

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

(WT/DS379)

**SECOND WRITTEN SUBMISSION OF
THE UNITED STATES**

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Short Form	Full Citation
<i>Canada – Aircraft (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999
<i>Canada – Aircraft (Article 21.5) (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000
<i>Canada – Dairy (AB)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999
<i>EC – DRAMS</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>EC – Selected Customs Matters (AB)</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002
<i>Japan – Alcohol (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November, 1996
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008
<i>US – Countervailing Measures (AB)</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003
<i>US – Countervailing Measures (Article 21.5)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005

<i>US – Customs Bond Directive (AB)</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/AB/R, adopted 1 August 2008
<i>US – DRAMS (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – FSC (Article 21.5 I) (AB)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – German Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – Lamb Meat (AB)</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
<i>US – Lead and Bismuth II (Panel)</i>	Panel Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/R, adopted 7 June 2000, as modified by the Appellate Body Report, WT/DS138/AB/R
<i>US – Softwood Lumber CVD Final (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004
<i>US – Upland Cotton (Panel)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, adopted 21 March 2005, as modified by the Appellate Body Report, WT/DS267/AB/R

I. INTRODUCTION

1. As the United States noted in its closing statement at the first meeting with the Panel, this dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements. Yet, notwithstanding China's lengthy First Written Submission and Answers to First Panel Questions, China has largely failed to articulate what specific aspect of the U.S. actions it challenges is inconsistent with an obligation contained in the covered agreements. While China has referenced multiple provisions of various agreements, China has not provided a proper interpretive analysis of those provisions. China's arguments do not provide a basis on which the Panel could sustain China's allegations that the United States has acted inconsistently with its WTO obligations.

2. Instead, China departs from the accepted rules of treaty interpretation and invents obligations found nowhere in the text of any covered agreement. Indeed, China has gone to great lengths to discuss anything *but* the specific obligations found in the text of the covered agreements. For example:

- Failure to consult: Rather than focus on the general requirement in Article 4 of the DSU to consult on a measure before identifying it in a panel request, China seeks to excuse its refusal to seek such consultations in respect of the "absence of legal authority" on the ground that this "measure" is "related to" measures that were the subject of consultations.
- Financial contribution: Rather than focus on a proper Vienna Convention analysis of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, China seeks to graft onto the SCM Agreement provisions in the ILC Draft Articles on State Responsibility.
- Subsidy offsets: Rather than focus on the text of Article 14 of the SCM Agreement, China attempts to invent an obligation based on panel and Appellate Body reports interpreting unrelated provisions of separate covered agreements, the AD Agreement and the AD provisions of the GATT 1994.
- Trading companies: Rather than focus on any particular provision of the SCM Agreement, China broadly claims that the United States acted inconsistently with the SCM Agreement writ large, never actually alleging violation of a specific provision by the United States.
- Concurrent application of AD and CVD measures: Rather than focus on the specific obligations in Articles 19.3 and 19.4 of the SCM Agreement, China develops a theoretical, yet unsubstantiated, basis for its allegation of "double remedies" before ultimately trying to challenge an *anti-dumping* duty under the *SCM Agreement*.

- Concurrent application of AD and CVD measures: Rather than focus on specific rights and obligations, *inter alia*, in GATT Article I:1 and paragraph 15 of China’s Protocol, China complains of imports from China being subjected to a dumping calculation methodology explicitly authorized under the covered agreements.
- China’s Accession Protocol: Rather than focus on specific rights afforded other WTO Members in its Protocol, China seeks to deny those rights by insisting that invocation of such rights in this dispute constitutes *ex post* rationalization.

Throughout this dispute, China’s arguments have consistently failed to meaningfully address the specific rights and obligations that the covered agreements in fact contain.

3. The proper focus of the Panel’s attention, of course, is the text of the covered agreements and the rights and obligations established therein. The United States takes the opportunity in this submission not only to reiterate its arguments on the basis of those rights and obligations, but also to address China’s arguments on their own terms. In so doing, the United States does not intend to signal its agreement with the view, implicit in China’s approach, that it would be appropriate for the Panel to base its findings on elements extraneous to the text of the covered agreements. However, this submission will highlight for the Panel that, in addition to the errors of law that pervade China’s claims in this dispute, China misunderstands or misreads even those sources on which China relies to make its case.

4. As a consequence, the United States respectfully submits that the only conclusion to be drawn is that China’s claims are without merit and must be rejected.

II. REQUEST FOR PRELIMINARY RULINGS

5. The United States has requested preliminary rulings from the Panel on two issues connected with China’s “as such” claims: (1) China’s failure to consult on a “measure” that it now seeks to have included within the Panel’s terms of reference, and (2) China’s failure to identify the specific measure at issue in this dispute. China has failed to justify why, despite these failings, its “as such” claims are properly before this Panel.

A. China Failed to Consult on a “Measure” In Respect of Which It Now Seeks Findings by the Panel

6. 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, notwithstanding the fact that China had concluded well before consultations that the

“measure” was a source of alleged impairment of its benefits under the covered agreements.¹ China does not dispute its failure to seek consultations on the new “measure,” but seeks to justify its non-compliance on the basis that the “measure,” in China’s view, “‘relates to’ the measures that were the subject of consultations,” citing the Appellate Body Report in *US - Continued Zeroing*.²

7. The United States has explained how the situation before the Appellate Body in that dispute was notably different from that presented to this Panel, and in particular, discussed how the “measure” introduced by China for the first time in the panel request was distinct from the measures that were the subject of consultations and had effectively expanded the scope of the dispute.³ The United States has observed, moreover, that China’s acknowledgment that it was aware of its concerns with the new “measure” well before consultations distinguishes this dispute from others in which this issue has arisen.⁴

8. In this respect, the United States submits that China misses the point in asserting that “[t]he United States provides no authority for the proposition that prior ‘awareness’ of a measure is relevant to whether a measure identified in a panel request is sufficiently related to the measures that were the subject of consultations.”⁵ The question under the terms of the DSU is *not* whether the two sets of measures are “sufficiently related.” As the Appellate Body has stated, the DSU contemplates consultations as “a prerequisite to panel proceedings.”⁶ China continues to offer no explanation for why it did not include the new “measure” in the consultations request.⁷ The fact that China was aware that the new “measure” raised concerns that, in China’s view, were similar to those raised by the investigations, indicates that China opted to skip consultations in respect of this new “measure.” However, nothing in Appellate

¹ U.S. First Written Submission, paras. 74-85; U.S. Statement Regarding U.S. Preliminary Ruling Requests, paras. 6-13; U.S. Answers to First Panel Questions, paras. 18-20.

² China Response to U.S. Request for Preliminary Rulings, para. 31 (quoting *US - Continued Zeroing (AB)*, para. 228).

³ See U.S. First Written Submission, paras. 79-85; U.S. Statement Regarding U.S. Preliminary Ruling Requests, paras. 7-13. Having so distinguished China’s new “measure” and explained how China has consequently expanded the scope of the dispute, the United States reiterates its rejection of China’s assertion to the contrary. See, e.g., China Answers to First Panel Questions, paras. 20, 22, 29-30.

⁴ See U.S. Answers to First Panel Questions, para. 27.

⁵ China Answers to First Panel Questions, para. 16.

⁶ *US - Customs Bond Directive (AB)*, para. 293 (quoting *Mexico - HFCS (Article 21.5) (AB)*, para. 58). China characterizes as an “apparent U.S. contention” the fact that “if a complaining Member is ‘aware’ of a measure at the time that it files a request for consultations, it must either identify that measure in the consultations request or forego any possibility of identifying that measure in a subsequent panel request.” China Answers to First Panel Questions, para. 17. Of course, that is not a “U.S. contention,” but simply a requirement of the DSU. Furthermore, this does not mean that the measure that was not included in the consultations request could not be the subject of a challenge under the WTO. As the United States has noted, China could easily have filed an additional consultations request including the new “measure,” an approach that the United States itself has taken care to follow in similar situations as the complaining party, including in disputes with China. See U.S. Statement Regarding U.S. Preliminary Ruling Requests, para. 13.

⁷ See China Answer to Panel Question 6.

Body or panel reports, or, more importantly, the DSU, suggests that a Member may choose to forego this “prerequisite” provided that the new measure is “sufficiently related” to the measures identified in the consultations request. If the requirement of consultations is to have any meaning, that requirement must be upheld in the clear circumstance where a Member simply chooses to skip that stage of the dispute settlement process. China has identified no basis on which the Panel should condone such conscious disregard of a fundamental requirement under the DSU.

B. The Alleged “Failure . . . to Provide Legal Authority” is Not a “Specific Measure at Issue in This Dispute”

1. China Has Failed to Establish the So-Called “Omission” as a “Measure” Subject to WTO Dispute Settlement Proceedings

9. The United States has noted that generally an “omission” would be a “measure” for purposes of WTO dispute settlement only to the extent that a WTO provision requires a Member to take a particular action.⁸ Here, although China styles the measure that is the subject of its “as such” claim as an “omission,” that is, a “failure . . . to enact legislation,”⁹ it has declined to identify any WTO provision requiring the enactment of particular legislation.¹⁰ Even with respect to the WTO provisions it has identified as the basis for its claims of inconsistency – SCM Articles 19.3 and 19.4, and GATT Article I:1 – China has not advanced any interpretation that suggests an affirmative obligation for a Member to adopt certain legislation.¹¹ Without being connected to such an affirmative obligation, the “measure” China seeks to challenge “as such” does not constitute an “omission” cognizable for purposes of WTO dispute settlement proceedings.

2. China Has Failed to “Identify the Specific Measures at Issue” Nullifying or Impairing a Benefit Accruing to China Under the Covered Agreements

10. The United States has demonstrated that, in avoiding any reference to specific aspects of U.S. law that result in the alleged WTO-inconsistent actions at issue, China has failed to “identify the specific measures at issue in this dispute,” as required by Article 6.2 of the DSU. China has not identified the specific measures that gives rise to the alleged nullification or impairment of a benefit accruing to China under the covered agreements, or, more specifically, it

⁸ See U.S. Statement Regarding U.S. Preliminary Ruling Requests, paras. 3-5, U.S. Answers to First Panel Questions, para. 180.

⁹ China Response to U.S. Request for Preliminary Rulings, para. 20.

¹⁰ See U.S. Statement Regarding U.S. Preliminary Ruling Requests, para. 5.

¹¹ See Panel Request, WT/DS379/2, p. 3. See also China Answers to First Panel Questions, paras. 272-277.

has not identified any provisions of U.S. law that will “as such” produce duties that necessarily give rise to a so-called double remedy.¹²

11. China argues that, rather than the concurrent application of AD and CVD measures, “it is the absence of legal authority that is the source of the impermissible double remedies of which China complains in this dispute.”¹³ It is difficult, however, to understand how the “absence of legal authority to avoid the imposition of a double remedy” can be the source of the alleged double remedy.

12. Indeed, China’s own characterization of its complaint belies its assertion that an absence of legal authority is “the source of the impermissible double remedies.” China has stated throughout this dispute that the so-called double remedy flows directly and necessarily from the concurrent imposition of CVD measures and AD measures based on an NME methodology. For example, China has asserted that, “the simultaneous application of the NME methodology and countervailing duties necessarily results in a double remedy for the same alleged acts of subsidization”;¹⁴ and “the imposition of a double remedy for the same alleged subsidy is *inherent* in the concurrent application of the NME methodology and countervailing duties to the same categories of imports.”¹⁵

13. Thus, although China’s claims continue to lack specificity as to how or to what extent the double remedy arises,¹⁶ it has consistently made the general assertion that the alleged double remedy arises from the concurrent imposition of CVD measures and AD measures based on an NME methodology. Once those measures are imposed concurrently, under China’s own theory, a double remedy emerges. Instead of pointing to the aspects of U.S. law that create the alleged double remedies as a “necessary result,” China points to an alleged “absence of legal authority” to avoid imposition of double remedies.

¹² U.S. First Written Submission, paras. 67-72; U.S. Answers to First Panel Questions, paras. 2-3, 9-10.

¹³ China Answers to First Panel Questions, para. 3. See also *id.* at para. 274.

¹⁴ China First Written Submission, para. 330.

¹⁵ China First Written Submission, para. 366. (Original emphasis) See also China First Written Submission, para. 346 (“[I]t was widely recognized that the concurrent application of the NME methodology and countervailing duties would give rise to the problem of double remedies for the same acts of subsidization.”); China First Written Submission, para. 374 (“A double remedy will ... arise in all cases in which Commerce applies the two remedies simultaneously.”); China Response to U.S. Request for Preliminary Rulings, para. 16 (“The double remedy arises as a necessary result of the operation of the two remedies whenever they are used in conjunction with each other.”); and China Answers to First Panel Questions, para. 29 (“China’s panel request makes clear that, in China’s view, the violations occur in any instance in which the United States applies the two remedies simultaneously, not just in the specific investigations at issue in this dispute.”)

¹⁶ For example, in paragraph 283 of its Answers to the First Panel Questions, China states that it “considers that the use of an NME methodology *necessarily offsets any subsidies* that the producer might have received.” (Emphasis added). Then in paragraph 287, China states that “China is not challenging, *per se*, the concurrent application of countervailing duties and an NME methodology.”

14. When invited by the Panel in its written questions to respond to the U.S. assertion that allowing the complaining party to rephrase any positive requirement as “a refusal of the law to provide authority not to do X” would allow circumventing the Article 6.2 requirement to identify the measures at issue, China’s answer does no more than continue the semantic gymnastics. China baldly states it is not challenging “a refusal of the law to provide authority *not* to do X,” suggesting instead that its claims are based on “the absence of legal authority for Commerce to take *affirmative* steps to avoid the imposition of double remedies.”¹⁷ Inserting the term “affirmative steps” into its description of the measure does not alter the fact that China never identified the basis for the concurrent application which is the source of China’s alleged nullification and impairment.¹⁸

15. China also seeks to find support for its attempted identification of the “measure at issue” in the Appellate Body Report in *EC - Selected Customs Matters*, pointing to the following statement:

Had the United States explicitly stated in the panel request that the heart of the problem is the *absence* of any procedures or institutions or mechanisms to ensure against divergences or to reconcile them promptly and as a matter of right when they occur, there would have been little doubt as to whether the panel request set out a claim under Article X:3(a) against the European Communities' system of customs administration as a whole.¹⁹

As the underlined portion of the quoted statement makes clear, and as China itself acknowledges,²⁰ the Appellate Body was addressing whether “a brief summary of the legal basis of the complaint” had been provided “sufficient to present the problem clearly,” as required by Article 6.2. The Appellate Body did *not* assert that such a characterization would satisfy the separate and distinct requirement in Article 6.2 to “identify the specific measures at issue,”²¹ which is the basis for this U.S. preliminary ruling request.

16. Rather than supporting China’s description of the “specific measure at issue,” the Appellate Body Report in *EC - Selected Customs Matters* highlights the inadequacy of China’s panel request. In stark contrast to China’s panel request, the complaining party in *EC - Selected Customs Matters* identified particular legal instruments of the responding party by citation and indicated that its challenge was based on the administration of those instruments *collectively*. On this basis, the Appellate Body concluded that the measures were identified with sufficient

¹⁷ China Answers to First Panel Questions, para. 13. (Original emphasis)

¹⁸ See U.S. Answers to First Panel Questions, paras. 1-3.

¹⁹ *EC - Selected Customs Matters (AB)*, para. 172. (Original italics; underlining added)

²⁰ See China Answers to First Panel Questions, para. 6.

²¹ See *EC - Selected Customs Matters (AB)*, para. 119 (“While these two issues relate to the identification of the specific *measure* at issue, the third issue raised by the United States [and discussed in the quotation above] relates to the Panel’s construction of the nature and scope of the *claim* set out in the panel request.”).

specificity for purposes of Article 6.2 of the DSU.²² The Appellate Body also observed, in contrast, that references to “implementing measures and other related measures” in the context of that panel request did not meet the specificity requirement of Article 6.2.²³ Given that China’s panel request makes no reference to *any* aspects of U.S. law in respect of the “as such” challenge, it falls far short of the specificity requirement in Article 6.2.

III. COMMERCE’S FINANCIAL CONTRIBUTION DETERMINATIONS WERE CONSISTENT WITH THE SCM AGREEMENT

17. As demonstrated in the U.S. First Written Submission, Commerce’s financial contribution findings in the various challenged CVD determinations were consistent with the SCM Agreement. In this submission, the United States reiterates certain important points and responds to several of China’s arguments pertaining to the interpretation of the term “public body” in Article 1.1(a)(1) of the SCM Agreement.

A. The Ordinary Meaning of the Term “Any Public Body,” in its Context and in Light of the Object and Purpose of the SCM Agreement, Confirms the U.S. Interpretation of that Term and Supports Commerce’s Determinations

18. As explained in the U.S. First Written Submission, 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. In this submission, the United States focuses on several additional important points regarding the ordinary meaning of the term, its context, and the object and purpose of the SCM Agreement.

1. The Ordinary Meaning of the Term “Any Public Body” Confirms that the U.S. Interpretation of that Term is Correct

19. The ordinary meaning of the term “public” includes the notion of belonging to the government or the nation.²⁴ The United States has already explained why the ordinary meaning of the word “public” supports Commerce’s determinations in the four countervailing duty investigations and will not dwell at length on this topic. Instead, it is worthwhile to focus on the meaning of the term “any” preceding “public body” in Article 1.1(a)(1) of the SCM Agreement.

20. China is correct that the term “any,” when used as an adjective, as it is in Article 1.1(a)(1), means “without limitation as to which” of the beings or things named.²⁵ Likewise, it

²² See *EC - Selected Customs Matters (AB)*, para. 152.

²³ See *EC - Selected Customs Matters (AB)*, footnote 369.

²⁴ See *The New Shorter Oxford English Dictionary*, at 2404 (1993) (Exhibit US-95). See also U.S. First Written Submission, para. 95.

²⁵ See *China Answers to First Panel Questions*, para. 55.

means “no matter which,” or “whichever,” or “*of whatever kind*” of the being or thing at issue.²⁶ In other words, through the use of the term “any,” the SCM Agreement indicates that there might be different *kinds* of public bodies.

21. The use of the term “any” also indicates that the drafters of the SCM Agreement did not intend the term “public body” to have a meaning that would relate back to the term “government.” That is, the SCM Agreement could have been written to say “government or public body,” or “government or its public bodies,” or “government or another public body.” But the term used is “government or any public body.” The use of the term “any” further distinguishes the term “public body” from the term “government.”

22. As discussed further below, China argues that a “public body” must implicitly be vested with government authority so that it is able to “entrust or direct” a private body. However, as noted in the U.S. Answers to First Panel Questions, it is not necessarily the case that all public bodies must possess the capacity to entrust or direct an entity.²⁷ This is consistent with the use of the term “any” preceding “public body.”

2. The Context of the Term “Any Public Body” Confirms the U.S. Interpretation of that Term Is Correct

23. The context of the term “any public body” supports the conclusion that a “public body” includes entities owned by the government or controlled by the government. The term “public body” appears in the same article of the SCM Agreement as the opposite term “private body.” The term “private,” when referring to a service or business, is defined as “provided or owned by an individual rather than the State or a public body.”²⁸ Therefore, it follows that the term “public,” when referring to a service or business, means “provided or owned by the State rather than an individual.”

24. China maintains that because the SCM Agreement refers to “a government” or “any public body” collectively as “government,” the two separate terms must possess similar characteristics and should be functional equivalents.²⁹ China is incorrect. Significantly, China essentially failed to answer Panel Question 14(a), continuing to ignore the presence in Article 1.1(a)(1) of the term “or.” Article 1.1(a)(1) states that “a government *or* any public body” can provide a “financial contribution” within the meaning of the SCM Agreement.³⁰ Article 1.1 of the SCM Agreement defines “government” as including a “government or any public body within the territory of a Member.” As the United States has explained, the two separate terms

²⁶ Oxford English Dictionary, Online Version, adjective definition *gen.* (Exhibit CHI-131) (emphasis added).

²⁷ See U.S. Answers to First Panel Questions, para. 43.

²⁸ *The New Shorter Oxford English Dictionary*, at 2359 (1993) (Exhibit US-95).

²⁹ See, e.g., China First Opening Statement, paras. 21-24; China Answers to First Panel Questions, paras. 52-54.

³⁰ See China Answers to First Panel Questions, paras. 52-54.

“government” and “public body” must have distinct and different meanings.³¹ To interpret the term “public body” to refer to entities that “possess characteristics similar to those that define a government”³² would be to reduce the term “public body” to redundancy or inutility.³³

25. Additionally, instead of answering the question the Panel asked about the use of the term “or” in Article 1.1(a)(1) of the SCM Agreement, China discusses the Appellate Body’s analysis of the text of Article 9.1(a) of the Agriculture Agreement in *Canada – Dairy*.³⁴ However, Article 9.1(a) of the Agriculture Agreement refers to “governments or *their* agencies” (emphasis added). The use of the term “their” in Article 9.1(a) of the Agriculture Agreement creates a link between “governments” and “agencies,” and such a link is absent from and not supported by the text of the SCM Agreement with respect to the terms “government” and “any public bodies.” This key difference between these two provisions supports the interpretation advanced by the United States, not that put forward by China.

26. It is useful to compare Article 1.1(a)(1) of the SCM Agreement to Article 2.1. Article 2.1 states that “an enterprise or industry or group of enterprises or industries” will be referred to subsequently as “certain enterprises” throughout the SCM Agreement. This is a similar drafting technique as that used in Article 1.1(a)(1), where “government” and “public body” are referred to subsequently throughout the Agreement as “government.” Clearly, the terms “enterprise” and “industry” (and groups thereof) have different meanings, despite being referred to collectively as “certain enterprises.” It could not be the case that an “industry” must share similar characteristics to an “enterprise.” Likewise, it cannot be the case that any “public body” must share similar characteristics, or be equivalent to, the “government.” China seeks to elevate a simple drafting technique into a rule that would read the term “public body” out of the SCM Agreement, by making it the “functional equivalent” of the government.

27. It is common practice to define one treaty term as including several different terms or concepts. The WTO agreements do this repeatedly. “Injury” is defined in the SCM Agreement and AD Agreement to mean not only “material injury” and “threat of material injury,” but also “material retardation” of the establishment of a domestic injury.³⁵ The term “financial services” is defined in the GATS Annex on Financial Services as including not only financial and banking services, but also “insurance and insurance-related services.”³⁶ China’s argument that one element in the definition of “government” – namely, “any public body” – should be read out of the SCM Agreement therefore is untenable.

³¹ See U.S. First Written Submission, paras. 98-99.

³² China First Opening Statement, para. 22.

³³ See *US – Gasoline (AB)*, p. 23 (stating that treaty interpretation “must give meaning and effect to all the terms of a treaty”).

³⁴ See China Answers to First Panel Questions, paras. 53

³⁵ See SCM Agreement, Art. 15 n.45; AD Agreement, Art. 3 n.9.

³⁶ GATS Annex on Financial Services, para. 5(a).

28. China also argues that because there is a financial contribution pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement only when a private body, *inter alia*, carries out “functions ... which would normally be vested in the government,” then “it follows *a fortiori* that the entity responsible for entrusting or directing the private body must itself be vested with government authority.”³⁷ There are at least two fundamental problems with this argument.

29. First, China again ignores the fact that the term “government” is defined for purposes of the SCM Agreement as “government or any public body within the territory of a Member.” This is important when analyzing the meaning of the language in subparagraph (iv) of Article 1.1(a)(1), which includes references to the term “government,” which is defined earlier. Subparagraph (iv) states that there is a financial contribution when a government or any public body entrusts or directs a private body:

...to carry out one or more of the types of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

Keeping in mind that the term “government” is defined to mean “government or any public body within the territory of a Member,” then the above language is properly read as follows:

...to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the *government or any public body within the territory of a Member* and the practice, in no real sense, differs from practices normally followed by *governments or any public bodies within the territory of a Member*.

Therefore, the proper reading of Article 1.1(a)(1)(iv) reveals that there is no language regarding strictly “governmental authority,” which could then be implied elsewhere in Article 1.1. The language in subparagraph (iv) refers simply to the types of functions in subparagraphs (i) through (iii) that otherwise normally would be carried out by, and vested in, governments or any public bodies under subparagraphs (i) through (iii). To take a concrete example, if a public body entrusted (*i.e.*, gave responsibility to) a private body to sell goods, and the selling of the goods normally would be vested in any public body (and therefore the practice did not differ from the practice of selling goods normally followed by any public body), then the conditions of Article 1.1(a)(1)(iv) have been met.

30. Indeed, as the Appellate Body has explained, the language in subparagraph (iv) simply refers back to the functions described in subparagraphs (i) through (iii), to ensure that only actions covered in subparagraphs (i) through (iii), and not something “outside the scope” of

³⁷ See China Answers to First Panel Questions, paras. 86.

those subparagraphs, are captured by instances of government (or, of course, public body) entrustment or direction of a private body.³⁸ There is nothing inherently governmental in nature about providing loans or equity within the meaning of subparagraph (i) or providing goods or services within the meaning of subparagraph (iii). Yet, clearly, a private body can be entrusted or directed to provide loans, equity, or goods and services, and there will be a financial contribution within the meaning of the SCM Agreement.

31. Second, as the United States has explained, China’s argument wrongly conflates the standard under Article 1.1(a)(1)(iv) with the question of whether an entity is a “public body.”³⁹ 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. Furthermore, as demonstrated above, the use of the term “any” preceding “public body” indicates that there may be more than one kind of public body. This means that some public bodies might not have the capacity to direct private bodies by exercising authority over them within the meaning of the Appellate Body’s interpretation of the term “directs.”⁴⁰ That does not mean that the entities are not “public bodies.” China is incorrect that the language in subparagraph (iv) somehow implies that “any public body” must be vested with government authority.

32. The proper interpretation is that a “public body” is an entity owned or controlled by the government, but not necessarily authorized by the government to perform government functions. This was the approach adopted by the panel in *Korea – Commercial Vessels*.⁴¹ That panel rejected Korea’s proposed standard, which was substantially similar to China’s proposed standard in this dispute. Korea, relying upon Article 5 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles”), proposed that an entity is a public body if it is “empowered by the law of the State to exercise elements of governmental authority,” and if it is “acting pursuant to such authority in the particular instance.”⁴² Korea also argued that an entity is not a public body if it is acting commercially.⁴³ The panel concluded, among other things, that these approaches could have resulted in the same entity being a public body on one day and a private body on the next day. The panel declined to adopt such an interpretation, reasoning instead that “[i]n all cases, ... public body status can be determined on the basis of government (or other public body) control.”⁴⁴ This Panel should follow a similar approach.

33. The *Korea – Commercial Vessels* panel also rejected the same contextual argument, based upon the definition of “public entity” in the GATS Annex on Financial Services, that

³⁸ *US – DRAMS (AB)*, para. 112.

³⁹ *See* U.S. Answers to First Panel Questions, para. 44.

⁴⁰ *See US – DRAMS (AB)*, para. 111.

⁴¹ *Korea – Commercial Vessels*, para. 7.55.

⁴² *Id.*, para. 7.39.

⁴³ *Id.*, para. 7.44.

⁴⁴ *Id.*, para. 7.55.

China advances here.⁴⁵ 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.

34. China argues that because U.S. domestic countervailing duty law uses the term “public entity,” then the United States must consider the terms “interchangeable.”⁴⁶ The fact that the United States implemented the SCM Agreement by using the term “public entity” in no way indicates that the United States intended the definition of “public entity” in an entirely separate agreement to dictate the meaning of terms in either the SCM Agreement or U.S. domestic countervailing duty law.

35. Although China argues that panels routinely have relied upon terms in one agreement when interpreting similar terms in another agreement,⁴⁷ an analysis of similar terms in other covered agreements cannot outweigh the ordinary meaning and immediate context of a term in the SCM Agreement. The definition of “public entity” in the GATS Annex on Financial Services sets forth a distinction between an entity carrying out government functions and an entity supplying financial services on commercial terms. In the SCM Agreement, on the other hand, the question of whether an entity is providing services on commercial terms is a “benefit” question, not a financial contribution or public body question. Accordingly, the definition of “public entity” in the GATS Annex on Financial Services, based in large part on a distinction between non-commercial and commercial action, is not relevant to the interpretation of the term “public body” in Article 1.1 of the SCM Agreement.

36. China further argues that the term “organismo publico” in the Spanish version of the SCM Agreement is the same term as that used for “government agency” in Article 9.1 of the Agreement on Agriculture, and that this somehow demonstrates that a “public body” or “organismo publico” under the SCM Agreement must be equivalent to a government.⁴⁸ China’s argument is unavailing. The issue in this dispute concerns 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 a term in the SCM Agreement. Furthermore, there is no discrepancy between the English and Spanish versions of the SCM Agreement. Any discrepancy that may exist lies solely in the texts of the Agreement on Agriculture, and this Panel need not reach the issue of interpreting that agreement – indeed, the Agreement on Agriculture is not within this Panel’s terms of reference. The reconciliation of the meaning of the different versions of the Agreement on Agriculture is a matter for another panel in another dispute.

3. The Object and Purpose of the SCM Agreement Confirms that the U.S. Interpretation of the Term “Any Public Body” is Correct

⁴⁵ See *id.*, para. 7.47.

⁴⁶ China Answers to First Panel Questions, para. 81.

⁴⁷ See *id.*, paras. 83-84.

⁴⁸ See China First Opening Statement, para. 23.

37. China argues that the entrustment or direction provision of Article 1.1(a)(1)(iv) of the SCM Agreement is sufficient to restrain governments from providing subsidies through companies that they own.⁴⁹ Government entrustment or direction, however, entails the government actions of exercising authority over, or giving responsibility to, a private body.⁵⁰ The Appellate Body has recognized that evidence of these government actions may be circumstantial in nature.⁵¹ When a government owns an entity, the government easily can avoid creating any evidence of its entrustment or direction of that entity. Communications between the government and the entity may occur behind closed doors. The government and the entity may have a strong incentive to maximize secrecy and privacy. An interpretation of Article 1 of the SCM Agreement that treats the government-owned entity as a public body avoids these problems and 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, which, as the Appellate Body has explained, “includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies.”⁵²

4. The Working Party Report Confirms that the U.S. Interpretation of the Term “Any Public Body” is Correct

38. As the United States has demonstrated, the ordinary meaning of the term “any public body,” in its context and in light of the object and purpose of the SCM Agreement, indicates that a “public body” is an entity owned or controlled by the government. With respect to the entities at issue in this dispute, this interpretation is further confirmed by the Working Party Report on China’s Accession.

39. As the United States has explained, paragraph 172 notes that “some Members of the Working Party sought to clarify 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.”⁵³ The representative of China did not dispute this nor represent that these Members’ understanding was incorrect. Instead, China noted that “such financial contributions would not necessarily give rise to a benefit.” In not disputing Members’ clarification of this matter, China indicated its own recognition that its state-owned enterprises and state-owned commercial banks are “public bodies.” This recognition is consistent with the ordinary meaning of the term “public body” in its context and in light of the object and purpose of the SCM Agreement. Accordingly, it is proper to treat China’s state-owned enterprises and state-owned banks as public bodies.

⁴⁹ See China First Opening Statement, paras. 19-20.

⁵⁰ See *US – DRAMS (AB)*, paras. 110-111.

⁵¹ See, e.g., *id.*, paras. 150, 157-158

⁵² *US – Softwood Lumber CVD Final (AB)*, para. 95 (citing *US – German Steel (AB)*, paras. 73-74).

⁵³ See U.S. First Written Submission, paras. 102-103; *Working Party Report*, para. 172.

B. Neither the Draft Articles Nor the Appellate Body’s Footnote Reference to Them in *US – DRAMS* Is Relevant to this Dispute

40. As demonstrated in the U.S. First Written Submission, the Draft Articles are not relevant rules of international law in this dispute. China, however, continues to argue that the Draft Articles 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. China is incorrect, for several reasons.

1. The Footnote in *US – DRAMS* Relied Upon by China is Not Relevant to this Dispute and Does Not Constitute a Finding that Government-Owned or Controlled Entities Cannot be “Public Bodies”

41. First, as the United States explained in its answers to the Panel’s questions, the Appellate Body in *US – DRAMS* addressed a different issue than the issue before the Panel in the present dispute.⁵⁴ 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.⁵⁵ The issue in the present dispute, on the other hand, is the interpretation of the term “public body” in Article 1.1(a)(1) of the SCM Agreement. In the passage of *US – DRAMS* frequently cited by China, footnote 179 to paragraph 112, the Appellate Body did not address the meaning of the term “public body” and whether an entity owned or controlled by the government can be a “public body.”

42. China argues that the Appellate Body, by relying on the Draft Articles in footnote 179 of *US – DRAMS*, accepted that government-owned corporate entities are separate from the state and constitute private bodies unless exercising elements of governmental authority. China is incorrect. The Appellate Body’s statement in footnote 179 was not relevant to the outcome of that dispute. In another dispute, *US – Countervailing Measures*, involving privatization, the Appellate Body was squarely faced with the argument that there is “a clear line separating a legal person (a firm) from its owners (shareholders).”⁵⁶ The Appellate Body *rejected this argument*, stating that “the legal distinction between firms and their owners that may be recognized in a domestic legal context is not necessarily relevant, and certainly not conclusive, for the purpose of determining whether a ‘benefit’ exists under the SCM Agreement, because a financial contribution bestowed on those investing in a firm may confer a benefit ‘upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.’”⁵⁷

⁵⁴ See U.S. Answers to First Panel Questions, paras. 28-31.

⁵⁵ See, e.g., *US – DRAMS (AB)*, paras. 88, 102.

⁵⁶ *US – Countervailing Measures (AB)*, para. 107.

⁵⁷ *Id.*, para. 115.

43. Likewise, the legal distinction between firms and their owners is not necessarily relevant, and certainly not conclusive, in a “public body” analysis. Although the Appellate Body was analyzing “benefit” in *US – Countervailing Measures*, the important point is that it was careful not to draw a bright line between a firm and its owners, in part because it was concerned about the risk of circumvention of the disciplines of the SCM Agreement.⁵⁸ Therefore, the footnote reference to the general separateness of a firm and its owners in *US – DRAMS* is not compelling, especially considering that this issue was not relevant to the resolution of that dispute.

44. In fact, the more relevant footnote in *US – DRAMS* is footnote 225, in which the Appellate Body noted the panel’s view that Commerce could have treated wholly government-owned entities as “public bodies.”⁵⁹ This is consistent with the panel’s statement in *EC – DRAMS* that government ownership may lead to a public body finding. That panel stated:

We do not wish to imply that it would not be possible or justified to treat a 100 per cent government owned entity as a public body, depending on the circumstances. Our task, however, is to review the determination actually made by the EC, not to make our own *de novo* interpretation of the facts in this case. Since the EC considered Woori Bank to be a private body, we will examine the question of entrustment or direction by the government with regard to Woori Bank. *A similar consideration applies to our discussion and analysis of Chohung Bank and the KEB in which the government of Korea held 80 per cent and 43 per cent of the shares, respectively, at the time of the investigation.*⁶⁰

45. In sum, footnote 179 in the *US – DRAMS* Appellate Body report does not constitute any definitive acknowledgment of the Draft Articles by the Appellate Body. Nor does it constitute a decision by the Appellate Body that government-owned entities cannot be “public bodies.” As described above, the panel in *Korea – Commercial Vessels* rejected an interpretation of “public body” based upon Article 5 of the Draft Articles.

2. The Draft Articles are Not Relevant Rules of International Law Applicable in the Relations Between the Parties in this Dispute

⁵⁸ *See id.*, para. 115.

⁵⁹ *US – DRAMS (AB)*, para. 131, n.225. The full text of that footnote is as follows:

Some of Hynix’s creditors were treated by the USDOC as Group B creditors despite the fact that the GOK held a 100 per cent ownership interest. The Panel noted that, in its view, the USDOC might have been entitled to treat these 100 per cent-owned firms as “public bodies”, but having refused to so classify them, the USDOC was required to establish entrustment or direction with respect to such creditors. (Panel Report, footnote 29 to para. 7.8 and footnote 80 to para. 7.62)

⁶⁰ *EC – DRAMS*, para. 7.119, n.129 (emphasis added).

46. In addition to the fact that the Appellate Body did not endorse the use of the Draft Articles in an interpretation of the term “any public body,” 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.

47. As an initial matter, China incorrectly argues that Article 3.2 of the DSU and Article 31 of the Vienna Convention “require” the Panel to take into account the Draft Articles in an interpretation of Article 1.1 of the SCM Agreement.⁶¹ At the same time, China appears to recognize that any such requirement would only apply to the extent the Draft Articles are “relevant.”⁶² This is because Article 31(3)(c) of the Vienna Convention only states that a treaty interpreter need take into account “any *relevant* rules of international law applicable in the relations between the parties” (emphasis added). Accordingly, the Panel certainly is *not* required to take into account the Draft Articles if they are not relevant and not applicable in the relations between the parties in this instance. In other words, 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. In fact, as the United States has demonstrated, they are *not* relevant and *not* applicable, and the Panel is *not* required to rely upon them.

48. The purpose of the Draft Articles is to formulate “the basic rules of international law concerning the responsibility of States for their internationally wrongful acts.”⁶³ 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.”⁶⁴ Importantly, the “articles *do not* attempt to define the content of the international obligations, the breach of which gives rise to responsibility.”⁶⁵ Put differently, the scope of the Draft Articles is limited to secondary rules of international law and explicitly excludes primary rules of international law.

49. The Draft Articles define an “internationally wrongful act of a State” as an action or omission that: (1) is attributable to the State under international law; and (2) constitutes a breach of an international obligation of the State.⁶⁶ Chapter II of Part One of the Draft Articles (*i.e.*, the chapter relied upon by China) deals with attribution of conduct to a State. Chapter III of Part One discusses “in general terms” when there is a breach of an international obligation, but does not specifically describe what constitutes a breach, because that is a question for the primary rules and treaties of international law.⁶⁷

⁶¹ See, e.g., China Answers to First Panel Questions, paras. 56-58, 64-66, 69.

⁶² See, e.g., *id.*, para. 66.

⁶³ *Draft Articles*, General Commentary, para. 1.

⁶⁴ *Id.*

⁶⁵ *Id.* (emphasis added).

⁶⁶ *Id.*, Article 2.

⁶⁷ *Id.*, Commentary to Chapter III, paras. 1-3.

50. Turning to this particular dispute, the question here is whether the United States breached its obligations under the GATT 1994, the AD Agreement, and/or the SCM Agreement.⁶⁸ China alleges that the United States did; the United States, of course, defends that it did not. Quite simply, the Draft Articles say nothing about *whether* such a breach occurred. The commentaries to the Draft Articles state as follows:

It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States. In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc.⁶⁹

In this dispute, to determine whether the United States breached its obligation to impose countervailing duties only in accordance with the provisions of the SCM Agreement,⁷⁰ the Panel must analyze whether the Department of Commerce’s findings of countervailable subsidies were consistent with the definition of such subsidies in the SCM Agreement and with the procedural requirements of that Agreement. These are questions solely for the SCM Agreement and GATT 1994. The Draft Articles are not helpful in determining *whether* the United States breached its obligations.

51. 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, but relates to the substantive conditions for something to be a subsidy, which, even if it is, is not prohibited as such but may give the right to another WTO Member, in this case, the United States, to impose CVDs if certain additional conditions under the “primary rules” of the SCM Agreement are met. As the Appellate Body stated in *US – FSC (Article 21.5 I)*:

Article 1.1 of the *SCM Agreement* sets out a *definition* of a “subsidy” for the purposes of that Agreement. Although this definition is central to the applicability and operation of the remaining provisions of the Agreement, Article 1.1 itself does not impose any obligation on Members with respect to the subsidies it defines. It is the provisions of the *SCM Agreement* which follow Article 1, such as Articles 3 and 5, which impose obligations on

⁶⁸ See U.S. First Written Submission, para. 115. See also Request for the Establishment of a Panel by China, at Section B.

⁶⁹ *Draft Articles*, Commentary to Chapter III, para. 2 (footnote omitted).

⁷⁰ See SCM Agreement, Art. 10.

Members with respect to subsidies falling within the definition set forth in Article 1.1. . . .

In other words, Article 1.1 of the SCM Agreement does not prohibit a Member from foregoing revenue that is otherwise due under its rules of taxation, even if this also confers a benefit under Article 1.1(b) of the SCM Agreement. . . .⁷¹

Similarly, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body confirmed that:

. . . the granting of a subsidy is not, in and of itself, prohibited under the SCM Agreement. Nor does granting a “subsidy”, without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the SCM Agreement.⁷²

In sum, 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.

52. The Draft Articles are not relevant for another reason as well. This is because Article 55 of the Draft Articles contains a *lex specialis* clause, which states:

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

The SCM Agreement is a “special rule of international law” that supersedes the Draft Articles. China’s argument on this point is entirely circular. China argues that the determination of whether Article 1.1 of the SCM Agreement supersedes the Draft Articles can only be made after first having recourse to the Draft Articles.⁷³ It states that “as the panel conducts its interpretative inquiry, having recourse to the ILC Draft Articles as it is required to do under Article 31(3)(c) of the Vienna Convention, it will have to evaluate whether the drafters of the SCM Agreement intended to depart from customary international law, and if so, to what extent.”⁷⁴ However, if the Panel first applies the Draft Articles to the SCM Agreement in its interpretation of Article 1.1, then it will have had to *presume* that Draft Articles are “relevant” within the meaning of Article 31(3)(c), which simply reverses the required order of analysis under the Vienna

⁷¹ *US – FSC (Article 21.5 I) (AB)*, paras. 85-86

⁷² *Canada – Aircraft (Article 21.5) (AB)*, para. 47.

⁷³ *See* China Answers to First Panel Questions, paras. 67-69.

⁷⁴ *Id.*, para. 69.

Convention, and the question of whether Article 1.1 is a “special rule of international law” is moot.

53. Rather, the proper approach for determining whether the SCM Agreement supersedes the Draft Articles is to determine whether the SCM Agreement is a “special rule of international law” that “produces different consequences than would otherwise flow from the rules of attribution” in the Draft Articles.⁷⁵ This can be done by a simple analysis of the terms of the SCM Agreement and a comparison of those terms to the terms used in the Draft Articles. Article 1.1 of the SCM Agreement uses the term “public body” when referring to one of the types of entities that can provide a financial contribution. It does not simply refer to the “State” or a “government” as the entity that can provide a financial contribution. Rather, it includes a separate type of entity, by use of the term “public body,” which does not appear in the Draft Articles. Clearly, then, Article 1.1 of the SCM Agreement can produce different consequences than the attribution provisions in the Draft Articles.

54. Finally, China argues that rather than constituting *lex specialis*, Article 1.1 of the SCM Agreement is “fully aligned” with the Draft Articles because the three categories of entities identified therein, “government,” “public body,” and “private body” that is “entrusted or directed,” “closely parallel” the categories of attribution in Articles 4, 5, and 8, respectively, of the Draft Articles.⁷⁶ This is incorrect, as a brief examination of Article 8 of the Draft Articles and Article 1.1 of the SCM Agreement demonstrates.

55. Article 8 of the Draft Articles states that the conduct of a person or a group of persons will be considered an act of the State if the person or group is acting under either the instructions, the direction, or the control of the State. China argues that this article is equivalent to the entrustment or direction provision in Article 1.1(a)(1)(iv) of the SCM Agreement.⁷⁷ However, a more plausible reading of the text of Article 8 of the Draft Articles is that it encompasses both “public bodies” within the meaning of the SCM Agreement and “private bodies” that are entrusted or directed.

56. As the United States has demonstrated, an entity is a “public body” within the meaning of the SCM Agreement if it is owned or controlled by the government. China, on the other hand, argues that ownership or control is only relevant in cases of entrustment or direction under Article 1.1(a)(1)(iv).⁷⁸ However, “control” is not necessarily relevant in an entrustment or direction analysis. Entrustment entails “the action of giving responsibility to someone for a task or an object.”⁷⁹ In other words, it entails a handing over of control to another entity. Ownership, meanwhile, is a prime indicator of control.

⁷⁵ See *Draft Articles*, Article 55, Commentary, para. 3.

⁷⁶ See China Answers to First Panel Questions, paras. 73-74.

⁷⁷ See China First Written Submission, paras. 73-74; China Answers to First Panel Questions, paras. 73-74.

⁷⁸ See China First Written Submission, paras. 60-61, 74, 78.

⁷⁹ *US – DRAMS (AB)*, para. 110.

57. Accordingly, while the references to “instructions” and “direction” in Article 8 of the Draft Articles might be somewhat reminiscent of the entrustment or direction provision in Article 1.1(a)(1)(iv) of the SCM Agreement, the reference to “control” is not. There is no need or basis to draw parallels between the SCM Agreement and the Draft Articles, but in any case, China’s forced parallels are not accurate. Article 5 of the Draft Articles is not “fully aligned” with the “public body” language in Article 1.1 of the SCM Agreement, and Article 8 of the Draft Articles is not “fully aligned” with the “entrusts or directs” language in Article 1.1 of the SCM Agreement.

58. Additionally, the United States notes that, given the level of detail and fine-line distinctions constructed in Articles 5-8 of the Draft Articles, it remains an open, and contested, question whether all of these details and distinctions have risen to the status of customary international law. Only if these articles were customary international law could they be said to be “applicable in the relations between the parties” and, as a result, possibly relevant in this dispute under Article 31.3(c) of the Vienna Convention. That some parts of the Draft Articles might be customary international law does not mean that all of the details of the Draft Articles, including the ILC Commentaries, are.

59. In sum, the Draft Articles are not relevant to this dispute. Moreover, they are not parallel to, or “fully aligned” with, the SCM Agreement and it is not even clear that the detailed distinctions in those articles are “applicable in the relations between the parties” as customary international law. China bases nearly its entire interpretation of the term “public body” on the guidelines in Article 5 of the Draft Articles. When Korea attempted to do this in *Korea – Commercial Vessels*, the panel in that dispute declined to read the Draft Articles into an interpretation of the term “public body.” This Panel should do the same.

60. For all these reasons, the Panel should find that Commerce properly determined that state-owned enterprises and banks that were owned or controlled by the Government of China constituted “public bodies.”

C. Commerce’s Findings that Sales by Public Body Input Producers, Through Trading Companies, Constituted Financial Contributions were Not Inconsistent with the SCM Agreement

61. Commerce properly determined that sales by public body producers, through intermediary trading companies, constituted financial contributions in the *OTR Tires*, *CWP*, and *LWRP* final determinations. The United States will not repeat here its arguments on this issue, but rather will only mention that China again appears to miss the point in its argument that Commerce was required to find that the public body input producers “entrusted or directed” the trading companies to provide financial contributions.⁸⁰

⁸⁰ See China Answers to First Panel Questions, paras. 76-79.

62. As explained in the U.S. First Written Submission, the SCM Agreement does not require that there be only one recipient of the benefit, or that the recipient of the financial contribution be the same as the recipient of the benefit.⁸¹ The SCM Agreement does indeed require that there be a financial contribution and a benefit, but not necessarily that they go to the same person or entity. As the panel in *Mexico – Olive Oil* stated, it is possible that “a benefit might be received by different recipients, that the recipient of the benefit might be different from the recipient of the financial contribution, and that a subsidy can be bestowed directly or indirectly, and in respect of production, manufacture or export of a product.”⁸²

63. Therefore, China misses the point when it argues that “[a]bsent a finding of entrustment or direction, there was no basis for Commerce to conclude that the producers under investigation purchased ‘government-provided goods’ when they acquired inputs from the trading companies.”⁸³ With respect to sales through trading companies, Commerce concluded that the public bodies made financial contributions to the trading companies, not that the public bodies made financial contributions to the respondent subject merchandise producers.⁸⁴ These financial contributions conferred benefits to the respondent subject merchandise producers.⁸⁵ This was a proper application of the SCM Agreement.

IV. COMMERCE’S DETERMINATIONS TO RELY UPON OUT-OF-COUNTRY BENCHMARKS WERE CONSISTENT WITH ARTICLE 14 OF THE SCM AGREEMENT

64. As explained in the U.S. First Written Submission and the U.S. Answers to First Panel Questions, Commerce’s benchmark determinations in the challenged investigations are consistent with the U.S. obligations under the WTO Agreements, in particular Article 14 of the SCM Agreement. In this submission, the United States responds to various arguments China made during the first meeting with the Panel, and in response to the Panel’s questions, concerning Commerce’s determinations to use out-of-country benchmarks to measure the benefit of certain government-provided inputs, loans, and land-use rights.

A. China’s Accession Protocol Recognizes the Right of Members to Use Out-of-Country Benchmarks to Measure Benefit

65. 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 in connection with Commerce’s determinations to use out-of-country

⁸¹ U.S. First Written Submission, paras. 147-159.

⁸² *Mexico – Olive Oil*, para. 7.152.

⁸³ China Answers to First Panel Questions, para. 78.

⁸⁴ See *OTR Tires CVD Final Decision Memorandum*, at 10 (Exhibit CHI-4); *CWP CVD Final Decision Memorandum*, at 10 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 8 (Exhibit CHI-2).

⁸⁵ *Id.*

benchmarks in the challenged investigations.⁸⁶ As the United States has explained, Commerce’s determinations were consistent with Article 14 of the SCM Agreement. Additionally, China has not made arguments concerning claims it included in its request for the establishment of a panel that were based on paragraph 15(b) of the Accession Protocol.⁸⁷ Thus, it is not necessary for the Panel to address China’s claims under paragraph 15(b) of the Accession Protocol. Nevertheless, the United States provides in this submission a few comments on China’s Answers to First Panel Questions regarding paragraph 15(b) to ensure that the U.S. position is not misunderstood.

66. As an initial matter, China continues to assert, erroneously, in its Answers to First Panel Questions that Commerce was required to reference paragraph 15(b) of the Accession Protocol in its CVD determinations. China argues that “[t]o the extent that Commerce considered Section 15(b) to establish a *different* standard for when it is permissible to resort to external benchmarks in the case of investigations involving imports from China, Commerce was required to provide an explanation for its determinations under this different standard, whatever it considered it to be.”⁸⁸ China is incorrect.

67. As explained in the U.S. First Written Submission and in response to the Panel’s Question 29, Commerce based its determinations upon U.S. law. 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.”⁸⁹ As a matter of U.S. law, it was neither necessary nor appropriate for Commerce to seek to justify its determinations on the basis of the SCM Agreement, China’s Accession Protocol, or any other WTO Agreement, rather than on the relevant provisions of U.S. law. As the United States has noted, however, in some instances, where parties to the underlying investigations raised arguments based on China’s Accession Protocol, Commerce addressed these arguments as part of its determination.⁹⁰

68. Contrary to China’s mischaracterization of the U.S. position,⁹¹ 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. 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)

⁸⁶ See, e.g., China Answers to First Panel Questions, para. 90.

⁸⁷ China First Written Submission, para. 31.

⁸⁸ China Answers to First Panel Questions, para. 93 (emphasis in original).

⁸⁹ *US – Lamb Meat (AB)*, para. 136.

⁹⁰ For example, in three of the investigations at issue, Commerce responded to such arguments by noting that a case-by-case approach to the question of whether in-country benchmarks provided the appropriate comparison is the approach China agreed to in its Accession Protocol. See *OTR Tire CVD Final Decision Memorandum*, at 42 (Exhibit CHI-4); *LWS CVD Final Decision Memorandum*, at 40 (Exhibit CHI-3); *LWRP CVD Final Decision Memorandum*, at 17 (Exhibit CHI-2).

⁹¹ See, e.g., China Answers to First Panel Questions, para. 91.

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 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.

69. As a general matter, the United States agrees with China that if a Member were to rely on paragraph 15(b) of China’s Accession Protocol as a justification for a measure that would otherwise not be justified under Article 14 of the SCM Agreement, the conditions under paragraph 15(b) would need to be met.⁹² However, the United States does not agree that the text of paragraph 15(b) imposes on Members any obligation to make any particular factual findings or determinations. On its face, the text simply does not support China’s assertion.

70. China also misunderstands the meaning of the term “special difficulties.”⁹³ Paragraph 150 of the Working Party Report explains that such difficulties could arise due to the fact that “China was continuing the process of transition towards a full market economy.” Members noted that “under those circumstances,” *i.e.*, China’s transition to a market economy, “special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations.” The Working Party Report makes clear that the reason additional flexibility was required for investigating authorities was the transitional nature of China’s economy – that situation alone was likely to pose “special difficulties.”

71. Finally, contrary to China’s misplaced emphasis on the word “considering” in the last sentence of paragraph 15(b) of China’s Accession Protocol,⁹⁴ the more relevant terms in that sentence are “where practicable” and “should.” The last sentence of paragraph 15(b) provides that “*where practicable*, the importing WTO Member *should* adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.” Thus, only where it is practicable, Members “should,” rather than “shall,” make adjustments to in-country benchmarks rather than resort to out-of-country benchmarks. This is consistent with the flexibility Members have in measuring the benefit, and the right of Members to “fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the [SCM] Agreement.”⁹⁵

72. Additionally, China incorrectly asserts that “the United States acted inconsistently with Section 15(c) [of China’s Accession Protocol] by using a methodology under Section 15(b) that

⁹² *See id.*, para. 98.

⁹³ *Id.*

⁹⁴ *Id.*, para. 99.

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

it had not notified to the Committee on Subsidies and Countervailing Measures.”⁹⁶ U.S. CVD law and regulations provide for the methodologies Commerce used to identify and measure the subsidy benefit in each of the challenged investigations, and these laws and regulations have already been notified to the Committee on Subsidies and Countervailing Measures under Article 32.6 of the SCM Agreement.⁹⁷ The United States did not change its CVD laws or regulations in any respect when China became a WTO Member. It was not necessary to do so because those laws and regulations already provided for the methodologies that would be used in cases against goods from China. Commerce relied entirely on laws and regulations that were already notified to the WTO in making its determinations in the challenged investigations.

73. For example, the Department’s regulations regarding the measurement of the benefit conferred by the government provision of goods call for the use of world market prices, an average of such prices, and other means where an actual market-determined price for the good is not available within the country of provision.⁹⁸ The Department relied on those regulations in these cases, and in other cases concerning market economy countries, where in-country benchmarks were not appropriate for measuring the benefit conferred.⁹⁹

74. 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. Those laws and regulations already provide the flexibility for Commerce to “use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks.” Paragraph 15(b) simply provides additional leeway to rely on such methodologies in the case of China, due to the “special difficulties” posed by its transitioning economy.

B. There is No Requirement to Perform a “Price Distortion” Analysis Before a Member May Rely Upon an Out-of-Country Benchmark

75. In China’s Answers to First Panel Questions, China argues that “Commerce did not properly establish that private prices . . . in China are distorted by the government’s predominant role in the market,” suggesting that Commerce relied on a “*per se* rule that private prices are distorted whenever the government plays a *significant* role in the market for the provision of the

⁹⁶ China Answers to First Panel Questions, para. 96; *see also id.*, para. 102.

⁹⁷ *See* United States, “Notification of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements,” G/SCM/N/1/USA/1 (April 10, 1995) and subsequent supplements. Article 32.6 of the SCM Agreement provides: “Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.”

⁹⁸ 19 C.F.R. § 351.511.

⁹⁹ *See, e.g., CWP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-1).

good in question.”¹⁰⁰ As the United States has explained, Commerce did not apply a *per se* rule relying solely on China’s ownership of the domestic production. Rather, Commerce reviewed all record evidence and determined appropriate benchmarks on a case-by-case basis in each of the challenged investigations. Additionally, as explained in the U.S. Answers to First Panel Questions, 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.¹⁰¹

76. In *US – Softwood Lumber CVD Final*, the Appellate Body analyzed a situation in which the government’s participation in the market is “so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.”¹⁰² The Appellate Body, in rejecting the distinction drawn by the panel, explained that:

[i]n terms of market distortion and effect on prices, there may be little difference between situations where the government is the sole provider of certain goods and situations where the government has a predominant role in the market as a provider of those goods. Whenever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices. This would be so even if the government price does not represent adequate remuneration.¹⁰³

The Appellate Body expressed concern that, in such a situation, a comparison to distorted, in-country benchmarks:

. . . would indicate a “benefit” that is artificially low, or even zero, such that the full extent of the subsidy would not be captured. . . . As a result, the subsidy disciplines in the SCM Agreement and the right of Members to countervail subsidies could be undermined or

¹⁰⁰ China Answers to First Panel Questions, para. 126 (emphasis added). China improperly conflates the terms “significant” and “predominant.” As the United States has explained, the Chinese government played a “predominant role” in the various markets in the challenged CVD investigations; its role was not merely “significant.”

¹⁰¹ U.S. Answers to First Panel Questions, paras. 68 and 87.

¹⁰² *US – Softwood Lumber CVD Final (AB)*, para. 93.

¹⁰³ *Id.*, para. 100.

circumvented when the government is a predominant provider of certain goods.¹⁰⁴

77. The Appellate Body confirmed that Article 14(d) of the SCM Agreement “ensures that the provision’s purposes are not frustrated in such situations.”¹⁰⁵ Article 14(d) requires authorities to calculate the benefit “in relation to” prevailing conditions in the market of the country of provision, but does not require the use of private prices in that market in all cases.¹⁰⁶ That is, in such cases, it is permissible for an investigating authority to use out-of-country benchmarks to measure benefit.

78. The Appellate Body’s analysis in *US – Softwood Lumber CVD Final* reflects the economic theory commonly referred to as the “Dominant Firm Model.” This theory concludes that the smaller, non-dominant firms, are “price takers” in that they set a price equal to that of the dominant firm because they are so small relative to the market demand.¹⁰⁷ 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.”¹⁰⁸

79. The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority is not required to forego the ability to determine a benchmark and measure the benefit. Instead, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.

80. In the investigations China challenges, Commerce applied the Appellate Body’s reasoning in *US – Softwood Lumber CVD Final* to the facts before it. As the United States has explained, 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

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, para. 101; *see also id.*, para. 89. In rejecting the Panel’s approach, the Appellate Body noted that, “We have said that the Panel’s restrictive interpretation of paragraph (d) frustrates the purpose of Article 14. More generally, it also frustrates the object and purpose of the SCM Agreement, which includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies.” *Id.*, para. 95 (citing *US – German Steel (AB)*, paras. 73-74).

¹⁰⁶ *US – Softwood Lumber CVD Final (AB)*, para. 101; *see also id.*, para. 89.

¹⁰⁷ *See, e.g.*, F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, 224 (Houghton Mifflin Company 1990) (Exhibit US-150).

¹⁰⁸ *US – Softwood Lumber CVD Final (AB)*, para. 101 (emphasis added).

market-determined prices to measure the adequacy of remuneration.”¹⁰⁹ 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.

C. Direct Government Intervention in the Market May Also Be Considered in Addition to the Government’s Predominant Role as a Supplier in the Market

81. 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 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.”¹¹⁰ Therefore, China asserts that this Panel should disregard any evidence other than that relating to the government’s predominant role as a supplier in the market when determining whether Commerce’s use of an out-of-country benchmark was consistent with the SCM Agreement. However, the Appellate Body did not make such a proclamation.

82. The question before the Appellate Body in *US – Softwood Lumber CVD Final* was whether an investigating authority could use an out-of-country benchmark when the government had a predominant role as a supplier of the good.¹¹¹ 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. For example, the government could set the price or interest rate for the market, which would prevent there being a “marketplace”¹¹² from which an investigating authority could select a benchmark to measure the benefit. This is similar to what Commerce discovered in the lending market, where China set both a floor on lending rates and a cap on deposit rates, guaranteeing the banks a considerable profit margin on each of their loans even while lending at the floor rate.¹¹³ This type of direct regulation of prices and interest rates distorts the domestic market, making prices and interest rates from that market inappropriate for use as benchmarks in determining the benefit.

83. Although it now argues otherwise, China has previously acknowledged in this dispute that direct government controls may be relevant in determining whether in-country prices can be

¹⁰⁹ *CWP CVD Final Decision Memorandum*, at 64-65 (Exhibit CHI-1); *see also LWRP CVD Final Decision Memorandum*, at 36 (Exhibit CHI-2); *LWS CVD Final Decision Memorandum*, at 72 (Exhibit CHI-3).

¹¹⁰ China Answers to First Panel Questions, para. 122 (emphasis removed) (*citing US – Softwood Lumber CVD Final (AB)*, para. 93).

¹¹¹ *US – Softwood Lumber CVD Final (AB)*, para. 80.

¹¹² *See Canada – Aircraft (AB)*, para. 157 (emphasis added).

¹¹³ *CFS CVD Final Decision Memorandum*, at Comment 10 (*citing Policy Lending Verification Report*, at 2-3) (Exhibit CHI-93).

used as benchmarks. In its discussion of hot-rolled steel, China noted that “[t]here is no government agency in China that sets prices for [hot-rolled steel], regulates the prices charged by either SOE or private producers for [hot-rolled steel], or regulates the industry in general.”¹¹⁴ Thus, China itself suggested that this Panel should consider other types of government intervention in the market when determining whether the use of an out-of-country benchmark was appropriate. We agree that it is important for this Panel to consider all relevant evidence of market distortion in assessing the consistency of Commerce’s determinations to use out-of-country benchmarks with the SCM Agreement.

D. Commerce’s Determinations to Use Out-of-Country Benchmarks to Measure the Benefit of Government-Provided Hot-Rolled Steel and BOPP were Consistent with the SCM Agreement

84. 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.¹¹⁵ These determinations rested, in part, on the fact 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.¹¹⁶ Thus private suppliers consisted of only a small portion of the sales in those markets. China’s challenge to these determinations rests upon its assertion that Commerce “employ[ed] a *per se* rule of distortion based on nothing more than the extent of SOE involvement in the input markets. . . .”¹¹⁷ This position, however, incorrectly presumes that establishing that the government has a predominant role in the market is not sufficient. However, as explained above, the Appellate Body found that prices will be distorted in a market where the government has a predominant role.¹¹⁸ Because China’s legal challenges to the use of out-of-country benchmarks for the government-provision of both hot-rolled steel and BOPP are the same, we address them together in this section.

85. In both the *LWRP* and *CWP* investigations, Commerce sought information on the extent of China’s ownership of production in the hot-rolled steel market. However, China failed to provide necessary information regarding its control of the hot-rolled steel sector.¹¹⁹ Therefore, Commerce relied upon the available facts to determine that over 96 percent of hot-rolled steel

¹¹⁴ China First Written Submission, para 125. Commerce explained, however, that these factors were not relevant for the decision on the government-provision of hot-rolled steel. This was because Commerce relied upon the government’s predominant role as a supplier in the hot-rolled steel market, and not upon evidence of direct government regulation of the market. See U.S. First Written Submission, para. 210.

¹¹⁵ See U.S. First Written Submission, para. 210.

¹¹⁶ *CWP CVD Final Decision Memorandum*, at 9-12 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 8 (Exhibit CHI-2); and see *LWS Final Decision Memorandum*, at 18-21 (Exhibit CHI-3).

¹¹⁷ China First Opening Statement, para. 40.

¹¹⁸ See, e.g., *US – Softwood Lumber CVD Final (AB)*, paras. 93, 100-103.

¹¹⁹ *CWP China Verification Report*, at 8 (Exhibit US-64); and *LWRP China Verification Report*, at 7 (Exhibit US-70).

production in China was accounted for by government-owned companies.¹²⁰ The small number of private hot-rolled steel producers operated within the distorted hot-rolled steel market, with prices reflecting the predominant role of the government.¹²¹ Similarly, the volume of imports equaled only *three percent* of total Chinese hot-rolled steel production.¹²² Therefore, because of China’s predominant role in the market, there was no commercial market for hot-rolled steel in China from which Commerce could select a benchmark price.

86. Similarly, when investigating whether private prices in China were usable to measure the benefit of the government-provided BOPP, Commerce first sought to ascertain the extent of government ownership of BOPP production in China. Despite multiple opportunities to clarify the extent of state ownership in the petrochemical industry, China failed to do so.¹²³ As a result, the only record evidence before Commerce showed that one SOE, China Petroleum and Chemical Corporation (Sinopec), which produces BOPP, accounted for *90 percent* of the petrochemical industry.¹²⁴ Based on available facts, Commerce “conclude[d] that the SOE involvement in the petrochemical industry distorts the market, and therefore it would be inappropriate to rely upon domestic private input prices in China as a benchmark.”¹²⁵ Commerce explained that “because of the government’s overwhelming involvement in the [Chinese] market for the inputs in question, the use of private producer prices in China would be akin to comparing the benchmark to itself, (*i.e.*, such a benchmark would reflect the distortions of the government presence).”¹²⁶

87. China’s objection to Commerce’s use of out-of-country benchmarks for hot-rolled steel and BOPP is based upon its claim that Commerce had a *per se* rule that government ownership of production is sufficient to determine that the government had a predominant role in the market.¹²⁷ However, it never explains what other factors should have been addressed in determining whether the government has a predominant role and which relevant record evidence was not assessed. China fails to point out that it did not even provide the percentage of domestic production that it represented in these markets.¹²⁸ China now argues that Commerce failed to assess all record evidence, but does not point to any additional record evidence that is relevant to

¹²⁰ *CWP CVD Final Decision Memorandum*, at 11 (Exhibit CHI-1); and *LWRP CVD Final Decision Memorandum*, at 4 (Exhibit CHI-2).

¹²¹ *Id.* See also *US – Softwood Lumber CVD Final (AB)*, para. 100.

¹²² 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).

¹²³ *LWS Final Decision Memorandum*, at Comment 13, at 69-70 (Exhibit CHI-3).

¹²⁴ *LWS Final Decision Memorandum*, at 19 (Exhibit CHI-3).

¹²⁵ *Id.*, at 70.

¹²⁶ *Id.*, at 20. See also, *US – Softwood Lumber CVD Final (AB)*, para. 100.

¹²⁷ China First Opening Statement, para. 40.

¹²⁸ *LWS Final Decision Memorandum*, at Comment 13, at 69-70 (*citing GOC Verification Report*, at 40) (Exhibit CHI-3).

determining whether the government had a predominant role in the market.¹²⁹ Instead, China restates its arguments from the investigation,¹³⁰ without addressing Commerce’s response that these arguments have no bearing on whether the government has a predominant role in the market as a supplier of the good.

88. China also ignores the analysis Commerce provided, both in the determinations at issue and also in the U.S. First Written Submission, which explains that Commerce reviewed other factors pertaining to control of the market, such as import penetration.¹³¹ For example, China fails to reconcile how, if Commerce has a *per se* rule of government ownership, Commerce relied upon in-country prices in the *OTR Tires* investigation when China owned “a significant portion of the natural and synthetic rubber produced domestically.”¹³² Contrary to China’s allegations, Commerce assessed the record evidence for each of these inputs to determine whether the government had a predominant role in the market, and did not simply stop once it determined that China had a majority ownership of the domestic production.

89. China is correct that Commerce relied upon the fact that China had a predominant role as the supplier in both the hot-rolled steel and BOPP markets. However, Commerce reached that determination by assessing all record evidence, not simply government ownership of domestic production. For these reasons, the Panel should reject China’s claims because China failed to demonstrate that Commerce’s use of out-of-country benchmarks for hot-rolled steel and BOPP were inconsistent with Article 14 of the SCM Agreement.

E. Commerce’s Calculation of the Benefit Conferred by Government-Provided Loans was Consistent with the SCM Agreement

1. Record Evidence Demonstrated Pervasive Distortion of the Banking Sector, Necessitating the Use of Out-of-Country Benchmarks

90. 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, it also directly controlled interest rates through its regulation of the market.¹³³ China objects to Commerce’s evaluation of China’s direct regulation of the Chinese lending market, asserting that Members should never use out-of-country interest rates, denominated in other currencies.¹³⁴ China also argues that its regulation of interest rates is part of its monetary policy, which is beyond the scope of the SCM Agreement.¹³⁵

¹²⁹ See, e.g., China Answers to First Panel Questions, para. 147.

¹³⁰ China First Written Submission, para. 127.

¹³¹ U.S. First Written Submission, paras. 207-208, and 224.

¹³² *Id.*, para. 203 (citing *OTR Tires CVD Final Decision Memorandum*, at 11 (Exhibit CHI-4)).

¹³³ *CFS CVD Final Decision Memorandum*, at 5-7 and Comment 10 (Exhibit CHI-93).

¹³⁴ China First Written Submission, para. 307.

¹³⁵ *Id.*

91. The U.S. First Written Submission discussed the substantial record evidence that demonstrated China’s predominant role in the lending market.¹³⁶ China has not challenged the facts upon which Commerce relied, such as the fact that China owns the vast majority of the banking sector¹³⁷ or that Chinese banks are still unable to operate on a commercial basis.¹³⁸ Based on the evidence on the records of the investigations, Commerce determined that it could not use any of the loans from the SOCBs as benchmarks because they are the very loans for which Commerce was attempting to measure the benefit.¹³⁹

92. Instead of addressing the basis for Commerce’s determination, China simply argues that “[a]ll interest rates are ‘distorted’ by governmental interventions. . . .”¹⁴⁰ Yet this statement ignores the significant difference between China’s intervention and that of most other governments. China intervened to ensure that its banks would earn considerable profits even while lending at the “floor” rate.¹⁴¹ China ensures that its banks earn a profit on *each* loan by capping the deposit rate below the interest rate floor and preventing competition among banks for savers’ capital.¹⁴² In addition, through its policies, China has ensured that Chinese savers have few options beyond depositing their savings with the banking system.¹⁴³ The fact that China has both a floor on lending rates and the cap on deposit rates is fundamentally different from typical government regulation in this market. Indeed, an official from the People’s Bank of China (“PBOC”), which sets the floor and cap rates, conceded that these limits set China apart from other countries, and this is necessary because Chinese banks have not yet fully implemented risk controls.¹⁴⁴ Thus, Commerce did not base its determination simply on the fact that China intervened in its banking sector, but on the extent to which it intervened and the nature of the intervention, which caused distortion in the lending market. Because of the government’s predominant role in the lending market and its control of interest rates directly

¹³⁶ U.S. First Written Submission, paras. 235-243.

¹³⁷ *CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93); *see also* NME Status Memo, at 140 (Aug. 30, 2006) (citing “Economic Survey of China, at 139 (Paris: OECD) (discussing the fact that the OECD data demonstrated that state ownership in the Chinese banking sector is much more widespread than in any other major world economy) (2005) (US Exhibit-69).

¹³⁸ *CFS CVD Final Decision Memorandum*, at Comment 10 (citing *Government of the People’s Republic of China Verification Report: Policy Lending*, at 6 (August 20, 2007) (*Policy Lending Verification Report*)) (Exhibit CHI-93).

¹³⁹ *See CWP CVD Final Decision Memorandum*, at 6 (Exhibit CHI-1); *LWS Final Decision Memorandum*, at 11 (Exhibit CHI-3); *OTR Tires CVD Final Decision Memorandum*, at 7 (Exhibit CHI-4); and 19 C.F.R. 351.505(a)(2)(ii) (Exhibit US-60).

¹⁴⁰ China First Opening Statement, para. 55 (emphasis removed).

¹⁴¹ *CFS CVD Final Decision Memorandum*, at Comment 10 (citing *Policy Lending Verification Report*, at 2-3) (Exhibit CHI-93).

¹⁴² *Id.* (citing *China’s Jan. 31, 2007 Submission*, at Exh. 4, which cited to the PBOC 2005 Annual Report, at 145) (Exhibit CHI-93).

¹⁴³ *Id.*

¹⁴⁴ *CFS CVD Final Decision Memorandum*, at Comment 10, pp. 68-69 (citing *Policy Lending Verification Report*, at 2-3) (Exhibit CHI-93).

through regulations, Commerce determined that these rates are not appropriate as benchmarks for determining the benefit of government-provided loans.¹⁴⁵

93. China has not challenged Commerce’s factual findings regarding its regulations in the lending market, although it characterizes them as a “subjective assessment.”¹⁴⁶ On the contrary, Commerce relied upon significant record evidence, including statements made by Chinese government officials.¹⁴⁷ China also provided evidence of the distortion this creates, conceding that “most commercial borrowers in China obtain interest rates of loans . . . that fall somewhere between the interest rate floor and the benchmark itself.”¹⁴⁸ The loans do not have much differentiation in interest rates because banks can lend at the floor rate and are still ensured a profit.¹⁴⁹ Thus, the interest rates are not at the level they otherwise would be absent these controls.

94. China has argued that interest rates should not be reviewed by Members under the terms of the SCM Agreement.¹⁵⁰ China also argues that only loans denominated in renminbi (“RMB”) can be used as benchmarks.¹⁵¹ China’s position, if accepted, would require the use of in-country interest rates, even if China set the lending rates. In that case, Members would be forced to use distorted loan interest rates as the benchmark. This would prevent Members from “fully offset[ing]”¹⁵² the benefit of government-provided loans. China provides no legal support for this reading of Article 14(b) of the SCM Agreement, a reading that is at odds with the text of Article 14(b) and also with prior panel and Appellate Body findings.¹⁵³

95. China avoided answering the Panel’s Question 34, which questioned China’s position that when determining the benefit for loans, Members cannot resort to an out-of-country benchmark. Instead of addressing the Panel’s concerns, China argues that the Appellate Body’s rationale in *US – Softwood Lumber CVD Final* permitting resort to out-of-country benchmarks is

¹⁴⁵ See *CWP CVD Final Decision Memorandum*, at 6 (Exhibit CHI-1); *LWS Final Decision Memorandum*, at 11 (Exhibit CHI-3); *OTR Tires CVD Final Decision Memorandum*, at 7 (Exhibit CHI-4); and 19 C.F.R. 351.505(a)(2)(ii) (Exhibit US-60).

¹⁴⁶ China Answers to First Panel Questions, para. 148.

¹⁴⁷ *CFS CVD Final Decision Memorandum*, at Comment 10, pp. 68-69 (citing *Policy Lending Verification Report*, at 2-3) (explaining that a PBOC official conceded that China’s regulations on the interest rates are unique and necessary because its banks do not yet operate on a market basis) (Exhibit CHI-93).

¹⁴⁸ China Answers to First Panel Questions, para. 199.

¹⁴⁹ *Id.* (citing *China’s Jan. 31, 2007 Submission*, at Exh. 4, which cited to the PBOC 2005 Annual Report, at 145) (Exhibit CHI-93).

¹⁵⁰ China argues that interest rates are “far beyond the scope of the SCM Agreement’s concern with the provision of trade-distorting subsidies to specific industries.” China First Written Submission, para. 275. Therefore, China argues, it “is not the role of WTO Members to reject the interest rates prevailing in the territory of another WTO Member as ‘unsuitable.’” *Id.*

¹⁵¹ “China questions whether it would *ever* be appropriate for an investigating authority to resort to a non-Chinese benchmark in the case of land-use rights.” China First Written Submission, para. 307.

¹⁵² *US – Softwood Lumber CVD Final (AB)*, para. 95.

¹⁵³ See, e.g., *US – Softwood Lumber CVD Final (AB)*, para. 103; and U.S. First Written Submission, paras. 251-254.

limited to Article 14(d) of the SCM Agreement.¹⁵⁴ However, the quote with which China supports its argument speaks to the provision of the financial contribution and not specifically to the provision of a good.¹⁵⁵ The Dominant Firm theory applies equally to the lending market, as well as to markets for goods, services, and land. China dismisses this well-established economic theory by claiming that the government only affects the lending market to the extent it directly regulates interest rates.¹⁵⁶ However, China provides no evidentiary support for this assertion.

96. China encourages this Panel to dismiss the substantial evidence Commerce has cited from the records of the proceedings, claiming that Commerce is “sit[ting] in judgment upon [China’s] monetary policies. . .”¹⁵⁷ and that Article 14(b) of the SCM Agreement does not provide “any authority or standard by which to evaluate and pass judgment on whether national methods of bank supervision and regulation are ‘traditional’ or ‘untraditional[.]’”¹⁵⁸ China’s statement is misleading. Commerce’s concern with China’s direct control over interest rates was that it created distortion in the lending market, not whether it was traditional.¹⁵⁹ A reading of the determinations reveals that Commerce assessed the role of the government in China’s banking sector to determine if it could rely upon lending rates in China, consistent with the Appellate Body’s determination in *US – Softwood Lumber CVD Final*.¹⁶⁰ As explained above, beyond government ownership in the sector, there are other ways that governments can intervene in the market to create distortions. 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.¹⁶¹

97. For the reasons given above, this Panel should find that Commerce’s determination to use out-of-country interest rates was not inconsistent with Article 14 of the SCM Agreement.

2. The Benchmarks Commerce Used to Measure the Benefit of Government-Provided Loans were Consistent with Article 14(b) of the SCM Agreement

¹⁵⁴ China Answers to First Panel Questions, para. 138.

¹⁵⁵ *Id.* (citing *US – Softwood Lumber CVD Final (AB)*, para. 93).

¹⁵⁶ China Answers to First Panel Questions, para. 139.

¹⁵⁷ China First Written Submission, para. 274; *see also* China Answers to First Panel Questions, para. 148.

¹⁵⁸ China Answers to First Panel Questions, para 148.

¹⁵⁹ *CFS CVD Final Decision Memorandum*, at Comment 10 (citing *Policy Lending Verification Report*, at 2-3) (Exhibit CHI-93).

¹⁶⁰ *US – Softwood Lumber CVD Final (AB)*, para. 101.

¹⁶¹ Commerce *refrained* from judging China’s monetary policies when it rejected arguments by domestic producers, in the *OTR Tires CVD* investigation. Domestic producers argued that China had monetary policies that distorted the inflation rate and, therefore, Commerce should not adjust for inflation in its lending benchmark. *OTR Tires CVD Final Decision Memorandum*, at Comment E.4, at 106 (Exhibit CHI-4). Commerce did not seek to determine whether China’s policies impacted the inflation rates, and instead continued to adjust for inflation in its benchmark calculation to ensure a “fair and meaningful cross-country comparison of interest rates.” *Id.* at 109.

98. Because there were no appropriate benchmarks within China to measure the benefit of government-provided loans, Commerce relied upon an out-of-country benchmark interest rate. China has raised several arguments attempting to establish that Article 14(b) of the SCM Agreement requires Members to use an in-country benchmark interest rate to measure the benefit. However, none of China's arguments are supported by the text of Article 14(b). Commerce calculated appropriate benchmark interest rates consistent with the requirements of Article 14(b).

99. Consistent with its regulation, which generally provides for the use of world average prices,¹⁶² Commerce used a group of interest rates to establish the benchmark.¹⁶³ In making its determination, Commerce controlled for the most significant factors by selecting a group of inflation-adjusted interest rates in countries with per capita gross national incomes (“GNIs”) similar to China.¹⁶⁴ Commerce then performed a regression analysis¹⁶⁵ of those rates, GNI data, and World Bank governance indicators to determine a yearly comparison interest rate.¹⁶⁶ This regression analysis took into account a key factor involved in interest rate formation, that of the quality of a country's institutions, which is not directly tied to state-imposed distortions in the banking sector discussed above.¹⁶⁷ Finally, Commerce adjusted for inflation as a proxy for an adjustment for exchange rate expectations.¹⁶⁸

100. China asserts that it “appears to be common ground that a benchmark loan can meet these criteria [in Article 14(b)] only if it is denominated in the same currency as the government-provided loan.”¹⁶⁹ However, China has not cited any textual basis or other support for this claim, nor is it “common ground” between the parties. Although it may be preferable in most cases to use a benchmark loan denominated in the same currency as the financial contribution, Article

¹⁶² See 19 CFR §351.511(a)(2)(ii) (Exhibit US-61).

¹⁶³ See *CWP CVD Final Decision Memorandum*, at 7-8 (Exhibit CHI-1); *LWS Final Decision Memorandum*, at 12 (Exhibit CHI-3); and *OTR Tires CVD Final Decision Memorandum*, at 8 (Exhibit CHI-4).

¹⁶⁴ *Id.*

¹⁶⁵ A regression analysis is a statistical technique that is used to establish a correlation between one variable (*e.g.*, interest rates) and other variables (*e.g.*, GNI and World Bank governance indicators). Commerce applied that correlation to estimate an interest rate for China given its GNI and World Bank governance indicators. These indicators report the quality of each country's institutions across several dimensions, including “quality of governance in a country, political stability, government involvement, and interference in the respective economies in assessing risk associated with lending to businesses in a country.” *CWP CVD Final Decision Memorandum*, at Comment 8 (Exhibit CHI-1).

¹⁶⁶ *Id.*

¹⁶⁷ “These indicators report the quality of each country's institutions across several dimensions, including political stability, government effectiveness, regulatory quality, rule of law, and control of corruption.” *CFS CVD Final Decision Memorandum*, at Comment 10, p. 71 (Exhibit CHI-93).

¹⁶⁸ To reflect only the cost of borrowing and not the various exchange rate expectations of the currencies, Commerce adjusted the comparison interest rate for inflation. Commerce adjusted for inflation because of the general link between inflation and exchange rate expectations and the fact that calculating an adjustment to account for exchange rate expectations was not feasible in these three investigations because of the limited availability of the necessary data. See, *e.g.*, *OTR Tires CVD Final Decision Memorandum*, at Comment E.4 (Exhibit CHI-4).

¹⁶⁹ China First Opening Statement, para. 51.

14(b) contains no obligation to do so. China’s restriction of its currency from international lending markets¹⁷⁰ cannot require Members to use a lending benchmark within China’s distorted banking market. Moreover, as explained in the U.S. First Written Submission, Commerce did not simply ignore currency in its benchmark calculation, but adjusted for inflation as a proxy for an adjustment for currency exchange rate expectations.¹⁷¹

101. China argues that the phrase “actually obtain” in Article 14(b) means that the benchmark must be an actual interest rate available to a borrower in China.¹⁷² However, the regression analysis used by Commerce is based upon actual interest rates available to borrowers in China. Moreover, a regression analysis is essentially an average of interest rates that takes more factors into account than a simple average. China has not objected to Commerce’s use of average prices in other instances, for example Commerce’s use of average world market prices for hot-rolled steel and BOPP.¹⁷³ Additionally, 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 “which the firm could actually obtain on the market.”

102. Commerce’s benchmark accounted for the maturity of the loans, adjusted for exchange rate expectations through an inflation adjustment accounting for currency differences, matched lending during the same time periods, and factored in the quality of the countries’ institutions, a known influence on interest rates.¹⁷⁴ Through these means, Commerce calculated comparison interest rates that were tailored to approximate a “comparable commercial loan which the firm could actually obtain on the market,” as required by Article 14(b) of the SCM Agreement.

103. Finally, with respect to China’s challenge to Commerce’s use of a yearly average LIBOR rate rather than a daily LIBOR rate to measure the benefit from dollar-denominated loans,¹⁷⁵ China has not addressed the arguments raised in the U.S. First Written Submission, nor has it shown any legal basis for its claim in its answer to the Panel’s question that it was “unlawful.”¹⁷⁶ Article 14(b) of the SCM Agreement contains no preference for a daily rate over a yearly average. Commerce calculated the benchmark rate consistent with its regulation.¹⁷⁷ China never argued in the underlying investigation that Commerce should depart from its regulation and use daily rates. Therefore, data on daily LIBOR rates was not on the record. The Panel should reject China’s claim that Commerce’s determination to use an annual average LIBOR rate was inconsistent with Article 14(b) of the SCM Agreement.

¹⁷⁰ China First Opening Statement, para. 51.

¹⁷¹ U.S. First Written Submission, para. 246, n. 366.

¹⁷² China First Opening Statement, para. 52.

¹⁷³ China Answers to First Panel Questions, para. 147.

¹⁷⁴ See *CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93), *LWS CVD Final Decision Memorandum*, at Comment 20 (Exhibit CHI-3); *CWP CVD Final Decision Memorandum*, at 7-8 (Exhibit CHI-1); and *OTR Tires CVD Final Decision Memorandum*, at Comment E.4 (Exhibit CHI-4).

¹⁷⁵ China First Written Submission, paras. 240-243.

¹⁷⁶ See China Answers to First Panel Questions, para. 144.

¹⁷⁷ See 19 C.F.R. §351.505(a)(2)(iv) (Exhibit US-60).

104. In sum, China has failed to demonstrate that Commerce’s benchmark determinations for government-provided loans were inconsistent with the U.S. obligations under the SCM Agreement.

F. Commerce’s Calculation of the Benefit of the Government Provision of Land-Use Rights was Consistent with the SCM Agreement

1. Record Evidence Demonstrated Pervasive Distortion of the Market for Land-Use Rights, Necessitating the Use of Out-of-Country Benchmarks

105. 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.”¹⁷⁸ In reaching this conclusion, Commerce primarily relied upon its findings that: 1) all land in China is owned by the government; and 2) reforms in the land-use rights market have not been successfully implemented. China continues to ignore the volume of evidence that the United States highlighted in the U.S. First Written Submission and instead claims that “Commerce found that prices were distorted based largely on the mere fact that the government was a significant supplier in the market.”¹⁷⁹ However, Commerce did not limit its analysis to the mere fact that the government owns all of the land in China.

106. Commerce’s investigations in *OTR Tires* and *LWS* confirmed that private land ownership is prohibited in China, and all land is owned by some level of government.¹⁸⁰ Therefore, companies lease land-use rights from the government for a period of years. Commerce also evaluated record evidence that demonstrated that the government retains significant control over the land-use rights markets through control of the primary market, which then affects the supply and pricing of land-use rights available on the secondary market as well.¹⁸¹ Additionally, Commerce found that China’s land reforms, which would have introduced market reforms on the transfer of land-use rights, were not being implemented.¹⁸² Therefore, contrary to China’s erroneous characterization, Commerce’s determination was not based on a finding that “market conditions are insufficiently ‘pure.’”¹⁸³ Rather, Commerce determined that the market had significant distortions from the government’s predominant role in the market.

¹⁷⁸ *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3); see also *OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (relying upon *OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

¹⁷⁹ China First Opening Statement, para. 43.

¹⁸⁰ See *LWS CVD Final Decision Memorandum*, at 15 and Comment 10 (citing *Central Government Verification Report*, at 23) (Exhibit CHI-3); see also *OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (relying upon *OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4). See also *NME Status Memo.*, at 41 (citing Article 9 of China’s constitution) (Exhibit US-76).

¹⁸¹ See U.S. First Written Submission, paras. 263-271.

¹⁸² See *id.*, paras 268-270.

¹⁸³ China Answers to First Panel Questions, para. 126.

107. China does not challenge any of these factual determinations. Instead, China responds that the factors Commerce identified are “wholly unrelated to the government’s role as a provider of the financial contribution at issue. . . .”¹⁸⁴ However, these factors are relevant because they demonstrate that not only does China own all of the land, it retains and exercises significant control over the supply of land-use rights for private industrial use, and can therefore influence price.

108. Without addressing this evidence, China argues that the CB Richard Ellis reports, upon which Commerce relied for land prices in Thailand, do not indicate that “Chinese land values are ‘distorted’ or that China is somehow a ‘special case’ compared to these other countries.”¹⁸⁵ However, the purpose of that publication is to show the actual prices of land and not to determine for countervailing duty purposes if the government has a predominant role in the market. China further asserts that because there is differentiation in the pricing as reported by CB Richard Ellis, then China has a “functioning market” that is not distorted.¹⁸⁶ However, this is based upon the flawed assumption that Commerce found uniform pricing in China as a basis for its determination. On the contrary, that was not a basis for Commerce’s determination that the government had a predominant role in the market.¹⁸⁷ The fact that prices differ is not determinative of whether the government has a predominant role in the market.

109. The thrust of China’s argument is that it does not believe Members should be able to resort to an out-of-country benchmark when determining the benefit for land-use rights under any circumstance.¹⁸⁸ In response to Panel Question 34, which concerned China’s view that Members may not use out-of-country benchmarks to measure the benefit of government-provided land-use rights, China erroneously argues that *Commerce’s* view is that “any benchmark must be drawn from the same general location”¹⁸⁹ China cites to several Commerce determinations in an attempt to show that “Commerce recognized that land values are unique to particular locations, and therefore any benchmark must be drawn from the same general location. . . .”¹⁹⁰

110. As an initial matter, the United States notes that this dispute concerns the consistency of Commerce’s determinations in the challenged CVD investigations with U.S. WTO obligations.

¹⁸⁴ China First Opening Statement, at para. 44.

¹⁸⁵ China Answers to First Panel Questions, para. 127.

¹⁸⁶ *Id.*, para. 128.

¹⁸⁷ See *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3); see also *OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (relying upon *OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

¹⁸⁸ “China questions whether it would ever be appropriate for an investigating authority to resort to a non-Chinese benchmark in the case of land-use rights.” China First Written Submission, para. 307. Again, in its opening statement, China reiterated, with respect to land-use rights, that Members would be precluded from resorting to an external benchmark “in any circumstance.” See China First Opening Statement, para. 48.

¹⁸⁹ China Answers to First Panel Questions, para. 133.

¹⁹⁰ *Id.*

The other determinations China cites are not before the Panel and are not relevant to the Panel's analysis.

111. In any event, China has misrepresented Commerce's position. Commerce consistently relies upon out-of-country benchmarks when it determines that the government plays a predominant role in a market, rendering in-country prices inappropriate for use as benchmarks. For example, Commerce relied upon out-of-country benchmarks in *Softwood Lumber from Canada* and *Coated Free Sheet Paper from Indonesia*.¹⁹¹

112. China argues that the few cases it cites demonstrate "other methods of determining whether land has been conferred for less than adequate remuneration, even where private prices are not available."¹⁹² However, these cases are not analogous to the land-use rights market in China. Commerce did not find in any of these cases that the land markets were distorted by the government's predominant role. Moreover, *Carbon-Quality Steel Plate from the Republic of Korea* did not even concern the provision of land for less than adequate remuneration under Article 1.1(a)(1)(iii) of the SCM Agreement. Instead, it was an example of Commerce's analysis of revenue foregone,¹⁹³ which falls under Article 1.1(a)(1)(ii) of the SCM Agreement,¹⁹⁴ where the benefit calculation is simply the amount of revenue that was foregone.¹⁹⁵

113. Similarly, China cites to the *Preamble* to Commerce's regulations as providing an alternate "price discrimination" method.¹⁹⁶ Commerce explained in the *Preamble* that where the government is the only source available to consumers in the country, it "will assess whether the government price was in accordance with *market principles*."¹⁹⁷ One such factor in that assessment that Commerce *may* rely upon is "possible price discrimination."¹⁹⁸ In the investigations at issue in this dispute, Commerce did, in fact, perform a market principles

¹⁹¹ See, e.g., *LWS CVD Decision Memorandum*, at 11-12 (citing *Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada*, 67 FR 15,545 (Apr. 2, 2002), and accompanying Issues and Decision Memorandum, at "Description of Provincial Stumpage Programs: Province of Quebec" and *Final Affirmative Countervailing Duty Determination: Coated Free Sheet Paper from Indonesia*, 72 FR 60,642 (Oct. 25, 2007) and the accompanying Issues and Decision Memorandum at "GOI Provision of Standing Timber for Less Than Adequate Remuneration") (Exhibit CHI-3).

¹⁹² China Answers to First Panel Questions, para. 134.

¹⁹³ *Certain Cut-to-Length Carbon Quality Steel Plate from the Republic of Korea, Final Affirmative Countervailing Duty Determination*, 64 Fed. Reg. 73,176, 73,184 (Dec. 29, 1999) (Exhibit CHI-150) (explaining that the price discount on the land conferred a benefit because the government "forfeits revenue that it normally would collect").

¹⁹⁴ In the *LWRP CVD* investigation Commerce treated the provision of land-use rights as a revenue foregone financial contribution, because the government did not collect the full amount owed by the foreign producer for the land-use rights that it had purchased. See *LWRP CVD Decision Memorandum*, at 10 (Exhibit CHI-2).

¹⁹⁵ *Id.*

¹⁹⁶ China Answers to First Panel Questions, para. 130.

¹⁹⁷ *Countervailing Duties; Final Rule*, 63 Fed. Reg. 65,348, 65,378 (Nov. 25, 1998) (emphasis added) (Exhibit CHI-91).

¹⁹⁸ *Id.*

analysis and found that “in light of all the evidence on the record, we continue to find that land-use rights in China are not priced in accordance with market principles.”¹⁹⁹ Thus, China’s argument that a “price discrimination” analysis could have been applied is misleading because that is part of the “market principles” analysis that was actually performed.

114. Even if China were able to establish other methods that could apply to the facts of these investigations, this would not establish that the method Commerce selected was inconsistent with Article 14(d) of the SCM Agreement. In *US – Softwood Lumber CVD Final*, the Appellate Body explained that it would not “suggest alternative methods that would be available to investigating authorities” because determining the consistency of an alternative method with the Agreement “will depend on how any such method is applied in a particular case.”²⁰⁰ That is, Commerce may apply a range of methods, and the question for this Panel is whether the method chosen in the challenged determination is consistent with Article 14(d). In short, it is. As explained above, Commerce relied upon record evidence that demonstrated that the predominant role of the government rendered the land-use rights market inappropriate as a source of benchmarks for determining the benefit of the government provision of land-use rights in these investigations.

2. The Benchmarks Used to Measure the Benefit of Government-Provided Land-Use Rights were Consistent with Article 14(d) of the SCM Agreement

115. 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 industrial estates, parks, and zones in Thailand.²⁰¹ In arriving at this determination, Commerce evaluated several criteria, including per capita GNI, population density, and types of land transactions represented in the data to ensure that the comparison prices would “relate or refer to or be connected with”²⁰² China’s prevailing market conditions, consistent with Article 14(d) of the SCM Agreement. However, China claims that the benchmark prices from Thailand did not sufficiently account for the prevailing market conditions.²⁰³ China simply ignores the substantial analysis Commerce performed to address the prevailing market conditions.

¹⁹⁹ See *LWS CVD Final Decision Memorandum*, at 17 (Exhibit CHI-34); see also *OTR Tires CVD Preliminary Determination*, 72 FR at 71,369 (Exhibit CHI-50).

²⁰⁰ *US – Softwood Lumber CVD Final (AB)*, para. 106.

²⁰¹ See *LWS CVD Final Decision Memorandum*, at 17 (citing *LWS CVD Preliminary Determination*, 72 FR at 67909 (Exhibit CHI-34)) (Exhibit CHI-3); see also *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4) (citing *OTR Tires CVD Preliminary Determination*, 72 FR at 71,369 (Exhibit CHI-50)).

²⁰² *US – Softwood Lumber CVD Final (AB)*, para. 103 (emphasis added).

²⁰³ China First Written Submission, para. 307. Again in its opening statement, China reiterated, with respect to land-use rights, that Members would be precluded from resorting to an external benchmark “in any circumstance.” See China First Opening Statement, para. 48.

116. Article 14(d) of the SCM Agreement lists several factors in relation to which the adequacy of remuneration should be determined, including: price, quality, availability, marketability, transportation and other conditions of purchase or sale. Demand is typically the primary determinant of the price for urban land, because that land is considered to have a fixed supply. Demand, in turn, tends to be a function of population density and the level of economic development, as measured by per capita GNI. For these reasons, Commerce accounted for price by selecting land values from the Bangkok area of Thailand because: (1) China and Thailand are at comparable levels of economic development; and (2) Bangkok and Shandong province are both above their respective country averages for population density and per capita GNI.²⁰⁴ First, Commerce noted that China and Thailand have similar levels of per capita GNI, namely, \$2010 and \$2990, respectively.²⁰⁵ Additionally, population densities in China and Thailand are roughly comparable, with 141 persons per square kilometer (k2) in China and 127/k2 in Thailand.²⁰⁶

117. Quality and marketability of land-use rights prices in China were taken into consideration by the fact that producers, in general, consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China.²⁰⁷ Thus, the same producers may compare prices across borders when deciding what land to buy or lease. Therefore, Commerce found that the “indicative land values” for land in Thai industrial zones, estates and parks provided in the Asian Industrial Property Reports present a reasonable and comparable price to the granted land-use rights in the county industrial parks at issue in the *LWS* and *OTR Tires CVD* investigations.²⁰⁸ Moreover, Commerce also used prices for land in industrial zones, as the land-use rights in China were also located in industrial zones.²⁰⁹ Use of similar types of land (*i.e.* land in industrial zones) would account for the quality and marketability of the land.

118. Commerce also took into account whether the transaction involved allocated or granted land-use rights, which would impact the marketability of the land-use rights. Some of the land-use rights at issue in the *OTR Tires CVD* investigation were allocated land-use rights and more closely resembled a lease or rental arrangement than a one-time purchase.²¹⁰ Commerce used the dividend yields from real estate investment trusts (“REITs”) because they were a reasonable

²⁰⁴ See *LWS CVD Preliminary Determination*, 72 FR at 67,909 (Exhibit CHI-34), see also *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4).

²⁰⁵ See *LWS CVD Preliminary Determination*, 72 FR at 67,909 (citing *Agriculture for Development*, World Bank World Development Report (2007), at 334) (Exhibit CHI-34), see also *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (citing *OTR Tires CVD Preliminary Determination*, 72 FR 71,368-71,369) (Exhibit CHI-4).

²⁰⁶ *Id.*

²⁰⁷ *Id.* (citing *Asian Industrial Property Market Flash*, CB Richard Ellis (Q1 2007), at 3; and *Asian Industrial Property Market Flash*, CB Richard Ellis (Q2 2007), at 3).

²⁰⁸ See *LWS CVD Final Decision Memorandum*, at 17 (Exhibit CHI-3); and *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4).

²⁰⁹ See *id.*

²¹⁰ See *OTR Tires CVD Preliminary Determination*, 72 FR at 71,370 (Exhibit CHI-50) (cited by *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4)).

proxy for property yields for industrial land in Thailand.²¹¹ When determining a benchmark for granted land-use rights, which resemble a sale of land, Commerce selected a benchmark price in Thailand for the sale of land.²¹²

119. Availability was accounted for by selecting benchmark prices from an urban area, Bangkok, where population densities were higher than on average for Thailand.²¹³ This is because the land-use rights at issue in the *OTR Tires* and *LWS CVD* investigations were also from urban areas of China.²¹⁴ Transportation is not a factor in valuing land because land is not transported. Therefore, the comparison prices accounted for the prevailing market conditions, consistent with Article 14(d) of the SCM Agreement.

120. China argued, for the first time, in its First Written Submission that certain factors other than those considered by Commerce should have also been taken into account when determining the land benchmark.²¹⁵ In response, the United States explained that China failed to “cite to where any such information is located on the record such that Commerce would have been able to make such adjustments.”²¹⁶ China never argued in the underlying *OTR Tires* or *LWS CVD* investigations that these additional factors should have been accounted for, nor did it provide evidence that these factors have any impact on land prices or explain which data could be used to account for these factors in the benchmark. It is not sufficient for China to merely list possible factors that may have influenced land prices in China. For this Panel to evaluate whether Commerce should have taken these additional factors into account, China must first demonstrate that these non-enumerated factors are part of the “conditions of purchase or sale” for land-use rights in China within the meaning of Article 14(d) of the SCM Agreement, which it has not done.²¹⁷

121. China also asserts that Commerce should have relied upon land-use rights prices from an industrial park in another county in China.²¹⁸ China mistakenly concludes that Commerce’s

²¹¹ See *id.*

²¹² See *LWS CVD Final Decision Memorandum*, at 17 (citing *LWS CVD Preliminary Determination*, 72 FR at 67909 (Exhibit CHI-34)) (Exhibit CHI-3); see also *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4) (citing *OTR Tires CVD Preliminary Determination*, 72 FR at 71,369 (Exhibit CHI-50)).

²¹³ See *LWS CVD Preliminary Determination*, 72 FR at 67,909 (relying upon *OTR Tires Memo to File: Tires: Land Benchmark Information*, at Atts. 9 and 13 (Dec. 7, 2007)); and *LWS Memo to File: Land Benchmark Information*, at Atts. 8 and 9 (Nov. 26, 2007)) (Exhibit CHI-34); and *OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4) (citing *OTR Tires CVD Preliminary Determination*, 72 FR at 71,369 (Exhibit CHI-50)).

²¹⁴ *Id.*

²¹⁵ China First Written Submission, para. 314.

²¹⁶ *Id.*, para. 286.

²¹⁷ Moreover, even if the requisite data is available, not every adjustment should be made. It is important to assess each adjustment to determine whether making such an adjustment would simply reintroduce the distortion from the Chinese market back into the benchmark.

²¹⁸ China Answers to First Panel Questions, para. 135.

rejection of these prices was based on where this land was located.²¹⁹ However, a review of Commerce’s determination shows that, in addition to the fact that China’s land-use rights market was distorted by the government’s predominant role, Commerce rejected these two self-selected contracts because they were not contemporaneous and did not demonstrate how the prices were determined, which prevented Commerce from determining whether the prices were set in accordance with market principles.²²⁰ Additionally, two prices from one park is not a sufficient set of data upon which Commerce could rely.²²¹

122. For the reasons given above, the United States respectfully requests that the Panel find that Commerce’s determination of the benefit of government-provided land-use rights in the *OTR Tires* and *LWS CVD* investigations was consistent with Article 14(d) of the SCM Agreement.

V. 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

123. As explained in the U.S. First Written Submission, China’s First Written Submission failed to identify any textual basis for the credit/offset obligation China has proposed.²²² Instead, China’s First Written Submission elevated context above text, suggesting that the use of the term “product” in various provisions of the SCM Agreement and the GATT 1994 *other than* Article 14 of the SCM Agreement imposes a precise and far reaching obligation on Members in the calculation of the benefit under Article 14. In addition, China’s First Written Submission attempted to draw an analogy to the Appellate Body’s reports on zeroing, which are related solely to provisions of the covered agreements pertaining to AD proceedings.

124. In China’s Answers to First Panel Questions, China posits a new and different “textual” basis for its invented credit/offset obligation. China now suggests that such a textual basis can be located in and limited to Article 14(d) of the SCM Agreement by virtue of the use of the term “good” in that provision. China also elaborates in its answers the flawed analogy it has drawn to the Appellate Body’s reports on zeroing. China’s arguments remain without merit.

A. There Is No Aggregation/Credit Obligation Contained in Article 14(d) of the SCM Agreement

125. In response to the Panel’s Question 51, China states that its “argument in this proceeding that Commerce was required to conduct its benefit analysis on an aggregate basis is limited to

²¹⁹ *Id.*

²²⁰ See *LWS CVD Final Decision Memorandum*, at 59 (Exhibit CHI-3).

²²¹ *Id.*

²²² See U.S. First Written Submission, paras. 288-316.

the context in which that situation arose, namely, in Commerce’s application of the adequate remuneration standard of Article 14(d) of the SCM Agreement.”²²³ China emphasizes that it “is not arguing that the SCM Agreement requires investigating authorities to provide ‘credit across different types of input products and even different types of subsidies.’”²²⁴

126. While China may intend to limit its argument to Article 14(d) of the SCM Agreement, China cannot avoid the necessary result of its position. As the United States has explained, if the use of the term “product” in various provisions of the SCM Agreement and the GATT 1994 establishes an obligation for Members to provide credit in the benefit calculation for non-subsidized transactions, then such an obligation necessarily applies to all types of subsidies and all determinations of benefits under each of the subparagraphs of Article 14. Evidently, now conscious of the troubling results that would flow from such an interpretation of the SCM Agreement, China appears to have abandoned its argument that the credit obligation stems from the term “product.”

127. Instead, China suggests in its Answers to First Panel Questions that “[t]he use of the singular term ‘good’ in Article 14(d) indicates that when a productive input is alleged to have been provided for less than adequate remuneration, adequacy of remuneration must be determined on an aggregated basis for that ‘good’ over the entire period of investigation.”²²⁵ In the first place, this is a complete shift in China’s position. What is more, this shift does not improve the quality of China’s argument. Indeed, China makes no attempt to sustain its new position with an interpretation of the relevant text in its context and in light of the agreement’s object and purpose; its new argument is nothing more than a naked and unsupported assertion. Further still, China’s new position makes an astonishing claim in its own right. In China’s view, the use of the “singular term ‘good’” in Article 14(d) accomplishes the following things: it establishes an obligation to aggregate the benefits of all transactions during the entire period of investigation involving the provision of a good;²²⁶ it establishes an obligation to provide credit in such an aggregate benefit calculation for transactions in which the good was sold for more than the established benchmark; and it limits these obligations to the unique situation of government-provided goods or services. If China is correct, then rather than specifying that the subsidies should be aggregated by using the term “aggregated,” as they did in paragraph 6 of Annex IV of the SCM Agreement,²²⁷ the drafters of the SCM Agreement, in Article 14(d), chose instead to simply use the term “good” to achieve the same result. Likewise, rather than specifying that so-called “negative benefits” must be credited against “positive benefits,” the drafters of the SCM Agreement agreed to silently require this, again by using the term “good.” Finally, rather than

²²³ China Answers to First Panel Questions, para. 158.

²²⁴ *Id.*, para. 160 (*quoting* U.S. First Written Submission, para. 302).

²²⁵ *Id.*, para. 158.

²²⁶ This obligation presumably applies with equal force to the government provision of a service, though China does not specify that this is the case.

²²⁷ “In determining the overall rate of subsidization in a given year, subsidies given under different programmes and by different authorities in the territory of a Member shall be aggregated.” SCM Agreement, Annex IV, para. 6.

using limiting language, such as “for the purpose of,” as in other provisions of the SCM Agreement,²²⁸ here again it was determined that the word “good” was sufficient to limit the applicability of China’s supposed aggregation and credit requirement and make it unique to subparagraph (d) of Article 14. China’s argument is simply not credible.

128. The correct, and far more plausible, reading of the text of Article 14(d) of the SCM Agreement does not support China’s argument. The second sentence of Article 14(d) provides that:

[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

The term “good” in this sentence 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, Members must look at the terms and conditions prevailing at the time of the sale of the good, “including price, quality, availability, marketability, transportation and other conditions of purchase or sale.” Such terms and conditions would be expected to vary over time; 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. Hence, the text of Article 14(d), and specifically the use of the singular term “good” when read in its immediate context, supports the conclusion that the adequacy of remuneration, and the benefit, may be determined on a transaction-specific basis. The text lends no support to China’s argument for an aggregation and credit/offset requirement.

129. In addition, 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. Article 1.1 of the SCM Agreement states that a subsidy shall be deemed to exist if there is “a financial contribution by a government” and “a benefit is thereby conferred.” 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.

²²⁸ See, e.g., SCM Agreement, Articles 6.4, 6.5, 11.9, 14 (chapeau), 16.1 (note 48), 19.2 (note 50), 27.6, and 32.4.

130. This reading of the SCM Agreement, permitting a disaggregated analysis of benefit, was echoed by the Panel in *US – Lead and Bismuth II*:

The term “benefit” effectively represents the portion of a “financial contribution” that, by reference to a market benchmark, the recipient gets for “free”. This is the portion of a “financial contribution” that, by reference to a market benchmark, the recipient has not “paid for”.²²⁹

131. Thus, the use of the singular in Articles 1 and 14 of the SCM Agreement supports calculating a benefit on a disaggregated basis to ensure it reflects “the portion” of the government’s financial contribution that actually confers a benefit on the recipient.

132. In sum, China’s new explanation for the source of its invented aggregation and credit/offset obligation fails, just as did its original explanation. It is simply not credible that the singular term “good” silently imposes such a precise and far reaching obligation, as China suggests it does. Moreover, as the United States has explained, reading Article 14(d) as China does is inconsistent with the object and purpose of the SCM Agreement, which “includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies” consistent with the right of WTO Members to “fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement.”²³⁰

133. The United States also notes that in China’s Answers to First Panel Questions, China states that “[i]n the OTR investigation, Commerce investigated whether a single ‘good’ – rubber – was provided for less than adequate remuneration”²³¹ This contradicts China’s own First Written Submission, wherein China explained that “[i]n OTR, Commerce investigated whether SOEs had provided *five separate types of rubber inputs* (synthetic rubber, natural rubber, butadiene rubber (‘BR’), SBR, and neoprene) to respondents for less than adequate remuneration.”²³² China offers no explanation for this significant shift in its portrayal of a basic fact in this dispute. Moreover, China is incorrect because the respondents reported that SOEs provided them with several distinct types of rubber (*e.g.*, natural rubber, BR, SBR, and neoprene). This is reflected in the final calculation memoranda attached as an exhibit to China’s First Written Submission.²³³ Thus, China’s attempt to conflate these separate inputs into one “good” is inconsistent with how they were reported in the *OTR Tires CVD* investigation. In addition, China’s characterization of rubber as a single good for which a single benefit should be calculated is contradicted by the annotated calculation memorandum China submitted in this

²²⁹ *US – Lead and Bismuth II (Panel)*, para. 6.70, n. 80. This finding was not addressed by the Appellate Body on appeal.

²³⁰ *US – Softwood Lumber CVD Final (AB)*, para. 95 (citing *US – German Steel (AB)*, paras. 73-74).

²³¹ China Answers to First Panel Questions, para. 159.

²³² China First Written Submission, para. 140 (emphasis added).

²³³ See CHI-56 (BCI) and CHI-57 (BCI).

dispute. China’s own annotation to this memorandum identified what China termed an “actual benefit” from the provision of one of the five rubber inputs.²³⁴

B. China’s Reliance on the Appellate Body’s Zeroing Reports Is Misplaced

134. 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.

135. 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. China suggests that “[t]he anti-dumping zeroing cases are based on the proposition that dumping must be judged with regard to ‘the product as a whole’ – that is, the aggregate pricing practice over the full range of product sales.”²³⁵ Without prejudice to the U.S. position on the correctness of the Appellate Body’s reports on AD zeroing, even assuming China’s characterization of the Appellate Body’s reports were correct, those reports do not support China’s argument.

136. In the Appellate Body’s view, dumping and dumping margins cannot be calculated at the level of individual transactions, but must be calculated for a product as a whole, on an aggregate basis. In this process of aggregation, sales above normal value must be credited or offset against sales below normal value. The Appellate Body has explained that price differentials found for specific transactions are not “dumping margins” themselves but only “intermediate comparisons” or “inputs” that must be “aggregated in order to establish the margin of dumping of the product” as a whole. In the CVD context, however, 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. For example, a loan provided by the government at a below-market interest rate is itself a subsidy. Another loan provided by the government at a below-market interest rate is another, separate subsidy.

²³⁴ China First Written Submission, Exhibit CHI-58, last page.

²³⁵ China Answers to First Panel Questions, para. 154.

137. As noted in the U.S. First Written Submission, an earlier panel explicitly accepted such an “individual transaction” approach to benefit determination.²³⁶ In *US – Countervailing Measures (Article 21.5)*, the panel accepted Commerce’s segmented or separate consideration of four categories of share offerings to evaluate whether the sales transactions in each share offering occurred at arm’s length and for fair market value and to determine whether the privatization had extinguished the benefit from non-recurring pre-privatization subsidies. The panel rejected the EC’s arguments (similar to China’s arguments in this dispute) that Commerce was obliged to examine a company’s privatization “*as a whole*”:

In the absence of a legally prescribed methodology, the Panel agrees with the United States that it is within a Member’s discretion to develop a *reasonable* methodology which, as required by Article 14 of the SCM Agreement, must be applied in a transparent manner and be adequately explained ... The Panel’s task is neither to perform a *de novo* review of the information and evidence on the record of the determination, nor to substitute our judgement for that of the USDOC. Accordingly, the issue before this Panel is not whether the Panel would have preferred that the USDOC analyse Usinor’s privatization *as a whole* but whether the USDOC’s segmented analysis of Usinor’s privatization is reasonable and was transparently applied and adequately explained.²³⁷

The panel there concluded that Commerce’s analysis was “not ... unreasonable.”²³⁸

138. The analogy China asks the Panel to make to the AD zeroing reports must be rejected because the Chinese government’s subsidization of Chinese OTR tire production is completely different from Chinese exporters dumping Chinese OTR tires onto the U.S. market. The analytical concepts that the Appellate Body found linked “dumping” and “dumping margin” to the product as a whole are not present in the CVD context. The export price of subject merchandise as a class (or the export price of “the product as a whole”) is not germane to determining whether a subsidy benefit exists. Instead, the correct inquiry is whether a government’s financial contribution conferred a benefit by, for example, providing a good for less than adequate remuneration. With regard to the challenged investigation, the export price of OTR tires as a class is in no manner connected to whether China provided a benefit to tire producers. Again, the correct inquiry is whether China provided a benefit to tire producers when it provided a rubber input. That is a matter that can be assessed with reference to an individual transaction, *e.g.*, China’s individual sale of a rubber input to a producer of OTR tires.

²³⁶ See U.S. First Written Submission, para. 292.

²³⁷ *US – Countervailing Measures (Article 21.5)*, para. 7.118 (emphasis added).

²³⁸ *Id.*, para. 7.119.

139. China also conflates aggregation in a dumping calculation with aggregation in a CVD calculation, but the concepts are distinct. Aggregation in the CVD context occurs *after* the benefit has been measured and the existence of a subsidy or subsidies has been determined. Before Commerce sums the benefits found for each month in the period of investigation, Commerce has already determined whether or not a benefit exists. In summing the benefits, Commerce is determining “the amount of the subsidy found to exist” within the meaning of Article 19.4 of the SCM Agreement. When the benefits associated with the government provision of input products are added together and included with any other benefits from any other subsidies found to exist, for example government-provided loans and loan guarantees, Commerce determines the appropriate CVD rate, which is “the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.” Nowhere does Article 19.4 make reference to any obligation of crediting government action that does not provide a benefit against government action that does provide a benefit. Rather, where a subsidy is found to exist it will be added to any others found to exist. Where no subsidy is found under a specific program or in a specific transaction, there is nothing to be added. If the drafters of the SCM Agreement had wanted to impose a credit requirement between different governmental interventions (*e.g.*, different programs, agencies or provisions of goods at different times), such obligation would have been included and the SCM Agreement would have been written differently.

C. China Still Has Failed to Explain How the United States Acted Inconsistently with Any Provision of the SCM Agreement or the GATT 1994 with respect to Commerce’s Benefit Calculations in the *OTR Tires* CVD Investigation

140. China continues to insist in its Answers to First Panel Questions that “Commerce’s methodology cannot plausibly be consistent with the United States’ obligations under Articles 1, 14, 19.4 or 32.1 of the SCM Agreement, or under Article VI:3 of the GATT.”²³⁹ As explained in the U.S. First Written Submission and above, China has failed to demonstrate that the United States acted inconsistently with Article 14 of the SCM Agreement. Additionally, China still has offered no explanation of how the United States acted inconsistently with any obligation in Articles 1, 10, 19.1, 19.4, and 32.1 of the SCM Agreement, nor Article VI:3 of the GATT 1994. With respect to Articles 10, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, China merely suggested in its First Written Submission that the use of the term “product” in these provisions supports a benefit calculation that includes a credit for instances in which the granting authority provided goods for adequate remuneration,²⁴⁰ a position from which it appears to have retreated in its Answers to First Panel Questions.²⁴¹ China has not otherwise explained how the United States acted inconsistently with these provisions. With respect to the Articles 1, 19.1 and 32.1 of the SCM Agreement, China provides no explanation whatsoever. A string

²³⁹ China Answers to First Panel Questions, para. 156.

²⁴⁰ China First Written Submission, paras. 145-46.

²⁴¹ China Answers to First Panel Questions, 158 (now arguing that the term “good,” in Article 14(d) of the SCM Agreement, rather than the term “product” in various places, is the source of the aggregation and credit obligation).

citation is not a substitute for a legal argument. China has failed to establish that the United States acted inconsistently with any of these provisions.

141. Furthermore, with respect to Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, China argues that these provisions apply with equal force to original investigations conducted by Members operating both prospective and retrospective CVD systems.²⁴² However, once again, China fails to provide *any* textual basis for this argument. Contrary to China’s position, as the United States has explained, 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.²⁴³ Accordingly, there is simply no basis for China to claim a violation of these provisions based on the challenged CVD investigations.

142. In support of its argument, China cites to the Appellate Body and panel reports in *US – Countervailing Measures*. China claims that neither the Appellate Body nor the panel in that dispute drew a distinction between CVD investigations and reviews, and ultimately found Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 applicable to CVD investigations.²⁴⁴ However, as China acknowledges, *US – Countervailing Measures* involved various types of CVD determinations, including CVD investigations, administrative reviews, and sunset (or five-year) reviews.²⁴⁵ Importantly, neither the Appellate Body nor the panel in *US – Countervailing Measures* addressed the textual argument the United States has raised in this dispute.²⁴⁶ The text of the covered agreements is unequivocal that the obligations in Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 apply only when duties are levied, and no duties were levied pursuant to the challenged CVD investigations. Hence, there is no basis for this Panel to find the challenged CVD investigations inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.²⁴⁷

143. Further, China mischaracterizes the U.S. position when it asserts that the U.S. argument would result in greater obligations for Members operating prospective systems.²⁴⁸ 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*. For example, in the first administrative reviews of the challenged countervailing duty orders, the United States could determine that the CVD rate for

²⁴² China Answers to First Panel Questions, paras. 161-165.

²⁴³ See, e.g., U.S. First Written Submission, para. 315.

²⁴⁴ China Answers to First Panel Questions, para. 162 (*citing to US – Countervailing Measures*).

²⁴⁵ *Id.*

²⁴⁶ China also relies on *US – Softwood Lumber CVD Final (AB)* to argue that the Appellate Body found a violation of Article VI:3 of the GATT 1994 with respect to the CVD investigation challenged in that dispute. China Answers to First Panel Questions, para. 162. Similar to *US – Countervailing Measures*, the Appellate Body did not address in *US – Softwood Lumber CVD Final* the textual arguments the United States has raised in this dispute, *i.e.*, that the United States does not “levy” countervailing duties in a CVD investigation.

²⁴⁷ See DSU Article 3.2 (WTO disputes cannot add to or diminish the rights and obligations provided in the covered agreements).

²⁴⁸ See, e.g., China Answers to First Panel Questions, para. 164.

one or all the orders is zero. In such a circumstance, no duties would be levied. Thus, any claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are premature and must be rejected.

144. For all of these reasons, the United States respectfully requests that the Panel reject China's claim that Commerce acted inconsistently with the SCM Agreement and the GATT 1994 by failing to provide a credit in the benefit calculation for instances where China provided goods for adequate remuneration.

VI. COMMERCE'S SPECIFICITY DETERMINATIONS IN THE OTR TIRES AND LWS CVD INVESTIGATIONS WERE CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

145. As the United States has explained, 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 with respect to both the policy lending and land-use rights subsidies that Commerce's specificity determinations were inconsistent with the covered agreements because Commerce failed to determine that the *benefits* of these subsidy programs, rather than the subsidy programs themselves, were specific.²⁴⁹ The United States fundamentally disagrees with the overarching premise of China's theory of specificity. The reading of Article 2 of the SCM Agreement for which China argues is not supported by the text or structure of the SCM Agreement, and thus must be rejected by this Panel.

146. The text of Article 2.1(a) of the SCM Agreement, pursuant to which Commerce found the policy lending subsidy specific, asks whether access to a subsidy is explicitly limited. Article 2.2, pursuant to which Commerce found the land-use rights subsidy specific, asks whether a subsidy is limited to a designated geographical region. Neither of these provisions references or otherwise requires an investigating authority to revisit the benefit determination to determine if this particular component of the subsidy is specific.

147. The Panel correctly noted in its questions to the parties that prior WTO panels have recognized the separate and independent nature of a specificity determination.²⁵⁰ This is reflected in the structure of Article 1 of the SCM Agreement, which provides that a subsidy must meet three criteria in order to be countervailable. First, there must be a financial contribution.

²⁴⁹ See, e.g., China First Written Submission, para. 224, and China First Opening Statement, para. 63 (arguing that policy lending was not specific because enterprises in China paid similar interest rates on loans); see also China First Written Submission, para. 300, and China First Opening Statement, para. 72 (arguing that the land-use rights subsidy was not specific because enterprises outside the Park paid similar rates to enterprises within the Park).

²⁵⁰ Panel Question 53 (citing to *EC-DRAMs*, *US-DRAMs*, and *Korea-Commercial Vessels*); see also China Answers to First Panel Questions, para. 166 (agreeing that a specificity determination is distinct from the determination of financial contribution and benefit).

Second, the financial contribution must confer a benefit. If the first and second criteria are met, a subsidy is deemed to exist. Finally, the subsidy must be specific within the meaning of Article 2 of the SCM Agreement. Thus, the structure of Article 1 of the SCM Agreement confirms that specificity is “a separate and independent condition from financial contribution and benefit.”²⁵¹

148. China’s overarching theory of specificity also calls for a reading of Article 2 of the SCM Agreement that is difficult to reconcile with the requirement of customary rules of treaty interpretation that the SCM Agreement be interpreted “in light of the object and purpose of” that agreement. As noted previously, the object and purpose of the SCM Agreement includes the right of WTO Members to “fully offset” the effects of injurious subsidies through the use of countervailing duties.²⁵² China’s theory would impose unnecessary, non-text-based layers on the specificity analysis by examining whether the *benefit* of a subsidy is specific. The practical result of such an additional analysis is that it is more cumbersome to find a subsidy specific and, accordingly, more difficult to find the subsidy countervailable and impose countervailing duties on injurious subsidization. Accordingly, China’s theory of specificity prevents Members from fully realizing the objectives of the SCM Agreement.

149. For these reasons and the reasons discussed below, the United States respectfully requests that the Panel reject China’s theory of specificity and, instead, focus on the text of Article 2 of the SCM Agreement and apply the specificity guidelines articulated therein. Following this correct analysis, there can be no doubt that Commerce’s specificity determinations were fully consistent with the obligations of the United States under the covered agreements.

A. China Has Failed To Demonstrate that Commerce’s Specificity Determination for Policy Lending in the *OTR Tires CVD* Investigation was Inconsistent with the Covered Agreements

150. The United States has explained that the record of the *OTR Tires CVD* investigation clearly substantiated that the policy lending was *de jure* specific within the meaning of Article 2.1(a) of the SCM Agreement because legislation explicitly limited access to the policy lending subsidy to a group of industries that included the tire industry.²⁵³ China raises three principal arguments against Commerce’s determination. First, China argues that Commerce’s specificity determination was inconsistent with the covered agreements because the legislation on which Commerce relied for its specificity determination does not “define[] the elements of the subsidy.”²⁵⁴ That is, according to China, the legislation on which Commerce relied for its

²⁵¹ Panel Question 53.

²⁵² See, e.g., *US – Softwood Lumber CVD Final (AB)*, para. 95.

²⁵³ See, e.g. U.S. First Written Submission, paras. 336-43.

²⁵⁴ See, e.g., China First Written Submission, para. 217; see also China Answers to First Panel Questions, para. 201 (arguing that the component parts of a subsidy – financial contribution and benefit – are relevant to determining whether a subsidy is *de jure* specific pursuant to Article 2.1(a) of the SCM Agreement).

specificity determination must also define the financial contribution and benefit of the policy lending subsidy.

151. This argument lacks any basis in the covered agreements. Article 2.1(a) of the SCM Agreement does not require an investigating authority to identify legislation that both defines the elements of a subsidy and also limits access to the subsidy to certain enterprises.²⁵⁵ Instead, that provision requires an investigating authority to determine only whether legislation explicitly limits access to the subsidy to certain enterprises.

152. This was precisely the analysis Commerce conducted in the *OTR Tires CVD* investigation. Commerce determined that, through legislation, the national government established a group of encouraged industries.²⁵⁶ In other legislation, the national government established that encouraged industries should receive lending.²⁵⁷ Then, the provincial and municipal governments furthered these legislative priorities by identifying the tire industry as a priority that should receive lending.²⁵⁸ In fact, provincial and municipal government policy documents specifically named an investigated tire producer and its tire production facility a priority.²⁵⁹ Finally, national planning documents identified a list of restricted industries and abolished projects to which lending was prohibited, further demonstrating that policy lending was not generally available. Thus, when all this legislation is viewed as a whole,²⁶⁰ there can be no question that the legislation explicitly limited access to the policy lending subsidy to a group of industries including the tire industry.

153. In support of its argument that legislation must define the elements of a subsidy in order to find that the legislation supports a *de jure* specificity determination, China draws on a hypothetical example taken from the Panel's Question 64.²⁶¹ China describes the facts of this hypothetical example as follows: a law provides that a particular financial institution is to provide loans on behalf of the government, a second law provides the same financial institution is to provide government loans only to three particular industries, and neither law indicates that the financial institution is to provide the government loans on better-than-market terms, but, in practice, certain of the loans provided pursuant to the laws are made on better than market terms.²⁶²

²⁵⁵ See, e.g., U.S. First Written Submission, para. 347.

²⁵⁶ *Id.*, para. 337.

²⁵⁷ *Id.*

²⁵⁸ *Id.*, paras. 338-42.

²⁵⁹ *Id.*, para. 340.

²⁶⁰ In this regard, the United States notes that China has explicitly acknowledged that an investigating authority is permitted to consider multiple pieces of legislation when determining whether a subsidy is specific pursuant to Article 2.1(a) of the SCM Agreement. See China Answers to First Panel Questions, paras. 200-01.

²⁶¹ China Answers to First Panel Questions, paras. 202-03.

²⁶² *Id.*, para. 202.

154. According to China, the legislation in this hypothetical does not demonstrate *de jure* specificity. China asserts that the legislation does not explicitly limit access to the subsidy because certain of the government loans do not provide a benefit.²⁶³ That is, certain of the government loans were made at commercial rates. China is essentially arguing, then, that this legislation does not demonstrate *de jure* specificity because the legislation limits government loans to certain enterprises without also ensuring that the loans provide a benefit. Once again, China’s specificity analysis is disconnected from the text of Article 2.1(a) of the SCM Agreement. Pursuant to that provision, the proper inquiry is whether legislation limits access to the subsidy to certain enterprises.

155. In the Panel’s hypothetical, the individual pieces of legislation, taken together, constitute (or at least are part of) the “legislation pursuant to which the granting authority operates” for the purposes of Article 2.1(a). Furthermore, this legislation explicitly limits access to the government loans to three industries. Thus, the loan subsidies (*i.e.*, the loans provided at below commercial rates) are specific within the meaning of Article 2.1(a) because only three industries have access to them. The fact that some of the loans are made at commercial rates does not change the reality that access to all the loans (both loans that confer a benefit and loans that do not) are explicitly limited to a group of industries. China’s analysis of this hypothetical further demonstrates that China has an incorrect understanding of Article 2.1(a) of the SCM Agreement.

156. China also argues that the United States has offered the Panel an *ex post* rationalization for Commerce’s specificity determination for the policy lending subsidy.²⁶⁴ China suggests that the United States has argued, for the first time in this dispute, that policy lending related to “access to credit” rather than preferential lending.²⁶⁵ As explained in the U.S. Answers to First Panel Questions, this is not the case. Neither the U.S. rationale nor the evidence on which Commerce relied is new.²⁶⁶

157. The rationale articulated by the United States in this dispute 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.”²⁶⁷ In the *OTR Tires CVD Final Determination*, Commerce articulated the same rationale. Commerce found that “the totality of the information on the record . . . shows that the government is directing policy lending to the tire industry or to specific enterprises in the tire industry.”²⁶⁸ Additionally, Commerce found that “the Guizhou [9th] Five Year Plan states, explicitly . . . the general directive that policy loans

²⁶³ China Answers to First Panel Questions, para. 203.

²⁶⁴ See China First Opening Statement, para. 64; China Answers to First Panel Questions, para. 170.

²⁶⁵ See China First Opening Statement, para. 64 (*citing to* U.S. First Written Submission, para. 355); China Answers to First Panel Questions, para. 170.

²⁶⁶ U.S. Answers to First Panel Questions, Question 57.

²⁶⁷ U.S. First Written Submission, para. 355.

²⁶⁸ *OTR Tires CVD Final Decision Memorandum* at 98.

should be allocated according to the plans.”²⁶⁹ Furthermore, substantial evidence originally submitted in the *CFS Paper CVD* investigation and also submitted in the *OTR Tires CVD* investigation further supports this point.²⁷⁰

158. China’s third argument is 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.²⁷¹ In particular, China has argued that, because the NDRC Catalogue that created the list of encouraged industries included such a broad range of industries in that list, any subsidies to encouraged industries must be generally available.²⁷² Of course, as discussed above, Commerce’s specificity determination did not rely on just the NDRC Catalogue. Commerce also relied, for instance, on the provincial and municipal planning documents. These policy documents were very specific, naming, for example, an investigated producer and its tire production facilities as a priority.²⁷³ Furthermore, there can be no question that policy lending is not generally available, because the same NDRC Catalogue that created the encouraged industry category also created a restricted industry category and abolished project category. Lending was expressly prohibited to these latter two categories.²⁷⁴

159. In making this argument, China also relies on the Large Civil Aircraft dispute (“the Boeing Dispute”) and asserts that, in that dispute, the United States argued that a program that targeted just two industries, the defense and aerospace industry, was not sufficiently discrete to constitute a group of enterprises or industries within the meaning of Article 2 of the SCM Agreement.²⁷⁵ China’s reliance on the Boeing dispute serves to distract this Panel from the actual question before it: did Commerce properly determine that policy lending was specific? Furthermore, China’s reliance on the Boeing dispute is premised on mischaracterizations of the U.S. arguments in that dispute. In addition, that dispute involved alleged subsidy programs that are clearly distinguishable from the policy lending subsidy program in the *OTR Tires CVD* investigation.

160. First, there were a number of subsidy programs alleged in the Boeing dispute. The first statement made by the United States on which China relies pertained to Independent Research and Development (“IR&D”) and Bid Proposal (“B&P”) Reimbursements. The United States

²⁶⁹ *Id.*, at 99. As noted in the U.S. First Written Submission, para. 339 & n. 518, this quotation incorrectly cites to the Guizhou 10th Five Year Plan instead of the Guizhou 9th Five Year Plan. This incorrect citation was the result of China’s translation errors. *Id.*

²⁷⁰ *See, e.g.*, U.S. First Written Submission, para. 358.

²⁷¹ *See, e.g.*, China First Opening Statement, para. 62; China Answers to First Panel Questions, paras. 174-176. The United States notes that in making this argument, China asserts that the NDRC Catalogue benefits a wide range of industries by relying on the “encouraged industry” “headings” found in this planning document. Of course, these headings are just that, headings. In actuality, this planning document lists specific projects under each heading that are encouraged.

²⁷² *See, e.g.*, China Answers to First Panel Questions, paras. 174-176.

²⁷³ *See, e.g.*, U.S. First Written Submission, para. 339-40.

²⁷⁴ *See, e.g.*, U.S. First Written Submission, para. 353.

²⁷⁵ China First Opening Statement, para. 66; China Answers to First Panel Questions, para. 182.

was explaining why these reimbursements were neither *de jure* nor *de facto* specific under Article 2 of the SCM Agreement. In explaining why the program was not *de jure* specific, the United States argued that the regulations pursuant to which the reimbursements were made placed no limitations on the industries or enterprises that could claim reimbursements.²⁷⁶ Thus, these statements confirm the U.S. position in this dispute. The proper focus of a *de jure* specificity determination is on whether the granting authority or legislation pursuant to which the granting authority operates explicitly limits access to a subsidy. In this dispute, where policy documents explicitly limit access to the policy lending subsidy to a group of industries, including the tire industry, there can be no question that the subsidy is *de jure* specific pursuant to Article 2.1(a) of the SCM Agreement.

161. China asserts that the United States argued in the Boeing dispute that: “the defense and aerospace industries are not sufficiently discrete to constitute a group of enterprises or industries.”²⁷⁷ However, this is a mischaracterization of the U.S. argument. What the United States argued was, first, the regulation pertaining to IR&D did not limit access to defense and aerospace industries.²⁷⁸ Again, the focus of the U.S. argument was on whether legislation limited access to the alleged subsidy; the same focus of the U.S. argument in this dispute.

162. Second, the United States argued that: “research-based defense and aerospace contracts are not an enterprise or industry or group of enterprises or industries within the meaning of Article 2.1.”²⁷⁹ The United States argued that this was because, *inter alia*, “research and development are simply activities in which any company in any industry may engage.”²⁸⁰ Thus, the U.S. position in the Boeing dispute that the reimbursements were not specific was based on a key factual distinction with the policy lending subsidy in this dispute. The reimbursement program did not target any company or industry. Instead, it was potentially available to any product regardless of the industry that produced the product. In contrast, China’s policy lending subsidy targeted encouraged industries and projects. Moreover, in the Boeing dispute, the reimbursement programs did not specifically name Boeing,²⁸¹ unlike the provincial and

²⁷⁶ Boeing U.S. First Written Submission, para 304, *available at*:
<http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-compl>

²⁷⁷ China First Opening Statement, para. 66 (citations omitted); *see also* China Answers to First Panel Questions, para. 182.

²⁷⁸ Boeing U.S. First Written Submission, para. 306, *available at*:
<http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-compl>

²⁷⁹ Boeing U.S. First Written Submission, para. 306, (quotations omitted) *available at*:
<http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-compl>

²⁸⁰ Boeing U.S. First Written Submission, para. 306, *available at*:
<http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-compl>

²⁸¹ Boeing U.S. First Written Submission, para 306, *available at*:
<http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-compl>

municipal planning documents in the *OTR Tires* CVD investigation, which specifically named a tire producer and its production facilities.

163. China also cites to statements the United States made in the Boeing dispute with respect to U.S. Department of Labor’s High Growth Job Training Initiative.²⁸² In explaining why that alleged subsidy program was not *de jure* specific, the United States explained that the grants were available across numerous industry *sectors* covering a significant portion of the U.S. economy.²⁸³ In the *OTR Tires* CVD investigation, the policies on which Commerce relied for the policy lending subsidy were not merely targeting industry sectors, but industries, projects, and even an investigated tire producer and its tire production facilities. Moreover, legislation expressly prohibited lending to a wide group of industries and projects. Thus, the policy lending subsidy in this dispute, in contrast to the job training initiative in the Boeing dispute, was limited to a group of industries, including the tire industry.

164. Finally, China cites to *US – Upland Cotton*, arguing that the U.S. and panel statements in that dispute cannot be reconciled with the U.S. argument in this dispute. Specifically, China asserts that the “apparent” position of the United States in this dispute is “that the term ‘group of enterprises or industries’ refers to *any* ‘group of enterprises or industries’ no matter how broad”²⁸⁴ The United States has not taken that position in this dispute. To the contrary, the United States made clear in its Answers to First Panel Questions that if a very broad array of enterprises, industries or sectors received a subsidy, this could lead to a determination that the subsidy was, in fact, generally available and, thus, not specific.²⁸⁵

165. In making this argument, China suggests that the policy lending subsidy presents the Panel with the difficult task of determining the exact point at which a subsidy is not specific, but instead, generally available. However, the facts of the *OTR Tires* CVD investigation did not present Commerce and do not present this Panel with such a difficult question.²⁸⁶ The facts demonstrate that the policy lending subsidy clearly was not generally available. As explained, for example, some of the legislation Commerce relied on was extremely specific. Provincial and municipal planning documents named an investigated tire producer and its production facility as a priority.²⁸⁷ Furthermore, the national planning documents not only created a list of encouraged industries, they also created a list of prohibited industries and abolished projects to which lending was prohibited.²⁸⁸ Accordingly, there can be no question that the policy lending subsidy

²⁸² China First Opening Statement, para. 66.

²⁸³ Boeing U.S. First Written Submission, para. 417, *available at*:

<http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-compl>

²⁸⁴ China Answers to First Panel Questions, para. 181.

²⁸⁵ U.S. Answers to First Panel Questions, para. 113.

²⁸⁶ See *US – Upland Cotton (Panel)*, para. 7.1142 (“The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis.”)

²⁸⁷ See, e.g., U.S. First Written Submission, para. 339-40.

²⁸⁸ See, e.g., U.S. First Written Submission, para. 353.

was not generally available within the Chinese economy, but instead, was specific within the meaning of Article 2.1(a) of the SCM Agreement.

B. China Has Failed To Demonstrate That Commerce’s Specificity Determination for Land-Use Rights Subsidies in the LWS CVD Investigation was Inconsistent with the Covered Agreements

166. The United States has explained that the record of the *LWS CVD* investigation clearly substantiated that the land-use rights subsidy was regionally specific within the meaning of Article 2.2 of the SCM Agreement.²⁸⁹ China raises three principal arguments against this determination.

167. First, 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, and Commerce failed to make this determination in the *LWS CVD* investigation.²⁹⁰ As explained in the U.S. First Written Submission, interpreting Article 2.2 in this manner would render Article 2.2 of the SCM Agreement redundant with Article 2.1.²⁹¹ That is, China’s interpretation would require not only that a subsidy be limited to a region but also that the subsidy be limited to certain enterprises within that region. Thus, China argues that, in order for a subsidy to be specific under Article 2.2 of the SCM Agreement, it would also have to be specific under Article 2.1 – limited to certain enterprises. China’s interpretation is contrary to the customary international law rules of treaty interpretation, a fundamental tenet of which is that the treaty interpreter “must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”²⁹²

168. In support of its argument, China cites to the 1990 Dunkel draft of the SCM Agreement, which stated that subsidies provided to *all* enterprises located within a designated geographical region would be specific.²⁹³ According to China, the fact that the final text of Article 2.2 no longer references “all enterprises” but, instead, references “certain enterprises” definitively demonstrates that the drafters rejected the understanding of regional specificity that the United States has advanced in this dispute.²⁹⁴

169. In the first place, this resort to the preparatory work of the SCM Agreement relies on “supplementary means of interpretation,” within the meaning of the customary rules of

²⁸⁹ See, e.g., U.S. First Written Submission, paras. 364-66.

²⁹⁰ China First Written Submission, para. 294.

²⁹¹ U.S. First Written Submission, para. 375.

²⁹² See, e.g., U.S. First Written Submission, para. 375, n.575 (citing to *Japan Alcohol (AB)* at para. 12).

The U.S. First Written Submission also explained how China’s theory was inconsistent with provisions of Article 8 of the SCM Agreement. See U.S. First Written Submission, para. 376-77.

²⁹³ China Answers to First Panel Questions, para. 185.

²⁹⁴ *Id.*

interpretation reflected in Article 32 of the Vienna Convention. 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.

170. In any event, however, contrary to China’s argument, the change in the draft text does not demonstrate that the U.S. position is incorrect. Changes in draft treaty text, particularly when no explanation is provided for the changes, can be interpreted in numerous ways. A much more reasonable explanation for the change identified by China is that the drafters did not want Article 2.2 to require that a subsidy be available to every enterprise in a region before it could be considered regionally specific. Thus, they eliminated the word “all” from the text.²⁹⁵ Further, the drafters did not want a determination of regional specificity to be dependent on a subsidy going to only *enterprises* within the region but instead, a subsidy could go to enterprises, groups of enterprises, industries or groups of industries within the region. Thus, the drafters replaced the word “enterprises” with “certain enterprises,” which Article 2.1 of the SCM Agreement defines as including “an enterprise or industry or group of enterprises or industries.” Understood in this way, the change in the text from the Dunkel draft 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.

171. Second, China argues that the New Century Industry Park did not constitute a designated geographical region because it did not have an economic or administrative character.²⁹⁶ In response, the United States explained that the ordinary meaning of “designated geographical region” is not limited to an area with administrative and economic character. New Century Industry Park clearly meets the proper definition of a designated geographical region because it is “a large tract of land, defined by the tract of land’s feature or arrangement, and called by a name.”²⁹⁷ Further, the United States explained that New Century Industry Park does, indeed, have an administrative nature because the Park has an administrator that oversees the Park and also has an economic nature because the park was established to promote industrial activity.²⁹⁸ Accordingly, there can be no question that New Century Industry Park is a designated geographical region within the meaning of Article 2.2 of the SCM Agreement.

²⁹⁵ Indeed, had Article 2.2 maintained a requirement that *all* enterprises in a region receive a subsidy before the subsidy could be considered regionally specific, then Article 2.2 could have been interpreted as an exception to Article 2.1(a). That is, Article 2.2 could have been interpreted as providing that subsidies to only certain enterprises within a region are not specific under Article 2.1(a).

²⁹⁶ China First Written Submission, para. 290.

²⁹⁷ U.S. First Written Submission, para. 369-70 (citing to the *New Shorter Oxford English Dictionary’s* definitions for “designated,” “geographical,” and “region”).

²⁹⁸ See, e.g., U.S. First Written Submission, para. 373.

172. Finally, 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.²⁹⁹ China conflates the benefit and specificity analyses. As discussed in the introduction to this section, neither the text nor the structure of the SCM Agreement supports a requirement that a benefit must be specific to find a subsidy specific. 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.

173. 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 easily circumvent the disciplines of Article 2.2 of the SCM Agreement. Pursuant to China's theory, all a granting authority need do to circumvent Article 2.2 is ensure that at least one enterprise outside the region receives a similar benefit and the program would no longer be regionally specific. This Panel should not adopt an interpretation of Article 2.2 that would permit Members to so easily circumvent the subsidy disciplines set forth in Article 2.2.³⁰⁰

174. An example drawing on a tax subsidy program is useful in demonstrating that China's theory of regional specificity is incorrect. If a granting authority created a tax credit for enterprises located in a designated geographical region, then that tax credit is regionally specific. This specificity determination is correct, irrespective of whether the granting authority has other subsidy programs in place through which it provides other tax credits to enterprises located outside the region. In fact, it would not be extraordinary for a granting authority to maintain more than one tax credit program. However, once a granting authority identifies a designated geographical region and provides a tax credit to that region, the subsidy is specific. Similarly, in the *LWS CVD* investigation, Huantai County identified New Century Industry Park and provided land-use rights for less than adequate remuneration to enterprises located in that Park. The fact that the county may have provided other land-use rights for less than adequate remuneration outside the Park is not relevant to Commerce's regional specificity determination.

VII. 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

175. China argues that the United States acted inconsistently with certain WTO obligations by concurrently applying AD and CVD measures to imports from China. The basis for the asserted prohibition on such concurrent application is not in the text of the covered agreements, but is instead located in a theory advanced by China of "overlapping rationales" for the NME

²⁹⁹ China First Written Submission, para. 301.

³⁰⁰ *Canada – Dairy (AB)*, para. 110 (rejecting an interpretation of Article 9 of the *Agreement on Agriculture* because the interpretation would permit Members to circumvent the disciplines set forth in that agreement); *see also, Korea – Commercial Vessels*, n. 209 (refusing to interpret Article 1 of the SCM Agreement in a manner that would allow Members to circumvent the subsidy disciplines).

methodology and for the imposition of CVDs.³⁰¹ According to this theory, the normal value calculated under an NME methodology necessarily captures the entire effects of subsidization in every instance, as a result of which the imposition of any level of CVDs would constitute a “double remedy.”

176. In this section, the United States demonstrates that China errs on theory, on economics, and on law. China’s theory suffers from multiple flaws, each of which is sufficient to undermine China’s assertion that a double remedy exists whenever CVD measures are imposed concurrently with AD measures calculated under an NME methodology. Without this foundation, China’s claims have no basis as they are all premised on the existence of a full double remedy in every instance of such concurrent application. In any event, China’s claims are also based on a fundamental misunderstanding of WTO provisions and their applicability to the circumstances of China’s complaint. China’s claims contesting the concurrent application of AD and CVD measures to imports from China are therefore devoid of merit.

A. China’s Claims Rest on a Direct Challenge to the Right of WTO Members to Apply AD and CVD Measures Concurrently to Imports from China that are Dumped and Subsidized

177. The United States has explained that, notwithstanding China’s arguments to the contrary, China’s claim fundamentally challenges the right of Members to apply AD and CVD measures concurrently to imports from China where those imports have been found to be both dumped and subsidized and the importing Member treats China as a non-market economy.³⁰² China may insist that “this is not a question of concurrent application. It is a question of whether it is permissible under the covered agreements to offset the same subsidies twice.”³⁰³ But China nevertheless asserts that the same subsidies are *entirely* offset twice *whenever* CVD measures are applied concurrently with AD measures based on an NME methodology. China’s argument, therefore, is a distinction without a difference. As the United States observed above,³⁰⁴ it is China’s own explanation of its theory that has left no doubt that the real locus of China’s claims is the concurrent application of AD and CVD measures:

– “Prior to its determination in *CFS Paper*, Commerce had correctly recognized that the designation of a country as an NME and the application of countervailing duties to imports from that country are mutually exclusive of each other.”³⁰⁵

³⁰¹ *E.g.*, China First Written Submission, paras. 366 and 374. *See also* China Answers to First Panel Questions, paras. 209-210.

³⁰² *See* U.S. First Written Submission, paras. 67-70, 384-385; U.S. First Opening Statement, para. 38; U.S. Answers to First Panel Questions, paras. 2, 9, 148-150, 184-185.

³⁰³ China Answers to First Panel Questions, para. 217. *See also* China First Opening Statement, para. 75.

³⁰⁴ *See* Section II.B. of this written submission.

³⁰⁵ China First Written Submission, para. 327.

- “[T]he simultaneous application of the NME methodology and countervailing duties necessarily results in a double remedy for the same alleged acts of subsidization.”³⁰⁶
- “[I]t was widely recognized that the concurrent application of the NME methodology and countervailing duties would give rise to the problem of double remedies for the same acts of subsidization.”³⁰⁷
- “[T]he imposition of a double remedy for the same alleged subsidy is *inherent* in the concurrent application of the NME methodology and countervailing duties to the same categories of imports.”³⁰⁸
- “A double remedy will therefore arise in all cases in which Commerce applies the two remedies simultaneously.”³⁰⁹
- “The double remedy arises as a necessary result of the operation of the two remedies whenever they are used in conjunction with each other.”³¹⁰
- “China’s panel request makes clear that, in China’s view, the violations occur in any instance in which the United States applies the two remedies simultaneously, not just in the specific investigations at issue in this dispute.”³¹¹

178. In response to direct questions from the Panel and the United States, China seems to acknowledge the weakness in its broad, sweeping arguments, and attempts to avoid the fact that its challenge is fundamentally about the concurrent application of AD and CVD measures. Instead of acknowledging the conclusion that follows necessarily from China’s own characterization of its theory, China suggests that concurrent application would still be permissible where the investigating authority takes “steps” to ensure that the normal value calculated under an NME methodology did not offset the same subsidies as the CVDs.³¹² However, under China’s theory, the normal value calculated under an NME methodology will “necessarily”³¹³ fully offset the same subsidies “in all cases”³¹⁴ of concurrent application because of the use of surrogate values (*i.e.*, costs and prices outside of China) when constructing normal value under the NME methodology. It follows, therefore, that, taking China’s theory at face

³⁰⁶ China First Written Submission, para. 330.

³⁰⁷ China First Written Submission, para. 346.

³⁰⁸ China First Written Submission, para. 366. (Original emphasis)

³⁰⁹ China First Written Submission, para. 374.

³¹⁰ China Response to U.S. Request for Preliminary Rulings, para. 16

³¹¹ China Answers to First Panel Questions, para. 29.

³¹² China Answers to First Panel Questions, para. 212; China Answer to First US Question, para. 1. *See also* China Answers to First Panel Questions, paras. 216-217, 289.

³¹³ China First Written Submission, paras. 326, 330, 340, and 374.

³¹⁴ China First Written Submission, paras. 366, 374, and 386; China Answers to First Panel Questions, para. 213.

value, the “steps” that an investigating authority would have to take in order to apply concurrent AD and CVD measures consistent with Articles 19.3 and 19.4 of the SCM Agreement and GATT Article I:1 would be to either (a) decline to impose one of those remedies, or (b) calculate normal value without using surrogate values, in other words, calculate normal value for NME imports in the same manner as for market economy imports.

179. Either course of action, of course, amounts to imposing upon Members a *choice* between imposing AD duties on the basis of an NME methodology and imposing CVDs. As the United States has explained,³¹⁵ this choice not only has no foundation in the text of the covered agreements, but would read out of paragraph 15 of the Protocol the explicit authorization to use an NME methodology *and* to impose CVDs.

B. China Has Failed to Establish That a Double Remedy Arises from the Concurrent Application of AD and CVD Measures

180. 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.³¹⁶ According to China, the rationale for an NME methodology is to place the producer in the position of having “market-determined” costs and prices when calculating normal value,³¹⁷ which necessarily includes ensuring that the effects of subsidies are removed from those costs.³¹⁸ The rationale for imposing CVDs, in China’s understanding, is to offset the “competitive advantage”³¹⁹ or “correct distortions”³²⁰ that result from the granting of subsidies to a particular firm. In China’s words, “[t]hese are two different approaches to remedying the fact that a producer’s costs and prices were not determined by market forces.”³²¹

181. China argues that a double remedy is created because the NME normal value “necessarily captures any trade-distorting effects of alleged subsidies.”³²² According to China, the NME methodology not only produces market-economy normal values (*i.e.*, the normal values that would be found if China were a market economy country) but also embodies some sort of built-in “correction” for all of the subsidies provided to Chinese respondents.³²³ Thus, in China’s view, it is precisely the NME methodology itself – that is, the use of market-determined costs

³¹⁵ U.S. First Written Submission, paras. 412-416; U.S. Answers to First Panel Questions, para. 170.

³¹⁶ *E.g.*, China First Written Submission, paras. 366 and 374. *See also* China Answers to First Panel Questions, paras. 209-210.

³¹⁷ China First Written Submission, paras. 324 and 372; China Answers to First Panel Questions, para. 209.

³¹⁸ *See* China First Written Submission, paras. 372-373; China Answers to First Panel Questions, para. 209.

³¹⁹ China First Written Submission, paras. 325; China Answers to First Panel Questions, para. 210.

³²⁰ China First Written Submission, paras. 326.

³²¹ China First Written Submission, para. 323.

³²² China First Written Submission, para. 330. *See also* China Answers to First Panel Questions, para. 220.

³²³ *See* China First Written Submission, paras. 326, 330, 340 and 372; China Answers to First Panel Questions, para. 220.

and prices outside China – that creates the higher normal value, which also remedies the effects of the subsidy.

182. As the United States explains in detail in this section, China’s theory is flawed in multiple respects.³²⁴ First, China’s theory mischaracterizes the rationales for the NME methodology and the imposition of CVDs. Second, China’s theory focuses solely on normal value, ignoring all other calculation aspects in the derivation of a remedy permitted under the Anti-Dumping Agreement. Third, China’s theory cannot be reconciled with the views of Contracting Parties and WTO Members, which have already reflected their judgments about the potential for double remedies in explicit provisions of the relevant agreements. Finally, China’s theory is based on flawed economic logic.

1. China’s “Rationales” for the NME Methodology and the Imposition of CVDs Have No Basis in the WTO Agreement

183. The United States recalls at the outset that AD measures and CVD measures are distinct remedies targeting distinct practices.³²⁵ The relevant WTO provisions outline different procedures that must be followed before imposing such measures, including separate bases and methods for calculating each remedy. As the United States has observed, neither the Anti-Dumping Agreement nor the SCM Agreement provides any rationale for that remedy – or the harm that remedy is designed to address – to be factored into the calculation or the imposition of the other remedy, with the sole exception of GATT Article VI:5, which does not apply here.³²⁶ Nevertheless, China advances a theory that is not only at odds with the distinctness of these two remedies, but in fact is premised entirely on a presumed interaction – indeed, an “overlap” – between the economic “distortion” that each remedy allegedly seeks to address. Because China’s theory is based on such an erroneous understanding of “overlapping rationales,” it fails to demonstrate the existence of a double remedy.

(a) NME Rationale

³²⁴ China is therefore wrong to assert that “[t]he United States ... appears not to deny the existence of a double remedy entirely, but rather considers it a question of *degree* in each instance.” China Answers to First Panel Questions, para. 256 (original emphasis). As the following discussion makes clear, the numerous shortcomings of China’s theory undermine the view that *any* overlap in remedies exists, much less, as is the premise of China’s claims, that there is an *entire* double remedy resulting in the relevant subsidies being fully offset twice. See U.S. Answers to First Panel Questions, paras. 186-187. In any event, it is difficult to understand on what basis China now seeks to rely on “some overlap” in remedies when China has yet to explain how, under its theory, there could be only “some overlap” instead of the *entire* overlap that has been at the core of China’s theory to date. *E.g.*, China Answers to First Panel Questions, para. 282. See also U.S. Answer to First Panel Question 92.

³²⁵ See U.S. First Written Submission, paras. 389-394.

³²⁶ See U.S. First Written Submission, para. 393.

184. China incorrectly asserts that subsidization is among the market distortions that the NME methodology is “meant to counteract.”³²⁷ This characterization reflects a fundamental misunderstanding of the NME methodology.

185. Dumping margins are normally calculated on the basis of a comparison between home market price and export price. Where circumstances do not permit a “proper comparison” with the home market price, an investigating authority may resort to constructed value – generally on the basis of costs and profits for the given producer/exporter in the home market – to approximate what the home market price would be.³²⁸ GATT rules have long recognized that NMEs, because of the inherent unreliability of costs and prices in such markets, pose “special difficulties” for the calculation of dumping margins that typically prevent the calculation of a dumping margin based on home market price or even constructed value.³²⁹ Those rules have accordingly provided for the right to employ an NME methodology that is not based on a “strict comparison [of export price] with domestic prices” in those markets.³³⁰ Article 2.7 of the Anti-Dumping Agreement confirms that Members retained this right after the Uruguay Round. Paragraph 15(a) of China’s Protocol again confirms that, because of the particular circumstances of China’s economy, Members may employ an NME methodology to calculate dumping margins in respect of imports from China. Nothing in the GATT 1994, the Anti-Dumping Agreement, or China’s Protocol provides support for the view that the NME methodology, or any other aspect of the calculation of the dumping margin, relates to subsidization or the economic distortion resulting from such *government practice*.³³¹

186. As contemplated by the above provisions, the use of an NME methodology is meant to replace unreliable costs and prices in the NME with surrogate values³³² from a market economy at a comparable stage of economic development, in order to calculate normal value to assess whether international price discrimination exists. Commerce cannot be sure that the NME constructed normal value is a “subsidy-free” price, and is under no obligation to do so under U.S. law (or the covered agreements) precisely because the NME methodology is neither intended nor designed to “counteract”³³³ subsidization. After the derivation of this special normal value, the export price is then subtracted from normal value, just as in any other anti-dumping proceeding. The NME methodology is used to calculate the *margin of dumping*. The

³²⁷ China Answers to First Panel Questions, para. 211. *See also* China First Written Submission, para. 373.

³²⁸ Article 2.2 of the Anti-Dumping Agreement.

³²⁹ *Ad Note 2* to Article VI:1 of the GATT 1994.

³³⁰ *Ad Note 2* to Article VI:1 of the GATT 1994.

³³¹ This is, of course, not surprising because it is the application of countervailing measures, as provided for under the SCM Agreement, that is designed to counteract subsidization.

³³² Notably, surrogate values may be higher or lower than the actual costs in an NME. For example, in many cases where Chinese capacity is rapidly expanding, actual depreciation expenses in the Chinese industry are far higher (due to recently constructed plants) than in the surrogate country (where recent capital investment has been lower). This results in the surrogate factory overhead ratio being lower than the actual ration in the Chinese industry.

³³³ China Answers to First Panel Questions, para. 211.

objective, as in any other anti-dumping proceeding, is to measure price discrimination, not to offset subsidies.

187. That the NME methodology is not designed to counteract subsidies is confirmed by reference to the U.S. statutory provision setting out the criteria that Commerce must evaluate when determining whether a country constitutes an NME.³³⁴ Commerce determines whether a country should be considered an NME based on a number of statutory criteria, including currency convertibility, wage rate determination, openness to foreign investment, government ownership or control over the means of production, and government control over pricing and output decisions and the allocation of resources. None of these criteria concerns subsidization. Whether the country concerned engages in subsidization is neither relevant nor considered in this analysis.³³⁵ If the NME methodology were concerned with offsetting subsidies, then presumably the extent of subsidies would be a factor in determining whether to classify a country as an NME country under the anti-dumping statute.

188. China cites to a statement by the U.S. Congress in support of its view that Commerce

³³⁴ See 19 U.S.C. § 1677(18), which provides:

(18) Nonmarket economy country.

(A) In general. The term “nonmarket economy country” means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

(B) Factors to be considered. In making determinations under subparagraph (A) the administering authority shall take into account–

(i) the extent to which the currency of the foreign country is convertible into the currency of other countries[.],

(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,

(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,

(iv) the extent of government ownership or control of the means of production,

(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and

(vi) such other factors as the administering authority considers appropriate.

³³⁵ See 19 U.S.C. § 1677(18); Memorandum for David M. Spooner, “Antidumping Investigation of Certain Lined Paper Products from the People’s Republic of China (‘China’) - China’s status as a non-market economy (‘NME’),” at 6 (Aug. 30, 2006). (Exhibit CHI-88).

generally does not use factor values³³⁶ that may be subsidized.³³⁷ The United States first notes that statements of the U.S. Congress, even in legislative history accompanying the passage of a statute, do not have the force of law in the U.S. legal system. Moreover, a closer examination of the legislative history selectively quoted by China reveals that its drafters did not even expect Commerce to ensure the elimination of factor values influenced by subsidies:

In valuing such factors, Commerce shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices. *However, the conferees do not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time.*³³⁸

Thus, it was hoped that Commerce would not use prices which it had *reason* to believe, by virtue of *generally available information*, were in fact subsidized.

189. This clarification is significant because in implementing the relevant statute, Commerce conducts no formal investigation and makes no determination that the factor values to be used are not subsidized. Rather, Commerce looks to generally available information to determine whether factor values from certain countries are appropriate. This generally available information typically takes the form of existing CVD orders that inform Commerce's examination, and even then, tends to result in the rejection of factor values in the limited circumstances where those values are based on import prices of inputs *and* the inputs are from countries that have been found in those CVD investigations to be providing non-product-specific *export subsidies*. Indeed, the records of the investigations at issue in this dispute reflect precisely this limited effort made by Commerce to consider subsidization in the context of applying the NME methodology.³³⁹

190. This proper understanding of the relevance of subsidization in the context of the NME methodology reveals that (a) nothing in the covered agreements renders subsidization at all relevant to the application of the NME methodology; (b) the NME methodology under U.S. law

³³⁶ As the United States has explained, factor values are the values of inputs (factors of production) used to produce the product under investigation. See U.S. First Written Submission, para. 450.

³³⁷ See China First Written Submission, para. 371 and footnote 315.

³³⁸ Legislative History to Omnibus Trade and Competitiveness Act of 1988, House Conference Report No. 100-576, 1988 U.S.C.C.A.N. 1547, 1623 (Exhibit CHI-123). (Emphasis added)

³³⁹ See *Memorandum to the File: Surrogate Values for the Preliminary Determination - Jiangsu Yulong Steel Pipe Co., Ltd. (CWP)*, dated January 3, 2008, p. 2; *Memorandum to the File: Investigation of Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Surrogate Values for the Preliminary Determination*, dated January 23, 2008, p. 1-2; *Memorandum to the File: Investigation of Laminated Woven Sacks from the People's Republic of China: Surrogate Values for the Preliminary Determination*, dated January 24, 2008, p. 2; *Memorandum to the File: Investigation of Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Surrogate Values for the Final Determination*, dated July 7, 2008, p. 2. (Exhibit US-151)

is not “meant to counteract”³⁴⁰ subsidization as one of the market distortions that give rise to the need for such a methodology; and (c) Commerce has typically excluded certain surrogate values in connection with subsidization in only a limited set of circumstances. China’s characterization of the “rationale” of the NME methodology is therefore incorrect.

(b) CVD Rationale

191. China asserts that the purpose of imposing CVDs is to offset any “competitive advantage”³⁴¹ a firm may receive by virtue of a subsidy, or to correct any economic “distortions”³⁴² 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.” As a result of this error, China contends that a double remedy arises when the economic “distortions” caused by subsidization, which are intended to be addressed by CVDs, are also addressed by the concurrent imposition of an AD duty.³⁴³

192. China’s position cannot be reconciled with the text of the SCM Agreement. The SCM Agreement 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,” or have any effect whatsoever on costs or prices. Rather, a CVD is levied “for the purpose of offsetting any subsidy,”³⁴⁴ not the “competitive advantage” or economic “distortion” resulting from that subsidy. This definition recognizes that the effect of a subsidy, if any, need not be calculated by an investigating authority.

193. It is because of this equivalence between the CVD and the subsidy itself (rather than its effects) that, as the United States has explained,³⁴⁵ Article VI:3 of the GATT 1994 authorizes Members to levy CVDs on products from other Members not “in excess” of the estimated subsidy, and Article 19.2 of the SCM Agreement provides that the “full amount” of a subsidy is countervailable.

194. Taken together, these provisions make plain that CVDs may be imposed to offset the full amount of subsidies, as defined under the SCM Agreement. It follows, then, that even where some subsidies may produce only limited demonstrable effects, the SCM Agreement permits the imposition of duties up to the full amount of the subsidy without measuring those possibly smaller effects. At the other end, the SCM Agreement does not permit CVDs in excess of the

³⁴⁰ China Answers to First Panel Questions, para. 211.

³⁴¹ China First Written Submission, paras. 325; China Answers to First Panel Questions, para. 210.

³⁴² China First Written Submission, para. 326.

³⁴³ *Id.*

³⁴⁴ Footnote 36 of the SCM Agreement.

³⁴⁵ See U.S. First Written Submission, paras. 391-392.

amount of the subsidy even if it could be shown that the effects of the subsidy are far greater.³⁴⁶ The SCM Agreement requires only that imports of the subsidized product injure the industry in the importing country that produces the like product. Contrary to China’s theory, CVDs are not required to be calculated at a level designed to eliminate economic distortions from subsidies.

195. In sum, China’s theory of a double remedy arising from the “rationales” for the NME methodology and the imposition of CVDs – both of which, in China’s view, are intended to address the same “distortions” – leads to the proposition that China believes that WTO Members should have folded CVD measures into the AD regime. In so doing, Members could have permitted countervailable subsidies to be addressed in the course of AD investigations, where they could be added to the cost of production and thereby create or increase dumping margins. Of course, such an approach would have eliminated any remedy for otherwise countervailable subsidies that did not result in dumping margins. In this light, China’s understanding of the “rationales” for these two distinct remedies patently conflicts with the actual regimes created by the WTO agreements and cannot support China’s claim as to the existence of a double remedy.

2. China’s Theory Wrongly Equates Normal Value with the “Remedy” Permitted Under the Anti-Dumping Agreement, Namely, the AD Duty

196. In evaluating China’s argument, it is important to bear in mind that the two *remedies* in question – AD and CVD measures – are both *duties* imposed upon the importation of the product under investigation. It follows that, in order for a “double remedy” to exist, there must be two duties, each of which remedies the same practice.

197. The United States has explained that the WTO agreements recognize that AD and CVD measures are, in fact, separate remedies for separate practices.³⁴⁷ Thus, investigating authorities are free under the WTO agreements to apply concurrent AD duties and CVDs, provided that the combined duties do not exceed the total of (1) the amount of AD duties that would properly be found in an independent AD investigation, and (2) the amount of CVDs that would properly be found in an independent CVD investigation. Article VI:5, which is limited to export subsidies, provides the sole exception to this rule.

198. China’s attempt to establish a double remedy on the basis of “competitive advantage” or economic “distortions” 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 focuses on normal values to avoid an inconvenient fact – that, depending upon the export price, a fifty dollar per unit subsidy could be accompanied by an NME dumping margin of zero dollars, one dollar or one hundred dollars. Thus, even under China’s theory, NME dumping margins do not necessarily offset subsidies, and

³⁴⁶ For example, a producer may receive a \$10 million grant to finance R&D. The R&D financed by the grant could result in efficiency gains that double the firm’s productivity, or fail to produce any gain whatsoever. Under either scenario, the subsidy would be \$10 million, and the CVD accordingly could not exceed that amount.

³⁴⁷ U.S. First Written Submission, paras. 389-394.

may have very little relationship to them.

199. China attempts to get around this fundamental problem by declaring export prices to be “entirely irrelevant.”³⁴⁸ They are not. Normal value is only one half of the basic dumping equation. Dumping margins are determined by subtracting export prices from normal values. Without both a normal value and export price (and a finding of material injury), there can be no dumping margin, no AD duty order, no AD duty, and no remedy.

200. The fact that China’s argument concerns only normal values, rather than dumping margins, explains why China was unable to provide a responsive answer to the Panel’s Question 93(b), about whether acceptance of China’s argument would permit Commerce to impose any CVDs, if a contemporaneous NME AD investigation showed that there was no dumping. China answered that there could be no “mathematical” comparison of AD duties and CVDs, and then avoided any comparison of them at all.³⁴⁹ Instead, China argued that the NME normal value itself necessarily offsets any “competitive advantage” that the NME producer had obtained from subsidies, regardless of whether any actual AD duties are assessed.³⁵⁰

201. China’s exclusive focus on normal value also explains why another of the arguments that it emphasizes is invalid. China has pointed out that some of the factor values selected by Commerce in determining normal value in the AD investigations are similar to the benchmarks that USDOC used to value subsidies in the concurrent CVD investigations.³⁵¹ China asserts that the use of similar values in both the AD and CVD proceeding ensures that the producer in

³⁴⁸ China First Written Submission, paras. 363 and 392.

³⁴⁹ China Answers to First Panel Questions, para. 287.

³⁵⁰ China Answers to First Panel Questions, para. 286. It is also in this respect that China’s attempt to compare this dispute with other proceedings in which Commerce took certain actions to avoid duplication of remedies is unavailing. In its answer to Panel Question 74, China identifies those proceedings as the following: *Certain Steel Products from the Netherlands*, *German Tool Steel*, and *LEU from France*. In none of those proceedings, however, did Commerce take any action on the basis of assertions about the alleged effects of subsidies on normal value. *Certain Steel Products from the Netherlands* does not concern the effect of subsidies upon factor quantities. It is simply an instance in which Commerce reduced a Dutch respondent’s cost of capital by the amount of capital received from the Dutch government as a grant. Thus, the producer’s actual cost of capital was the reduced amount. In *Tool Steel* and *LEU*, Commerce refused to increase the dumping margin that would have been found in an independent AD proceeding by the full amount of countervailable subsidies. In *Tool Steel*, Commerce refused to add the CVD to normal value. In *LEU*, Commerce refused to subtract the CVD from the export price. Both proposals would have automatically increased the dumping margin that would have been found, absent any CVD case, by the amount of the countervailable subsidies found in the companion CVD case, thus indisputably collecting the CVD twice. These straightforward proposals to double-count CVDs contrast starkly with China’s theory that there is a double remedy because the alleged rationales underlying AD and CVD measures overlap, inherently creating a double remedy when each measure is applied as it would be in an independent proceeding. China’s inability to demonstrate a double remedy through a “mathematical comparison between a CVD margin and an AD margin,” either in the investigations at issue or before this Panel, further confirms that China’s attempt to be exempted from application of either the AD or CVD remedy rests solely on the basis of its unsubstantiated and flawed theory of “overlapping rationales.” China Answers to First Panel Questions, para. 286.

³⁵¹ See China First Written Submission, paras. 393-397; China Answers to First Panel Questions, paras. 281-282.

question is placed in the position of having a “market-determined” cost of production, at least for that particular factor. According to China, this demonstrates that the resulting AD duties and CVDs address the same economic “distortion,” defined by China as the extent to which the producer enjoys a below-market cost of production.³⁵² In short, China argues that this proves that AD duties remedy subsidies.

202. Any potential similarity between factor values used in the calculation of NME normal value, on the one hand, and benchmarks used to assess the existence of a subsidy, on the other hand, does not establish what China seeks to prove by drawing such a comparison. It does not follow from such potential similarity that the resulting AD duties and CVDs remedy the same economic “distortion” and that, therefore, a double remedy exists. This is because China fails to actually compare the two *remedies* at issue, basing its conclusion instead on the antecedent determination of normal value. As explained above, even if the entire normal value is assumed to be “market-determined,” that alone says nothing about what the ultimate AD duty – that is, the *remedy* – will be.³⁵³ Normal value does not itself become a remedy simply because China declares export prices to be “entirely irrelevant.”³⁵⁴ Export prices may be irrelevant to China’s argument, but they are not irrelevant to the actual *remedy*, which is an AD duty. China has therefore not shown how an NME normal value – even assuming it actually represents the market-determined cost of production – constitutes a *remedy* at all, still less one that inherently remedies subsidies, in addition to dumping.³⁵⁵

3. China’s Theory is Not Supported by Economic Logic

203. Even assuming, *arguendo*, that normal values, by themselves, could create a double remedy, China’s theory about NME normal values – that they necessarily are high enough to cover the full value of any subsidies provided within China – is unsound. China’s argument amounts to the assertion that NME normal values necessarily equal at least the sum of: (1) the cost of production that the Chinese producers would have had, if China had been a market economy country at the time of the investigation; plus (2) the amount by which those costs would have been lowered by the subsidies to those producers.

204. The theory that NME normal values necessarily offset the amount by which normal values in a “market economy China” would have been lowered by subsidies is based on the

³⁵² See China First Written Submission, paras. 371-373.

³⁵³ For example, the normal value could be accompanied by a dumping margin of zero percent, 100 percent, or anything in between. Indeed, an exporter whose costs are all “market-determined” can still be found to be dumping precisely because the AD remedy is about measurement of price discrimination and not about offsetting the “competitive advantage” or economic “distortion” resulting from subsidization.

³⁵⁴ China First Written Submission, para. 363.

³⁵⁵ An additional problem with China’s argument in this respect is that, as the United States explains in Section VII.B.3 of this submission, the fact that one factor value in an NME normal value determination may be from a surrogate market economy country is only one part of the determination of normal value, and the NME methodology approximation of the entire normal value may be distorted by a host of other factors (such as profit and general expenses, and surrogate market values that may themselves have been reduced by subsidies).

assumption that NME normal values are completely unaffected by subsidies. This is simply not true (just as it is not true for concurrent AD and CVD proceedings involving market economies), as the United States explained in its First Written Submission,³⁵⁶ for at least three reasons.

205. First, put simply, while NME subsidies may not directly reduce the factor values used to calculate normal value in an NME proceeding, such subsidies may easily affect the quantity of factors consumed by the NME producer in manufacturing the product under investigation. The simplest example would be where a domestic subsidy in an NME country enables an investigated producer to purchase more efficient equipment, lowering its consumption of labor, raw materials, or energy. When the surrogate factor values are multiplied by the NME producer's lower factor quantities, they result in lower normal values and, hence, lower dumping margins.³⁵⁷ Any reduction in factor usage by NME producers would reduce normal value in a second manner, because the final factor values are also used to calculate the amounts to be added to normal value for overhead, SG&A, and profit.³⁵⁸

206. Moreover, in determining normal value in NME cases, Commerce does not exclusively use factor *quantities* in the NME countries, *valued* in the surrogate, market economy country. Factor values may also be based on the prices of inputs imported into China from market economy countries. Given that the input suppliers in these countries are often competing with Chinese suppliers of those same inputs, it is by no means safe to assume that those prices are not lower as the result of competing with subsidized products *in China*.

207. Finally, in at least some cases, the NME exports of the product under investigation will account for a large enough share of the world market to influence prices in world markets. In such cases, particularly where the industry is export-oriented or has excess capacity (a chronic problem in China), subsidies could increase output and exports from China, which, in turn, would reduce the prices of the good in question in world markets. These lower prices would reduce profits for producers selling in these markets, which, in turn, would reduce the profit rates Commerce derives from their financials to add to normal value.

C. China's Claims Have No Foundation in the WTO Agreement

1. The WTO Agreement Contains No Prohibition on the Concurrent Application of AD and CVD Measures in the Context of Domestic

³⁵⁶ See U.S. First Written Submission, paras. 450-454.

³⁵⁷ See U.S. First Written Submission, paras. 450-452.

³⁵⁸ China's response to this argument is that "any such benefit that accrued to the producer would be reflected in the producer's cost of capital, to the extent that it conferred any benefit at all." China Answers to First Panel Questions, para. 206. However, there is no basis for the assumption that reduced quantity of factors consumed, potentially resulting in lower normal values, "would be reflected in the producer's cost of capital." The factor quantities affect the cost of production inputs, not the cost of capital. See U.S. First Written Submission, para. 450. Moreover, China focuses here on input subsidies, but ignores the fact that, for example, subsidies that increase plant efficiency reduce factor usage.

Subsidies

208. The United States has observed that the issue of concurrent application of AD and CVD measures has been given consideration by Contracting Parties since the founding days of the GATT 1947. 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 subsidization.” This prohibition appears to be based on the presumed effect of export subsidies on export prices, that is, that export subsidies produce a direct and proportionate reduction in export prices with no corresponding effect on home market prices (normal value), thereby directly resulting in inflated dumping margins.³⁵⁹ No other provisions of the covered agreements preclude the concurrent application of AD and CVD measures under any other circumstances.³⁶⁰

209. 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.³⁶¹ Article 15 of the Subsidies Code included a provision re-affirming the right of Signatories to base AD duties on an NME methodology when applied in respect of a country described in *Ad Note 2* to GATT Article VI:1.³⁶² Furthermore, Article 15 also imposed upon Signatories the obligation to choose between AD investigations and CVD investigations when examining allegations of injury caused by imports from such a country. As a result, Signatories were restricted in the ability to apply AD and CVD measures concurrently to imports, not only as provided for in GATT Article VI:5, but with respect to all subsidies (not just export subsidies) from that group of countries.

210. 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. The decision not to continue this prohibition on the concurrent application of AD and CVD measures in the SCM Agreement is particularly significant given that Contracting Parties specifically discussed the role of non-market economies during the Uruguay Round negotiations.³⁶³ Furthermore, China was already well into its GATT accession negotiations by this point.³⁶⁴

211. China does not contest the fact that Members agreed not to bring Article 15 of the Code into the text of the SCM Agreement. Rather, China submits that the concurrent application of AD and CVD measures in respect of NMEs was no longer “relevant” given the state of U.S. countervailing duty practice and the transitioning nature of the NME Contracting Parties at the

³⁵⁹ China appears to agree with this underlying presumption of Article VI:5. *See* China Answers to First Panel Questions, para. 219.

³⁶⁰ *See* U.S. First Written Submission, paras. 396-402.

³⁶¹ *See* U.S. First Written Submission, paras. 404-407.

³⁶² *See* Article 15.2 of the Tokyo Round Subsidies Code.

³⁶³ *See* U.S. Answers to First Panel Questions, paras. 119-121.

³⁶⁴ China’s accession negotiations began under the auspices of the GATT in 1987 and concluded under the WTO in 2001.

time of the Uruguay Round.³⁶⁵ Whatever the specific reason for not including Article 15 of the Subsidies Code in the SCM Agreement, the fact remains that the only provision in the history of the covered agreements prohibiting the concurrent application of AD and CVD measures *outside* the context of *export subsidies* was no longer in force once the SCM Agreement applied.

212. This was the background against which China conducted negotiations with Members on its accession first to the GATT and then to the WTO. Whatever may have been the relevance to certain Contracting Parties of a provision on the concurrent application of AD and CVD measures in respect of NMEs, paragraph 15 of China’s Protocol made clear that Members would have the right to treat China as an NME when conducting AD investigations and that, therefore, a provision like Article 15 of the Subsidies Code would indeed have been relevant for China during those negotiations. Despite this relevance to China, and China’s recognition that Article 15 of the Subsidies Code had been discontinued by virtue of the SCM Agreement, China’s Protocol does not reflect any limitation on a Member’s right to concurrently apply CVDs and AD duties calculated on the basis of an NME methodology. To the contrary, the Protocol clearly sets out, in paragraph 15(a), the right of Members to apply such AD duties and to apply CVDs calculated on the basis of benchmarks outside China.³⁶⁶

213. In its answer to Panel Question 69, China misunderstands the significance of the fact that Contracting Parties and Members have adopted clear texts when intending to limit a Member’s right to concurrently apply AD and CVD measures. China suggests that the United States posits two different arguments with respect to GATT Article VI:5: one relating to concurrent application of AD and CVD remedies, and one relating to the imposition of so-called double remedies.³⁶⁷ This is incorrect. As the United States has discussed, the dichotomy between “concurrent application” and “double remedies” is a false one, as China’s own argument makes clear that this dispute is fundamentally about the concurrent application of AD and CVD measures in the investigations at issue.³⁶⁸

214. The United States has advanced, and continues to advance, only one argument relating to GATT Article VI:5. And, contrary to China’s understanding, that argument is not simply an *a contrario* reading of that provision. As the foregoing discussion reveals, and as set out in the U.S. First Written Submission,³⁶⁹ the narrowly circumscribed prohibition in GATT Article VI:5 must be understood together with paragraph 15 of China’s Protocol and in light of the circumstances surrounding the adoption and elimination of Article 15 of the Tokyo Round Subsidies Code. When these provisions are properly examined under the customary rules of interpretation of public international law, the absence of a prohibition on the concurrent application of AD and CVD measures in the context of domestic subsidies must be given meaning. Understood in this light, China’s claims amount to nothing less than an attempt to

³⁶⁵ China Answers to First Panel Questions, paras. 230 and 232.

³⁶⁶ See U.S. First Written Submission, paras. 411-414.

³⁶⁷ China Answers to First Panel Questions, paras. 216 and 218.

³⁶⁸ See, e.g., Section VII.A of this written submission.

³⁶⁹ See U.S. First Written Submission, paras. 395-417.

introduce rules in the covered agreements, based on an unsubstantiated theory, without going through the proper forum of negotiations with other Members.

2. China Has Failed to Establish Violations of Articles 19.3 and 19.4 of the SCM Agreement

215. In order for China to succeed on its claims under Articles 19.3 and 19.4, it must establish that a CVD has been “levied,” respectively, in amounts not “appropriate” according to the terms of Article 19.3, and in amounts exceeding the amount of subsidy found to exist by the investigating authority. The United States has noted that China has failed to meet this standard on multiple grounds. First, no claim can be made out under either provision because no CVDs have been “levied” yet under the U.S. retrospective system.³⁷⁰

216. Second, and more fundamentally, China does not base its claims in relation to the amounts of the CVDs at issue. Instead, China contends that the NME normal value is “meant to counteract” subsidization,³⁷¹ as a result of which the AD duty calculated under the NME methodology must be understood to somehow constitute a CVD within the meaning of the SCM Agreement. The United States has demonstrated that an AD duty calculated under the NME methodology does not constitute a “countervailing duty” as that term is defined in footnote 36 of the SCM Agreement.³⁷²

217. Moreover, if one accepts China’s premise that such an AD duty is simultaneously a CVD – that is, that such an AD duty is “levied for the purpose of offsetting any subsidy”³⁷³ – it follows that the duty could “only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of [the SCM Agreement] and the Agreement on Agriculture.”³⁷⁴

³⁷⁰ See U.S. Answers to First Panel Questions, para. 175.

³⁷¹ China Answers to First Panel Questions, para. 211.

³⁷² See U.S. First Written Submission, paras. 419-427; U.S. First Opening Statement, para. 47; U.S. Answers to First Panel Questions, para. 176.

³⁷³ Footnote 36 of the SCM Agreement.

³⁷⁴ Article 10 of the SCM Agreement. (Footnote omitted) Article 10 provides in full:

Members shall take all necessary steps to ensure that the imposition of a countervailing duty³⁶ on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated³⁷ and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

³⁶ The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

In other words, under China’s theory, the AD duty resulting from the NME methodology could *not* be imposed following only an AD investigation; rather, because China considers this AD duty to also be a CVD, a Member must first make the requisite findings of a CVD investigation (for example, subsidization, benefit, specificity, and injury by reason of subsidized imports). Accepting China’s theory would mean that imposition of an AD duty calculated under an NME methodology, without conducting a CVD investigation, would necessarily violate the SCM Agreement. This absurd result cannot be reconciled with WTO provisions that explicitly authorize use of an NME methodology.³⁷⁵

218. Finally, as discussed above, Contracting Parties declined to retain Article 15 of the Tokyo Round Subsidies Code, the only provision limiting the right to concurrent application of AD and CVD measures on imports from NMEs, in the SCM Agreement. China suggests that the elimination of Article 15 of the Subsidies Code in the Uruguay Round does not preclude an implicit prohibition of similar nature contained in Articles 19.3 and 19.4 of the SCM Agreement.³⁷⁶ However, the Code also contained provisions that were virtually identical to Articles 19.3 and 19.4 of the SCM Agreement.³⁷⁷ If, as China now claims, the concurrent application of AD and CVD measures on imports from NME countries “necessarily results”³⁷⁸ in a double remedy by virtue of “overlapping rationales” of the NME methodology and the imposition of CVDs,³⁷⁹ and such double remedy violates Articles 19.3 and 19.4, there would have been no need for Code signatories to include an express prohibition on concurrent AD and CVD investigations in Article 15 of the Code. The predecessors to Articles 19.3 and 19.4 in the Code should have been able to serve the same function of “implicit prohibition” that China now seeks to read into Articles 19.3 and 19.4. Plainly, such an “implicit prohibition” was not contained in those provisions of the Code and is likewise not contained in Articles 19.3 and 19.4.

³⁷ The term “initiated” as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

³⁷⁵ See *Ad Note* to Article VI:1 of the GATT 1994; Article 2.7 of the Anti-Dumping Agreement; and paragraph 15(a) of China’s Protocol.

³⁷⁶ See China Answers to First Panel Questions, paras. 223-225.

³⁷⁷ Articles 4.2 and 4.3 of the Tokyo Round Subsidies Code provide:

2. No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
3. When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and to be causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. (Footnotes omitted)

³⁷⁸ China First Written Submission, para. 330.

³⁷⁹ *E.g.*, China First Written Submission, paras. 366 and 374. See also China Answers to First Panel Questions, paras. 209-210.

3. China Has Failed to Establish a Violation of Article I:1 of the GATT 1994

219. China argues that the United States acted inconsistently with its obligations under Article I:1 of the GATT 1994 by “avoid[ing] the imposition of a double remedy” in respect of market economies but not doing so in respect of non-market economies.³⁸⁰ In support of this argument, China points to two specific situations in which, according to China, Commerce has taken action to avoid a double remedy for market economies: declining to deduct CVDs from the export price, and declining to add subsidies to the cost of production.³⁸¹ The United States has demonstrated that Commerce takes these actions equally in cases involving non-market economies.³⁸² The United States has also explained, moreover, that China’s 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:1.³⁸³

220. Finally, 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.³⁸⁴ In response China simply asserts that “the discrimination in the standard that Commerce applies for the avoidance of a double remedy relates ... solely to the origin of the products.”³⁸⁵ Unlike the situation where origin-based discrimination could be found in the text of a legal instrument, at no time has Commerce articulated any such “standard” or otherwise indicated that “double remedies” would not be avoided in respect of imports from China. To the contrary, as China has noted, Commerce has stated that it would seek to avoid double remedies when concurrently applying AD and CVD measures on imports from China,³⁸⁶ just as Commerce does in the circumstance of market economy imports. The sole basis for China’s conclusion that Commerce has accorded certain treatment to “like products” is speculation about how Commerce might approach other investigations. As the United States has explained, speculation cannot substitute for a showing of more favorable treatment accorded “like products.”³⁸⁷

4. “As Such” Claims

221. China bases its “as such” claims on a supposed “absence of legal authority” under U.S.

³⁸⁰ China First Written Submission, para. 413.

³⁸¹ See China First Written Submission, paras. 405-412.

³⁸² See U.S. First Written Submission, paras. 433-436.

³⁸³ See U.S. First Written Submission, paras. 440-444.

³⁸⁴ See U.S. First Written Submission, para. 431.

³⁸⁵ China Answers to First Panel Questions, para. 291.

³⁸⁶ See China First Written Submission, para. 357 (quoting Issues & Decision Memorandum from CVD investigation on *Coated Free-Sheet Paper*). See also *OTR Tires CVD Final Decision Memorandum*, p. 16 (Exhibit CHI-4).

³⁸⁷ See U.S. First Written Submission, footnote 593; U.S. Answers to First Panel Questions, para. 189.

law. The United States has demonstrated that this “measure” is not properly within the Panel’s terms of reference.³⁸⁸ The United States notes in addition that, in making out its “as such” claims, China bears the burden as a threshold matter of establishing the existence of this “measure.”³⁸⁹ China has failed to do so.

222. China places great emphasis on statements made by Commerce and the GAO, and proposed legislation (unadopted by the U.S. Congress), to support its view on the “absence of legal authority.”³⁹⁰ None of these sources supports the conclusion China would need to establish (assuming *arguendo* that the measure existed and was within the Panel’s terms of reference), namely, that *no legal authority* exists for Commerce to take whatever (undefined) actions China considers necessary to “avoid a double remedy.” Indeed, China appears to recognize this in its own first written submission, stating that “Commerce *appears* to lack authority under *the U.S. anti-dumping laws* to avoid the imposition of double remedies in investigations of imports from NME countries, but this is unclear.”³⁹¹ As the United States explained at the first substantive meeting of the Panel, the statements of Commerce and GAO referenced by China refer to particular aspects of Commerce’s authority³⁹² or amount to nothing more than the self-evident statement that there is no express provision in U.S. law addressing “double remedies” *per se* in the context of domestic subsidies.³⁹³ In the U.S. legal system, the mere absence of such an express provision does not mean that the relevant agency necessarily lacks the authority to take actions that are not so explicitly spelled out in the agency’s governing statute. However China may mischaracterize Commerce’s statements as reflecting an acknowledgment that it lacks *any* legal authority whatsoever to take actions to avoid a double remedy,³⁹⁴ the fact remains that Commerce has never made such a broad, unqualified statement about its own authority. China

³⁸⁸ See Section II of this written submission.

³⁸⁹ See *US – Gambling (AB)*, para. 141.

³⁹⁰ China First Written Submission, paras. 347-354.

³⁹¹ China First Written Submission, para. 362 (original italics; underlining added). This may explain why China hedged its assertions about its “as such” claims in its first written submission by asserting that U.S. law is inconsistent with certain WTO obligations “to the extent” that Commerce lacks such authority. *Id.* at paras. 364, 386, 421 and 424.

³⁹² For example, when referring to “adjustments for CVDs.” China First Written Submission, footnotes 304 and 308 and accompanying text.

³⁹³ See, e.g., U.S. Answers to First Panel Questions, para.63 (discussing GAO statements); China First Written Submission, footnote 309 and accompanying text (referring to whether “AD adjustment” had been provided *by Congress*). In this respect, China’s reference to the unadopted Trade Rights Enforcement Act has no relevance, as it merely creates the express provision mentioned above that everyone agrees does not exist at this point in U.S. law. See China First Written Submission, paras. 353-354.

³⁹⁴ See, e.g., China First Written Submission, para. 359 (“Commerce continued to make statements that are consistent with its previous position that it lacks authority to avoid double remedies in NME investigations”); 416 (“Commerce has taken the position that ... U.S. law does not permit it to make any adjustment to avoid the imposition of a double remedy in the case of imports from countries that the United States has designated as non-market economies”); and 422 (“Commerce has stated in the countervailing duty determinations at issue in this dispute that U.S. law does not permit Commerce to avoid the imposition of a double remedy”); China Answers to First Panel Questions, para. 21 (characterizing panel request as noting that in investigations at issue, “Commerce stated that it lacks legal authority to avoid the imposition of double remedies in the context of parallel AD/CVD investigations of imports from NME countries”).

has therefore failed to establish that an “absence of legal authority” exists.

223. Finally, the United States has explained that China’s “as such” challenge centers on the *discretion* held by Commerce – and recognized by China – to concurrently impose AD and CVD measures on imports from NMEs. 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.³⁹⁵

VIII. PROCEDURAL CLAIMS UNDER THE SCM AGREEMENT

A. It Is Unnecessary for the Panel to Make Findings on China’s Claim Under Article 13.1 of the SCM Agreement

224. The United States explained in its First Written Submission why China’s claim under Article 13.1 has no legal basis under the SCM Agreement.³⁹⁶ China has not disputed the evidence that, following the initiation of each investigation at issue, the United States remained available for consultations on all relevant matters, including new subsidy allegations, consistent with Article 13.2 of the SCM Agreement. Indeed, the record reflects that China took advantage of the U.S. availability for consultations subsequent to the filing of new subsidy allegations in each investigation.³⁹⁷

225. At the first substantive meeting of the Panel, and again in written answers to the Panel’s questions, the United States confirmed that when conducting investigations on imports from China, it will continue to afford China a reasonable opportunity to continue consultations, including with respect to new subsidy allegations, throughout the investigation period.³⁹⁸ In its written responses to the Panel’s questions, China states that, in the light of this confirmation, it “does not believe the Panel needs to address this issue further.”³⁹⁹ The United States agrees that it is unnecessary for the Panel to make any findings on this claim.

B. China Has Not Demonstrated that the United States Failed to Meet its Obligation Under Article 12.1.1 of the SCM Agreement to Provide the Government of China and Each Exporter and Foreign Producer At Least 30 Days to Reply to the Questionnaire

226. China claims that the United States acted inconsistently with Article 12.1.1 of the SCM Agreement because it did not provide at least thirty days for the Government of China and Chinese respondents to reply to Commerce’s supplemental requests for information in the four

³⁹⁵ See U.S. Answers to First Panel Questions, paras. 182-183.

³⁹⁶ See U.S. First Written Submission, paras. 464-73.

³⁹⁷ See U.S. First Written Submission, para. 466.

³⁹⁸ U.S. Answers to First Panel Questions, para. 198.

³⁹⁹ China Answers to First Panel Questions, paras. 293-298.

CVD investigations at issue. As explained in the U.S. First Written Submission, the thirty-day requirement in Article 12.1.1 does not apply to every supplemental request for information as China submits. Rather, the text of the Agreement, understood in its proper context, provides that the thirty-day requirement applies only to the questionnaire issued at the outset of each investigation.⁴⁰⁰

227. China disagrees with the U.S. reference to the singular term “questionnaire” in paragraph 6 of Annex VI to the SCM Agreement as context for interpreting Article 12.1.1. According to China, recognizing that paragraph 6 refers to a specific questionnaire – that is, the questionnaire issued at the outset of an investigation – would mean that an investigating authority would be allowed to conduct verifications of only the initial questionnaire.⁴⁰¹ However, nothing in Annex VI limits the verification to information provided in “the questionnaire.”⁴⁰² To the contrary, when read in its entirety, paragraph 7 of Annex VI makes clear that *any* “information” obtained is subject to verification by the investigating authority.⁴⁰³ China’s concern about the proper reading of Article 12.1.1 in the light of paragraphs 6 and 7 of Annex VI is therefore without merit.

228. In its First Written Submission, the United States noted that the term “questionnaires” in Article 12.1.1 logically referred to the initial questionnaire given that this questionnaire typically required more extensive information from governments and respondents than subsequent requests for information.⁴⁰⁴ China disputes this view, arguing that initial questionnaires and new subsidy allegation questionnaires are “indistinguishable” because of the similar “nature of the questions and the level of detail requested from respondents” in both types of questionnaires.⁴⁰⁵ China attempts to demonstrate this similarity by highlighting certain specific questions from two of the four CVD investigations at issue, specifically, the *LWS* and *OTR Tires* investigations.⁴⁰⁶

229. As an initial matter, the United States recalls that, as explained in the First Written Submission, there is a conceptual difference between the initial questionnaire and subsequent requests for information, including new subsidy allegation questionnaires.⁴⁰⁷ This conceptual

⁴⁰⁰ See U.S. First Written Submission, paras. 476-490.

⁴⁰¹ China Answers to First Panel Questions, paras. 309.

⁴⁰² The term “the questionnaire” is not used in Annex VI to denote the basis for the verification conducted by the investigating authority. Rather, it is used to explain, in paragraph 6, when “[v]isits to explain the questionnaire” are appropriate and, in paragraph 7, to establish a point in time before which a verification should generally not take place.

⁴⁰³ Paragraph 7 of Annex VI provides, in pertinent part, the following: “As the main purpose of the on-the-spot investigation is to verify *information provided* . . . further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the *information to be verified* and of any further *information* which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of *information obtained*.” (Emphasis added.)

⁴⁰⁴ See U.S. First Written Submission, para. 479.

⁴⁰⁵ China Answers to First Panel Questions, para. 299.

⁴⁰⁶ See China Answers to First Panel Questions, paras. 300-302.

⁴⁰⁷ See U.S. First Written Submission, para. 479.

difference tends to follow from the fact that an initial questionnaire is issued *at the outset* of an investigation, after an application under Article 11 of the SCM Agreement is filed and an investigation is initiated on the subsidy allegations in that application. As such, the initial questionnaire provides the investigating authority its first opportunity to seek relevant information on the record of the investigation. The initial questionnaire, then, by its very nature, asks not only about specific programs, but also general questions on industry structure, identification of foreign producers and exporters, production data, export volumes, sales, and ownership and other affiliations among firms in the industry.

230. A new subsidy allegation questionnaire, however, is issued *in the course of* an investigation, at which point the exporting Member and respondents have presumably supplied the investigating authority with much of the broader information sought in the initial questionnaire. As a result, a new subsidy allegation questionnaire tends to include questions only on a specific program (or programs) and does not include general questions that have already been asked in the initial questionnaire. In focusing exclusively on the “nature” and “level of detail” of questions posed about a specific subsidy program (or programs),⁴⁰⁸ China ignores this conceptual difference and consequently overlooks the significant general (*i.e.*, non-program-specific) questions that form a critical part of any initial questionnaire.

231. Turning to the investigations at issue in this dispute, the United States notes that China limits its discussion to questionnaires issued to the Government of China in the *LWS* and *OTR* investigations.⁴⁰⁹ However, after examining more fully the range of questionnaires issued to *all* interested parties, including respondent companies, in *all four* CVD investigations, it becomes clear that the initial questionnaire is significantly more extensive than the new subsidy allegation questionnaire, which explains why Article 12.1.1 of the SCM Agreement specifies a thirty-day requirement in particular for the initial questionnaire.⁴¹⁰

232. In all four CVD investigations, the amount of information requested in the new subsidy allegation questionnaires was significantly less than that covered in the initial questionnaires. For instance, in each of the four CVD investigations, the initial questionnaire issued to the Government of China and the respondent companies covered anywhere from 21 to 28 alleged subsidy programs, *in addition to* questions requesting general information on industry structure, identification of foreign producers and exporters, production data, etc.⁴¹¹ The new subsidy allegation questionnaires, however, covered only one to twelve alleged subsidy programs and no

⁴⁰⁸ China Answers to First Panel Questions, para. 301.

⁴⁰⁹ See China Answers to First Panel Questions, paras. 300-302.

⁴¹⁰ The subsequent requests for information on new subsidies alleged in each investigation have been provided in response to the Panel’s Question 206 (Exhibits US-129 through US-149).

⁴¹¹ See Exhibit US-104 (Part 1 of 3) (in CWP, questions covered 28 alleged subsidy programs and general information); Exhibit US-105 (Part 1 of 2) (in LWRP, questions covered 27 alleged subsidy programs and general information); Exhibit US-106 (Part 1 of 3) (in LWS, questions covered 23 alleged subsidy programs and general information); Exhibit US-107 (Part 1 of 3) (in OTR Tires, questions covered 21 alleged subsidy programs and general information).

general information.⁴¹² Specifically, in *LWS* and *OTR Tires*, the two investigations China submits as examples, the new subsidy allegation questionnaires generally covered less than half the programs covered in the initial questionnaire.⁴¹³ Notably, in *CWP* and *LWRP*, the two investigations that China excludes from its discussion of this issue, the new subsidy allegation questionnaires covered at most three alleged subsidy programs in *CWP*⁴¹⁴ and only one in *LWRP*.⁴¹⁵

233. Therefore, China’s selective reliance on questions from only two of the four CVD investigations at issue in this dispute, and its narrow focus on the “nature” and “level of detail” of program-specific questions, fail to substantiate its assertion that “the new subsidy allegations questionnaires are indistinguishable from the initial questionnaires.”⁴¹⁶ Instead, the conceptual difference between the initial questionnaire and a new subsidy allegation questionnaire, as confirmed by the above examination of the questionnaires in these investigations, confirms the logic of properly interpreting the term “questionnaires” in Article 12.1.1 to refer exclusively to questionnaires issued at the outset of an investigation.

234. In any event, it is worth recalling that China asks the Panel to adopt a *broad* rule that the thirty-day requirement in Article 12.1.1 of the SCM Agreement applies to *every* supplemental request for information. Whatever the alleged difficulties of *particular* requests for information subsequent to the initial questionnaire, they do not justify reading Article 12.1.1 to impose such a broad requirement for *all* requests for information. Other provisions in the SCM Agreement govern the adequacy of opportunities afforded by the investigating authority for a respondent to provide information in a given instance.

235. In this respect, the United States notes its disagreement with China’s assertion that adopting an interpretation of Article 12.1.1 along the lines of that given to Article 6.1.1 of the Anti-Dumping Agreement by the panel in *Egypt-Steel Rebar*⁴¹⁷ would provide investigating

⁴¹² See Exhibits US-129 through US-149.

⁴¹³ In the *LWS* CVD investigation, the new subsidy allegation questionnaire issued to the Government of China covered 11 programs and those issued to four respondents covered 12 programs for one respondent, 11 programs for a second respondent, 7 programs for a third respondent, and 1 program for a fourth respondent. See Exhibits US-139 through US-143. In the *OTR Tires* CVD investigation, the first new subsidy allegation questionnaire issued to the Government of China covered 10 programs and those issued to three respondents covered 9 programs for two respondents and 8 programs for a third respondent. See Exhibits US-144 through US-147. Additionally, the second new subsidy allegation questionnaire issued to the Government of China in *OTR Tires* covered only 1 program. See Exhibit US-148.

⁴¹⁴ In the *CWP* CVD investigation, the first new subsidy allegation questionnaire issued to the Government of China and to three respondents covered only 1 program. See Exhibits US-129 through US-132. Additionally, the second new subsidy allegation questionnaire issued to the Government of China covered 3 programs and those issued to two respondents covered 2 programs for one respondent and 1 program for the second respondent. See Exhibits US-133, US-134 and US-135.

⁴¹⁵ In the *LWRP* CVD investigation, the new subsidy allegation questionnaire issued to the Government of China and to two respondents covered only 1 program. See Exhibits US-136, US-137 and US-138.

⁴¹⁶ China Answers to First Panel Questions, para. 299.

⁴¹⁷ *Egypt – Steel Rebar (Panel)*, para. 7.276.

authorities “unfettered discretion” to issue any number of lengthy questionnaires with unreasonably short response times and would place interested Members and parties “entirely at the mercy of the demands of investigating authorities.”⁴¹⁸ 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.⁴¹⁹ Of particular relevance here is the general requirement in Article 12.1 that interested parties “be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant.” This provision ensures, *inter alia*, that requests for information beyond the initial questionnaire are not subject to unreasonable time constraints that prevent a respondent from adequately defending its interests. Had China believed it was denied such an opportunity in respect of any of the new subsidy allegations in the investigations at issue, it could have brought a claim accordingly. China has not done so.⁴²⁰

IX. CONCLUSION

236. For the reasons set forth above, along with those set forth in the United States’ First Written Submission, oral statements at the first substantive meeting with the Panel, and responses to the Panel’s questions, the United States requests that the Panel reject China’s claims.

⁴¹⁸ China Answers to First Panel Questions, para. 314 and footnote 231.

⁴¹⁹ *See, e.g.*, Articles 12.1-12.3.

⁴²⁰ *See* Panel Request, WT/DS379/2, pp. 6-7.

LIST OF U.S. EXHIBITS

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

US-	Title
150	F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance, 224 (Houghton Mifflin Company 1990)
151	<ul style="list-style-type: none">■ <i>Memorandum to the File: Surrogate Values for the Preliminary Determination - Jiangsu Yulong Steel Pipe Co., Ltd. (CWP), dated January 3, 2008</i> ■ <i>Memorandum to the File: Investigation of Light-Walled Rectangular Pipe and Tube from the People’s Republic of China: Surrogate Values for the Preliminary Determination, dated January 23, 2008</i> ■ <i>Memorandum to the File: Investigation of Laminated Woven Sacks from the People’s Republic of China: Surrogate Values for the Preliminary Determination, dated January 24, 2008</i> ■ <i>Memorandum to the File: Investigation of Certain New Pneumatic Off-The-Road Tires from the People’s Republic of China: Surrogate Values for the Final Determination, dated July 7, 2008</i>