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

(WT/DS379)

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

December 8, 2009
(Corrected December 11, 2009)

TABLE OF REPORTS CITED

Short Form	Full Citation
Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
China – Audiovisual Products	China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/R, circulated 12 August 2009
EC – Bed Linen (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002
Japan – DRAMS (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
Korea – Alcoholic Beverages (Panel)	Panel Report, *Korea – Taxes on Alcoholic Beverages,* WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – Countervailing Measures (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003

US – Customs Bond (AB)	Appellate Body Report, *United States – Measures Relating to Shrimp from Thailand*, WT/DS343/AB/R, adopted 1 August 2008
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 – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005

I. TERMS OF REFERENCE

A. US REQUEST FOR PRELIMINARY RULINGS

1. (To the United States) Please comment on China's response to Panel Question 7 that "the lack of legal authority to avoid the imposition of double remedies in parallel investigations of imports from China was already the subject of consultations."

1. There is no basis for China's assertion that the supposed "lack of legal authority" was the subject of consultations. Article 4.2 of the DSU provides for each Member to undertake to afford adequate opportunity for consultations "regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former." Article 4.4 requires a complaining party to provide, in its request for consultations, the "reasons" for the request, "including identification of the measures at issue and an indication of the legal basis for the complaint."

2. It follows from these provisions that the subject of consultations – that is, the *representations* of a Member about certain *measures* – can be determined *solely* by reference to the content of the consultations request.

3. The Appellate Body reached a similar conclusion in *US – Upland Cotton*:

> We believe that the Panel should have limited its analysis to the request for consultations because we are inclined to agree with the panel in *Korea – Alcoholic Beverages*, which stated that "[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel". Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU, which provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." Moreover, it would seem at odds with the requirements in Article 4.4 of the DSU that the request for consultations be made in writing and that it be notified to the DSB.[1]

4. Furthermore, relevant context supports this analysis: Article 4.11 of the DSU provides that other Members may request to be joined in consultations requested pursuant to Article XXII of the GATT 1994 if they have a substantial trade interest in such consultations. Given that the only basis such Members have for deciding whether to request to join is the circulated version of the consultation request, the "subject" of the consultations that they are deciding whether to join must be defined by that request.

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[1] *US – Upland Cotton (AB)*, para. 287 (footnote omitted), quoting *Korea – Alcoholic Beverages (Panel)*, para. 10.19.

5. Turning to the consultations request, the United States has explained that the "measure" challenged "as such" by China is *not identified* in that request.[2] To date, China has not suggested otherwise. Instead, the only way China has been able to connect this new "measure" to the consultations request is to suggest that the new "measure" was somehow "already evident on the face of the measures that were the subject of consultations."[3] Even if the new "measure" were "evident on the face of the measures" *actually identified* in the consultations request (a point the United States has shown to be incorrect[4]), that would not somehow mean the new "measure" itself was so identified in the request.[5] Because the so-called "absence of legal authority" was not identified in the consultations request, it was not among the measures that were the subject of consultations.

2. (To both parties) What is the legal relevance under Article 4.4 and 6.2 of the DSU of whether or not this "absence of legal authority" was in fact the subject of consultations?

6. Article 4.4 requires the consultations request to be in writing and notified to the DSB and the relevant Councils and Committees, and that the written request identify the measures at issue. As a result, Article 4.4 makes clear that Members have an interest in knowing the particular measures that are the subject of consultations, and that the means by which they are so informed is by being notified of the scope of the consultations in writing. Both Article 4.7 and Article 6.2 of the DSU require that consultations have been held with respect to a measure before that measure can be the subject of a panel request. In this dispute, China did not notify the so-called "lack of legal authority" as being within the scope of the consultations, and China is not free to ignore this requirement and request a panel on a measure that has not been the subject of a consultations request.

3. (To both parties) Concerning the US argument that China could not include its "as such" claims in its request for establishment because those claims were not referred to in its request for consultations: Please comment on the relevance, if any, of the findings of the Appellate Body in Mexico – Rice (paras. 135-145) and of the panel in China – Publications and Audiovisual Products (paras. 7.114-7.133) with respect to the correspondence between the request for consultations and the panel request on the issue of the legal basis for a complaint, i.e., the findings that a complainant may include provisions in its request for establishment that were not referred to in its request for consultations provided that the legal basis in the panel request may reasonably be said to have evolved from the legal basis that formed the subject of consultations and that the addition of provisions does not have the effect of changing the essence of the complaint.

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[2] *See* U.S. First Written Submission, paras. 79-81.

[3] China Answer to Panel Question 7, para. 21.

[4] *See, e.g.*, U.S. Second Oral Statement, para. 89; U.S. Second Written Submission, para. 222.

[5] *See* U.S. Answer to Panel Question 7, para. 18.

7. The U.S. preliminary ruling request relating to China's failure to consult is based on the fact, demonstrated by the United States,[6] that China decided not to identify, in its consultations request, the "measure" it subsequently challenged "as such" in its panel request. The cited portions of the Appellate Body Report in *Mexico – Rice* and the panel report in *China - Audiovisual Products* address a different issue. Those disputes concerned whether the *claims* must be identical between the consultations and panel requests, rather than the *measures*. The Appellate Body in *Mexico – Rice* articulated the following rationale for permitting certain new *claims* to be included in a panel request:

> A complaining party may learn of additional information during consultations – for example, a better understanding of the operation of a challenged measure – that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process.[7]

The panel in *China – Audiovisual Products* relied on this rationale in reaching its conclusion in respect of the new *claim* at issue in that dispute.[8] No panel or Appellate Body Report has relied on this rationale – that is, "new information" resulting in a panel request that has "evolved" from the consultation process – to justify permitting panel findings on a *measure* identified for the first time in a panel request.[9] The United States therefore submits that the reasoning in those reports has no relevance for the Panel's consideration of the U.S. preliminary ruling request relating to China's failure to consult on the alleged "absence of legal authority."

8. The United States notes that, in any event, the "absence of legal authority" challenged by China in its panel request cannot "reasonably be said to have evolved from"[10] any "additional information [learned] during consultations"[11] on the measures identified in the consultations request. In the circumstances envisioned by the Appellate Body, a complaining Member initiates

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[6] *See, e.g.*, U.S. Answer to Panel Question 7, para. 19.

[7] *Mexico – Rice (AB)*, para. 138.

[8] See *China – Audiovisual Products*, paras. 7.114-7.115 and 7.121.

[9] The United States recognizes that the Appellate Body in *Brazil – Aircraft* made reference to statements of that panel that appeared to articulate a similar explanation about how information obtained in consultations might affect the scope of the matter submitted to a panel. *See Brazil – Aircraft (AB)*, para. 132. However, that explanation was not the basis for the Appellate Body's decision to permit findings on the "new" measures, which had not come into effect until after the consultations were held. The Appellate Body based its conclusion on the fact that the "specific measures at issue in this case are the Brazilian export subsidies for regional aircraft under PROEX"; that those subsidies had been identified in Canada's consultations request; and that the "new" measures "did not change the essence of the export subsidies." *Id.* at para. 132.

[10] *Mexico – Rice (AB)*, para. 138.; *China – Audiovisual Products*, para. 7.131.

[11] *Mexico – Rice (AB)*, para. 138.

consultations on the basis of its understanding at the time and, based on new information learned during the exchange of information that takes place during consultations, that complaining Member's claims "evolve" into those set out in its panel request.[12]

9. China recognizes that that is not the situation in this dispute. In particular, as the United States has explained, China was fully aware of the existence of this alleged "absence of legal authority," and of the supposed effects of this "measure" on China's benefits under the covered agreements, at least fifteen weeks prior to the date it filed its consultations request.[13] Notwithstanding China's understanding of the existence and allegedly detrimental effects of this "measure," China did not identify the "absence of legal authority" in the consultations request, limiting the measures at issue to determinations and orders issued in connection with eight AD and CVD investigations. In its consultations request, China limited the scope of the dispute to "the definitive anti-dumping and countervailing duties imposed by the United States pursuant to [those] final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce."[14]

10. In other words, China had every opportunity to include in its consultations request an "as such" challenge to the "absence of legal authority" and to thereby expand the scope of its request beyond the specific duties imposed as a result of the eight investigations. China did not do so. Therefore, rather than the measures at issue "evolving" on the basis of what was learned during consultations, the addition of the "absence of legal authority" in the panel request reflected China's attempt to broaden the scope of the dispute beyond the "as applied" claims identified by China in its consultations request.[15]

4. (To both parties) If consultations are requested and held on particular calculations in a particular CVD investigation, and subsequently a panel is requested in respect of those calculations:

(a) Could the panel request also include an as such claim concerning the provisions of the domestic legislation related to those calculations?

and/or

(b) Could the panel request also include an as such claim on provisions of the domestic legislation other than those related to the particular calculations that were the subject of the consultation request?

Please cite any relevant jurisprudence.

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[12] *See Mexico – Rice (AB)*, para. 138.

[13] *See, e.g.*, U.S. Answer to Panel Question 7, para. 19.

[14] China Consultations Request, p. 1.

[15] *See* U.S. First Written Submission, paras. 78-81.

11. The United States notes that the question seeks a response to two purely hypothetical scenarios. The circumstances described in those scenarios, however, do not appear to reflect the actual circumstances before the Panel in this dispute. Furthermore, the scope of the consultations request can only be determined by examining the *text* of the consultations request itself.[16] It is therefore difficult to evaluate the question of a complaining Member's failure to consult on a particular measure on the basis of the abstract situations raised by this question rather than an actual consultations request. Moreover, these hypothetical scenarios assume that the "related" legislation is clearly in existence, and, as a written instrument, is concrete and therefore easily defined and located. The United States has explained that neither of these conditions holds true in respect of the alleged "absence of legal authority" that China introduced for the first time in its panel request.[17] In this light, the United States respectfully submits that any answer provided to the hypothetical scenarios raised by this question will provide at most very limited assistance to the Panel in resolving this part of the U.S. request for preliminary rulings.

12. With these introductory comments in mind, the United States considers that, as a general matter, the response to both parts of the Panel's question is in the negative: the fact that a consultations request identified a calculation that led to the imposition of a CVD measure would not be sufficient to allow a panel request to introduce an "as such" challenge to domestic legislation "related to" that calculation. The same would be true, *a fortiori*, with respect to provisions of domestic legislation *other than* those "related to" that calculation.

13. When examining whether a complaining Member may introduce a measure in its panel request that was not identified in the consultations request, the fundamental question is whether "the 'essence' of the challenged measures [has] changed"[18] from the consultations request to the panel request. In the above hypotheticals, the complaining Member appears to have limited its consultations request to how the duties in that particular investigation were calculated. Such duties have a much more limited scope of application (that is, they apply only to products subject to the relevant CVD determination or order) as compared with statutory provisions, which can apply more generally to all CVD investigations regardless of the product at issue. In addition, laws are typically adopted by different governmental entities, often in different branches of government and operating under different legal authorities, from those that conduct CVD investigations or impose CVDs. A statutory provision, "related" or otherwise, is therefore likely to be a separate and legally distinct measure from duties imposed in a particular investigation.

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[16] *See, e.g.*, *US – Customs Bond (AB)*, para. 294.

[17] *See, e.g.,* U.S. Second Written Submission, para. 222. These differences between the legislation described in the hypotheticals and the "absence of legal authority" in this dispute are highlighted in the U.S. discussion of its request for preliminary rulings. For example, China has consistently avoided providing any clarification as to the alleged "absence of legal authority" by failing to identify this "omission" in relation to any affirmative WTO obligation, and failing to identify where, under U.S. law, Commerce is required to take certain actions that produce a WTO-inconsistent result that could be challenged "as such." *See, e.g.* U.S. Statement Regarding U.S. Preliminary Ruling Requests, paras. 4-5; U.S. Answer to Panel Question 1, paras. 2-4.

[18] *US – Customs Bond (AB)*, para. 294, *quoting Mexico – Rice (AB)*, para. 137.

14. In this respect, the hypothetical scenario (a) presented by this question resembles that addressed by the Appellate Body in *US – Customs Bond*.[19] In that dispute, the Appellate Body similarly noted that the "focus" of the consultations request was on the WTO-consistency of a particular measure, and determined that this challenge did not necessarily implicate the WTO-consistency of regulatory and statutory provisions that were "related" by virtue of providing the general authority for that measure.[20] The Appellate Body concluded, accordingly, that the inclusion of those regulatory and statutory provisions in the panel request did not permit the panel to make findings in respect of those provisions.[21]

15. Finally, permitting a panel to make findings on the statutory provisions in the above hypotheticals would undermine the purpose of consultations. Consultations on how an investigating authority's specific calculations were done in a particular investigation would not address issues that arise in the fundamentally different discussion involving the operation of legislation in general terms and in all cases. Such a discussion is what is implicated by the nature of consultations over legislation "as such." Where the request for consultations does not cover legislation as such, it is difficult to imagine how parties to a dispute could have had the opportunity "to reach a mutually agreed solution, [or] where no solution is reached, [the] opportunity to 'define and delimit' the scope of the dispute between them."[22]

B. OTHER ISSUES

5. (To both parties) The Panel notes the terms of para. (d)(i) of China's request for the establishment of the panel:

> *"in connection with each instance in which the US authorities resorted to a benchmark outside of China for the purpose of determining the existence and amount of any alleged subsidy benefit –*
>
> *(i) the US authorities' rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, subject producers received a subsidy benefit under the methodologies set forth in Article 14 of the SCM Agreement;"*

Please explain whether in your view, the language of para. (d)(i) of the request provides a sufficient basis for China's claims in respect of the benchmarks actually used by the USDOC for land use rights and loans.

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[19] Also in this respect, the hypothetical scenario (a) stands in contrast to the situation in *US – Continued Zeroing*, where the additional measures in the panel request maintained, and had the same legal basis as, the duties that were identified in the consultations request. *See US – Continued Zeroing (AB)*, paras. 228, 231.

[20] *US – Customs Bond (AB)*, para. 294.

[21] *See US – Customs Bond (AB)*, para. 296.

[22] *US – Customs Bond (AB)*, para. 293.

16. Paragraph (d)(i) of China's request for the establishment of the Panel refers to "each instance in which the US authorities resorted to a benchmark outside of China ..." and specifically identifies Commerce's "rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, subject producers received a subsidy benefit under the methodologies set forth in Article 14 of the SCM Agreement ...." The claim identified there is directed at the "rejection of prevailing terms and conditions in China ...." Nowhere in paragraph (d)(i), nor elsewhere in China's request for the establishment of the Panel, does China refer to the "benchmarks actually used" by Commerce for land-use rights or loans.

17. In this regard, the United States draws the Panel's attention to the analysis of the panel in *China – Audiovisual Products*.[23] That panel found that certain "discriminatory requirements" challenged by the United States were outside of the panel's terms of reference because "[t]he United States did not inform China that it was challenging every possible discriminatory requirement in its measures, but rather the specific ones described in the narratives."[24] In that dispute, China argued "that by listing certain aspects the United States indicated that these were the only ones that were the subject of its claim and thus are the only ones within the panel's terms of reference." That panel concluded that, "[j]ust as the European Communities did in *US – Carbon Steel*, the United States has, through its description of its claim in the panel request, only notified China that its claim concerned the specific requirements set forth in the panel request."[25]

18. Here, China specified that its claim related only to "the following obligations of the United States" and listed certain aspects of Commerce's determinations in connection with Article 14 of the SCM Agreement, indicating that this was the extent of China's claims with respect to the use of benchmarks. The question then appears to be whether China is challenging something other than Commerce's "rejection of prevailing terms and conditions in China as the basis for determining whether, and to what extent, subject producers received a subsidy benefit under the methodologies set forth in Article 14 of the SCM Agreement." Accordingly, to the extent that China is bringing a different claim, China's claim would be outside the scope of its panel request.

II. OFFSETS

6. (To both parties) Would different factual circumstances possibly require different methodological approaches as to whether the benefit analysis must be done on an aggregate or other basis. In this respect, please comment on Canada's argument at para. 23 of its oral statement that:

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[23] *China – Audiovisual Products*, paras. 7.83-104 (An appeal of this panel report is currently pending before the Appellate Body. However, the panel's findings with respect to its terms of reference were not appealed).

[24] *Id.* at 7.104.

[25] *Id.*

> *"under certain circumstances, the examination of whether the provision of a good through one or more transactions is made for adequate remuneration may require that other transactions be examined. For example, where there is an on-going contractual relationship between a government supplier and a purchaser, it may be appropriate to take into account a range of transactions between the same parties concerning the same goods in order to determine whether one or more transactions were made for adequate remuneration".*

19. Under the SCM Agreement, investigating authorities are permitted to apply methodologies that account for different factual situations, including the conditions under which the subsidy was provided. In all cases, benefit determinations are made on a case-by-case basis and depend on the particular facts of a given situation. Nothing in the SCM Agreement prescribes any particular level of aggregation at which the calculation of a subsidy benefit must be conducted, and nothing requires Commerce to provide a credit in any aggregation of multiple transactions for non-subsidized transactions. Canada agrees.[26]

20. The hypothetical situation identified by Canada in paragraph 23 of its oral statement is not similar to the facts of the *OTR Tires* CVD investigation. There is no evidence in the *OTR Tires* record of any "on-going contractual relationship between a government supplier and a purchaser," and neither the investigated producers nor the Government of China argued that such a contractual obligation existed such that Commerce would have needed to reconsider the monthly benchmark comparison.

21. If Commerce were presented with such a situation in a particular investigation, Commerce would evaluate the particular facts and determine an appropriate methodology for calculating the benefit. If, for instance, a single sale called for multiple deliveries, those deliveries might appropriately be treated as one transaction for the purpose of making a comparison with an appropriate benchmark. This would, of course, depend on the terms and conditions of the sale and the particular facts of that situation. Again, however, there is no evidence that such a situation existed in the *OTR Tires* CVD investigation.

22. As mentioned above, nothing in the SCM Agreement requires any particular level of aggregation in the calculation of benefit, and nothing requires Commerce to provide a credit in any aggregation of multiple transactions for non-subsidized transactions. As noted in the U.S. First Written Submission, the "guidelines" in Article 14 of the SCM Agreement afford Members a great deal of flexibility in the calculation of benefit.[27] Indeed, the context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. The SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating

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[26] Canada Third Party Oral Statement, para. 22.

[27] *See* U.S. First Written Submission, paras. 184-186, 291-295.

authorities have the option of analyzing each subsidy on a transaction by transaction basis.[28] Moreover, even if an authority were to choose to conduct an analysis at a particular level of aggregation in certain circumstances, nothing in the SCM Agreement requires an authority to provide a credit for those transactions that do not provide a benefit when performing such an analysis. Regardless of the factual circumstances presented in a particular investigation, the SCM Agreement imposes no obligation to reduce the amount of the benefit found to exist because of other government transactions in which a benefit was not provided.

7. *At the second substantive meeting, China argued that the USDOC: (i) used "aggregate" monthly benchmarks, which it compared to individual transactions in performing its benefit analysis; (ii) in some instances used benchmark prices that were not contemporaneous to the transactions; and that as a result, the USDOC did not perform an "apples-to-apples" comparison.*

   (a) (to the United States) Please comment on this argument of China.

23. China has once again introduced an entirely new argument in support of its attempt to invent an obligation for investigating authorities to provide credit in the benefit calculation for non-subsidized transactions. For the first time, in response to oral questions during the second Panel meeting, China argued that Commerce failed to make an apples-to-apples comparison in its benefit determinations. China has yet to fully explain this argument, either orally or in writing, and in briefly noting it at the Panel meeting, China did not reference any provision of the covered agreements. Accordingly, China's argument is unclear and it is difficult to respond to it. Nevertheless, the United States has the following comments on China's new argument.

24. China appears now to take issue with (i) Commerce's comparison of individual rubber sales to aggregate monthly benchmarks, and (ii) Commerce's use of monthly benchmarks that included data from a month other than the month for which the input price was reported. It is not clear how China's new criticisms of Commerce's methodology relate to China's CVD credit/offset argument. Additionally, the United States notes that China's new argument appears to be a reversal of its prior position, stated earlier in this dispute, that it was within Commerce's discretion under the covered agreements to compare financial contributions and benchmarks on a monthly basis.[29]

25. In any event, China's arguments misrepresent the facts. The comparison Commerce performed in evaluating the benefit conferred by the provision of rubber was an "apples-to-apples" comparison fully consistent with Article 14 of the SCM Agreement. In the *OTR Tires* CVD investigation, Commerce requested that the investigated producers report their purchases of each kind of rubber input by providing the "monthly, weighted-average price paid ... to each of

[28] *See* U.S. Second Written Submission, paras. 128-131.

[29] China First Written Submission, para. 150.

your suppliers."[30] Commerce calculated benefits for the provision of rubber for less than adequate remuneration by comparing the monthly price of each government-sourced input to a monthly benchmark based on the average price in a given month that the investigated producer paid to private input suppliers (*i.e.*, private Chinese producers and/or the price of the input imported from outside China).[31]

26. In most instances, Commerce compared the monthly benchmark to *one* monthly price for the government-sourced input as reported by the investigated Chinese producers. However, in multiple instances, investigated producers reported to Commerce two or three prices in a given month.[32] In those instances where investigated producers reported two or three government-sourced prices in a given month, Commerce compared the monthly benchmark to each price.[33] That is, Commerce accepted the data in the manner provided by the investigated producers.

27. In most instances, the monthly benchmarks were based on private prices *from the same month* in which the investigated producers reported purchase of the government produced input. However, for some rubber inputs, Commerce employed monthly data from a proximate month because the investigated producer did not have private purchases of the input in the given month.[34]

28. Article 14 of the SCM Agreement contains the obligations with respect to measuring the adequacy of remuneration when the government provides goods or services. By its terms, this provision establishes guidelines.[35] Article 14(d) states that the adequacy of remuneration for goods or services is to be determined:

> in relation to the prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

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[30] *See*, *e.g.*, Supplemental Questionnaire to GTC at Question 64 (Nov. 9, 2007) (Exhibit US-154).

[31] *See, e.g., OTR Tires Final Decision Memorandum*, 11 (CHI-4).

[32] *See, e.g.*, GTC Minor Corrections for Verification, "Rubber Purchases" (Mar. 12, 2008) (Exhibit US-155) (Contains BCI).

[33] *See, e.g.,* Final Calculation Memorandum for GTC at attachment – spreadsheet tab "Rubber Calculations" (July 7, 2008) (Exhibit CHI-56).

[34] *See,e.g.,* Final Calculation Memorandum for GTC at attachment – spreadsheet tab "Rubber Calculations" (July 7, 2008) (Exhibit CHI-56); Final Calculation Memorandum for TUTRIC at attachment – spreadsheet tab "Rubber Calculations" (July 7, 2008) (Exhibit US-156) (Contains BCI); *see also* Further Detail on Reported Rubber Prices (for business confidential detail on reported rubber purchases) (Exhibit US-157) (Contains BCI).

[35] The chapeau of Article 14 of the SCM Agreement states that subsections (a) - (d) are "guidelines" to be followed in establishing a method for determining a subsidy benefit; *see also* US First Written Submission, paras. 184-85 (discussing the Appellate Body's recognition that Article 14 provides "guidelines" which allow an investigating authority flexibility in measuring subsidy benefits).

29. Commerce complied with the guidelines in this provision by employing benchmarks based on the investigated producers' actual purchases of inputs from private suppliers during the POI. This provision does not require that an investigating authority measure the benefit on any particular temporal basis (*i.e.,* daily, monthly, annually). Thus, Commerce's comparison of the monthly government-sourced prices reported by the investigated producers to a monthly benchmark – whether it was one, two or three reported government prices in a given month – was not inconsistent with Article 14(d). In addition, this provision does not require that benchmarks be exactly contemporaneous with the purchase of goods, *i.e.,* from the same month, same week or same day. Introducing such a requirement could make benefit calculations almost impossible in many situations. Thus, Commerce's use of benchmark data from a proximate month when data for the month of purchase was unavailable is not inconsistent with the obligations of the United States.

III. SPECIFICITY

8. (To the United States) Was there specific evidence on the record that distinguished the way in which land-use rights were provided by the government in the New Century Industrial Park from the way in which land-use rights were provided by the government for similar purposes elsewhere in Huantai County and/or Shandong Province? Please identify any such evidence and any references to it in the USDOC specificity determination.

30. Evidence on the record of the *LWS* CVD investigation distinguished the way in which land-use rights were provided by the government in New Century Industrial Park. The subsidy was provided only to enterprises that exceeded a minimum level of investment in the park.[36] In addition, the subsidy was available only to those enterprises willing to physically locate in the park.[37] Further, record evidence showed that land-use rights in the New Century Industrial Park were not provided in the same manner as other land-use rights in the same jurisdiction. Specifically, the land-use rights in the park were not provided in accordance with the requirements set forth by the government.[38] First, the land for the park had not been converted from collective ownership for agricultural use to industrial land at the time the land-use rights were originally provided to enterprises located in the park.[39] In addition, the local authorities did not conduct a formal appraisal of the value of the land before selling it.[40] For these reasons, the

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[36] *LWS CVD Preliminary Determination,* 72 FR at 67,905 (Exhibit CHI-34).

[37] *LWS CVD Final Decision Memorandum*, 55 (Exhibit CHI-3); *LWS CVD Preliminary Determination*, 72 FR at 67,905 (CHI-34) (noting that the subsidy was designed to attract enterprises to an undesirable location).

[38] *See generally, LWS* Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Provincial and Local Government, 5-12 (Mar. 4, 2008) (Exhibit US-158) (Contains BCI).

[39] *LWS* Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) - Provincial and Local Government (March 4, 2008) at 9-10 (Exhibit US-158) (Contains BCI).

[40] *LWS* Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) - Provincial and Local Government (March 4, 2008) at 10 (Exhibit US-158) (Contains BCI).

land-use rights subsidy was distinct from Huantai County's provision of any land-use rights outside the park. In this regard, the United States recalls that the GOC provided information relating to only a handful of transactions for land-use rights outside the park and inside Huantai County, and that each of these transactions was hand-selected by the GOC.[41]

9. (To the United States) In para. 48 of its oral statement at the second substantive meeting, the United States argued that:

> *"China's theory that a benefit must also be specific to find a subsidy regionally specific must be rejected because it would allow a granting authority to circumvent the disciplines of Article 2.2 simply by ensuring that at least one enterprise outside the region receives a similar benefit".*

In a situation in which not just one, but every other enterprise outside the region pays similar land prices to those charged inside the region, would this, in the US view, either preclude or support a finding of regional specificity?

31. As an initial matter, this hypothetical presents facts that were not present in the *LWS* CVD investigation. As discussed immediately above, there is little evidence on the record of the investigation with respect to land-use rights prices outside the park and inside Huantai County. Moreover, what little evidence there is suggests that there was some price variability within Huantai County.

32. With respect to the specific facts of the hypothetical – a uniformity of land-use rights prices within the control of a granting authority is not determinative of a regional specificity determination. For example, the granting authority could have a number of subsidy programs in place to provide land-use rights. The fact that multiple programs may exist providing a similar benefit (*i.e.,* similarly priced land-use rights) would not determine whether a program is regionally specific. Article 2.2 of the SCM Agreement requires only that the program be limited to enterprises within a designated geographical region. Article 2.2 does *not* require that the subsidy program provide a *benefit* that is unique to enterprises within the designated geographic region.

IV. BENCHMARKS

10. Concerning your respective arguments as to the relevance of Section 15 of China's Protocol of Accession to the Panel's examination of China's claims concerning the USDOC's benefit determinations:

[41] *See* U.S. Response to the Panel's First Set of Questions, Question 60.

(a) (to the United States): If the Panel were to find that the USDOC determinations at issue are inconsistent with the United States' obligations under Article 14(d) (inputs and land use rights) and/or Article 14(b) (loans), does the United States consider that the Panel would have to evaluate whether its actions nevertheless were justified under Section 15(b) of China's Protocol of Accession?

33. As the United States has explained throughout this dispute, 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. Were the Panel to find that the determinations are inconsistent with the United States' obligations under Article 14(b) and/or Article 14(d), the United States considers that it would not be necessary for the Panel to evaluate whether the U.S. actions were justified under paragraph 15(b) of China's Protocol of Accession. Neither party in this dispute has requested that the Panel make findings regarding paragraph 15(b). Additionally, because China has declined to articulate any basis for the claim included in its request for the establishment of the Panel that Commerce's determinations were inconsistent with paragraph 15(b), it has not been necessary for the United States to put forward any arguments demonstrating that Commerce's determinations were consistent with that provision. As a result, there is no basis for the Panel to make any findings with respect to paragraph 15(b) of China's Protocol of Accession.

11. (To both parties): What meaning is to be accorded to the phrase in Section 15(b) of China's Protocol of Accession: "methodologies ... which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks". In particular, please discuss the significance, in that phrase, of the term "always" and the meaning to be accorded to the combined use of the terms "possibility" and "may".

34. As noted above, the United States does not consider that it is necessary for the Panel to evaluate whether the U.S. actions could have been justified under paragraph 15(b) of China's Protocol of Accession.

35. With respect to the meaning of the text in paragraph 15(b) of China's Protocol of Accession that is identified in the Panel's question, the United States notes that this language simply recognizes that prevailing terms and conditions in China may not be available as appropriate benchmarks in CVD proceedings. 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 Protocol of Accession because the "special difficulties" associated with the transitional nature of China's economy may justify the use of out-of-country benchmarks.

36. The use of the terms "the possibility" and "may not always" in paragraph 15(b) indicates that, while appropriate internal benchmarks may be available in some cases, in other cases they may not. In the challenged investigations, Commerce used internal benchmarks where possible, and relied on external benchmarks only where no appropriate internal benchmarks were available. For example, in the *OTR Tires* CVD investigation, Commerce relied upon the investigated companies' actual import prices and domestic purchase prices from private producers as benchmarks when determining whether a benefit was conferred by the rubber purchased from government-owned producers, even though the government owned the producers of a significant portion of domestically produced rubber.[42] However, where the evidence of record indicated that prevailing terms and conditions were not available as appropriate benchmarks, Commerce appropriately used methodologies for identifying and measuring the subsidy benefit that took that fact into account.

37. As the United States has explained, China's Protocol of Accession sets forth additional terms and conditions to which China agreed as a condition for its accession to the WTO. 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. Paragraph 15(b) permits Members to use methodologies that take into account the possibility that appropriate internal benchmarks may not be available in China.

12. (To both parties) Please submit any comments concerning Exhibit US-150.

38. Exhibit US-150 was submitted by the United States with its Second Written Submission in support of the conclusion that there is no requirement to perform a "price distortion" analysis before a Member may rely upon an out-of-country benchmark. It also responds to questions posed by the Panel.[43] Exhibit US-150 is an excerpt from an economic textbook on the "Dominant Firm Model" theory, which explains that a single firm or a group of firms can hold a dominant position in a market.[44] This theory concludes that smaller, non-dominant firms are "price takers" in that they set a price equal to that of the dominant firm(s) because they are so small relative to the market demand.[45] A smaller firm in such a market is a "price taker" because it is "so small relative to market demand that it views changes in its output as having no effect on price."[46] The Appellate Body's analysis in *US – Softwood Lumber CVD Final* regarding the

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[42] *OTR Tires CVD Final Decision Memorandum*, at 11 (Exhibit CHI-4).

[43] *See, e.g.,* First Set of Panel Questions, Question 32.

[44] *See, e.g.*, F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance, 221 (Houghton Mifflin Company 1990) (Exhibit US-150). For example, where a single firm has "a market share of 40 percent or more," it can be considered dominant. *Id.*

[45] *Id*. at 224.

[46] *Id.*

Canadian government's predominant role in the softwood lumber market reflects this economic theory.

39. Consistent with the "Dominant Firm" theory, the Appellate Body noted that "[w]hen private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers *will align* their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices."[47] Therefore, when the government has a predominant role, it "effectively determines the price at which private suppliers sell the same or similar goods. . . ."[48] The Appellate Body, therefore, concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.[49]

40. As the "Dominant Firm" theory explains, price distortion is a *result* of the predominant role of the firm or groups of firms that hold a dominant position in the market. Consistent with this theory, the Appellate Body never found that Article 14 of the SCM Agreement required a finding that prices were actually distorted in a market before an investigating authority could resort to an out-of-country benchmark.[50] Therefore, Exhibit US-150 supports a finding that where the government's participation in the market is predominant, as was the case with China's participation in certain of the markets examined in the challenged determinations, the investigating authority does not act inconsistently with Article 14 of the SCM Agreement by using an out-of-country benchmark.

13. (To both parties) What is the relevance to the claim concerning the USDOC's determinations of distortion in respect of inputs (both hot-rolled steel and BOPP) that the information used in those determinations for the government's share of production was based on facts available and adverse inferences?

41. Commerce's reliance on available facts on the record regarding the government's share of production in the hot-rolled steel and BOPP markets is not relevant to the Panel's analysis of China's claims concerning Commerce's determination that the Government of China played a predominant role in those markets. China has not challenged Commerce's use of available facts

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[47] *US – Softwood Lumber CVD Final (AB)*, para. 101 (emphasis added).

[48] *Id.*, para. 93 (emphasis added).

[49] *Id.*, para. 103.

[50] *Id*. China's price distortion argument rests on a misuse of paragraph 102 of the *US – Softwood Lumber* Appellate Body decision, which discusses "whether an allegation that the government is a significant supplier" is sufficient to rely upon an out-of-country benchmark. (emphasis added). *See, e.g.,* China Answers to First Panel Questions, para. 126, and China's Second Submission to the Panel, paras. 57-58. However, Commerce determined based upon record facts that the Government of China has a predominant role in the markets at issue; there were not merely allegations that it was a significant provider. *See, e.g., CWP CVD Final Decision Memorandum*, at 7 (finding a predominant role in the banking sector) (Exhibit CHI-1).

on the record in this regard, and Commerce's reliance on such available facts is permitted by the SCM Agreement.

14. (To the United States) Did the USDOC consider the proportion of the Chinese HRS and BOPP markets supplied by imports in concluding that private prices for HRS in China were distorted as a result of the government's role as a supplier of the good at issue in the CWP, LWR and LWS investigations? If so, please refer the Panel to the relevant paragraph(s) of the USDOC determinations in this respect, and indicate the proportion of the HRS and BOPP markets supplied by imports in each case.

42. Commerce did consider the volume of imports when determining whether the Government of China had a predominant role in the hot-rolled steel and BOPP markets. As explained in paragraph 208 of the U.S. First Written Submission, Commerce looked at import data both to determine what role imports of hot-rolled steel played in the market as well as to consider whether import prices could be used to determine the benefit of the government provision of hot-rolled steel. Because the volume of imports equaled only three percent of total Chinese hot-rolled steel production,[51] Commerce concluded that "the import quantities are small relative to Chinese domestic production of [hot-rolled steel]."[52] Therefore, there was no commercial market for hot-rolled steel in China from which Commerce could select a benchmark price.

43. There was less information available on imports of BOPP because the applicable Chinese tariff code covered both BOPP and another petrochemical product.[53] Thus, the Government of China could not provide the amount of BOPP imported into China. Further, the Government of China was also unable to provide domestic consumption figures for BOPP. Therefore, there was no basis upon which Commerce could assess the import data, even if it was available.[54] Commerce thus relied upon the only evidence on the record, which showed that the Chinese Government had a predominant role because one government-owned company, China Petroleum and Chemical Corporation (Sinopec), which produced BOPP, accounted for 90 percent of the petrochemical industry.[55]

15. (To the United States) In footnote 206 to the USDOC Issues and Decision Memorandum in CWP (Exhibit CHI-1), the USDOC states that:

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[51] *See LWRP China Verification Report*, at Exh. A-2 (Mar. 5, 2008) (Exhibit US-70); *CWP China Verification Report*, at Exh. A-2 (Mar. 5, 2008) (Exhibit US-65); *CWP Petitioners' Pre-Preliminary Comments*, at Exh. 37 (Oct. 26, 2007) (Exhibit US-66); *and Memo to the File, "LWRP: China Import Statistics for Hot-rolled Steel,"* at Att. 1 (June 6, 2008) (Exhibit US-68).

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

[53] Response of the Government of China to the New Subsidy Allegations Questionnaire, 7 (Nov. 16, 2007) (Exhibit US-159).

[54] *Id*.

[55] *LWS Final Decision Memorandum*, at 19 (Exhibit CHI-3).

> *"Even if arguendo we were to rely on the GOC's 71 percent production figure, we would still find that government production accounts for a significant portion of the HRS industry, so that it is reasonable to conclude that private prices in China are significantly distorted, and therefore unusable as benchmarks".*

Footnote 126 to the USDOC Issues and Decision Memorandum in LWR (Exhibit CHI-2) is identical, aside from the fact that it refers to the "GOC's 70.81 percent production figure". Please explain the import of these footnotes in the USDOC's findings of distortion of private prices for HRS.

44. Commerce's determinations that private prices for hot-rolled steel were distorted were based on its conclusion that the Chinese Government had a predominant role in the hot-rolled steel market through its 96 percent ownership of that market and the absence of any evidence that countered that predominant role. China has not challenged Commerce's factual determination, based on facts available on the record, that the Chinese government owns 96 percent of the hot-rolled steel producers in China. Commerce's findings of distortion of private prices were not based on the "GOC's 70.81 percent production figure" referenced in the footnotes identified in the Panel's question, and those footnotes do not describe the basis of Commerce's determinations.

16. (To both parties) What is the relevance to the claims concerning the USDOC's distortion analysis (with respect to inputs) in the CWP, CWR and LWS investigations of the fact that, in the OTR investigation, the USDOC did not conclude that private prices in China were distorted? Is the approach adopted by the USDOC in one investigation relevant to the Panel's evaluation of the USDOC's determination in other investigations?

45. China's claims concerning Commerce's determinations to use out-of-country benchmarks in the *CWP*, *LWRP*, and *LWS* CVD investigations are premised on China's argument that Commerce's rejection of private prices was based on "unlawful presumptions" and a failure to consider evidence beyond government ownership of the sector. The United States has discussed the selection of the in-country benchmark for rubber in the *OTR Tires* investigation to illustrate the fact that Commerce did not rely solely upon government ownership of domestic production when determining whether the Chinese government had a predominant role in the input markets.[56] In *OTR Tires*, even though government-owned rubber producers accounted for "a significant portion of the natural and synthetic rubber produced domestically,"[57] Commerce relied upon in-country prices from private rubber producers because there was a "large penetration of imports of natural rubber and synthetic rubber in the PRC rubber markets and [a] lack of other evidence on the record to show that [government-owned producers] or government

[56] *See* U.S. First Written Submission, paras 202-203.

[57] *OTR Tires CVD Final Decision Memorandum*, at 11 (Exhibit CHI-4).

agencies through other methods had control of, or otherwise distorted, these markets. . . ."[58] Similarly, for the benchmarks at issue in this dispute, Commerce looked at all record evidence, including, where available, import penetration in the markets at issue.[59]

17. (To the United States): What in your view is the meaning of the term "the market" in Article 14(b)? On what "market" could the investigated firms have "actually obtained" loans on the same terms as those of the loan benchmark(s) used?

46. In *US – Upland Cotton*, the Appellate Body agreed with the panel in that dispute that the ordinary meaning of the word "market" is "'a place ... with a demand for a commodity or service'; 'a geographical area of demand for commodities or services'; 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices'."[60] The Appellate Body noted that "[t]his ordinary meaning does not, of itself, impose any limitation on the 'geographic area' that makes up any given market."[61] The Appellate Body also pointed out that, in Article 6.3(c) of the SCM Agreement, the only "express qualification" of the term "market" "is that it must be 'the same' market," which is in contrast to "the other paragraphs of Article 6.3: paragraph (a) restricts the relevant market to 'the market of the subsidizing Member'; paragraph (b) restricts the relevant market to 'a third country market'; and paragraph (d) refers specifically to the 'world market share'."[62] The Appellate Body concluded that "the ordinary meaning of the word 'market' in Article 6.3(c), when read in the context of the other paragraphs of Article 6.3, neither requires nor excludes the possibility of a national market or a world market."[63]

47. There is no reason to read the term "market" in Article 14(b) of the SCM Agreement differently. The term "market" is not qualified in any way in Article 14(b), and the context of Article 14 suggests that the relevant "market" is not limited to the country of provision. While Article 14(a) refers to "the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member" and Article 14(d) makes reference to "prevailing market conditions for the good or service in question in the country of provision," there is no geographic specification whatsoever identified in Article 14(b). Moreover, as has been discussed throughout this dispute, despite the presence in Article 14(d) of a geographical indicator, the Appellate Body has explained that the terms of Article 14(d) do not bind investigating authorities to select only benchmarks from within the country of provision when the government has a predominant role in the market.[64] Thus, as in *Upland Cotton*, the use of the

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[58] *Id*.
[59] *See* U.S. First Written Submission, paras 202-203.
[60] *US – Upland Cotton (AB)*, paras. 404-405.
[61] *US – Upland Cotton (AB)*, para. 405.
[62] *US – Upland Cotton (AB)*, para. 406.
[63] *US – Upland Cotton (AB)*, para. 406.
[64] *US – Softwood Lumber CVD Final (AB)*, para. 103.

term "market" in Article 14(b) "neither requires nor excludes the possibility of a national market or a world market"[65] for lending.

48. The panel in *EC – DRAMS* recognized the difficulties investigating authorities face in measuring the benefit of government-provided loans:

> In the absence of a comparable commercial loan, it may well be difficult to apply for example Article 14(b) dealing with loans and referring the investigating authority to a comparable commercial loan that could actually be obtained on the market. . . . In 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.[66]

49. The term "market" must also be read in the context of the rest of Article 14(b), particularly its reference to a "comparable commercial loan."[67] The term "market" must not be read in such a way as to strictly require an administering authority to choose a benchmark from a particular geographical market in all cases, especially where that market is so distorted by government predominance and other interventions that there are no comparable "commercial" loans available in that market for benchmark purposes. Such a narrow reading of the word "market" would effectively eliminate the word "commercial" from the term "comparable commercial loan," and would, in some cases, require authorities to engage in a circular benefit comparison that is essentially meaningless.

50. In these cases, Commerce recognized that the lending "market" in China is so distorted by government predominance in the banking sector and other government interventions that there were no comparable "commercial" loans available for benchmark purposes. Therefore, Commerce selected a benchmark lending rate that was both "commercial" and "comparable," given that there are no commercial loans available within China. While Commerce could have chosen an out-of-country lending benchmark from one particular country to meet the goal of selecting a benchmark from a defined "market," such an approach could have sacrificed comparability. This is because each country's lending rates may be affected by a variety of economic factors for which there may be insufficient information to permit an adjustment, and, thus, those rates individually would not provide sufficient comparability to the home market. By averaging lending rates across countries and making other adjustments, Commerce sought to control for these country-specific factors to minimize the impact of any one country's anomalies and thus maximize comparability. The benchmark on which Commerce relied was a rate from

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[65] *US – Upland Cotton (AB)*, para. 406.

[66] *EC – DRAMS*, para. 7.213.

[67] *See* U.S. First Written Submission, para. 232.

"the market" because it was based on a regression analysis of actual commercial lending rates reported by each country in the group.[68]

18. (To both parties) What if any limits would be imposed by Article 14(b) of the SCM Agreement on an investigating authority's selection of a loan benchmark in a situation:

(a) where there is a private market for loans, but the government imposes capital controls on all borrowers?

(b) where there is a private market for loans but all borrowers are legally prohibited from borrowing from any source outside the country in question?

(c) where the government is the sole provider of loans in the country in question, and prohibits borrowing from any source outside that country?

51. As discussed in the U.S. First Written Submission, Article 14 of the SCM Agreement provides a series of flexible "guidelines" for calculating the benefit conferred by a subsidy.[69] The Appellate Body has explained that Article 14 provides a "framework" within which a benefit calculation is to be performed, but not a "precise detailed method of calculation."[70] The guidelines in Article 14 are not "rigid rules that purport to contemplate every conceivable factual circumstance."[71] The Appellate Body has also noted that Article 14 provides Members with "some latitude," and that the general guidelines in the Article allow for the benefit methodology to be "adapted to different factual situations."[72] Where an authority encounters problems in using the methodology outlined in Article 14, an authority is "entitled to considerable leeway in adopting a reasonable methodology" to calculate benefit.[73]

52. The "limits" imposed by Article 14(b) of the SCM Agreement are that the benchmark selected by the administering authority must represent what the recipient firm would pay for a "comparable commercial loan which the firm could actually obtain on the market." If record evidence indicated that capital controls, prohibition on outside borrowing, and/or government monopoly over lending, as described in the Panel's question, prevented the formation of commercial lending rates in the country of provision, Article 14(b) provides the investigating authority the "leeway" to select an alternative benchmark. As long as that alternative benchmark represents the amount a firm would pay on a comparable commercial loan that is made on terms the firm could actually obtain on the market given its financial condition and creditworthiness, the benchmark methodology would be consistent with the guidelines articulated in Article 14(b).

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[68] *See* U.S. Second Written Submission, para. 99.
[69] *See* U.S. First Written Submission, paras. 183-185.
[70] *US – Softwood Lumber CVD Final (AB)*, para. 92.
[71] *US – Softwood Lumber CVD Final (AB)*, para. 92.
[72] *Japan – DRAMS (AB)*, para. 91.
[73] *EC – DRAMS*, para. 7.213.

Importantly, there is nothing in Article 14(b) that suggests that government regulation of the lending sector limits an investigating authority's "considerable leeway"[74] in selecting a loan benchmark that would permit it to "fully offset"[75] the benefit of the government-provided loan.

19. (To the United States) Under the terms of Article 14(b), do you consider that to be "comparable" a loan must be in the same currency? If not, under what circumstances can a loan denominated in another currency be used as a benchmark?

53. Article 14(b) of the SCM Agreement does not define the term "comparable" and contains no obligation for investigating authorities to use a benchmark loan denominated in the same currency as the financial contribution. As the Appellate Body has explained, "[t]he ordinary meaning of the word 'comparable' is 'able to be compared'."[76] Moreover, in addition to requiring that the benchmark loan be "comparable," Article 14(b) requires that it be "commercial." Although it may be preferable in many cases to use a benchmark loan denominated in the same currency as the financial contribution, there may be instances in which it is not possible to identify a "commercial" benchmark loan that is in the same currency as the financial contribution. In those circumstances, a loan denominated in another currency must be used as a benchmark.

54. When reliance upon a benchmark in another currency is required, however, adjustments may be needed to account for the different currencies. For example, Commerce adjusted for inflation as a proxy for an adjustment for currency exchange rate expectations.[77] Additionally, Commerce relied upon a group of countries with comparable gross national incomes, which minimized the impact that one particular currency may have on the benchmark rate. In this manner, Commerce selected a "comparable commercial loan" by which it could measure the benefit of the government-provided loans.

20. (To the United States) Other than in the investigations at issue in this dispute and in the CFS paper investigation, has the USDOC ever constructed a loan benchmark on the basis of a basket of borrowing rates in various currencies? Please identify any such investigations and explain the methodologies used.

55. The United States notes that China's claims in this dispute are limited to the specific investigations at issue, and thus it is not clear how U.S. experiences with loan benchmarks in other investigations may be relevant to those claims. Nevertheless, Commerce has relied upon

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[74] *EC – DRAMS*, para. 7.213 (emphasis added). 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).

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

[76] *EC – Bed Linen (AB)*, para. 57.

[77] U.S. First Written Submission, para. 246, n. 366.

benchmark rates in other currencies where there are no available benchmarks for the currency in which the government-provided loan was denominated. For example, in *Certain Cold-Rolled Carbon Steel Flat Product from Brazil*, Commerce relied upon a dollar-denominated benchmark rate for real-denominated loans because it was unable to find any commercial lending rates for that type of real-denominated loan.[78] Commerce also recently preliminarily selected a lending benchmark rate in a countervailing duty investigation on carrier bags from Vietnam, which follows the methodology applied in the China investigations at issue in this dispute.[79]

21. (To the United States) The USDOC's determinations in respect of loans refer to "foreign banks" operating in China. Please explain what is meant by the term "foreign banks"?

56. Commerce's references to "foreign banks" in its determinations refer to banks in China that are wholly-owned and directly controlled by banks outside of China.[80] Therefore, "foreign banks" do not include foreign purchases of minority shares in government-controlled banks.[81]

22. (To the United States) – What was the evidence of record concerning the participation of foreign banks as lenders in China, and concerning restrictions on their activities?

57. Based on evidence reviewed by Commerce in these investigations, foreign banks operate in niche markets and account for only approximately two percent of China's total banking assets.[82] In addition to the minimal size of the foreign banking sector, foreign banks were subject to significant restrictions, in addition to being subject to the lending rate floor and deposit rate cap, discussed below in response to question 24 and elsewhere. For example, foreign banks "must have a track record of three years of operations in China and must have been profitable for two consecutive years" to be allowed to lend in renminbi.[83] As a result, by December 2005, many foreign bank branches in China had not obtained permission to conduct renminbi business.[84] Even when the foreign banks were authorized to lend in renminbi, they could not

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[78] *See Certain Cold-Rolled Carbon Steel Flat Products from Brazil*, 67 Fed. Reg. 62,128 (Oct. 3, 2002) (final affirmative countervailing duty determination), and accompanying Issues and Decision Memo. at "Long-Term Benchmarks" (Exhibit US-160).

[79] *See Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam*, 74 Fed. Reg. 45,811, 45,815 (Sept. 4, 2009) (preliminary affirmative countervailing duty determination) (Exhibit US-161).

[80] *See* Memorandum for David M. Spooner, "Antidumping Investigation of Certain Lined Paper Products from the People's Republic of China - China's status as a non-market economy ('NME')," n. 264 (Aug. 30, 2006) (hereinafter "*China's Status as a Non-Market Economy*") (Exhibit US-69).

[81] *Id*.

[82] *Id*. at 54-55 (citing *Economic Survey of China (Paris: Organization for Economic Cooperation and Development*), 139 (2005)). *See also, Access to Capital in China: Competitive Conditions for Foreign and Domestic Firms*, Journal of International Commerce and Economics at 6 (Dec. 2005) (provided in "Petition for the Imposition of Antidumping and Countervailing Duties on Certain Off the Road Tires from the People's Republic of China," at Exh.48 (June 18, 2007)) (Exhibit US-162).

[83] The Economist Intelligence Unit, *Country Commerce: China*, at 17 (Mar. 2006) (cited in *China's Status as a Non-Market Economy*, at 8) (Exhibit US-163).

[84] *Id*.

lend in renminbi to Chinese individuals and there was a high threshold for deposits.[85] Additionally, there were geographic restrictions in place during the periods of investigation that restricted renminbi lending by foreign banks to twenty-five cities.[86]

58. In addition to restrictions on foreign banks for lending renminbi, there were also restrictions on foreign banks' lending in foreign currencies. One such restriction was that China's State Administration of Foreign Exchange must approve foreign-currency loans by foreign-bank branches to Chinese companies.[87] Because of these restrictions placed on foreign banks, the government-owned banks controlled the vast majority of the lending in China and retained a predominant role in the Chinese lending market.

23. (To the United States) What if any evidence was there that foreign banks were subject to the same conditions pursuant to the NDRC Catalogue and other planning documents relied upon by the USDOC?

59. As explained above in response to Question 21, Commerce's references to "foreign banks" in its determinations refer to banks in China that are wholly-owned and directly controlled by banks outside of China. Therefore, Commerce did not investigate whether the foreign banks in the investigations at issue in this dispute were government entities that could provide a financial contribution, and Commerce did not investigate or verify the extent to which NDRC catalogues or other PRC government planning documents governed the lending activities of the foreign banks in China.

24. (To the United States) What if any evidence was there that foreign banks were subject to the same interest rate rules (minimum lending rates, maximum deposit rates)?

60. Foreign banks are subject to the same minimum lending rates and maximum deposit rates as government-owned banks in China.[88] The applicability of the minimum lending rate is found in Article 38 of the Law of the People's Republic of China on Commercial Banks, which states that, "[a] commercial bank shall determine its loan rate in accordance with the upper and lower limit of loan rate set by the People's Bank of China."[89] Foreign banks are included in this requirement because Article 92 of the same law states that, "[t]he provisions of this Law shall be

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[85] *See also, Access to Capital in China: Competitive Conditions for Foreign and Domestic Firms*, Journal of International Commerce and Economics, at 6 (Dec. 2005) (Exhibit US-162).

[86] The Economist Intelligence Unit, *Country Commerce: China*, at 17-18 (Mar. 2006) (cited in *China's Status as a Non-Market Economy*, at 8) (Exhibit US-163).

[87] *Id*. at 18.

[88] *See, e.g., Private Financial Experts Verification Report*, Countervailing Duty Investigation: Coated Free Sheet Paper from China, at 13 (Aug. 21, 2007) (providing a financial expert's explanation that foreign banks also have benefited from the banking regulations requiring a cap on deposit rates and a floor on lending rates) (provided in "Factual Submission by Titan Tire Corporation, et. al.," Exh. 12 (Feb. 25, 2008)) (Exhibit US-164).

[89] Law of the People's Republic of China on Commercial Banks, Art. 38 (Dec. 27, 2003) (cited in *China's Status as a Non-Market Economy*, at 53) (Exhibit US-165)

applicable to the foreign invested commercial banks, Sino-foreign joint venture commercial banks, and branches of the foreign commercial banks, unless otherwise there are provisions by laws and administrative regulations, the provisions shall prevail."[90] The applicability of the deposit rate cap for foreign banks is found in Article 64 of Regulation of the People's Republic of China on the Administration of Foreign-Funded Banks. This law explains that there are legal ramifications for a foreign funded bank if it is found to be "[i]ncreasing or decreasing deposit or loan interest rates by violating the relevant provisions."[91] Therefore, the foreign banks operated under the same regulations as the government-owned banks.

V. DOUBLE REMEDY

27. (To the United States) Please explain why the illustrations provided by China in paragraph 395 of its first written submission, Exhibit CHI-142, and the new exhibit provided by China on the second day of the second substantive meeting do not suffice to demonstrate that a double remedy does or would exist?

61. None of the illustrations provided by China demonstrates the existence of a double remedy with respect to any of the four concurrent AD and CVD investigations at issue.

Paragraph 395 of China FWS and Exhibit CHI-142

62. China submitted the BOPP film example in paragraph 395 of its FWS and the hot-rolled steel example in Exhibit CHI-142 (entitled "Further Examples of Offsetting the Same 'Subsidies' Twice") in an apparent attempt to substantiate its double remedy theory. Specifically, China considers this information to demonstrate that the question of whether subsidies pass through to export prices is irrelevant to its theory of double remedies, and that the existence of double remedies flows exclusively from the calculation of NME normal values.[92] Following this logic, China submits that the BOPP film example and Exhibit CHI-142 shows that NME AD methodologies and CVDs have overlapping rationales.[93]

63. In the first instance, the United States has shown that China's contention about the "overlapping rationales" is erroneous, because it lacks any legal basis in the covered agreements, it lacks any evidentiary basis on the administrative records of the investigations at issue, and it lacks any economic basis or logical basis in the operation and purpose of these two distinct

[90] *Id*.

[91] Regulation of the People's Republic of China on the Administration of Foreign-funded Banks, Art. 64 (Dec. 11, 2006). (Exhibit US-166).

[92] *See, e.g.*, China First Written Submission, para. 396.

[93] *See, e.g.*, China First Written Submission, para. 397.

remedies.[94] In any event, China's misguided efforts to find support in selective data from the investigations at issue is unavailing.

64. The tables contained in paragraph 395 of China's First Written Submission and Exhibit CHI-142 merely show that, in specific instances, the AD surrogate values[95] (used to approximate a normal value) and CVD benchmarks for certain inputs were higher than the actual costs paid by the Chinese producers of the product subject to investigation. It appears that China considers the difference between the surrogate normal value and the Chinese producer's actual cost of the input to reflect the subsidization of that input. It does not follow from this simplistic comparison that the rationales for NME AD methodologies and CVDs are overlapping, much less that a double remedy is inherent in the concurrent application of NME AD duties and CVDs.

65. First, notwithstanding China's efforts to suggest otherwise, there is nothing inherently suspect, nor inconsistent with any of the covered agreements, about the fact that AD surrogate values may under certain circumstances be greater than the actual costs of Chinese producers. The United States recalls that the premise of the recourse to the NME methodology is that reliance on actual costs and prices in China, in light of the non-market nature of its economy, would not produce meaningful dumping margins. China attempts to suggest that the differential in particular instances between surrogate values for certain inputs and actual costs of those inputs is due to the fact that the NME normal value accounts for subsidization. That argument, however, is merely a thinly disguised attempt to have this Panel effectively require investigating authorities to use China's actual costs and prices (or surrogate values that are identical to those actual costs and prices) when calculating dumping margins. Such an outcome would deprive Members of the right expressly accorded them in paragraph 15 of China's Protocol.

66. Second, the BOPP film example and Exhibit CHI-142 do not establish that the NME methodology necessarily produces a surrogate value that exceeds the Chinese producer's actual costs and prices, therefore capturing subsidization according to China's logic. Indeed, the records of these investigations belie the conclusion advanced by China that the surrogate value exceeds the actual Chinese cost whenever an investigating authority applies the NME methodology. For example, in the AD investigation in *OTR Tires,* the surrogate ratios for SG&A (particularly the depreciation component of SG&A) were *lower* than the actual Chinese ratios.

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[94] The many flaws in China's "overlapping rationales" version of its double remedies claim are summarized in paras. 70-81 of the U.S. Opening Statement at the Second Panel Meeting. *See also* U.S. Second Written Submission, paras. 183-195.

[95] We use the term "surrogate value" here in the same sense that China does, that is, to refer to the price for a factor of production used in producing the relevant good, taken from a surrogate market economy.

	Depreciation[96]	**SG&A**
DOC Ratios[97]	1.66%	8.19%
Guizhou Tyre[98]	3.68%	8.48%

67. Notably, the respondents involved in *OTR Tires* have readily acknowledged that the surrogate values may be lower than the actual Chinese costs. In its brief to the U.S. Court of International Trade ("USCIT"), GPX admitted that in *OTR Tires* there were instances where the surrogate values for certain rubber inputs used by Commerce in calculating the NME normal value were lower than the actual costs for the input. In particular, GPX stated:

> We recognize that in some cases it is possible that a subsidy-free surrogate value (e.g. from Indian import statistics) used as part of the NME AD calculation could be lower than a respondent's actual cost for the input. Indeed, this appears to be the case in some factors of production in the OTR tires case with respect to certain types of rubber purchased from certain respondents.[99]

68. In light of these shortcomings, China's reliance on comparisons of selective data from the investigations in paragraph 395 of its First Written Submission and in Exhibit CHI-142 fails to demonstrate the existence of a double remedy in any of the investigations at issue.

Exhibit CHI-170

69. With regard to Exhibit CHI-170, the United States notes that China has not provided a written explanation of these tables, including the series of assumptions that underlie that data, although China did provide a limited oral explanation during the second Panel meeting and will presumably include such a written explanation in its answers to the Panel's questions. In the absence of that written explanation, the United States submits that it is still not entirely clear exactly how China views this exhibit as support for its double remedy theory or its position that a double remedy was actually imposed in the investigations at issue. Accordingly, the United States provides preliminary comments below about Exhibit CHI-170 based on its understanding

[96] Depreciation was calculated as a percentage of cost of goods sold.

[97] *Memorandum to The File Regarding Off The Road Tires from China: Surrogate Values for the Final Determination*, at Attachment VIII (July 7, 2009) (public document) (Exhibit US-167). Included in this Exhibit is a re-print of page 1 of Attachment VIII in Word format to facilitate reading of highlighted sections, in particular the 8.19% SG&A figure referenced in the above table.

[98] *Guizhou Tyre's Section A Questionnaire Response*, at Attachment A-7, pp. 7-8, 11 (Oct. 26, 2007) (public version) (Exhibit US-168).

[99] *GPX Int'l Tire Corp. v. United States*, Court No. 08-00825, "Respondent Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Judgment on the Agency Records, Volume 1: CVD/NME AD Coordination Issue," at pp. 32-33, footnote 8 (February 27, 2009) (Exhibit US-169).

of China's arguments to date, and will respond specifically to China's written explanation of Exhibit CHI-170 when commenting on China's answers to the Panel's second set of questions.

70. Exhibit CHI-170, like the BOPP film example and Exhibit CHI-142, appears to be offered in support of China's theory that AD duties based on NME methodologies and CVD duties have overlapping rationales and that, accordingly, NME AD duties correct for or offset subsidies. As with the BOPP film example and Exhibit CHI-142, Exhibit CHI-170 fails to provide China the much-needed substantiation for its legally untethered theory. Rather, even a preliminary examination of this exhibit reveals multiple flaws.[100]

71. First, Exhibit CHI-170 reflects the first time that China has attempted to address the actual *remedies* at issue, that is, by comparing AD duties and CVDs. The United States welcomes China's belated recognition of the importance of considering the two actual remedies when advancing a double remedy claim.[101] It is significant, however, that China advances this new argument with hypothetical data instead of actual data from any of the investigations at issue. In particular, Exhibit CHI-170 contains no information to demonstrate, as China must, that the NME normal value had "the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of" the product under investigation and that, therefore, subsidization was remedied twice *in the concurrent AD and CVD investigations at issue*. China has never attempted to make that showing on the record of any of the investigations. Therefore, at this late stage of these proceedings, the United States can only conclude that China cannot demonstrate that there was a "double remedy" in any of the four concurrent investigations, as a result of which China's double remedy claims must fail.

72. Second, the results desired by China are driven by the self-serving choice of values for the pre-subsidy costs, post-subsidy costs, and surrogate values. In particular, in the NME simulations in Exhibit CHI-170, China assumes that the surrogate value and the benchmark in China (what China calls the pre-subsidy cost) have the same value (both are set at 15), and that the surrogate value (set at 15) is necessarily higher than the actual cost of Chinese respondents (what China calls the post-subsidy cost, set at 10).

73. China, however, has not demonstrated that the NME methodology necessarily produces a surrogate value that is equal to the benchmark or a surrogate value exceeding the actual Chinese cost. Notably, China has failed to establish any legal, conceptual or theoretical relationship,

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[100] The United States also notes that China has made no attempt at any point in these proceedings to show any double remedy with respect to any of the numerous subsidy programmes that did *not* involve the provision of inputs for less than adequate remuneration (e.g., grants, equity infusions, loans). In this respect, Exhibit CHI-170, like the BOPP film example and Exhibit CHI-142, does not alleviate China's burden of demonstrating the existence of a double remedy in the context of those *other types* of subsidies.

[101] In the light of China's insistence that Exhibit CHI-170 demonstrates a double remedy, it also appears, contrary to its protestations to date, that China was in fact well aware of the information it could have provided during the investigation to show that, under its theory, a double remedy could result from Commerce's concurrent investigations. This only makes even more incomprehensible China's refusal to do so.

between the price for a factor in a *surrogate* market economy (e.g., India, Turkey, or Mexico) and the benchmark for that same factor in the country of provision (China, in this case), that would support this conclusion.[102] Indeed, as the United States has shown above in this answer, the facts of these investigations demonstrate that these consequences do *not* inexorably follow from the application of the NME methodology.[103] As a result, it is difficult to see how the concerns China imagines to be hidden in this data can be said to be *inherent* in the concurrent application of NME AD duties and CVDs.

74. Finally, in the calculations underlying Exhibit-CHI-170, China ignores the fact that many subsidies enhance efficiencies and reduce or change factor usage by Chinese respondents. The United States recalls that, under the NME methodology, Commerce (i) determines the quantities of the *factors* of production (e.g., labor, materials, energy) *actually used by the respondent*, (ii) multiplies those quantities by the prices of each of those factors based on either a "surrogate value" from a market economy country or the actual price paid for an input imported from a market economy country; and (iii) adds an amount for factory overhead, SG&A and profit.[104] When domestic subsidies improve the efficiency of a respondent firm, that firm could well use less of the factors to achieve the same level of output, thereby reducing the cost of labor, materials, and energy, and, in turn, reducing the costs of factory overhead and SG&A. This reduction would then translate, through application of the NME methodology, into a *lower* cost of production and normal value for that respondent. Exhibit CHI-170 appears to take no account of this consequence of the application of the NME methodology, avoiding altogether any reference to the quantities of factors applied to the surrogate values chosen by China. Exhibit CHI-170, therefore, presents a woefully incomplete and therefore distorted illustration of the operation of the NME methodology.

75. In sum, the data presented in paragraph 395 of China's FWS and Exhibit CHI-142, as well as the hypothetical numbers selected by China for Exhibit CHI-170, do not demonstrate that NME AD duties and CVDs have overlapping rationales or that NME AD methodologies correct for or offset subsidization. Thus, they offer no support for China's assertion that a double remedy arises inherently from the concurrent application of NME AD duties and CVDs.

28. (To the United States): The United States argues that Article 15 of the Tokyo Round Subsidies Code is relevant to examining the WTO-consistency of the imposition of double

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[102] China has relied on the argument that any costs and prices taken from a market economy are by necessity "subsidy-free" in an attempt to somehow link the surrogate values to the benchmark. (China Second Written Submission, para. 235.) The United States has demonstrated why this is not the case under the U.S. NME methodology. (*See* U.S. Second Written Submission, paras. 188-189.)

[103] Oddly, China's implicit assumption that the surrogate value necessarily equals the benchmark in concurrent AD and CVD investigations involving NMEs is also contradicted by China's own emphasis in its submissions on the fact that the surrogate values used were *different* from the benchmarks. *See, e.g.*, China First Written Submission, paras. 397-398; China Second Written Submission, para. 223; China Answer to Panel Question 92, para. 281.

[104] *See* U.S. First Written Submission, paras. 450-452.

remedies. Please discuss whether Article 15, in your view, contains or reflects a recognition, implicit or not, of the existence of double remedies as a result of the concurrent application of AD duties calculated under the NME methodology and of CVD duties.

76. The United States is not aware of any information in the negotiating history or any other supplementary means of interpretation that indicates that Article 15 was included in the Tokyo Round Subsidies Code because of a recognition that the concurrent application of AD NME duties and CVDs results in double remedies. The United States does not consider that speculation on this point would be helpful in resolving this dispute.

77. Article 15 of the Tokyo Round Subsidies Code sets out a clear prohibition on the concurrent application of NME AD duties and CVDs in respect of imports from those Contracting Parties described in the second paragraph of the *Ad Note* to GATT Article VI:1. Whatever reasons negotiators may have had for including such a limitation in the Tokyo Round Subsidies Code at that particular point in time, what is clear is that, when faced with the opportunity to include that limitation in the SCM Agreement during the Uruguay Round, Members declined to do so. In other words, Members decided not to maintain that or any similar limitation on Members' right to apply the full amount of duties calculated in accordance with the provisions of the Anti-Dumping Agreement and the SCM Agreement, as relevant. As a result, there is no basis to read such a limitation into provisions of the SCM Agreement addressing the amount of CVDs ultimately levied on products subject to a CVD investigation, i.e., Articles 19.3 and 19.4.

78. The United States has explained that China's reliance on Articles 19.3 and 19.4 is particularly misplaced given that provisions virtually identical to Articles 19.3 and 19.4 existed in the Tokyo Round Subsidies Code (i.e., Articles 4.2 and 4.3) alongside Article 15.[105] If, as China contends, Articles 19.3 and 19.4 prohibit the concurrent application of NME AD measures and CVD measures because of a resulting "double remedy," such a prohibition would appear to have likewise been captured by Articles 4.2 and 4.3 of the Tokyo Round Subsidies Code. However, finding such a prohibition implicit in those provisions would render superfluous the express prohibition in Article 15 of the Code. The fact that it was necessary to include that express prohibition in the Code reinforces the significance of Members' decision not to continue that express prohibition in the SCM Agreement.

29. (To the United States): When did the US policy of not applying countervailing duties on imports from NMEs first go into effect? Please refer to any relevant instruments or policy statements.

79. Commerce first determined not to apply countervailing duties to certain NMEs in 1984.

[105] *See* U.S. Second Written Submission, para. 218.

80. U.S. law grants Commerce the general authority to conduct CVD investigations, whether in respect of market economies or NMEs.[106] This includes the authority for Commerce to determine whether a "government of a country or any public entity within the territory of a country is providing ... a countervailable subsidy."[107]

81. Commerce first had to resolve the issue of the application of the U.S. CVD law to NMEs in two administrative proceedings in 1984: *Wire Rod from Poland* and *Wire Rod from Czechoslovakia*. In those two proceedings, Commerce concluded that "a 'bounty or grant,' within the meaning of the CVD law, cannot be found in an NME."[108] Of course, Commerce was addressing only the facts regarding the particular NMEs before it. Commerce was not making a decision that the CVD law could *never* be applied to imports from *any* NME. Commerce reached its conclusion, in large part, because both output and input prices in Poland and Czechoslovakia were centrally administered, thereby effectively administering profits as well. Commerce explained that "[t]his is the background that does not allow us to identify specific NME government actions as bounties or grants."[109] Thus, Commerce based its decision not to apply the U.S. CVD law to NMEs upon the economic realities of Soviet-bloc economies circa 1984.

30. (To the US): What was the rationale for the US policy decision in 2007 that countervailing duties could be applied to imports from China?

82. Commerce explained its rationale for applying U.S. CVD law to China in 2007 in the context of the CVD proceeding on *Coated Free Sheet Paper from the People's Republic of China* (*CFS Paper*).

83. As part of its explanation, Commerce discussed both the *Georgetown Steel* judicial decision as well as its administrative determinations that were the subject of that decision:

> To determine that a countervailable subsidy had been bestowed, the Department needed to establish that: (a) the [nonmarket economy] government had bestowed a "bounty or grant" on a producer; and (b) that the bounty or grant was specific. The Soviet-style economies at that time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity. In

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[106] 19 U.S.C. §§ 1671, 1677(5) & 1677(5A) (Exhibit US-45).

[107] 19 U.S.C. § 1671(a).

[108] *Carbon Steel Wire Rod from Poland*; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (May 7, 1984) (Exhibit CHI-118); *Carbon Steel Wire Rod from Czechoslovakia*: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (May 7, 1984) (Exhibit CHI-117). At that time, under the relevant U.S. statute, "bounty" or "grant" was the term used for subsidy.

[109] *Carbon Steel Wire Rod from Poland*; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (May 7, 1984) (Exhibit CHI-118); *Carbon Steel Wire Rod from Czechoslovakia*: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (May 7, 1984) (Exhibit CHI-117).

> such a situation, subsidies could not be separated out from the amalgam of government directives and controls.
>
> "Bounties or grants" in Soviet-style economies had no meaning because, given the pervasive role of [NME] governments in the economy in general, and those industries in particular, an alleged subsidy essentially involved one arm of the government giving money to another arm. The Federal Circuit recognized this, explaining that "[e]ven if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves." Georgetown Steel, 801 F.2d at 1316. In light of this, subsidies would have no meaning in such an economy. Similarly, in an economy essentially comprised of a single entity, it made little sense to attempt to analyze the distribution of benefits for the purpose of applying the specificity test.[110]

84. It is important to bear in mind that the Federal Circuit's reasoning in *Georgetown Steel* did not rest on the total absence of market-determined prices. Likewise, Commerce's decision to apply the CVD law to China did not rest on a finding of market-determined prices in the PRC. Instead, Commerce, in the context of *CFS Paper*, determined that China did not have a Soviet-style centrally-planned economy and, as a result, the Chinese government no longer administratively sets most prices. As Commerce made clear in *CFS Paper*, it is the absence of central planning, not the presence of market-determined prices, that makes subsidies identifiable and U.S. CVD law applicable to China.[111] In *CFS Paper*, Commerce found that the Chinese economy as of 2006 and 2007 was "one in which constrained market mechanisms operate alongside (and sometimes, in spite of) government plans."[112] Commerce also explained as follows:

> [P]rivate industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. Foreign trading rights have been given to over 200,000 firms. Many business entities in present-day China are generally free to direct most aspects of their operations and to respond to (albeit limited) market forces.[113]

Given the presence of limited market forces and entrepreneurship, Commerce found that "China's economy, though riddled with the distortions attendant to the extensive intervention of the PRC Government, is more flexible than these Soviet-style economies."[114]

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[110] *CFS Paper, Georgetown Steel Memorandum*, at p. 10 (March 29, 2007) (Exhibit US-8).
[111] *See CFS Paper, Georgetown Steel Memorandum*, at pp. 4-5, 10 (March 29, 2007) (Exhibit US-8).
[112] *CFS Paper, Georgetown Steel Memorandum*, at p. 9 (March 29, 2007) (Exhibit US-8).
[113] *CFS Paper, Georgetown Steel Memorandum*, at p. 10 (March 29, 2007) (Exhibit US-8).
[114] *CFS Paper, Georgetown Steel Memorandum*, at p. 5 (March 29, 2007) (Exhibit US-8).

85. Thus, Commerce found in *CFS Paper* and continues to find that the economy in present-day China is in the midst of a transitioning process. In providing its rationale for applying U.S. CVD law to China, Commerce determined that economic incentives are having greater effect in China because of the loosening of central planning and growth of the private sector, and that there is sufficient flexibility in the Chinese economy to separate economic activity from the amalgam of government directives and controls that previously defined the entire economy.[115] The situation in China contrasts markedly with the ossified Soviet-style economies where actors were not capable of reacting to economic incentives, and only responded lockstep to the mandates of government fiat.

86. Commerce's application of U.S. CVD law to China in *CFS Paper* was therefore driven by changing factual circumstances in China, as Commerce sought to take into full account developments in China's subsidy programs and how the Chinese government administers support to sectors of the Chinese economy. Because of the mixed, transitional nature of China's economy, Commerce no longer had any basis to conclude as of 2007 that U.S. CVD law was not applicable to China.

31. (To the United States) The US seems to argue that China's argument amounts to a challenge on the concurrent application of AD duties calculated under the US NME methodology and of countervailing duties. Please discuss whether, even if the Panel accepts the US argument in this respect, it would necessarily follow that the same would be true with respect to all NME methodologies of all Members.

87. Yes, it follows from the nature of China's argument that its challenge to the concurrent application of CVDs and NME AD duties applies equally to the NME methodologies of all WTO Members.

88. China's theory about the existence of a "double remedy" is premised on the view that an AD duty calculated under an NME methodology offsets subsidization in respect of the same product.[116] This characterization of the NME methodology is largely based *not* on specific aspects of the U.S. NME methodology, but on China's belief that, at a more general level of abstraction, the NME methodology and the application of CVDs have "directly overlapping rationales,"[117] namely, the correcting of economic "distortions"[118] in the market of the exporting Member.[119]

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[115] *CFS Paper, Georgetown Steel Memorandum*, at pp. 4-10 (March 29, 2007) (Exhibit US-8).

[116] The United States has already explained the absurdities that would result from accepting this theoretical premise. *See, e.g.*, U.S. Second Written Submission, para. 217; U.S. Second Oral Statement, para. 77.

[117] China First Submission, para. 374.

[118] China First Submission, para. 326.

[119] The United States has demonstrated the numerous errors that underlie China's belief in the "overlapping rationales" of the NME methodology and CVDs. *See, e.g.*, U.S. Second Written Submission, paras. 183-195.

89. These "overlapping rationales" are reflected, according to China, in the fact that the calculation of an NME normal value on the basis of costs and prices *other than the actual costs and prices of Chinese producers under investigation* necessarily captures the effects of subsidies bestowed on the same product.[120] Of course, the use of costs and prices *other than* the actual domestic costs and prices of the producer under investigation is the very hallmark of *any* NME methodology, as recognized by the explicit right in paragraph 15 of China's Protocol to use those other costs and prices. Therefore China's challenge is fundamentally about the concurrent application of *any* NME methodology together with CVDs.

32. (To both parties) With respect to the decision of the US Court of International Trade in GPX International Tire:

(a) Please discuss whether the decision of the US Court of International Trade is relevant to the Panel's examination of China's "as such" claims. In other words, is the Court, in its Opinion, assuming or ruling on the absence or existence of legal authority for the USDOC to avoid imposing a double remedy?

90. In *GPX Int'l Tire Corp v. United States ("GPX")*,[121] the United States Court of International Trade ("USCIT") found that Commerce's concurrent application of NME AD duties and CVDs to OTR tires from China was not in accordance with U.S. law. The court gave Commerce three options to remedy the shortcomings the court had found: (1) refrain from applying CVDs to China; (2) treat China or GPX as a market economy entity; or (3) adjust its methodology (either AD or CVD) to address the problem.[122] In providing these options, particularly option (3), it appears that the court considered that none of these options was clearly inconsistent with Commerce's statutory authority.[123] In particular, if the "absence of legal authority" were as "evident" as China claims, including on the basis of alleged pronouncements made by Commerce itself, we would not expect the court to have expressly provided Commerce with the option of adjusting its NME AD and CVD methodologies.

(b) Please discuss the basis on which the US Court of International Trade came to the conclusion that a double remedy may arise from the concurrent imposition of AD duties calculated under the NME methodology and of countervailing duties.

91. It should be recalled at the outset that, in the proceedings before Commerce, the argument as to whether a double remedy could arise from the concurrent application of NME AD duties

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[120] *See, e.g.*, China First Written Submission, para. 374; China Second Written Submission, para. 235.

[121] *GPX Int'l Tire Corp v. United States*, Slip Op. 09-103 (Ct. Int'l Trade Sept. 18, 2009) (Exhibit CHI-169).

[122] *GPX*, at 18-19.

[123] Although the court declined to rule on the question whether Commerce had the authority to make any necessary *AD* adjustments to permit the imposition of both NME AD duties and CVDs (*GPX*, at footnote 14.), the court's option nevertheless appears to consider that, at the very least, Commerce retains the authority to make any necessary *CVD* adjustments.

and CVDs centered on whether subsidies automatically lowered export prices (an argument abandoned by China before this panel).[124] The *GPX* opinion does not discuss those economic issues, but focuses instead on the court's understanding of the relevant U.S. law, particularly the court's understanding of the evolution of the NME provisions of the AD law.

92. As the Panel's question correctly recognizes, the court in *GPX* did not conclude that there actually was *any* double remedy in the case before it, still less that the CVDs were entirely duplicative of the NME AD duties. The court concluded only that some degree of overlap between the two remedies was "likely," and that "[i]f there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools."[125]

93. The court reached that conclusion principally on the basis of two assertions that the court erroneously drew from the 1986 Court of Appeals case addressing Commerce's determination that could not apply the CVD law to NMEs at the time, *Georgetown Steel*:[126] (i) "the NME AD statute was designed to remedy the inability to apply the CVD law to NME countries, so that subsidization of a foreign producer or exporter in an NME country was addressed through the NME AD methodology";[127] and (ii) *Georgetown Steel* "makes clear that Commerce need not apply CVD law to the same goods that are subject to NME AD calculations."[128]

94. In respect of the first assertion, the court, with all due respect, is demonstrably incorrect. The legislative history of the U.S. NME AD methodology demonstrates that it was designed to remedy the problem that home market prices in NME countries were unreliable, and so had to be replaced by normal values calculated using surrogate prices for inputs.[129] This is reinforced by the fact that, when enacting the NME provisions into law in 1974, Congress made no adjustments to the CVD law, as one would have expected if, as the court believes, the NME AD methodology were designed also to remedy subsidization.[130]

95. The USCIT also stated that *Georgetown Steel* "makes clear that Commerce need not apply CVD law to the same goods that are subject to NME AD calculations."[131] Again, with all due respect, the court is simply wrong. The issue in *Georgetown Steel* was whether Commerce could apply CVDs (irrespective of whether *any* AD duties were also imposed) to potash from the USSR and the German Democratic Republic and carbon steel wire rod from Czechoslovakia and

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[124] *See, e.g.*, U.S. First Written Submission, footnote 607; U.S. Answer to Panel Question 73.

[125] *GPX*, at p. 18.

[126] *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (Exhibit CHI-90).

[127] *GPX.* at p. 16.

[128] *GPX*, at p. 13.

[129] *See, e.g.,* S. Rep. No. 93-1298, at 174 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7186, 7311 (Exhibit US-170).

[130] The CVD law, by its terms, applies to "*any* country," which would include NMEs. 19 U.S.C. § 1671(a).

[131] *GPX*, at p. 13.

Poland.[132] Commerce determined that those economies, which all operated under the same, highly rigid Soviet system, were so monolithic as to nullify the very concept of a government transferring a benefit to an independent producer or exporter. Under these conditions, Commerce could not determine whether such governments had bestowed a subsidy (then called a "bounty or grant") upon their respective exports.[133] Commerce therefore concluded that it could not apply the U.S. CVD law to these exports.

96. The U.S. Court of Appeals for the Federal Circuit accepted Commerce's logic, agreeing that, "Even if one were to label these incentives as a 'subsidy,' in the loosest sense or the term, the governments of those nonmarket economies would in effect be subsidizing themselves."[134] Thus, *Georgetown Steel* did not hold that Commerce could refrain from applying the CVD law to a group of products so long as those products were subject to NME AD duties. Nor did *Georgetown Steel* hold that Commerce was free not to apply the CVD law to exports from NME countries in situations where it was nevertheless possible to do so. The Federal Circuit simply deferred to Commerce's determination that it was unable to apply the CVD law to exports from Soviet Bloc countries in the mid-1980s.[135]

(c) Please feel free to make any other comments you wish concerning this decision.

97. The *GPX* opinion should have no bearing on this panel's consideration of this dispute for four reasons: (1) the *GPX* opinion is not instructive for this dispute because it is an opinion of a U.S. court interpreting U.S. law, whereas this dispute concerns the interpretation of the WTO agreements, including provisions from China's Accession Protocol that do not appear in U.S. law; (2) the *GPX* opinion is not the final judgment of the U.S. courts; (3) the *GPX* opinion mischaracterizes Commerce's NME methodology; and (4) even on its own terms, the opinion does not support the position taken by China here – that, where a WTO Member is applying AD duties determined under a NME methodology to Chinese goods, it may not apply any CVDs to those same imports.

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[132] *See Potassium Chloride From the Soviet Union*: Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition, 49 Fed. Reg. 23,428 (June 6, 1984) (Exhibit CHI-116); *Potassium Chloride From the German Democratic Republic*; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: 49 Fed. Reg. 23,428 (June 6, 1984) (Exhibit US-171); *Carbon Steel Wire Rod from Poland*: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (May 7, 1984) (Exhibit CHI-118); *Carbon Steel Wire Rod from Czechoslovakia*: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (May 7, 1984) (Exhibit CHI-117).

[133] *See, e.g., Carbon Steel Wire Rod from Czechoslovakia*: Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,370 (May 7, 1984) (Exhibit CHI-117).

[134] *Georgetown Steel,* at p. 1316.

[135] It follows that, in applying the CVD law to China, Commerce has not repudiated its position in *Georgetown Steel*. There may, indeed, still be NME countries in which it would be impossible to determine that the government had transferred a benefit to a producer or exporter. If faced with a CVD petition against such a country, Commerce would again be unable to apply the CVD law and would cite *Georgetown Steel* as authority for not being required to do so in that situation.

1. *GPX* is an Opinion of a U.S. Court Interpreting U.S. Law, whereas this Dispute Concerns the Interpretation of the WTO Agreement.

98. As the United States explained in its opening statement at the second Panel meeting,[136] the focus of this Panel's inquiry is under the *WTO Agreement*, not *U.S. law*, and the *substance* of the U.S. law at issue in the *GPX* case is very different from the provisions of the WTO agreements under consideration.

2. The *GPX* Opinion is Not the Final Decision of the U.S. Courts.

99. The *GPX* opinion is not the final decision of the U.S. courts on this issue. Following the *GPX* opinion, the USCIT remanded the OTR tires proceeding to Commerce for action in accordance with the court's analysis. Commerce must report the results of its determination upon remand to the court no later than December 17, 2009,[137] at which point that new determination would be subject to challenge by interested parties within that same court proceeding. Commerce intends to seek an appeal once the USCIT has entered a final judgment, and, in the light of, *inter alia*, the errors discussed above, expects that the Court of Appeals will reverse the USCIT's decision.

100. A U.S. court decision that is under appeal or that still may be appealed is not a "final court decision" under U.S. law.[138] Hence, until either: (a) the time in which an appeal of *GPX* may be filed expires without an appeal having been filed; or (b) the appeal is finally resolved by the Court of Appeals for the Federal Circuit, the *GPX* decision remanding the OTR tires AD and CVD determinations to Commerce is not a final judicial decision and, accordingly, would not constitute precedent in any U.S. court.

3. The *GPX* Opinion is an Erroneous Characterization of the NME Methodology Under U.S. Law

101. The United States explained, in its answer to part (b) of the Panel's question, how the *GPX* court erred in its characterization of the U.S. NME methodology.

4. *GPX* Does Not Hold that Commerce May Not Apply the CVD Law to Exports from China if Commerce is Concurrently Imposing NME AD Duties on those Exports.

102. Finally, the *GPX* opinion itself does not support China's claim in this dispute. Although much of China's argument is unclear,[139] China is in essence asking this panel to find that, where

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[136] *See* U.S. Second Oral Statement, para. 88.

[137] *GPX*, at pp. 33-34.

[138] *See Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990) (Exhibit US-172)

[139] *See* Second Written Submission of the United States, paras. 177- 179.

WTO Members are imposing AD measures on exports from China pursuant to an NME methodology, they cannot impose any CVDs on those exports – even if the AD duties are lower than the CVDs and even if the AD duties are *de minimis*. *GPX* did not reach that conclusion. Instead, the court merely suggested (with no analysis substantiating that suggestion) that there *may* be *some* double-counting, and on that basis directed Commerce to examine this possibility and report back to the court.

VI. OTHER ISSUES

35. (To the United States) Please react to China's argument at the second substantive meeting that there is no support in WTO jurisprudence for the proposition that a subsidy determination may be based on a finding of financial contribution to one entity, and of benefit to another entity, without a prior finding that the first entity received a benefit.

103. China is incorrect. As the *Mexico – Olive Oil* panel emphasized, a pass-through analysis is not required any time "there is *any* arms'-length transaction between unrelated companies in the chain of the production of an imported product subject to a countervail investigation. . . ."[140] Indeed, paraphrasing the findings of the Appellate Body in *US – Countervailing Measures*, the panel noted that, "under Article 1.1(b), a benefit might be received by different recipients, . . . the recipient of the benefit might be different from the recipient of the financial contribution, and . . . a subsidy can be bestowed directly or indirectly, and in respect of production, manufacture or export of a product."[141] "In other words, it is not necessary to identify the particular recipient or recipients of the benefit and the particular manner in which a subsidy is bestowed in order to determine that a benefit has been conferred, and that therefore a subsidy exists, within the meaning of Article 1.1(b)."[142]

104. As the United States has explained,[143] in the investigations China challenges, Commerce determined, in accordance with SCM Article 1.1, that China made a financial contribution (*i.e.*, a provision of a good) to the trading companies that purchased input products from state-owned producers.[144] Commerce also found that a benefit was conferred upon producers of subject merchandise that purchased input products from the trading companies because the input products were sold for less than adequate remuneration within the meaning of Article 14(d) of the SCM Agreement.[145] Commerce explained that "[f]or these transactions, the GOC's financial contribution (provision of a good) is made to the trading company suppliers that purchase the

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[140] *Mexico – Olive Oil*, para. 7.143 (emphasis in original).

[141] *Mexico – Olive Oil*, para. 7.152 (*citing US – Countervailing Measures (AB)*, paras. 110-113.) (emphasis added).

[142] *Mexico – Olive Oil*, para. 7.152.

[143] U.S. First Written Submission, Section III.B.

[144] *CWP CVD Final Decision Memorandum* at 10 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum* at 8 (Exhibit CHI-2); *OTR Tires CVD Final Decision Memorandum* at 10 (Exhibit CHI-4).

[145] *CWP CVD Final Decision Memorandum* at 10 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum* at 8 (Exhibit CHI-2); *OTR Tires CVD Final Decision Memorandum* at 10-11 (Exhibit CHI-4).

[input product], while all or some portion of the benefit is conferred on the [subject merchandise] producers who purchase the [input product] from the trading company suppliers."[146] Thus, in these investigations, in some instances, the recipient of the financial contribution, the trading company, was different from the recipient of the benefit that Commerce countervailed, the producer of subject merchandise. This is contemplated by the SCM Agreement, as the *Olive Oil* panel explained.[147]

105. It was not necessary to measure any benefit that may have been received by the trading companies. The amount or portion of any benefit received by the *trading companies* is irrelevant for the purpose of determining the benefit conferred upon the *subject merchandise producers*. What matters is that Commerce properly identified a financial contribution and the amount of the benefit conferred upon the producers of subject merchandise. As the United States has explained,[148] Commerce did so by comparing the price paid by producers of subject merchandise to the trading companies with an appropriate benchmark price. As a result of such comparisons, Commerce determined in the challenged investigations that producers of subject merchandise received a benefit when they purchased government-provided goods because the price paid for such goods was less than the benchmark price.[149]

106. Commerce's analysis identified only the amount of benefit that effectively "passed through" the trading companies and was conferred upon producers of subject merchandise. Commerce's determinations were thus consistent with the requirements of the SCM Agreement and do not raise the concerns at issue in the Appellate Body's admonition that ". . . Members must not impose duties to offset an amount of the input subsidy that has not passed through to the countervailed processed products."[150]

36. (To both parties) How, precisely, do you believe the word "questionnaire" should be defined for the purpose of Article 12.1.1? Do you believe that every "formal request for information" by an investigating authority constitutes a "questionnaire" for the purpose

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[146] *CWP CVD Final Decision Memorandum* at 10 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum* at 8 (Exhibit CHI-2); *OTR Tires CVD Final Decision Memorandum* at 10 (Exhibit CHI-4).

[147] *Mexico – Olive Oil*, para. 7.152 (*citing US – Countervailing Measures* (AB), paras. 110-113.).

[148] U.S. First Written Submission, paras. 323-324.

[149] *See Memorandum to The File, from Shane Subler, entitled "Final Determination Calculation Memorandum for Zhejiang Kingland Pipeline and Technologies Co., Ltd.; Kingland Group Co., Ltd., Beijing Kingland Century Technologies Co.; Zhejiang Kingland Pipeline Industry Co., Ltd.; and Shanxi Kingland Pipeline Co., Ltd.,"* at 3, dated May 29, 2008 (Exhibit US-75); *Memorandum to The File, from Damian Felton, entitled "Final Determination Calculation Memorandum for Zhangjiagang Zhongyuan Pipe-Making Co., Ltd.; Jiangsu Qiyuan Group Co., Ltd.; Jiangsu Zhongjia Steel Co., Ltd.; Zhangjiagang Zhongxin Steel Product Co., Ltd.; and Zhangjiagang Baoshuiqu Jiaqi International Business Co., Ltd.,"* at 5, dated June 13, 2008 (Exhibit US-77) *Memorandum to The File, from Shane Subler, entitled "Final Determination Calculation Memorandum for Kunshan Lets Win Steel Machinery Co., Ltd.,"* at 3, dated June 13, 2008 (Exhibit US-76); *Memorandum to The File, from Nicholas Czajkowski, entitled "Final Calculation Memorandum for Guizhou Tire Company Limited (GTC),"* at 3, dated July 7, 2008 (Exhibit US-78).

[150] *US – Softwood Lumber CVD Final* (AB), para. 141.

of Article 12.1.1? If not, on what basis would you distinguish "questionnaires" in this sense from other types of information requests? What is the relevance of Members' (including the parties') practices to the Panel's resolution of this claim?

107. The United States continues to believe that the term "questionnaire" in Article 12.1.1 of the SCM Agreement refers to the request for information issued at the outset of each investigation to the interested Member and to foreign producers and exporters.[151]

108. First, the ordinary meaning of the term "questionnaire" is "[a] formulated series of questions by which information is sought from a selected group, usu[ally] for statistical analysis."[152] This meaning does not encompass every "formal request for information" by an investigating authority, but only those delivered in the form of a "series of questions.

109. Second, even where a "formal request for information" takes the form of a "series of questions," the United States has explained that the distinction between the request for information issued *at the outset* of an investigation and *subsequent* requests for information follows from the context of the term "questionnaire" in Article 12.1.1, in particular Annex VI to the SCM Agreement. Paragraphs 6 and 7 of Annex VI reveal that Members did not impose a 30-day requirement for response for every request for information, and that by referring specifically to "*the* questionnaire," Members focused on the one document that would always be issued in investigations, namely, the original questionnaire.[153]

110. The United States has also noted the distinctive nature of the questionnaire issued at the outset of an investigation, which tends to include more questions about specific subsidy programs in addition to more general questions about the industry and the firms under investigation than would be found in subsequent requests for information.[154] Furthermore, reading Article 12.1.1 to impose a 30-day minimum period for response to every request for information would likely make it impossible for an investigating authority to complete investigations within the timeframes set out in Article 11.11 of the SCM Agreement.[155] These points confirm the proper reading of the term "questionnaire" in Article 12.1.1, in the light of its context, to mean the request for information issued by an investigating authority at the outset of an investigation.

111. The United States recalls that the panel in *Egypt – Rebar* found the same understanding of the term "questionnaire" in the context of the corresponding provision in the Anti-Dumping

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[151] *See, e.g.*, U.S. First Written Submission, para. 482; U.S. Second Written Submission, para. 226.

[152] U.S. First Written Submission, para. 476, *quoting The New Shorter Oxford Dictionary*, 1993. (Exhibit US-95)

[153] *See, e.g.*, U.S. First Written Submission, paras. 477-478; U.S. Second Written Submission, para. 227.

[154] *See* U.S. First Written Submission, para. 479; U.S. Second Written Submission, paras. 228-233.

[155] *See* U.S. First Written Submission, paras. 480-481.

Agreement.[156] That panel similarly recognized the context provided by the use of the term "questionnaire" in the corresponding AD provisions governing on-the-spot investigations,[157] and noted the "operational and logistical problems" that result from interpreting "questionnaire" to mean every request for information.[158] The United States has explained why China's attempts to distinguish this panel report are unavailing.[159]

112. Finally, the United States has noted that the interpretation of Article 12.1.1 advanced by China throughout these proceedings is inconsistent with China's *actual practice* in the implementation of Article 12.1.1 in its own CVD investigations.[160] During the second Panel meeting, China did not contest or even attempt to refute or distinguish the evidence in Exhibit US-153, which demonstrated that China provides *less than 30 days* for requests for information subsequent to the questionnaire issued at the outset of the investigation. The United States considers these actions taken by China in the context of *ongoing* CVD investigations to be relevant to the Panel's evaluation of China's claim under Article 12.1.1. These actions indicate that, notwithstanding the assertions made before this Panel, China itself does not apply the 30-day requirement in Article 12.1.1 to requests for information beyond the original questionnaire. Given that China, in its own implementation, appears to have recognized the proper understanding of Article 12.1.1, as explained by the United States throughout these proceedings, the United States continues to wonder whether China considers it necessary for the Panel to make findings on this claim.

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[156] *See* U.S. First Written Submission, para. 483.

[157] *Egypt – Steel Rebar (Panel)*, para. 7.275.

[158] *Egypt – Steel Rebar (Panel)*, para. 7.277.

[159] *See* U.S. First Written Submission, footnote 654; U.S. Second Written Submission, para. 235.

[160] *See* U.S. Second Oral Statement, paras. 89-90.

LIST OF U.S. EXHIBITS

United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China

(WT/DS379)

US-	Title
154	Supplemental Questionnaire to GTC at Question 64 (Nov. 9, 2007)
155	**GTC Minor Corrections for Verification, "Rubber Purchases" (Mar. 12, 2008) (Contains BCI)**
156	**Final Calculation Memorandum for TUTRIC at attachment – spreadsheet tab "Rubber Calculations" (July 7, 2008) (Contains BCI)**
157	**Further Detail on Reported Rubber Prices (for business confidential detail on reported rubber purchases) (Contains BCI)**
158	***LWS* Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Provincial and Local Government, 5-12 (Mar. 4, 2008) (Contains BCI)**
159	Response of the Government of China to the New Subsidy Allegations Questionnaire (Nov. 16, 2007)
160	*Certain Cold-Rolled Carbon Steel Flat Products from Brazil*, Issues and Decision Memo. at "Long-Term Benchmarks"
161	*Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam*, 74 Fed. Reg. 45,811, 45,815 (Sept. 4, 2009)
162	*Access to Capital in China: Competitive Conditions for Foreign and Domestic Firms*, Journal of International Commerce and Economics (Dec. 2005)
163	The Economist Intelligence Unit, *Country Commerce: China*, (Mar. 2006)
164	*Private Financial Experts Verification Report*, Countervailing Duty Investigation: Coated Free Sheet Paper from China (Aug. 21, 2007)
165	Law of the People's Republic of China on Commercial Banks (Dec. 27, 2003)
166	Regulation of the People's Republic of China on the Administration of Foreign-funded Banks (Dec. 11, 2006)
167	*Memorandum to The File Regarding Off The Road Tires from China: Surrogate Values for the Final Determination* (July 7, 2009)
168	*Guizhou Tyre's Section A Questionnaire Response*, Attachment A-7 (Oct. 26, 2007) (public version)
169	*GPX Int'l Tire Corp. v. United States*, Court No. 08-00825, "Respondent Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Judgment on the Agency Records, Volume 1: CVD/NME AD Coordination Issue" (February 27, 2009)
170	S. Rep. No. 93-1298 at 174 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7186, 7311
171	*Potassium Chloride From the German Democratic Republic*; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition: 49 Fed. Reg. 23,428 (June 6, 1984)
172	*Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990)