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

(WT/DS379)

EXECUTIVE SUMMARY OF SECOND WRITTEN SUBMISSION OF THE UNITED STATES

August 24, 2009

I. Request for Preliminary Rulings

1. The United States has demonstrated that China's "as such" claims are not within the Panel's terms of reference because China failed to consult on the "measure" at issue, as required by the DSU. The United States has explained how China's reliance on the Appellate Body Report in *US - Continued Zeroing* is misplaced. The United States has observed, moreover, that contrary to China's understanding, nothing in any Appellate Body or panel report, or, more importantly, the DSU, suggests that a Member may forego the prerequisite of consultations if the Member deems the new measure to be "sufficiently related" to the measures identified in the consultations request.

2. The United States has also demonstrated that the "measure" China seeks to challenge "as such" does not constitute an "omission" cognizable for purposes of WTO dispute settlement proceedings because it has not been connected to any affirmative WTO obligation to take a particular action. Furthermore, by avoiding any reference to specific aspects of U.S. law that result in the double remedies giving rise to the alleged WTO-inconsistency at issue, China has failed to "identify the specific measures at issue in this dispute," as required by Article 6.2 of the DSU. Rather than supporting China's argument under Article 6.2, the Appellate Body Report in *EC - Selected Customs Matters* highlights the inadequacy of China's panel request.

II. Commerce's Financial Contribution Determinations Are Consistent With the SCM Agreement

3. An analysis of the ordinary meaning of the term "any public body," in its context and in light of the object and purpose of the SCM Agreement, demonstrates that Commerce's financial contribution determinations were consistent with the SCM Agreement. The U.S. First Written Submission discussed why the term "public" means that a "public body" can be an entity that is owned or controlled by the government. In addition, the use of the term "any" before "public" indicates that there can be different *kinds* of public bodies. Contrary to China's argument, not all public bodies must be vested with governmental authority to entrust or direct a private body.

4. China is incorrect that the SCM Agreement's reference to "a government" or "any public body" collectively as "government" means the two separate terms must possess similar characteristics and should be functional equivalents. To interpret the term "public body" to refer to entities that "possess characteristics similar to those that define a government" would be to reduce the term "public body" to redundancy or inutility.

5. China argues that Article 1.1(a)(1)(iv) of the SCM Agreement requires that an entity responsible for entrusting or directing a private body must itself be vested with government authority. The SCM Agreement, however, defines the term "government" as "government or any public body," so Article 1.1(a)(1)(iv) does not relate strictly to "governmental authority." China also wrongly conflates the standard under Article 1.1(a)(1)(iv) with the question of whether an entity is a "public body." An entrustment or direction analysis involves an analysis of the *actions* of the government or public body and the *actions* of the private body or bodies at issue. A public body analysis, on the other hand, involves an analysis of the *nature* of the entity or entities at issue.

6. The term "public body" is properly understood as an entity owned or controlled by the government, but not necessarily authorized by the government to perform government functions. The *Korea – Commercial Vessels* panel adopted this approach, rejecting an argument by Korea that was substantially similar to China's. That panel also rejected the contextual argument China

makes here, which is based upon the definition of "public entity" in the GATS Annex on Financial Services. That definition, which applies only for purposes of the Annex on Financial Services, is not relevant to an interpretation of "public body" in the SCM Agreement. An analysis of similar terms in other covered agreements cannot outweigh the ordinary meaning and immediate context of a term in the SCM Agreement.

7. China's arguments related to the Spanish and French versions of the Agreement on Agriculture are unavailing. The issue here is the interpretation of the term "public body," or "organismo publico," or "organisme public" in the SCM Agreement. There is no need to look to the Agreement on Agriculture to determine the meaning of this term, and there is no discrepancy between the English and Spanish versions of the SCM Agreement.

8. An interpretation of Article 1 of the SCM Agreement that treats the government-owned entity as a public body ensures that governments will not be able to hide behind their ownership interests to escape the disciplines of the SCM Agreement. Such a reading of Article 1 is consistent with the object and purpose of the SCM Agreement.

9. The Working Party Report on China's Accession further confirms the correctness of the U.S. interpretation with respect to the entities at issue in this dispute. Paragraph 172 of the Working Party Report reflects that the representative of China did not dispute the understanding of some Members that "when state owned enterprises (including banks) provided a financial contribution, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement." China thus indicated its own recognition that its state-owned enterprises and state-owned commercial banks are "public bodies."

10. China incorrectly argues that the Draft Articles on Responsibility of States for Internationally Wrongful Acts are relevant rules of international law that should be used to interpret the term "public body," and that the Appellate Body in *US – DRAMS* endorsed the use of the Draft Articles in interpreting Article 1 of the SCM Agreement. In *US – DRAMS*, the issue was whether the Korean government had entrusted or directed private bodies within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. The issue in this dispute is the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. The Appellate Body did not decide in *US – DRAMS* that government-owned entities cannot be "public bodies."

11. The Draft Articles are not relevant rules of international law applicable in the relations between the parties in this dispute, within the meaning of Article 31(3)(c) of the Vienna Convention. The threshold question is whether the Draft Articles, and particularly the attribution guidelines in Chapter II of Part One of those articles, are relevant and applicable. They are *not* relevant and *not* applicable, and the Panel is *not* required to rely upon them. The Draft Articles concern "the secondary rules" of state responsibility, and the "general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom." The Draft Articles say nothing about *whether* a breach occurred.

12. The question of whether goods or loans were provided by the "government or any public body" in China is not one of attribution of wrongful acts to China. That is, it is not a "secondary rule" question of attribution. It relates to the substantive conditions for something to be a subsidy, which, even if it is, is not prohibited as such. China is trying to graft secondary rules of

general international law (limited to wrongful conduct) onto one of several conditions under primary rules of international law that do not even define wrongful conduct.

13. Additionally, Article 55 of the Draft Articles contains a *lex specialis* clause. The SCM Agreement is a "special rule of international law" that supersedes the Draft Articles. Contrary to China's argument, the Draft Articles are not parallel to, or "fully aligned" with, the SCM Agreement and it is not clear that the detailed distinctions in those articles are "applicable in the relations between the parties" as customary international law. The panel in *Korea – Commercial Vessels* declined to read the Draft Articles into an interpretation of the term "public body."

14. With respect to sales through trading companies, Commerce concluded that the public bodies made financial contributions to the trading companies, and these financial contributions conferred benefits to the respondent subject merchandise producers. This was a proper application of the SCM Agreement. No entrustment or direction analysis was required.

III. Commerce's Determinations to Rely upon Out-Of-Country Benchmarks Were Consistent with Article 14 of the SCM Agreement

15. The United States and China appear to agree, although for different reasons, that it will not be necessary for this Panel to make any findings with respect to paragraph 15(b) of China's Accession Protocol. However, the United States notes that China incorrectly argues that Commerce was required to reference paragraph 15(b) of the Accession Protocol in its CVD determinations. The Appellate Body has explained that proceedings before a national authority, such as the CVD investigations at issue in this dispute, may properly focus solely on "the requirements of the national law, regulations and procedures."

16. Contrary to China's mischaracterization of the U.S. position, the United States underscores that the Accession Protocol sets forth *additional* terms and conditions to which China agreed as a condition for its accession to the WTO. Paragraph 15(b) was included in China's Accession Protocol because the "special difficulties" associated with the transitional nature of China's economy may justify the use of out-of-country benchmarks. The text of paragraph 15(b) does not impose on Members any obligation to make any particular factual findings or determinations, and does not impose restrictions on the use of out-of-country benchmarks beyond those contained in Article 14 of the SCM Agreement. Additionally, because the methodologies the United States used to identify and measure a benefit under paragraph 15(b) are the same as those used under Article 14, and are provided for under the laws and regulations the United States has already notified to the SCM Committee, the United States is in full compliance with paragraph 15(c) of China's Accession Protocol.

17. Contrary to China's argument, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber CVD Final* require a separate price distortion analysis before a Member may rely upon an out-of-country benchmark. The Appellate Body's analysis in *US – Softwood Lumber CVD Final* reflects the economic theory commonly referred to as the "Dominant Firm Model." Consistent with this theory, the Appellate Body noted that "[w]hen private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers *will align* their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices." The Appellate Body concluded that where an investigating authority

has determined that a government plays such a predominant role, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.

18. In the investigations China challenges, Commerce applied the Appellate Body's reasoning in *US – Softwood Lumber CVD Final* to the facts before it. Commerce determined, based on record evidence, in the case of the markets for hot-rolled steel and BOPP, that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's distortions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration." Likewise, for loans and land-use rights, based on the evidence on the administrative record, Commerce determined that, due to the government's predominant role, it was necessary to use out-of-country benchmarks to measure the benefit.

19. In addition to the market distortion inherent in the fact that the government was the predominant supplier in the markets, Commerce also found evidence of direct government intervention in the lending and land-use rights markets that would further impact prices, rendering those prices inappropriate for determining the amount of the benefit. China incorrectly argues that the Appellate Body found in *US – Softwood Lumber CVD Final* that "the possibility of rejecting private prices was deemed to exist only when the 'government's role in providing the financial contribution' was predominant." The Appellate Body did not address and, consequently, did not exclude the possibility that other types of government intervention would also distort the market and render prices unreliable.

20. Available evidence showed that China owned *96 percent* of the producers in the hot-rolled steel market and at least *90 percent* of the producers in the BOPP market. Thus, private suppliers consisted of only a small portion of the sales in those markets. Despite complaining that Commerce applied a *per se* rule, China does not explain what other factors Commerce should have addressed in determining whether the government had a predominant role and which relevant record evidence was not assessed. Also, during the investigation, China declined numerous requests to provide additional information. Thus, Commerce determined that China had a predominant role in the hot-rolled steel and BOPP markets and, therefore, used out-of country benchmarks to measure the benefit conferred by government-provided inputs. Commerce reached its determination by assessing all record evidence, not simply government ownership of domestic production.

21. In the *CWP, OTR Tires*, and *LWS* CVD investigations, Commerce relied upon record evidence that indicated that not only did China have a predominant role as an owner of the majority of the banks in China, it also directly controlled interest rates through its regulation of the market. Commerce did not "sit in judgment upon [China's] monetary policies. . . ." Commerce's concern with China's direct control over interest rates was that it created distortion in the lending market. Commerce properly evaluated the extent to which China's invasive control over interest rates distorted the lending market, such that it was inappropriate to rely upon any in-country interest rates as benchmarks.

22. For RMB-denominated loans, the regression analysis Commerce used is based upon actual interest rates available to borrowers in China. A regression analysis is essentially an average of interest rates that takes more factors into account than a simple average, and Article

14(b) of the SCM Agreement does not state a preference for the use of one interest rate rather than an average of interest rates. Commerce calculated comparison interest rates that were tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market." For dollar-denominated loans, Commerce used a yearly average LIBOR rate rather than a daily LIBOR rate to measure the benefit. Article 14(b) of the SCM Agreement contains no preference for a daily rate over a yearly average.

23. In the *OTR Tires* and *LWS* CVD investigations, Commerce found that China "exercises control over the supply side of the land market in China as a whole so as to distort prices in the primary and secondary markets." Commerce found China not only owns all of the land, but retains and exercises significant control over the supply of land-use rights for private industrial use, and can therefore influence price. China essentially argues that Members should never be able to resort to an out-of-country benchmark when determining the benefit for land-use rights. China's position is incompatible with the Appellate Body's findings in *US – Softwood Lumber CVD Final*.

24. Because prices for land-use rights within China were inappropriate for use as benchmarks, Commerce compared the prices respondents paid for land-use rights to the sales of certain industrial land in Thailand. In arriving at this determination, Commerce evaluated several criteria to ensure that the comparison prices would "relate or refer to or be connected with" China's prevailing market conditions, consistent with Article 14(d) of the SCM Agreement.

IV. China Has Failed To Demonstrate that Commerce Was Required To Provide a Credit in the Benefit Calculations for Instances in Which China Provided Rubber Inputs for Adequate Remuneration in the OTR Tires CVD Investigation

25. China has shifted away from its contextual argument based on the term "product" in various provisions of the SCM Agreement and the GATT 1994 *other than* Article 14 of the SCM Agreement, and now posits a new and different "textual" basis for its invented credit/offset obligation, suggesting that the use of the term "good" in Article 14(d) of the SCM Agreement establishes the obligation and limits its application to situations under Article 14(d). This is a complete shift in China's position. Moreover, contrary to China's argument, the mere use of the "singular term 'good'" in Article 14(d) cannot establish an obligation to aggregate the benefits of all transactions during the entire period of investigation involving the provision of a good and provide credit in such an aggregate benefit calculation for transactions in which the good was sold for more than the established benchmark, and also limit this obligation to the unique situation of government-provided goods or services. China's argument is simply not credible.

26. The correct, and far more plausible, reading of the text of Article 14(d) of the SCM Agreement is that term "good" is in the singular, and associated with the terms "in question," because, while a government may provide a variety of goods and services, to determine the adequacy of remuneration for a particular good provided by the government, Members must look at the "prevailing terms and conditions" for *that* good, and not some other good. Furthermore, the prevailing terms and conditions would be expected to vary over time; in many cases, they would be unique to each given transaction. In such cases, each transaction would have to be analyzed independently to determine whether any benefit is conferred as a result of that transaction, and consequently if a subsidy exists.

27. The context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. The SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction by transaction basis. However, the ability of a Member to investigate more than one subsidy in a single proceeding is not disputed. When analyzing multiple subsidies, though, there is no obligation to provide a credit in that analysis when an investigating authority determines that a granting authority did not provide a subsidy.

28. While China's Answers to First Panel Questions appear to abandon the concept of "product as a whole" in favor of an entirely new textual argument based on the term "good" in Article 14(d) of the SCM Agreement, China nevertheless continues to emphasize the flawed analogy it attempts to make to the Appellate Body's reports on zeroing. As the United States has explained, however, the Appellate Body's zeroing reports examine the calculation of margins of dumping under the AD Agreement and certain provisions of the GATT 1994 that relate solely to AD proceedings. There are no provisions in the SCM Agreement, nor in the CVD provisions of the GATT 1994, that are analogous to the provisions relied upon by the Appellate Body in its zeroing reports, and there is certainly no analogous text in Article 14(d), which China now argues is the source of the obligation it proposes.

29. Additionally, there is simply no analytical connection between the calculation of margins of dumping and the calculation of a subsidy benefit that would justify extending the Appellate Body's reasoning in the zeroing reports to this dispute. In the CVD context, benefit and the existence of a subsidy *can* be calculated at the level of an individual transaction. An individual transaction, which itself is a financial contribution by the government, can confer a benefit and a subsidy would therefore be determined to exist as a result of that transaction. In addition, aggregation in the CVD context occurs *after* the benefit has been measured and the existence of a subsidy or subsidies has been determined.

30. China has not explained how the United States acted inconsistently with any of the provisions to which China makes reference. A string citation is not a substitute for a legal argument. China has failed to establish that the United States acted inconsistently with any of provision of any covered agreement.

31. Furthermore, with respect to Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because the SCM Agreement defines "levy" as "the definitive or final legal assessment or collection of a duty or tax," and the United States does not levy duties in a CVD investigation, there is simply no basis for China to claim a violation of these provisions based on the challenged CVD investigations. While China cites to the Appellate Body and panel reports in *US – Countervailing Measures* in support of its argument, neither the Appellate Body nor the panel in that dispute addressed the textual argument the United States has raised in this dispute. To be clear, the United States is not arguing that the obligations found in these provisions are inapplicable to the United States. Rather, the United States is explaining that these obligations are only applicable *when the United States actually levies duties*. Here, China's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are premature and must be rejected.

V. Commerce's Specificity Determinations in the OTR Tires and LWS CVD Investigations Were Consistent with Article 2 of the SCM Agreement

32. Commerce's specificity determinations for the policy lending subsidy and land-use rights subsidy were clearly substantiated by positive evidence and otherwise in accordance with the covered agreements. China argues that Commerce was required to determine that the *benefits* of these subsidy programs, rather than the subsidy programs themselves, were specific. China's reading of Article 2 of the SCM Agreement is not supported by the text or structure of the SCM Agreement, and must be rejected by this Panel. Neither Article 2.1(a) nor Article 2.2 requires an investigating authority to revisit the benefit determination to determine specificity. Prior WTO panels have recognized the separate and independent nature of a specificity determination. This is reflected in the structure of Article 1 of the SCM Agreement, which identifies three criteria for a countervailable subsidy: financial contribution, benefit, and specificity.

33. With respect to the *OTR Tires* CVD investigation, China complains that the legislation on which Commerce relied for its specificity determination does not "define[] the elements of the subsidy." But this is not required by the SCM Agreement. Instead, Article 2.1(a) of the SCM Agreement requires an investigating authority to determine only whether legislation explicitly limits access to the subsidy to certain enterprises. Here, national, provincial, and municipal legislation and policy documents, viewed as a whole, explicitly limited access to the policy lending subsidy to a group of industries including the tire industry.

34. Contrary to China's argument, the United States has not offered the Panel an *ex post* rationalization for Commerce's specificity determination for the policy lending subsidy. The U.S. rationale in this dispute and in the *OTR Tires CVD Final Determination* is that Chinese policies "call upon the banks to make credit available to tire companies, and the policies instruct agencies to direct or allocate that credit to the tire producers."

35. Additionally, China argues that the legislation on which Commerce relied for specificity listed such a broad range of industries as encouraged that policy lending must have been generally available and not specific. However, the policy documents on which Commerce relied were very specific, naming, for example, an investigated producer and its tire production facilities as a priority. Furthermore, lending was expressly prohibited to particular categories of industries. Thus, the policy lending subsidy was specific and not generally available. China's references to U.S. statements in the Large Civil Aircraft dispute ("the Boeing Dispute") and *US – Upland Cotton* are merely a distraction. China mischaracterizes the U.S. statements in those disputes and the U.S. position here.

36. With respect to the *LWS* CVD investigation, China argues that Article 2.2 of the SCM Agreement requires that a regional subsidy be limited to a subset of enterprises or industries within a designated geographical region. China's interpretation would require that, in order for a subsidy to be specific under Article 2.2, it would also have to be specific under Article 2.1 – limited to certain enterprises. China's interpretation renders Article 2.2 redundant with Article 2.1. This is contrary to customary international law rules of treaty interpretation.

37. China cites to the 1990 Dunkel draft of the SCM Agreement in support of its argument. However, recourse to such supplementary means is permissible only in limited circumstances. In this case, interpretation of Article 2.2 of the SCM Agreement in its context and in light of the object and purpose of the agreement does not lead to a manifestly absurd or unreasonable result or leave the meaning of Article 2.2 ambiguous or obscure. Consequently, there is no need to have recourse to the material that China has proffered. In any event, however, a much more

reasonable explanation for the change in the text identified by China supports the U.S. understanding of regional specificity. That is, a subsidy that goes to every enterprise or industry in a region is regionally specific, but Article 2.2 does not require that all enterprises in the region receive the subsidy to find the subsidy regionally specific.

38. China argues that the land-use rights subsidy in the *LWS* CVD investigation was not regionally specific because enterprises both inside and outside the Park paid the same price for land-use rights. China conflates the benefit and specificity analyses. The text of Article 2 makes no reference to a subsidy benefit and the structure of Article 1 demonstrates that a specificity determination is separate and independent from a benefit determination. In addition, China's theory that a benefit must also be specific to find a subsidy regionally specific must be rejected because it would allow a granting authority to circumvent the disciplines of Article 2.2 simply by ensuring that at least one enterprise outside the region receives a similar benefit.

VI. The United States Did Not Act Inconsistently With the SCM Agreement or the GATT 1994 By Concurrently Applying CVD and AD Measures to Certain Products from China

39. The real locus of China's challenge is the concurrent application of AD and CVD measures. China's attempts to suggest that concurrent application would still be permissible where the investigating authority takes "steps" to ensure that the same subsidies are not offset twice are unavailing. Under China's own theory, the "steps" that an investigating authority would have to take would necessarily result in being required to *choose* between imposing AD duties on the basis of an NME methodology and imposing CVDs.

40. China's theory as to the existence of a so-called double remedy is premised on its view of the "overlapping rationales" of an NME methodology and the imposition of CVDs. China argues that a double remedy is created because the NME normal value "necessarily captures any trade-distorting effects of alleged subsidies." This theory contains multiple flaws.

41. Incorrect Rationales for NME Methodology and CVDs: China incorrectly asserts that subsidization is among the market distortions that the NME methodology is "meant to counteract." The use of an NME methodology, however, is meant to replace unreliable costs and prices in the NME with surrogate values from a market economy, in order to calculate normal value to assess whether price discrimination exists. Commerce determines whether a country should be considered an NME based on a number of statutory criteria, none of which concerns subsidization. China relies on a statement by the U.S. Congress in support of its view that Commerce generally does not use factor values that may be subsidized. However, rather than ensuring that subsidized factor values are not used, Commerce considers subsidization only in a limited set of circumstances, as evidenced by the determinations in the investigations at issue.

42. China also asserts that the purpose of imposing CVDs is to offset any "competitive advantage" a firm may receive by virtue of a subsidy, or to correct any economic "distortions" that result from that subsidy, and in so doing, also erroneously suggests that the *level* of CVDs imposed is connected to and somehow reflective of the degree of "competitive advantage" or "distortions." The SCM Agreement, however, does not require any demonstration by an investigating authority, when considering the level at which CVDs may be imposed, that subsidies confer a "competitive advantage" upon their recipients or create economic "distortion."

Article VI:3 of the GATT 1994 and Article 19.2 of the SCM Agreement make plain that CVDs may be imposed to offset the full amount of subsidies.

43. Normal Value is Not a "Remedy": China's theory obscures the basic point that the remedies at issue are AD duties and CVDs, while China's argument addresses NME normal values. Normal values, of course, are not in and of themselves AD duties. China's exclusive focus on normal value explains why China errs in emphasizing the similarity between some of the factor values selected by Commerce in determining normal value in the AD investigations, and the benchmarks that Commerce used to value subsidies in the concurrent CVD investigations. According to China, this demonstrates that the resulting AD duties and CVDs address the same economic "distortion," and, therefore, that the AD duties remedy subsidies. China, however, fails to actually compare the two *remedies* at issue, basing its conclusion instead on the antecedent determination of normal value.

44. Faulty Economic Logic: Even assuming, *arguendo*, that normal values, by themselves, could create a double remedy, China's theory about NME normal values is unsound because it is based on the assumption that NME normal values are completely unaffected by subsidies. This is simply not true. First, put simply, NME subsidies may easily affect the *quantity* of factors consumed by the NME producer, which, when multiplied by the surrogate factor *values*, results in lower normal values and, hence, lower dumping margins. Second, in determining normal value in NME cases, Commerce may use factor values based on the prices of inputs imported into China from market economy countries, which inputs may well be priced lower as the result of competing with subsidized products *in China*. Finally, in at least some cases where increased NME exports of the product account for a large enough share of the world market to lower world prices, these lower prices would reduce profits for producers selling in these markets, which would then reduce profit rates Commerce derives from their financial statements to add to normal value.

45. GATT Article VI:5 prohibits such concurrent application only in the circumstance where imposing both remedies would "compensate for the same situation of dumping or export subsidization." No other provisions of the covered agreements preclude the concurrent application of AD and CVD measures under any other circumstances. That other rules did not so preclude the concurrent application is confirmed by the adoption and ultimate elimination of Article 15 of the Tokyo Round Subsidies Code, which imposed upon Signatories the obligation to choose between AD investigations and CVD investigations when examining allegations of injury caused by imports from an NME country. Members did not include this requirement when they adopted the SCM Agreement, which contains no provision similar to Article 15 on concurrent application of AD and CVD measures. Nor did Members include in China's Protocol any limitation on a Member's right to concurrently apply CVDs and AD duties calculated on the basis of an NME methodology. Therefore, the covered agreements do not contain the prohibition on concurrent application that China seeks to have this Panel effectively create.

46. Articles 19.3 and 19.4 of the SCM Agreement: China's claims under Articles 19.3 and 19.4 must be based on a CVD that has been "levied." However, no CVDs have been "levied" yet under the U.S. retrospective system. Furthermore, China erroneously asserts that the *AD duty* calculated under the NME methodology must be understood to somehow constitute a *CVD* within the meaning of the SCM Agreement. Moreover, because China considers such an AD duty to also be a CVD, a Member must first make the requisite findings of a CVD investigation.

Accepting China's theory would mean that imposition of such an AD duty, without conducting a CVD investigation, would necessarily violate the SCM Agreement.

47. GATT Article I:1: The United States has explained that China's MFN complaint centers on the application of the NME methodology, and that because such application is expressly authorized by paragraph 15(a) of China's Protocol, it does not contravene Article I:1. With respect to China's "as applied" claims under Article I:1, the United States has noted China's failure to identify how the United States did not accord to products from China the same "advantage" accorded "like products" from market economies. The sole basis for China's conclusion that Commerce has accorded certain treatment to "like products" is mere speculation.

48. "As Such" Claims: China has failed to meet its burden as a threshold matter of establishing the existence of the "absence of legal authority" that it seeks to challenge "as such." None of the sources cited by China supports the conclusion China would need to establish, namely, that *no legal authority* exists for Commerce to take whatever (undefined) actions China considers necessary to "avoid a double remedy." Furthermore, because China does not challenge a "measure" that mandates any WTO-inconsistent action, but challenges how Commerce chooses to exercise its discretion, the so-called "absence of legal authority" is not inconsistent with U.S. obligations under the WTO Agreement.

VII. Procedural Claims Under the SCM Agreement

49. In its written responses to the Panel's questions about its claim under Article 13.1 of the SCM Agreement, China states that, in the light of the U.S. confirmation that it would continue to afford a reasonable opportunity for consultations throughout an investigation, as required by Article 13.2, China "does not believe the Panel needs to address this issue further." The United States agrees that it is unnecessary for the Panel to make any findings on this claim.

50. With respect to China's claim under Article 12.1.1 of the SCM Agreement, the United States has explained that the thirty-day requirement in that provision applies only to the questionnaire issued at the outset of each investigation. China disputes this view, arguing that initial questionnaires and new subsidy allegation questionnaires are "indistinguishable."

51. China's argument ignores the conceptual difference between the initial questionnaire and subsequent requests for information, including new subsidy allegation questionnaires. The initial questionnaire, by its very nature, asks not only about specific programs, but also general questions on a variety of other relevant issues. A new subsidy allegation questionnaire tends to include questions only on a specific program and does not include general questions that have already been asked in the initial questionnaire. This critical difference, overlooked by China, is reflected in the full range of questionnaires issued to *all* interested parties, including respondent companies, in *all four* CVD investigations at issue.

52. The United States disagrees with China's assertion that reading Article 12.1.1 to apply only to initial questionnaires would provide investigating authorities "unfettered discretion" and would place interested Members and parties "entirely at the mercy of the demands of investigating authorities." This hyperbolic concern ignores the other provisions of the SCM Agreement, in particular, the other sub-paragraphs of Article 12, which collectively ensure that interested Members and parties are given rights in proceedings before investigating authorities.