expressions such as "initiating an investigation" or "investigating" or equivalent expressions with respect to the new subsidy allegations.

(a) Please explain the significance of this terminology for purposes of applicable US law.

195. No provision of U.S. law refers to "initiating an investigation" or "investigating" in the specific context of new subsidy allegations. With respect to new subsidy allegations, Commerce's reference to "initiating an investigation" in the documentation provided by China

[226] See, e.g, Oct. 5, 2007 Memorandum to the File from Toni Page, Et al., Analysts, through Barbara Tillman, Office Director, entitled "Countervailing Duty Investigation on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation Analysis for New Subsidy Allegations," at 12-15 (declining to accept new subsidy allegations in the ongoing *Tires* investigation with respect to three programs because petitioners failed to satisfy the necessary requirements) (Exhibit US–124); *see also* Nov. 9, 2007 Memorandum from Damian Felton, Analyst, to Susan Kuhbach, Office Director, entitled "Analysis of Petitioners' October 5, 2007, New Subsidy Allegations," at 5-9 (declining to accept new subsidy allegations in the ongoing *CWP* investigation with respect to three programs because petitioners failed to satisfy the necessary requirements) (Exhibit US–125).

[227] See *LWR CVD Preliminary Determination*, 72 Fed. Reg. 67,703, 67,610 (Nov. 30, 2007) (Exhibit CHI-19); *CWP CVD Preliminary Determination*, 72 Fed. Reg. 63,875, 63,885 (Nov. 13, 2007) (Exhibit CHI–6); April 9, 2008 Memorandum from Damian Felton, Analyst, to David Spooner, Assistant Secretary, entitled "Post-Preliminary Findings for the Provision of Land for Less Than Adequate Remuneration and New Subsidy Allegations," at 1-9 (Exhibit US–126); *Tires CVD Preliminary Determination*, 72 Fed. Reg. 71,360, 71,366-76 (Dec. 17, 2007) (Exhibit CHI-50); May 2, 2008 Memorandum from Barbara Tillman, Office Director, to David M. Spooner, Assistant Secretary, entitled Post-Preliminary Analysis of Non-Tradeable Share Reform; Provision of Water to FIEs for Less Than Adequate Remuneration; Grants to the Tire Industry for Electricity; and Various Provincial/Municipal Programs," at 1-17 (Exhibit US–127); and April 22, 2008 Memorandum from Barbara Tillman, Office Director, to David M. Spooner, Assistant Secretary, entitled "Post-Preliminary Analysis of New Subsidy Allegations" (*Sacks*), (Exhibit US–128).

[228] See *LWR CVD Final Decision Memorandum*, at 8-13 (Exhibit CHI-2); *CWP CVD Final Decision Memorandum*, at 9-18 (Exhibit CHI-1); *Tires CVD Final Decision Memorandum*, at 9-27 (Exhibit CHI-4).

denotes that Commerce had accepted a new subsidy allegation, and would examine further the information contained therein in the context of the ongoing investigation on the subsidization of a given product. It is this further examination of the information contained in the allegation that is captured by Commerce's use of the term "investigating" when used in reference to new subsidy allegations.

(b) How do you reconcile the use of such expressions with the US argument that the USDOC did not initiate new investigations?

196. The expressions "initiating an investigation" and "investigating," when used in the context of new subsidy allegations, have a particular meaning in the practice of the Department of Commerce. As explained in the answer to sub-part (a), these terms can be used in the specific context of new subsidy allegations to refer respectively to (i) the decision to include new subsidies in ongoing countervailing duty investigations on a given product, and (ii) the examination of a new subsidy as part of the ongoing investigation. The fact that these expressions have a certain meaning when used in the practice of Commerce, however, does not bear on the specific meaning of the term "investigation" in Article 13.1 of the SCM Agreement.[229]

197. As explained in the U.S. First Written Submission, that term refers particularly to the investigation undertaken by an investigating authority following the filing of an application that the investigating authority has determined meets the criteria set out in Article 11 of the SCM Agreement. Such an investigation ascertains whether the prerequisites for the imposition of a countervailing duty – the existence of an actionable subsidy and material injury to the domestic industry caused by subsidized imports – have been met. In this light, the only "investigations" in this dispute are those four investigations conducted respectively on CWP, LWRP, LWS, and OTR. China does not dispute that it was invited for consultations prior to the initiation of each of these investigations. China's claim under Article 13.1 of the SCM Agreement, therefore, has no merit.

198. Finally, the United States recalls the brief exchange held with China on this issue during the Panel's first substantive meeting with the parties. In response to the U.S. point that China's claim appeared to be reduced to a complaint about not having received an *invitation* given the availability of continuing consultations under Article 13.2 of the SCM Agreement, China clarified that it was seeking confirmation that the United States would be available for consultations in future investigations where new subsidy allegations were presented. The United States confirmed at the meeting, and confirms again now, that when conducting investigations on imports from China, it will continue to afford China a reasonable opportunity to continue consultations, including with respect to new subsidy allegations, throughout the investigation period.

[229] See *US - Corrosion-Resistant Steel Sunset Review (AB)*, footnote 87 to para. 87; *US - Softwood Lumber CVD Final (AB)*, para. 56.

101. (United States) Please explain to the Panel the US procedural rules to include new subsidy allegations in an ongoing investigation? Please explain why the United States used section 701(a) of the Tariff Act in certain instances and section 775 of the Tariff Act in other instances? What is the difference between these two sections of the Tariff Act?

199. The only procedural rule under U.S. law relating to new subsidy allegations in investigations is contained in Commerce's regulations at 19 C.F.R. § 351.301(d)(4)(i)(A), which provides that new subsidy allegations are normally due no later than 40 days before the scheduled date of the preliminary determination.[230]

200. Section 701(a) of the Tariff Act is the general rule that establishes when a countervailing duty shall be imposed. The provision requires the imposition of a duty if: (a) a subsidy "with respect to the manufacture, production, or export of a class or kind of merchandise" exists, and (b) an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of subject merchandise imports or sales.

201. Section 775 provides, *inter alia*, that if, in the course of a CVD investigation, Commerce becomes aware of a subsidy that appears to be countervailable, the agency shall include the subsidy in the ongoing investigation.

202. Notwithstanding that Commerce cited to section 701(a) or section 775 of the Tariff Act in its determinations, both provisions are relevant to the examination of new subsidy allegations. Specifically, with respect to those new subsidy allegations that Commerce has accepted, the agency is charged with examining whether a countervailable subsidy exists on the production, manufacture, or export of a class or kind of merchandise, in accordance with section 701(a). Likewise, section 775 is relevant to the examination of new subsidy allegations because Commerce is required to include in the ongoing investigation the subsidy addressed in the new subsidy allegation if it appears to be a countervailable subsidy.

203. Commerce's citation to section 701(a) in one instance, and section 775 in another, carries no legal implication, nor does it reflect Commerce's view of the applicability of either provision in the context of new subsidy allegations.

103. (Both parties and third parties) Is the focus of a CVD investigation a "product" or a "subsidy", and does this determine the focus of the consultations provided for Article 13 of the SCM Agreement? In answering, please draw on all the provisions of the SCM Agreement that you consider relevant.

[230] The exception to this general rule relates to upstream subsidies and is not applicable to any of the investigations at issue. 19 C.F.R. 351.301(d)(4)(ii).

204. The focus of a countervailing duty investigation necessarily includes all subsidies relating to a particular product. Once an investigation has been initiated following a duly substantiated application under Article 11, the discovery of additional subsidies on the same product would appropriately form part of that ongoing investigation of the subsidized product. This interpretation is supported by the explicit text provided in the SCM Agreement. For example, several provisions refer to the product as the "subject of" an investigation or "subject to" an investigation.[231] Article 15.7(v) refers to the "product being investigated," and footnote 46 speaks of "the product under consideration." These provisions undermine China's argument that each new subsidy allegation, in and of itself, triggers a new "investigation" in terms of Article 13.1 of the SCM Agreement when there is already an ongoing investigation on the same product.

205. The above-cited provisions, however, do not determine the focus of the *consultations* provided for in Article 13.1. Given that Article 13.1 provides for the "aim" of such consultations to be "clarifying the situation as to the matters referred to in [Article 11.2] and arriving at a mutually agreed solution," the focus of those consultations would more appropriately be the matters in Article 11.2. As discussed in the U.S. First Written Submission,[232] Article 11.2 covers not only information on the "existence, amount and nature of the subsidy in question" – information that would be expected in a new subsidy allegation – but also other information that would not typically be contained in such an allegation, such as information on domestic production, identity of foreign producers and exporters, and injury. The fact that a new subsidy allegation would normally not include much of the information intended to be the subject of consultations under Article 13.1 reinforces the conclusion that new subsidy allegations do not trigger new "investigations" that require inviting an exporting Member for consultations.

VII. QUESTIONNAIRES

104. (United States) Please provide the Panel with the questionnaires sent as regarding the new subsidy allegations.

206. Please see Exhibits US-129 through US-149.

VIII. FACTS AVAILABLE AND ADVERSE INFERENCES

108. (United States) What is the US response to China's assertion that investigating authorities can resort to facts available only in the situations contemplated in Article 12.7 of the SCM Agreement?

207. Article 12.7 of the *SCM Agreement* provides that "preliminary and final determinations ... may be made on the basis of the facts available" when "any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable

[231] See Articles 12.9, 13.1, 13.2, and 13.4, and footnote 50 of the SCM Agreement.
[232] U.S. First Written Submission, para. 470.

period or significantly impedes the investigation." Therefore, an investigating authority may use facts available when an interested Member or party refuses access to necessary information, otherwise does not provide necessary information, or significantly impedes the investigation. As noted in the U.S. First Written Submission, and as Commerce noted in its final determinations, Commerce did not ask the respondents to report the amount of SOE-produced hot-rolled steel purchased from trading companies.[233] Accordingly, as discussed further in response to the Panel's next question, Commerce relied on evidence from the record of each investigation to make its determinations on this issue.

109. (United States) What were the bases for drawing adverse inferences in the CWP investigation? Why did the US draw adverse inferences in that investigation and not in the LWR investigation? (Exhibit CHI-1, pp. 10-11, Exhibit CH-2, pp. 8-9 and 25-26). And assuming that the USDOC did not draw adverse inferences in the CWP investigation, why did the USDOC determine in the LWR investigation that 70.81 percent of HRS purchased from trading companies was produced by SOEs while it determined in the CWP investigation that 96.1 percent of HRS purchased from trading companies was produced by SOEs.

208. The bases for applying facts available in the CWP and LWRP investigations were the same. As noted in the U.S. First Written Submission, Commerce was not presented evidence that indicated the need for information about the amount of steel purchased through trading companies that came from SOEs until a very late stage of the investigations.[234] Therefore, Commerce did not have an opportunity to request additional clarifying information given the time frame for completing the investigations. Commerce nevertheless carefully reviewed the record to determine what information was available to calculate the amount of SOE-produced hot-rolled steel that respondents purchased through trading companies. To make this determination, Commerce relied on information submitted by China to quantify the amount in each investigation.

209. In the CWP investigation, China reported that approximately 71 percent of hot-rolled steel production in China in 2006 was by state-owned producers. Commerce subsequently learned that China inaccurately reported the ownership structure of the hot-rolled steel industry and determined that the reported percentage was unverifiable. Thus, to determine the percentage of hot-rolled steel production accounted for by SOEs, Commerce did not accept China's characterization of the companies' ownership. Instead, Commerce categorized producers as state-owned where record evidence indicated that a hot-rolled steel producer was state-owned or where China failed to provide factual evidence supporting the classification of the company. On this basis, Commerce determined that SOEs accounted for 96.1 percent of the hot-rolled steel production, and not approximately 71 percent as reported by China. Therefore, in the CWP final determination, to calculate the benefit respondents received from such trading company

[233] U.S. First Written Submission, para. 494.
[234] U.S. First Written Submission, para. 493.

transactions, Commerce determined that 96.1 percent of hot-rolled steel purchased from trading companies was government-produced steel.[235] In the LWRP investigation, China reported that 70.81 percent of hot-rolled steel production in China in 2006 was by state-owned producers. Commerce used the production figure of 70.81 percent that China reported to calculate the benefit respondents received from government-produced hot-rolled steel purchased from trading companies.[236]

110. (United States) Please explain why seeking information that was missing from the record of the original investigation, in an assessment review i.e., after concluding the investigation, would "cure" any alleged violation of Aarticles 12.1 and 12.7 in the original investigation.

210. As the United States has explained, Commerce was not able to determine until a very late stage of the investigations that it required information about the amount of steel purchased through trading companies that came from SOEs.[237] The United States has not argued to the Panel that any alleged violation of Articles 12.1 and 12.7 in the CWP and LWRP investigations would be "cured" by the collection in a subsequent assessment review of this additional information. Should the Panel find that the United States acted inconsistently with Article 12.1 and 12.7 in the course of the CWP and LWRP original investigations, the United States would determine during implementation how to bring its measures into conformity with those obligations and take any appropriate action accordingly.

111. (United States) Why does the CWP determination not also indicate that the USDOC would be seeking the missing information in the future assessment review?

211. In the LWRP investigation, in contrast to the prior CWP investigation, interested parties submitted arguments concerning SOE-produced hot-rolled steel purchased from trading companies.[238] In response to those interested party arguments, Commerce notified them that it would be seeking additional information in a future assessment review. Interested parties did not submit similar arguments in the CWP investigation.

[235] See *CWP CVD Issues & Decision Memorandum*, at 10-11 (Exhibit CHI-1).
[236] See *LWRP CVD Issues & Decision Memorandum*, at 3-4, 8-9, 25-26 (Exhibit CHI-2).
[237] U.S. First Written Submission, para. 493.
[238] See *LWRP CVD Issues & Decision Memorandum*, at 8-9, 22-26 (Exhibit CHI-2).

LIST OF U.S. EXHIBITS

United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China
(WT/DS379)

US-	Title
111	Dynamic Random Access Memory Semiconductors from the Republic of Korea, 71 Fed. Reg. 14174 (Dep't of Commerce March 21, 2006) (final results) and attached Issues and Decision Memorandum at 6-7
112	Certain Hot-Rolled Carbon Steel Flat Products from South Africa, 66 Fed. Reg. 50412 (Dep't of Commerce Oct. 3, 2001) (final determination) and attached Issues and Decision Memorandum
113	Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Trinidad and Tobago, and Turkey, 66 Fed. Reg. 49931, 49936 (Dep't of Commerce Oct. 1, 2001) (initiation of investigation)
114	Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India, 67 FR 34905, at Comment 3 (Dep't of Commerce May 16, 2002) (final determination) and attached Issues and Decision Memorandum at Comment 3
115	Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 64 Fed. Reg. 30636, 30642 (Dep't of Commerce June 8, 1999) (final determination)
116	Certain Kitchen Appliance Shelving and Racks from the People's Republic of China, 74 Fed. Reg. 36656 (Dep't of Commerce July 24, 2009) (final determination) and attached Issues and Decision Memorandum at Comment 4
117	(Intentionally Omitted)
118	MTN.GNG/NG10/W/9 and Revs. 1-4
119	MTN.GNG/NG10/21
120	MTN.GNG/NG10/23, pg. 27
121	19 CFR § 351.212
122	19 CFR § 351.303(f)
123	New Subsidy Allegations Certificates of Service (various investigations)
124	Oct. 5, 2007 Memorandum to the File from Toni Page, Et al., Analysts, through Barbara Tillman, Office Director, entitled "Countervailing Duty Investigation on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation Analysis for New Subsidy Allegations," at 12-15

125	Nov. 9, 2007 Memorandum from Damian Felton, Analyst, to Susan Kuhbach, Office Director, entitled "Analysis of Petitioners' October 5, 2007, New Subsidy Allegations," at 5-9
126	April 9, 2008 Memorandum from Damian Felton, Analyst, to David Spooner, Assistant Secretary, entitled "Post-Preliminary Findings for the Provision of Land for Less Than Adequate Remuneration and New Subsidy Allegations," at 1-9 (CWP CVD)
127	May 2, 2008 Memorandum from Barbara Tillman, Office Director, to David M. Spooner, Assistant Secretary, entitled Post-Preliminary Analysis of Non-Tradeable Share Reform; Provision of Water to FIEs for Less Than Adequate Remuneration; Grants to the Tire Industry for Electricity; and Various Provincial/Municipal Programs," at 1-17 (OTR Tires CVD)
128	April 22, 2008 Memorandum from Barbara Tillman, Office Director, to David M. Spooner, Assistant Secretary, entitled "Post-Preliminary Analysis of New Subsidy Allegations" (Sacks CVD)
129	CWP CVD Sept, 11, 2007 New Subsidy Allegation ("NSA") Questionnaire to East Pipe
130	CWP CVD Sept. 11, 2007 NSA Questionnaire to the Government of China
131	CWP CVD Sept. 11, 2007 NSA Questionnaire to Kingland Pipe
132	CWP CVD Sept. 11, 2007 NSA Questionnaire to Shuangjie Pipe
133	CWP CVD Nov. 13, 2007 NSA Questionnaire to East Pipe
134	CWP CVD Nov. 13, 2007 NSA Questionnaire to the Government of China
135	CWP CVD Nov. 13, 2007 NSA Questionnaire to Kingland Pipe
136	LWRP CVD Sept. 20, 2007 NSA Questionnaire to the Government of China
137	LWRP CVD Sept. 20, 2007 NSA Questionnaire to Qingdao Pipe
138	LWRP CVD Sept. 20, 2007 NSA Questionnaire to ZZ Pipe
139	LWS CVD Nov. 2, 2007 NSA Questionnaire to the Government of China
140	LWS CVD Nov. 2, 2007 NSA Questionnaire to Ningbo Packaging
141	LWS CVD Nov. 2, 2007 NSA Questionnaire to Shandong
142	LWS CVD Nov. 2, 2007 NSA Questionnaire to Shandong Plastic Fabric
143	LWS CVD Nov. 2, 2007 NSA Questionnaire to Zibo Aifudi
144	OTR Tires CVD Oct. 5, 2007 NSA Questionnaire to Guizhou Tyre

145	OTR Tires CVD Oct. 5, 2007 NSA Questionnaire to TUTRIC
146	OTR Tires CVD Oct. 5, 2007 NSA Questionnaire to the Government of China
147	OTR Tires CVD Oct. 5, 2007 NSA Questionnaire to GPX/Starbright
148	OTR Tires CVD Nov. 14, 2007 NSA Questionnaire to the Government of China & Guizhou Tyre
149	OTR Tires CVD Jan. 15, 2008 NSA Questionnaire to Tianjin Dolphin Rubber & Tianjin Dolphin Carbon Black