European Union – Definitive Countervailing Duties on New Battery Electric Vehicles from China

(WT/DS630)

THIRD PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

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USA-2	International Energy Agency, Global EV Outlook 2024
USA-3	Definitions from The New Shorter Oxford English Dictionary, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.) (excerpts)
USA-4	Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, January 14, 2020
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I. INTRODUCTION

1. The United States welcomes the opportunity to provide its views on the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that have been raised in this dispute.

2. Like most WTO Members, the United States has a systemic interest in advancing economic growth, including through private, market-oriented investment, that promotes resilience and sustainability and benefits workers. That interest is threatened by a different kind of activity—namely, the strategic attempts to target specific industries for domestic or global market dominance by companies and countries using extensive government support and other wide-ranging non-market policies and practices, including in a manner that attempts to neutralize WTO subsidy disciplines. Such policies and practices distort trade, investment, and competition, and have created critical dependencies and systemic vulnerabilities globally. In the clean vehicle sector, for example, China has pursued global dominance through non-market policies and practices. It now produces approximately 60 percent of electric vehicles sold and 80 percent of the batteries that power them,[1] and accounts for almost 100 percent of lithium-iron-phosphate (LFP) production capacity.[2]

3. When these harmful policies and practices include the use of subsidies, and subsidized imports harm another Member's domestic industry, the GATT 1994 and the SCM Agreement provide a remedy. The United States has a systemic interest in ensuring that the rules disciplining subsidies are available and effective to address acute situations in which subsidized imports harm a WTO Member's domestic industry.

4. As we elaborate below, the interpretations underpinning many of China's claims would undermine those rules and the object and purpose of the SCM Agreement. They would, in particular, limit the ability of other Members to appropriately use the WTO subsidies disciplines to address the harms caused by China's industrial policies and massive excess capacity.

II. CLAIMS REGARDING ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

5. China argues that the European Union (EU) breached Article 1.1(a)(1) of the SCM Agreement in determining that Chinese battery and LFP suppliers constituted "public bodies" in assessing whether they provided batteries and LFP to producers in China for less than adequate remuneration.[3] The United States will focus on China's underlying contention that the European Commission (Commission) inadequately found that the suppliers "possess governmental authority" or "exercise governmental functions."[4] China also asserts that, in making a determination under the standard it proffers, an investigating authority may only consider certain

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[1] Washington Post, "How China pulled ahead to become the world leader in electric vehicles," March 3, 2025 (USA-1).

[2] International Energy Agency, Global EV Outlook 2024, p. 80 (Exhibit USA-2).

[3] China First Written Submission, paras. 317, 582.

[4] *See*, *e.g.*, China First Written Submission, paras. 427, 657.

types of record evidence and must adhere to a particular methodology.[5] As elaborated below, the text of Article 1.1(a)(1) supports nether China's underlying interpretation of "public bodies" nor the evidentiary and methodological requirements proposed by China.

6. For its part, in examining whether such entities were "public bodies" under Article 1.1(a)(1), the Commission considered evidence concerning the legal and economic environment prevailing in China in which the battery and LFP suppliers operate, the relationship between the suppliers and the Government of China (GOC), and core characteristics and functions of the suppliers.[6] Based on that record information, the Commission determined that "companies supplying batteries are vested with government authority and exercise government functions in that they implement the GOC policies."[7] It similarly determined that LFP producers are "vested with governmental authority and exercise governmental functions."[8]

7. The United States has serious concerns with the interpretation of "public body" relied upon by China. It relies entirely on prior, erroneous Appellate Body reports, argues that the term "public body" refers to "an entity that 'possesses, exercises or is vested with governmental authority,'" and that "an entity must be *governmental in nature* in order to be deemed to be a public body."[9] The EU appears to agree with China that "governmental authority" is required for an entity to be a public body, and the Commission appears to have made its public body finding in light of this purported requirement.[10] However, the EU emphasizes that the SCM Agreement does not prescribe the mechanisms and evidence for such governmental authority, and that only the authority accorded to an entity must be governmental.[11]

8. Contrary to the interpretation relied upon by China, nothing in Article 1.1(a)(1) of the SCM Agreement restricts the meaning of "public body" to an entity possessing, exercising, or otherwise vested with governmental authority, or exercising governmental functions. Indeed, the SCM Agreement is fundamentally about the ability of Members to defend against distortions

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5 *See*, *e.g.*, China First Written Submission, paras. 314, 321-328 (criticizing the Commission for relying on information concerning "the legal and economic environment allegedly prevailing in China" and not conducting "an entity-by-entity analysis" of each supplier). China generally questions the EU's consideration of evidence about the legal and economic environment in China and the relationship of the suppliers to the GOC. China First Written Submission, paras. 316, 317, 596, 603.

6 *See*, *e.g.*, EU First Written Submission, paras. 1021-1024.

7 EU First Written Submission, para. 1163.

8 EU First Written Submission, para. 1701.

9 China First Written Submission, para. 322 (citing *US – Countervailing Duties (China) (Article 21.5 – China)*, para. 5.100) (emphasis original).

10 *See*, *e.g.*, EU First Written Submission, para. 1004.

11 EU First Written Submission, paras. 107, 111.

caused by the transfer of the public resources of another Member. Logically, an entity may constitute a public body where evidence before an investigating authority supports that the government has the ability to control that entity to convey financial value.[12] Put another way, a public body may be any entity that a government is able to control, such that when the entity conveys economic resources, it is transferring the public's resources.

9. The SCM Agreement does not define the term "public body,"[13] but definitions of the words "public" and "body" shed light on the ordinary meaning of this term. By definition, the noun "body" refers to a group of persons or an entity (as opposed to, for example, the "material frame" of persons). The definition in the sense of "an aggregate of individuals" is: "an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society."[14] Turning to the adjective "public," the relevant definition that pertains to a "body" as a group of individuals is the first: "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation."[15]

10. Thus, the ordinary meaning of the composite term "public body" according to dictionary definitions would be "an artificial person created by legal authority; a corporation; an officially constituted organization" that is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." These definitions point towards ownership by the community as one meaning of the term "public body." If an entity "belongs to" or is "of" the community, it also follows that the community can make decisions for, or control, that entity.

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[12] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.248 (dissent). *See also* U.S. Second Written Submission, *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 82-89, *available at* https://ustr.gov/sites/default/files/enforcement/DS/US.Sub2_1.pdf; U.S. Appellant Submission, *US – Pipe and Tube Products (Turkey) (Panel)*, paras. 27-34, *available at* https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/WTO/Pending/US.Appellant.Sub.fin.%28public%29.pdf; U.S. Second Written Submission, *US – Pipe and Tube Products (Turkey) (Panel)*, para. 81, *available at* https://ustr.gov/sites/default/files/enforcement/DS/US.Sub2.fi.pdf; U.S. Statements at the August 15, 2019, DSB Meeting, pp. 3-7, *available at* https://ustr.gov/sites/default/files/enforcement/DS/437.(21.5).Aug15.2019.DSB.Stmt.(As.Delivered).fin.pdf; U.S. Statements at the December 19, 2014, DSB Meeting, pp. 4-5, *available at* https://ustr.gov/sites/default/files/enforcement/DS/436.Dec19.2014.DSB_.Stmt_.as-delivered.Public.pdf; U.S. Appellee Submission, *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 61-64, *available at* https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/US.Appellee.Sub_.fin_.pdf.

[13] China First Written Submission, para. 321; *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (dissent).

[14] *The New Shorter Oxford English Dictionary*, at 253 (1993) (Exhibit USA-3).

[15] *The New Shorter Oxford English Dictionary*, at 2404 (1993) (Exhibit USA-3).

11. Nothing in these dictionary definitions restricts the meaning of the term "public body" to an entity vested with, or exercising, governmental authority, or one exercising governmental functions. Had the drafters of the SCM Agreement intended to convey that meaning, they could have chosen any number of other terms—for example, "governmental body," "public agency," "governmental agency," or "governmental authority." The ordinary meaning of these terms would have more clearly conveyed the sense of exercising governmental authority. That they were not chosen sheds light on the different concept captured by the term that was chosen, "public body."

12. The ordinary meaning of the terms of a treaty must be understood "in their context."[16] Reading the term "public body" in context supports the conclusion that a "public body" is an entity controlled by the government such that the government can use that entity's resources as its own.

13. In Article 1.1(a)(1), the term "public body" is part of the disjunctive phrase "by a government or any public body within the territory of a Member." The SCM Agreement thus uses two different terms—"a government" on the one hand and "any public body" on the other hand—to identify the two types of entities that can provide a financial contribution. As a contextual matter, the use of the distinct terms "a government" and "any public body" together in this way indicates that the terms have distinct and different meanings. Treaty interpretation should give meaning and effect to all terms of a treaty, and provisions of the WTO Agreement should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility.[17] In this way, the term "public body" should not be interpreted so as to render it redundant with the word "government."

14. The term "government," as the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, means, among other things: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry."[18] In *Canada – Dairy*, the Appellate Body explained that "[t]he essence of 'government' is . . . that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority." The Appellate Body further explained that a "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a

[16] Vienna Convention on the Law of Treaties, Article 31.

[17] *US – Offset Act (Byrd Amendment) (AB)*, para. 271; *see also US – Gasoline (AB)*, at p. 23.

[18] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (citing *Shorter Oxford English Dictionary*, L. Brown (ed.) (Claredon Press, 1993), Vol. I, p. 1123).

'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[19]

15. The term "public body," therefore, should be interpreted as meaning something other than an entity that performs "functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens." Otherwise, a "public body" is "a government," or a part of "a government," and there is no reason for the term "public body" to have been included in Article 1.1(a)(1) of the SCM Agreement.

16. The context supplied by "financial contribution" further suggests a different common concept between "government" and "public body." The notion that both entities are referred to collectively as "government" and are capable of making a "financial contribution" suggests that the core attribute they share is the ability to convey the economic resources of the public. After all, control over and authority to dispose of the public's economic resources is a core function of government in every WTO Member. The broad language used and multiple methods of conveying value described in Article 1.1(a)(1) reveal an intention to capture within the meaning of "financial contribution" a wide array of transfers of value. Ultimately, the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government.

17. With regard to this attribution analysis, the United States agrees with the dissenting Appellate Body member in *US – Countervailing Duties (China) (Article 21.5 – China)* that this "examination involves an assessment of the relationship between the relevant entity and the government",[20] and that "[w]hen that relationship is sufficiently close, the entity in question may be found to be a public body and all of its conduct may be attributed to the relevant Member for purposes of Article 1.1(a)(1)."[21] The United States further agrees that "[t]he relationship between an entity and a government may take different forms, depending on the legal and economic environment prevailing in the relevant Member."[22]

18. Under Article 1.1(a)(1), any examination of whether an entity is a public body must be on a case-by-case basis, and thus whether the entity's conduct can be attributed to the relevant government, in light of all the evidence before it. As discussed above, the ordinary meaning of "public body" in Article 1.1(a)(1) suggests that the key question is whether a government is able to control the entity such that when the entity conveys economic resources, it is transferring the

[19] *Canada – Dairy (AB)*, para. 97.

[20] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (citing *US – Carbon Steel (India) (AB)*, para. 4.29; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317).

[21] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (dissent).

[22] *US – Countervailing Duties (China) (Article 21.5 – China) (AB)*, para. 5.247 (dissent).

public's resources. Requiring a finding that the entity in question has governmental authority or exercises governmental functions risks rendering synonymous the definitions of "government" and "public body", contrary to the principle of effectiveness.[23]

19. In conducting this case-by-case inquiry, nothing in the text of Article 1.1(a)(1) supports China's assertions that it must be "granular" or "entity-by-entity" to the exclusion of considering evidence that applies to more than one entity (*e.g.*, relevant information about an association the entity is a member of or the regulatory and economic environment in which it operates).[24]

20. In sum, China seeks to fault the Commission's public body determinations on the basis of an erroneous interpretation of Article 1.1(a)(1) of the SCM Agreement. For that reason, the claim should fail.

21. Furthermore, that both the EU and China present their arguments within the framework of the Appellate Body's government authority interpretation does not mean the Panel must accept it. For one, as described above, the interpretation contravenes the ordinary meaning and context of the language used in Article 1.1(a)(1); thus, for the Panel to apply it would contravene the Panel's terms of reference and direction under DSU Articles 7.1, 11, and 3.2 to interpret and apply the provisions of the covered agreements in light of the customary rules of interpretation of public international law.

22. The Appellate Body's government authority interpretation also reflects an interpretation that Members, including the EU, have repudiated as erroneous. For example, a January 2020 joint statement by the trade ministers of the EU, Japan, and the United States affirmed that to be a public body, "it is not necessary to find that the entity 'possesses, exercises or is vested with government authority'" and that the Appellate Body's erroneous interpretation "undermines the effectiveness of WTO subsidy rules."[25] Similarly, during the WTO DSB meeting at which the *US – Anti-Dumping and Countervailing Duties (China)* panel and Appellate Body reports were adopted, seven other Members joined the United States in raising concerns about the Appellate Body's interpretation.[26] Therefore, the United States invites the Panel to undertake its own objective assessment of the meaning of Article 1.1(a)(1), consistent with the interpretive approach the United States sets out above.

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[23] *See US – Offset Act (Byrd Amendment) (AB)*, para. 271; *see also US – Gasoline (AB)*, at p. 23.

[24] China First Written Submission, paras. 314, 320, 329, 590, 999.

[25] Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, January 14, 2020 (Exhibit USA-05).

[26] Dispute Settlement Body, Minutes of the Meeting Held on March 25, 2011, WT/DSB/M/294, paras. 103-127. Those Members are Mexico, Türkiye, the EU, Canada, Australia, Japan, and Argentina.

III. CLAIMS REGARDING ARTICLE 2.1 OF THE SCM AGREEMENT

23. China argues that the EU did not sufficiently demonstrate that several subsidy programs were *de jure* specific—namely, the provision of batteries and LFP for less-than-adequate remuneration and certain tax credits.[27] In particular, China argues that the EU breached Articles 1.2, 2.1(a), and 2.4 of the SCM Agreement by: insufficiently identifying the "certain enterprises" to which the subsidy program limitations applied;[28] using "broad brush" references rather than clearly identifying the legislation limiting eligibility;[29] and not adducing legislation explicitly limiting access to the subsidies in question.[30]

24. The EU argues that its *de jure* specificity determinations were consistent with the SCM Agreement because, among other things: the record information sufficed for the certain enterprises to be "known and particularized" even if not "explicitly identified";[31] it identified the certain enterprises in question even if it was by "cross-reference" to other legal instruments;[32] and the Commission adequately supported its determinations with evidence that the industries in question could access the subsidies in question.[33]

25. Below the United States provides comments on the proper interpretation of Article 2.1 of the SCM Agreement, and then explains how China's claims appear to rely on an interpretation of "explicitly limits access" to "certain enterprises" that the text does not support.

26. Article 2.1 of the SCM Agreement sets out guiding principles to determine whether a subsidy is "specific" to "an enterprise, industry, or group of enterprises or industries"—*i.e.*, to "certain enterprises."[34] This text establishes that a subsidy may be specific where the recipient "enterprise" or "industry" is known or can be discerned, or a "group of enterprises or industries" is known or can be discerned. Past reports have observed that although the industries and enterprises must be "known and particularized," they need not be "explicitly identified" for the subsidy to be considered *de jure* specific.[35] As underscored in the *US – Ripe Olives from Spain*

[27] China First Written Submission, paras. 579, 759, 890.

[28] *See*, *e.g.*, China First Written Submission, para. 574.

[29] *See*, *e.g.*, China First Written Submission, para. 577.

[30] *See*, *e.g.*, China First Written Submission, para. 579.

[31] *See*, *e.g.*, EU First Written Submission, paras. 1603-1605.

[32] *See*, *e.g.*, EU First Written Submission, paras. 1606-1608.

[33] *See*, *e.g.*, EU First Written Submission, paras. 1609-1618.

[34] SCM Agreement, Art. 2.1. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 364.

[35] *US – Carbon Steel (India) (AB)*, para. 4.365. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

panel report, Article 2.1(a) "prescribes no particular analytical approach or methodology". It similarly permits the investigating authority to "rely upon *any fact* it considers relevant" in determining if there is an explicit limitation on "access" to "certain enterprises."[36]

27. The inquiry of whether a subsidy is specific to certain enterprises is guided by "principles" articulated in subparagraphs (a) through (c) of Article 2.1. Article 2.1(a) identifies circumstances in which a subsidy is *de jure* specific (*i.e.*, where limitations on eligibility explicitly favor certain enterprises).[37] Subparagraphs (a) and (b) both "direct scrutiny to the eligibility requirements imposed by the granting authority or the legislation pursuant to which the granting authority operates."[38]

28. Article 2.1(c) provides that, "notwithstanding any appearance of non-specificity" resulting from application of Articles 2.1(a) and 2.1(b), a subsidy may nevertheless be "in fact" specific.[39] Application of Article 2.1(c) is a fact-driven, context-dependent exercise. By providing for a *de facto* specificity analysis, as one panel report correctly noted, Article 2.1(c) "reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analysing subsidies covered by the SCM Agreement."[40]

29. Article 2.4 of the SCM Agreement requires that a specificity determination under Article 2 be "clearly substantiated on the basis of positive evidence." "Positive" evidence is evidence that is "characterized by . . . the presence or possession of features or qualities" or

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[36] *US – Ripe Olives from Spain (EU) (Panel)*, paras. 7.36-7.38 (emphasis original) (finding that the U.S. investigating authority was permitted under Article 2.1(a) to consider and base its determination on different legal instruments, including references to predecessor subsidy programs, and how those instruments interoperate).

[37] Article 2.1(a) of the SCM Agreement provides: "Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific." *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 367, 369.

[38] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368.

[39] SCM Agreement, Article 2.1(c) provides as follows:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

[40] *US – Countervailing Measures (China) (Panel)*, para. 7.240.

"affirmative"[41] and "objective" evidence.[42] If an investigating authority clearly substantiates on the basis of positive evidence that access to a subsidy is limited to certain enterprises by a granting authority, or the legislation pursuant to which the granting authority operates, then the authority's determination of specificity is consistent with the requirements of Article 2 of the SCM Agreement.

30. China's claims overlook that Article 2.1(a) does not prescribe a particular approach or type of record evidence that the investigating authority must consider in determining if there is an explicit limitation on access and if "certain enterprises" were identified.[43] In particular, neither Article 2.1(a) nor Article 2.4 prohibits an investigating authority from relying upon a range of information rather than on a singular law or other legal instrument. The United States agrees with the EU that such determinations may be based on what the EU describes as the "totality" of evidence.

31. An unbiased and objective investigating authority could, as the Commission did, support an explicit limitation on access to certain enterprises with "central provincial and municipal government planning documents"[44] and a "cross-reference" through which one instrument operates by reference to another.[45]

IV. CLAIMS REGARDING ARTICLE 11.6 OF THE SCM AGREEMENT

32. China argues that the EU breached Article 11.6 of the SCM Agreement because the Commission did not demonstrate the existence of "special circumstances" when it initiated the *ex officio* investigation.[46] In China's view, "special circumstances" are an *additional* requirement to the requirement of having "sufficient evidence" of the existence of a subsidy, injury, and causal link.[47] China further argues that because "special" can mean "not ordinary or usual" or

[41] Definition of "positive" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 2300 (Exhibit USA-3).

[42] *US – Hot-Rolled Steel (AB)*, para. 192 (describing "positive evidence" as evidence "of an affirmative, objective and verifiable character," which is "credible"). This interpretation of the term "positive evidence" in the AD Agreement was found to be applicable to the SCM Agreement by the panel in *EC – Countervailing Measures on DRAM Chips*. *EC – Countervailing Measures on DRAM Chips*, para. 7.226, n. 191.

[43] *See*, *e.g.*, *US – Ripe Olives from Spain (EU) (Panel)*, paras. 7.36-7.38; *see also US – Carbon Steel (India) (AB)*, para. 4.365.

[44] *See* EU First Written Submission, at 211-213.

[45] *See US – Ripe Olives from Spain (EU) (Panel)*, paras. 7.36-7.38. *See also* EU First Written Submission, paras. 1606-1608.

[46] China First Written Submission, para. 1288.

[47] China First Written Submission, paras. 1290, 1315.

"exceptional", that additional requirement must be "a situation that departs from the ordinary course by virtue of distinctive characteristics."[48]

33. The EU argues that there is no additional requirement in Article 11.6 for an investigating authority to demonstrate "special circumstances" in order to initiate an *ex officio* investigation.[49] Rather, the proper interpretation of Article 11.6 is that *ex officio* investigations can proceed only if the investigating authority has sufficient evidence that a subsidy, injury, and causal link exist.[50]

34. The United States disagrees with China's interpretation that Article 11.6 imposes a higher threshold to initiate an *ex officio* investigation or that it requires additional or "exceptional" evidence beyond the "sufficient evidence" required under Article 11.2. The United States agrees with the EU that the text of Article 11.6 contains no such requirements, as we elaborate below.

35. Article 11.6 of the SCM Agreement provides:

> If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of a subsidy, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

36. By its own terms, Article 11.6 provides the evidentiary standard for an investigating authority to self-initiate an investigation when no "written application by or on behalf of a domestic industry." For instance, Article 11.6 provides that investigations may be initiated by an investigating authority "only if they have sufficient evidence of a subsidy, injury or causal link, as described in paragraph 2, to justify the initiation of an investigation." Accordingly, and contrary to China's assertion,[51] nothing in the text of Article 11.6 suggests that the *ex officio* initiation of a countervailing duty investigation is subject to a unique evidentiary threshold or heightened scrutiny (*i.e.*, an additional requirement to show "special circumstances").

37. Furthermore, the text of Article 11.1 provides that "[e]xcept as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged subsidy

[48] China First Written Submission, para. 1293.

[49] EU First Written Submission, para. 2935. In the alternative, the EU argues that the Commission's investigation would have satisfied such an additional requirement if it existed. EU First Written Submission, para. 2941.

[50] EU First Written Submission, para. 2935.

[51] China First Written Submission, para. 1315.

shall be initiated upon a written application by or on behalf of the domestic industry." Although initiation pursuant to Article 11.6 is an exception to the initiation procedures outlined in Article 11.1, there is no further limitation on when that exception may be invoked. Indeed, the "special circumstance" included in Article 11.6, when read together with Article 11.1, simply reflect the recognition that an investigation is typically initiated by written application. That is, as correctly stated by the EU,[52] an Article 11.6 initiation is the "special circumstance".

38. China's argument concerning the negotiating history of Article 5.1 of the AD Agreement and Article 11.6 of the SCM Agreement is similarly misplaced.[53] First, it does not show an agreement that "special circumstances" signifies a requirement for additional or different evidence. The material cited by China simply shows that contracting parties held different views about the meaning of "special" and whether or not self-initiated investigations should be regarded as "rare."[54] Second, China's reference to "market structure"[55] merely provides an example, offered by certain delegations, of a circumstance in which an investigating authority may wish to self-initiate an investigation, not an exhaustive list of all possible special circumstances.[56]

39. China's reliance on a GATT panel's interpretation of Article 2:1 of the Tokyo Round Subsidies Code, which concerned *ex officio* investigations, is also misplaced.[57] China elides that the GATT panel *rejected* the claim that "special circumstances", or any other aspect of Article 2:1, implies a different level of evidence for an *ex officio* investigation.[58] Moreover, the text extracted by China is mere dicta under the panel's finding on a different issue.[59]

40. Finally, the United States notes that the practice of China's investigating authority is precisely what it represents to the Panel as WTO-inconsistent. In recent *ex officio* antidumping

[52] EU First Written Submission, para. 2914.

[53] China First Written Submission, para. 1303.

[54] China First Written Submission, 1300.

[55] China First Written Submission, para. 1300.

[56] EU First Written Submission, paras. 2929, 2941.

[57] *See* China First Written Submission, paras. 1291, 1304, 1315. Article 2:1 of the Subsidies Code reads: "If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above."

[58] *US – Softwood Lumber II*, BISD 40S/358, para. 336 (finding that "Canada's claim was not well-founded in that there was nothing in the text of Article 2:1 to suggest a different level of evidence for self-initiation than for initiation pursuant to a petition").

[59] *US – Softwood Lumber II*, BISD 40S/358, para. 336. The excerpt selected by China is under the GATT panel's findings concerning the "standard of sufficient evidence" under Article 2:1 of the Subsidies Code.

investigations of imports of pecans from Mexico and the United States, China's investigating authority identified the basis for its investigations as:

> Preliminary evidence and information obtained by the Department of Commerce showed dumping of imported pecans originating in Mexico and the United States being exported to China at lower-than-normal prices. At the same time, the number of products entering the Chinese market has increased significantly, and the price has shown a downward trend, which has caused reduction and suppression of the prices of similar products in China's domestic industry, and China's domestic industry has suffered substantial damage, and there is a causal relationship between the dumping of imported products from Mexico and the United States and the substantial damage to the domestic industry.[60]

41. Thus, in its own domestic practice, China does not purport to identify any "special circumstances" that are additional to the "sufficient evidence" listed in paragraph 2.[61] That China's investigating authority understands "special circumstances" differently, and applies that different understanding in investigations against imports from other Members, further underscores that China's interpretation of Article 11.6 in this dispute is incorrect and that its claim should fail.

IV. CLAIMS REGARDING ARTICLE 12.7 OF THE SCM AGREEMENT

42. China contends the EU improperly relied on "facts available" under Article 12.7 of the SCM Agreement as to the GOC and the three sampled respondents.[62] Specifically, China argues that the EU was not permitted to resort to facts available where (1) the requested information is not in an interested party's *possession*;[63] and (2) the party ultimately provided the requested information within a "reasonable period," even if *after* the authority's prescribed deadline.[64] In

[60] MOFCOM initiation notice for *ex officio* antidumping investigations on imports of pecans from Mexico and the United States, September 25, 2025 (Exhibit USA-5).

[61] In the AD Agreement, the parallel provisions are Article 5.2 and Article 5.6, which are the same except that they concern dumped rather than subsidized imports.

[62] China First Written Submission, para. 943.

[63] China First Written Submission, paras. 947, 957-958.

[64] China First Written Submission, paras. 947, 960.

addition, China argues that even if the EU satisfied the conditions to use "facts available," it failed to select appropriate replacement facts.[65]

43. The EU contends that the Commission appropriately used "facts available" when (1) an investigating authority was refused access to necessary information, regardless of actual possession;[66] or (2) when the interested party failed to provide requested information by the authority's deadline within a "reasonable period."[67] And in selecting replacement facts, an investigating authority can on a case-by-case basis consider non-cooperation in determining which inferences are reasonable.[68]

44. The United States disagrees with China's restrictive interpretation of the grounds on which an investigating authority can use and select "facts available."

45. Article 12.7 of the SCM Agreement states:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.[69]

46. Article 12.7 contains similar obligations to those under Article 6.8 of the AD Agreement.[70] Unlike the AD Agreement, however, the SCM Agreement does not contain an Annex with detailed rights and obligations regarding the use of facts available. In these circumstances, the detailed rules in the AD Agreement may be considered as context in interpreting Article 12.7 of the SCM Agreement.[71] At the same time, the specific rules in Annex II of the AD Agreement cannot be imported directly into the SCM Agreement; if this were the intent of the drafters, the SCM Agreement would have repeated those same rules in the text of the SCM Agreement.

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[65] China First Written Submission, para. 943.

[66] EU First Written Submission, paras. 2426-2427.

[67] EU First Written Submission, para. 2438.

[68] EU First Written Submission, paras. 2439, 2442-2443.

[69] SCM Agreement, Art. 12.7.

[70] *See, e.g., Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.

[71] *See also Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295 ("[I]t would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.").

47. At least one prior report has reasonably observed that Article 12.7 is "intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[72] This observation reflects a reasonable understanding of the relevant provisions. The requisite flexibility of investigating authorities to effectively conclude investigations even in the face of non-cooperative parties is further acknowledged and ensured by Article 12.1.1, which implicitly recognizes the flexibility investigating authorities require to set deadlines for submissions.

48. One scenario which may trigger resort to Article 12.7 is if information is not provided within "a reasonable period." Definitions of "reasonable" include "Proportionate" and "Within the limits of reason; not greatly less or more than might be thought likely or appropriate; moderate."[73] Therefore, the use of the term "reasonable" implies a degree of flexibility that is determined on a case-by-case basis. What will constitute a "reasonable period" will be based on the circumstances of a particular case.[74]

49. Although the United States does not opine on the factual bases for the Commission's use of facts available, it offers comments on the proper legal interpretation under Article 12.7 of (1) when the investigating authority may resort to facts available; (2) the term "reasonable period"; and (3) the proper selection of replacement facts.

A. Interpretation of Article 12.7

50. China argues that one cannot "refuse[] access to," or otherwise "[] not provide" necessary information that it does not "actually h[o]ld or possess[]."[75] China then concludes that, where no such information exists in the possession of an interested party, the latter has no duty to cooperate with the investigating authority.[76] However, the term "possession" does not appear anywhere in Article 12.7. Instead, the plain meaning of the phrase "refuses access to, or otherwise not provide" connotes a "certain *response* –or a lack thereof—" by an interested party.[77] China's narrow interpretation unjustifiably constrains the basis for triggering "facts

[72] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296.

[73] Definition of "reasonable" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2496 (Exhibit USA-3).

[74] *See also US – Hot-Rolled Steel (AB)*, para. 84.

[75] China First Written Submission, para. 957.

[76] *See* China First Written Submission, paras. 957-958 (stating that "where information lies outside the responding party's control, its failure to provide or procure such information cannot be construed as a refusal to cooperate with the authority, justifying a resort to facts available.").

[77] *US – Anti-Dumping and Countervailing Duties (Korea)*, para 7.270.

available" by reading a requirement of "possession" into the provision where none exists. Had the drafters intended to introduce such constraint, they would have explicitly included it.

51. Additionally, China overlooks that Article 12.7 is a means to enable investigating authorities to make determinations. The Appellate Body has observed that Article 12.7 is "intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[78] Hence, Article 12.7 is meant to be a tool for an investigating authority to "overcome a lack of information,"[79] especially when the "interested party is unable or unwilling to provide necessary information."[80]

B. Interpretation of "Reasonable Period" under Article 12.7

52. The EU and China agree that the SCM Agreement is not tied to a specific deadline and that an investigating authority must consider a range of factors to determine a "reasonable period," including the interested party's ability to comply.[81] However, China goes one step further, arguing that even information provided after the deadline set by the investigating authority cannot be the basis to reject that information.[82] We disagree with China's interpretation.

53. First, the SCM Agreement permits investigating authorities to establish deadlines for requested information to interested parties. Although it does not explicitly use the word "deadline," the first sentence of Article 12.1.1 contemplates that investigating authorities may impose appropriate time limits.[83] Indeed, past WTO reports recognize that investigating authorities "must be able to control the conduct of their investigation," and "in the absence of time-limits, authorities would effectively cede control" to the interested parties.[84]

54. Second, while "reasonable" implies a "degree of flexibility that involves consideration of all of the circumstances of a particular case," these considerations do not absolve the interested

[78] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296.

[79] *EC – Countervailing Measures on DRAM Chips* (*Panel*), para. 7.245.

[80] *US – Hot-Rolled Steel (AB)*, para. 7.51.

[81] EU First Written Submission, para 2438; China FWS, paras. 960-961.

[82] China First Written Submission, para. 960.

[83] SCM Agreement, Article 12.1.1 states "interested Members receiving questionnaires…shall be given at least 30 days for reply."

[84] *US – Hot-Rolled Steel (AB)*, para. 73.

party from complying with a given deadline that it deems unreasonable.[85] China's interpretation conflates the investigating authority's obligation to set a "reasonable timeline" with an interested party's incentive to comply.

C. Selection of Replacement Facts

55. China claims that the EU breached Article 12.7 of the SCM Agreement by selecting unreasonable replacement facts in reaching its determinations. According to China, an investigating authority, *inter alia* (1) cannot read missing information as "necessarily incriminating" or in the "most negative light";[86] and (2) should select the "best information" based on an evaluation of all substantiated facts on the record.[87]

56. China's interpretation is overly restrictive and is not supported by the plain meaning of the provision. First, none of the constraints that China cites to above are found in Article 12.7.

57. Second, China's argument disregards Article 12.7 of the SCM Agreement, which permits investigating authorities to draw unfavorable inferences from missing information when a party does not cooperate. Context in Annex II to the AD Agreement provides: "[I]f an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."[88] In this regard, an investigating authority may take into account a party's failure to provide information—particularly where the party was aware of the consequences—when relying on facts available to draw inferences.[89] Here, the EU describes that China failed to provide the requested information despite repeated notices from the Commission identifying deficiencies.[90] Accordingly, the Commission's use of facts available in response to China's non-cooperation is consistent with Article 12.7.

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[85] *US – Hot-Rolled Steel (AB),* paras. 84, 86 ("In determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses …. Article 6.8 and paragraph 1 of Annex II are not a license for interested parties simply to disregard the time-limits fixed by investigating authorities.").

[86] China First Written Submission, para. 968.

[87] China First Written Submission, para. 970 (stating that "the authority must engage in a 'process of reasoning and evaluation' of all substantiated facts on the record, so as to select the 'best' information available to it.").

[88] AD Agreement, Annex II, para. 7.

[89] *See US – Hot-Rolled Steel (Panel)*, para. 7.71 ("[I]t seems clear that any 'less favourable' result under paragraph 7 of Annex II may only be appropriate in the case of an interested party who does not cooperate.").

[90] The EU noted that in response to China's lack of cooperation throughout the investigation, the Commission sent "deficiency letters" to the GOC and the three exporting producers. EU First Written Submission, para 31.

58. Third, China's assertion of the "best information" standard is unsupported. Article 12.7 permits a determination to be made on "facts available"—that is, on *facts*. Logically, a determination cannot be made on the basis of "non-factual assumptions or speculation."[91] However, past WTO reports recognize that Article 12.7 only requires the investigating authority to select "facts available" that "reasonably replace" the missing information to arrive at an accurate determination.[92] Such evaluation *may* involve a "degree of comparison"[93]—though not always required[94]—and the best information could mean " one that *results from* complying with the obligations in [the SCM Agreement] in the specific facts and circumstances of a given case."[95]

V. CLAIMS CONCERNING FISCAL SUBSIDY PROGRAM

59. China challenges in four respects the Commission's determinations that China's Fiscal Subsidy Policy conferred a benefit to Chinese BEV producers and how the Commission calculated and allocated that benefit. First, China argues that the beneficiaries under the Fiscal Subsidy Policy were the consumers purchasing vehicles and not the BEV producers, who only received the subsidy for "administrative efficiency".[96] Second, China argues that the Commission incorrectly calculated the benefit by failing to adjust for the income taxes on the subsidy amounts.[97] Third, China argues that the Commission improperly allocated the benefit to export BEV sales, even though the benefit was only conferred to domestic BEV sales.[98] Fourth, China argues that the Commission erred in calculating the benefit using subsidy amounts disbursed to BEV producers during the period of investigation *from sales before the period of investigation*.[99]

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[91] *US – Carbon Steel (India) (AB)*, para. 4.417.

[92] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 294 ("[T]he 'facts available' to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide.); *US – Carbon Steel (India) (AB)*, para. 4.424. ("['Facts available'] must be limited to those that reasonably replace the missing 'necessary information.'").

[93] *See US – Carbon Steel (India) (AB)*, para. 4.431.

[94] *US – Carbon Steel (India) (AB)*, para. 4.434 ("Conceivably, there may be circumstances where the kind of 'comparative evaluation' […] is not practicable.").

[95] *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.44.

[96] China First Written Submission, paras. 781-804.

[97] China First Written Submission, paras. 805-810.

[98] China First Written Submission, paras. 811-817.

[99] China First Written Submission, paras. 818-824.

60. The EU argues in response that: (1) Chinese BEV producers were the actual beneficiaries of the subsidy;[100] (2) the Commission's calculation of the countervailable subsidy without any offset of alleged taxes levied was correct;[101] (3) the Commission properly allocated the benefit from the Fiscal Subsidy Policy to all BEV sales, including both domestic sales and export sales of BEV to the EU;[102] and (4) the Commission properly calculated the benefit based on subsidy amounts disbursed to BEV producers during the period of investigation.[103]

61. Below, the United States first provides its views regarding the provisions of the SCM Agreement and the GATT 1994 concerning the determination of benefit. Second, we note several ways in which China's claims regarding the Fiscal Subsidy Program misread those provisions and would suggest additional obligations on investigating authorities that do not exist in the text of the SCM Agreement or GATT 1994.

A. Interpretation of Relevant Provisions of the SCM Agreement and the GATT 1994

62. Article 1.1 of the SCM Agreement, titled "Definition of a Subsidy," provides, in relevant part, that "a subsidy shall be deemed to exist if:

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> > (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); [. . .]

and "(b) a benefit is thereby conferred."

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[100] EU First Written Submission, paras. 2077-2141.

[101] EU First Written Submission, paras. 2142-2153.

[102] The EU explains that for its allocation methodology, the Commission "(i) used the disbursements received by the Chinese BEV producers and allocated those amounts to the product concerned, i.e. BEV; then (ii) allocated the benefit to the EU sales on the basis of the total turnover of the product concerned (including both domestic sales and export sales); (iii) calculated the ratio of EU sales out of the total turnover sales of BEVs." EU First Written Submission, para. 2166.

[103] EU First Written Submission, paras. 2160-2166.

63. Articles II:2 and VI:3 of the GATT 1994 affirm Members' authority to levy duties that "offset" subsidies, subject to the requirement that they not exceed the amount of subsidy found to exist.[104] Article VI:3 provides:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture production or export of any merchandise.

64. Article 14 of the SCM Agreement governs the "calculation of the amount of a subsidy in terms of the benefit to the recipient" and does not provide any "guideline" for a "direct transfer of funds" in the form of a grant.

65. The term "benefit" is not defined by the SCM Agreement,[105] and its ordinary meaning would be "do good to, be of advantage to; improve" and "receive benefit; profit."[106] Article 14 of the SCM Agreement "constitutes relevant context for the interpretation of 'benefit' in Article 1.1(b)."[107] Article 14's title— "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient" —similarly reflects the advantage provided to the recipient of a financial contribution. As such, the concept of "benefit" relates to situations in which a firm receives "an improvement" or "an advantage".

66. Therefore, based on the ordinary meaning of the term and the context of Article 14, outlined above, a "benefit" arises when the recipient has received something that makes the

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[104] Article II:2(b) of the GATT 1994 provides that "[n]othing in this Article shall prevent any contracting party from imposing at any time on the importation of any product . . . any anti-dumping or countervailing duty applied consistently with the provisions of Article VI."

[105] When terms are not defined, they should be interpreted based on their ordinary meaning in their context and in light of the object and purpose of the SCM Agreement. *See* DSU, Article 3.2; *US – Large Civil Aircraft (Second Complaint) (Panel)*, p. 187.

[106] Definition of "benefit" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 214 (Exhibit USA-3).

[107] *See Canada – Aircraft (AB)*, para. 155.

recipient better off than it otherwise would have been absent that financial contribution.[108] Thus, the focus of the benefit analysis centers on "benefit to the recipient."

67. These provisions recognize the diverse ways in which subsidies are conferred, and the authority of Members to offset them. Members may impose countervailing duties to offset subsidies that are "bestowed" or "granted" either "directly or indirectly." For instance, Members may impose countervailing duties regardless of whether the subsidies are bestowed upon "the manufacture, production or export" of a product.[109] And duties may be imposed to offset subsidies imposed on "any merchandise"—*i.e.*, without restriction as to the type of product.[110]

68. The first clause of Article 19.4 makes clear that duties cannot be levied "in excess of" the "amount of the subsidy found to exist" by the investigating authority. The term "amount" is defined as "something quantitative, a number, 'a quantity or sum viewed as the total reached.'"[111] Thus, a Member cannot levy duties greater than the quantity of subsidy found to have been bestowed on the manufacture, production, or export of the product in question. For instance, a Member cannot collect duties on subsidies alleged but not demonstrated, or levy punitive duties.

B. Comments on Interpretations Underlying Fiscal Subsidy Claims

69. China claims that even though the government provided a financial contribution to the BEV producers, the actual beneficiaries were the ultimate purchasers of vehicles, who allegedly paid a reduced purchase price. China provides the example of a BEV that normally costs 200,000 RMB but instead, under the Fiscal Subsidy Policy, is sold to a consumer for 180,000 RMB.[112] Although the 20,000 RMB difference goes to the BEV producer, China argues that the producer does not benefit because the amount merely provides the producer the sales price it would have been paid absent the Fiscal Subsidy Policy.[113]

70. As an initial matter, the SCM Agreement does not require that for a subsidy to exist, the financial contribution and benefit must be provided to a single entity. As the panel report in *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*

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[108] SCM Agreement, Art. 14 (Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient). *See Canada – Aircraft (AB)*, para. 157; *EC – Large Civil Aircraft (AB)*, para. 973.

[109] SCM Agreement, Art.14.

[110] GATT 1994, Article VI:3; SCM Agreement, Article 10.

[111] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 552 (quoting 1 *Shorter Oxford English Dictionary* 71 (6th ed. 2007)).

[112] China First Written Submission, para. 788.

[113] China First Written Submission, para. 788.

recognized, "the recipient of the financial contribution can be someone other than the recipient of the benefit" and that "where the purported recipient of the benefit is someone other than the recipient of the financial contribution . . . the issue of benefit requires a separate analysis."[114]

71. Furthermore, the United States understands that the Commission's analysis of the Fiscal Subsidy Program did not simply assume that the recipient of the financial contribution was also the recipient of the benefit. Rather, the Commission "established that the Chinese BEV producers were the actual beneficiaries of the subsidy."[115] This determination was based on evidence and analysis, *inter alia*, that (1) the subsidy was not a benefit to consumers in the form of a reduced purchase price, because when the subsidy was removed, the price of the vehicles did not increase;[116] (2) the Chinese BEV producers received the subsidy as cash disbursements "without any condition to pass those amounts to consumers via lower prices;"[117] and (3) the purpose of the Fiscal Subsidy Policy was to support the Chinese NEV industry, as evidenced by the fact that the program excluded imported BEVs.[118] An unbiased and objective investigating authority could have determined based on the foregoing that the BEV producers were the actual beneficiaries of the Fiscal Subsidy Policy.

72. China also contends that, contrary to Articles 14 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, the Commission allocated the benefit of the subsidy to all BEV sales even though, in China's view, the benefit was only conferred on domestic BEV sales.[119]

73. The United States generally agrees with the EU that because money is fungible, if there are no restrictions on the use of the subsidy funds, "it is reasonable to conclude that the subsidies could be used to benefit the totality of BEV production, including production that is ultimately destined for export."[120] The Commission based this determination on the evidence that "the funds stemming from the Fiscal Subsidy Policy were fully available to the Chinese BEV producers," and that those producers were able to devote those funds to BEV production for the domestic and export markets.[121] This reasoning reflects Articles 19.4 and Annex IV:3 of the SCM Agreement, which do not prescribe how to calculate the rate of subsidization. Article 19.4 calls for a calculation "in terms of subsidization per unit of the subsidized and exported product,"

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[114] *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 12.36.

[115] EU First Written Submission, para. 2093.

[116] EU First Written Submission, para. 2095.

[117] EU First Written Submission, para. 2100.

[118] EU First Written Submission, para. 2115.

[119] China First Written Submission, paras. 811-817.

[120] EU First Written Submission, para. 2163.

[121] EU First Written Submission, para. 2167.

and Annex IV:3 establishes that "[w]here to a subsidy the subsidy is tied to the production or sale of a given product, the value of the product shall be calculated as the total value of the recipient firm's sales of that product."[122]

74. Next, China argues that the Commission incorrectly calculated the benefit from the Fiscal Subsidy Policy because it did not adjust the amounts received by BEV producers to account for the income taxes levied on the subsidy amounts.[123] The United States agrees with the EU that nothing in Article 1.1(b) or Article 14 of the SCM Agreement requires such an adjustment.

75. As discussed above, although the guidelines in Article 14 enumerate instances which "shall not be considered" to confer a benefit, it lacks any "guideline" for the financial contribution in the present dispute—*i.e.*, a "direct transfer of funds" in the form of a grant. Absent such text, a grant simply bestows a benefit to the recipient—as previous WTO panels have agreed.[124]

76. Finally, China contends that the Commission improperly countervailed subsidies disbursed to BEV producers during the period of investigation from sales made prior to the period of investigation. China and the EU agree that the government disbursed the subsidies well after the sales occurred. In fact, the Commission found that there was a degree of unpredictability regarding when subsidy funds were disbursed to BEV producers, and that this uncertainty "can extend up to four years."[125] For this reason, the Commission determined that the "benefit to producers fully materializes when the disbursements are finally received," and not when the sale was made.[126]

77. The United States generally agrees with the EU that the SCM Agreement permits an investigating authority to calculate the benefit based on subsidy funds provided during the period of investigation, regardless of whether that disbursement took place due to a company's actions or sales prior to the period of investigation. Nothing in the SCM Agreement imposes the rule

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[122] To that end, an Appellate Body report has observed that Article 19.4 of the SCM Agreement requires that the amount of the subsidy be calculated "in terms of subsidization per unit of the subsidized and exported product." *US – Washing Machines (AB)*, para. 5.295.

[123] China First Written Submission, paras. 781-804.

[124] *See EC – Large Civil Aircraft (Panel),* para. 7.1969, n. 5724 (observing [I]n the context of a grant, the magnitude of the subsidy is properly determined on the basis of the amount of funding actually transferred by means of the grant. In other words, where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same.); *see also US – Lead and Bismuth II (Panel), para.* 2186 (explaining that the benefit calculation for grants is straightforward because "the act of identifying the 'benefit' (under Article 1.1) is normally the same as the act of measuring the 'benefit' (under Article 14).").

[125] EU First Written Submission, para. 2186.

[126] EU First Written Submission, para. 2186.

China advocates; to the contrary, the notion of a "benefit" in Article 1.1 logically refers to the receipt of an advantage by the recipient. We note that the panel in *Japan – DRAMs (Korea)* explained that Article 19.4 of the SCM Agreement requires that there be "present subsidization at the time of duty imposition" which "does not mean that investigating authorities are prevented from establishing the existence of subsidization (and injury and causing) by reference to data *taken from a past period of investigation*."[127]

78. In sum, based on the proper interpretation of the relevant articles of the SCM Agreement and the GATT 1994, and the record evidence highlighted by the EU, it appears that an unbiased and objective investigating authority could have determined that the Fiscal Subsidy Program (1) conferred a benefit to BEV producers that (2) reflected the subsidy amount in fact paid to those producers during the period of investigation.

VI. CLAIMS CONCERNING ALL-OTHERS RATE

79. China argues that the Commission's calculation of the countervailing duty rate for the cooperating companies that were not individually examined was not "in the appropriate amounts" under Article 19.3 of the SCM Agreement and was "in excess of" the amount of the subsidies under Article 19.4.[128] Specifically, China faults the Commission for: (1) not including one individually examined exporter, Tesla (Shanghai); and (2) including rates calculated on the basis of partial facts available.[129]

80. The EU argues that its choice to not include Tesla (Shanghai) in the calculation is linked to its injury determinations under Article 15 of the SCM Agreement because imported BEV models for the three included exporters were more comparable to the BEV models produced and sold in the EU.[130] Furthermore, the EU argues that the facts available were not "adverse" and were only used to fill in gaps in necessary information.[131] The financial instruments used as facts available concerned programs that were broadly used by the BEV industry and so did not lead to a less favorable result and were similar to what might have been calculated if producer-specific data was used.[132]

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[127] *Japan – DRAMs (Korea) (Panel)*, para. 7.356 (emphasis added).

[128] China First Written Submission, para. 1248.

[129] China First Written Submission, paras. 1232, 1239. The Commission included subsidy margins that were based on partial facts available from the other three individually examined exporters: BYD, SAIC, and Geely Groups.

[130] EU First Written Submission, paras. 2844-2857.

[131] EU First Written Submission, para. 2864.

[132] EU First Written Submission, paras. 2860-2861.

81. The United States offers several comments on the proper interpretation of Articles 19.3 and 19.4 of the SCM Agreement, which do not support the obligations that China seeks to infer.

82. Article 19.3 of the SCM Agreement provides that exporters "not actually investigated for reasons other than a refusal to cooperate" may be "subject to a definitive countervailing duty."[133] Interpreting this provision, an Appellate Body report observed that "countervailing duties may be imposed on imports of products subject to the investigation, even though specific shipments from exporters or producers that were not investigated individually might not at all be subsidized."[134]

83. Thus, the SCM Agreement expressly contemplates that an investigating authority may adopt a methodology that may subject individual exporters or producers to countervailing duties without individually investigating them. Article 19.3 only requires that the countervailing duty rate be levied "in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury." And Article 19.4 of the SCM Agreement provides, in relevant part, that no countervailing duty shall be levied "in excess of the amount of the subsidy found to exist."

84. The obligations in the SCM Agreement for the calculation of a countervailing duty rate for companies not individually investigated are not delineated in the same manner as they are in Article 9.4 of the AD Agreement.[135] By contrast, Article 19.3 of the SCM Agreement establishes only that non-investigated exporters may be subject to countervailing duties and may request an expedited review. Neither the SCM Agreement nor the GATT 1994 prescribe a particular methodology for calculating a countervailing duty rate for non-investigated firms.

85. China acknowledges that no specific provision in the SCM Agreement prescribes the method to calculate countervailing duty rates for companies not individually investigated.[136] It nonetheless relies on the panel report in *US – Supercalendered Paper* to argue that Articles 19.3 and 19.4 of the SCM Agreement do not allow an investigating authority to omit an investigated company's rate or to calculate countervailing duty rates for non-investigated companies using rates based on partial facts available.[137] That reliance is misplaced.

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[133] SCM Agreement, Art. 19.3.

[134] *US – Softwood Lumber IV (AB)*, para. 152.

[135] For example, under Article 9.4(i) of the AD Agreement the duty for non-examined exporters or producers may not exceed "the weighted average margin of dumping" for "selected exporters or producers".

[136] China First Written Submission, para. 1224. China argues that, even so, permitting an investigating authority to "cherry-pick" subsidy rates could "systematically lead to an outcome that is less favorable for the cooperating non-investigated exporting producers." China First Written Submission, para. 1241.

[137] China First Written Submission, paras. 1250-1260.

86. First, China highlights the observation that "the rate of subsidization available to investigated exporters that provides an appropriate basis for determining the rate applicable to non-investigated exporters" to argue that the Commission erred in not including in its calculations the rates of *all* "investigated exporters".[138] But as just noted, and as China agrees, Article 19.3 does not contain a required methodology for setting out a rate to apply to non-investigated companies. Moreover, the panel report China relies on recognized that "there is no specific provision in the SCM Agreement prescribing the methodology for determining the countervailing duty rate for non-investigated exporters."[139] Furthermore, it recognized that investigating authorities require flexibility in determining the calculation methodology, noting that basing the rate for non-investigated companies on the investigated companies "will *generally* be 'appropriate'".[140] The panel did not find that it would always be appropriate, nor required, to use all investigated companies' subsidy rates in the calculation for non-investigated companies. Thus, China's claim fails on this basis.

87. Second, China notes the panel's finding that it is not appropriate "to base the all-others rate for non-investigated exporters on the countervailing duty rate determined for investigated exporters, particularly when that rate is determined, wholly or in part, using the Article 12.7 facts available mechanism."[141] China's reliance on that statement is misplaced because it is based on interpreting, incorrectly, the phrase "appropriate amount" in Article 19.3 of the SCM Agreement with reference to Article 9.4 of the AD Agreement.[142] As noted above, the AD Agreement and the SCM Agreement impose different obligations to calculate the margin or rate for a non-investigated entity. Unlike the SCM Agreement, Article 9.4 of the AD Agreement specifies the antidumping margins that can and cannot be used (and certain reports have understood this provision to refer to partial facts available).[143] That the SCM Agreement omits such obligations must be given meaning. It does not support the inference that obligations specified in a different agreement, but not the SCM Agreement, nonetheless apply.[144]

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[138] China First Written Submission, paras. 1233-1234, citing *US – Supercalendered Paper (Panel)*, para. 7.265.

[139] *US – Supercalendered Paper (Panel)*, para. 7.259.

[140] *US – Supercalendered Paper (Panel)*, para. 7.263 (emphasis added).

[141] China First Written Submission, para. 1253, citing *US – Supercalendered Paper (Panel)*, para. 7.265.

[142] *US – Supercalendered Paper (Panel)*, para. 7.267 (purporting to find support for its interpretation of "appropriate" in the "context provided by Article 9.4 of the Anti-Dumping Agreement, which directs investigating authorities to disregard, when constructing the all-others rate, margins of dumping established using facts available").

[143] The United States has disagreed with this interpretation. *See*, *e.g.*, *US – Hot-Rolled Steel (AB)*, para. 122.

[144] *See US – Carbon Steel (AB)*, para. 65.

88. Thus, China's claim is based upon an interpretation of Articles 19.3 and 19.4 of the SCM Agreement that the text does not support. An unbiased and objective investigating authority could determine, as the Commission did, that the particular facts and circumstances of an investigation justify: (1) calculating a duty rate for non-investigated companies using the rates of a portion, rather than all, of the subsidy rates of the investigated companies and (2) including in such calculations subsidy rates based on partial facts available. The EU was only required to establish a reasonable methodology in view of the facts before it—*e.g.*, to use the subsidy rates calculated for the three companies whose imported BEV models were more comparable to the BEV models produced and sold in the EU.

VII. CONCLUSION

89. The United States appreciates the opportunity to provide its views in this third-party submission and hopes that its comments will be useful to the Panel.