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

(WT/DS379)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES

May 27, 2009

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Canada – Aircraft (Panel)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS70/AB/R
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I. INTRODUCTION

1. China introduces its First Submission by stating that "[t]he issues raised in this dispute are of concern to all Members."[1] We agree.

2. This dispute squarely presents before the Panel several questions relating to how the antidumping ("AD") and countervailing duty ("CVD") remedies available to all Members under WTO rules can be effectively applied to Members, such as China, with economies that, by their nature, pose methodological challenges to investigating authorities not present when examining dumped or subsidized imports from other Members.

3. Prior to 1979, China's economy reflected the standard features of a centrally planned economy. Prices were set and resources allocated administratively through five-year plans. The state created, owned and sustained economic enterprises without due regard to the cost of operating and maintaining them, or the demand for the goods and services they provided. Production and investment goals were often established for political, rather than economic and commercial reasons.

4. Under these circumstances, China's economy functioned much like other countries that operated economies as virtual State monopolies, which effectively rendered it impossible for investigating authorities to identify financial contributions that conferred a benefit. As a result, like other GATT Contracting Parties, the United States declined to apply its CVD law to imports from China and other countries with centrally planned economies. Beginning in the 1990s, as some of these countries began reforming their economies so as to make them more market-oriented, the United States resumed the application of its CVD law to imports from these countries.

5. After three decades as a planned economy, China began a process of reform in 1979 with the objective of establishing a socialist market economy. By the time of its request to join the WTO in 1995, China had taken significant steps to start reforming its centrally planned economy, including substantial price deregulation, the expansion of trading rights, the elimination of production quotas, substantial decentralization of state investment decision-making, the "corporatization" of SOEs, the privatization of many small and medium-sized SOEs, currency convertibility for trade purposes, and reduced restrictions on foreign investment. These reforms, as well as additional policy changes undertaken by China in subsequent years, led the United States in 2006 to determine that it was now possible to identify financial contributions conferring a benefit in China and, accordingly, to start applying its countervailing duty law to imports from China.

6. The United States and other WTO Members recognized at the time of China's accession that these reforms were ongoing, and that more reforms would be needed for China's economy to operate fully on market principles. No one presumed that China's transformation was completed

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[1] China First Submission, para. 1.

simply by virtue of China's entry into the WTO. Rather, such reform was a process, initiated even before China sought accession to the GATT and likely to continue well after China's accession to the WTO. Members therefore raised concerns during China's accession negotiations about the application of WTO rules, including trade remedies, in the context of the transitioning nature of China's economy. To address these concerns, China undertook several commitments in its Protocol of Accession,[2] including commitments on the application of trade remedies by other Members, that sought to ensure that the WTO rights and obligations of Members were not effectively altered by the entry of this transitioning economy into the multilateral trading system.

7. The same characteristics of China's economy that led Members to negotiate these particular commitments also pose challenges for investigating authorities seeking information to perform the necessary calculations and analyses under the AD and CVD rules. In the context of the AD and CVD investigations at issue in this dispute, the U.S. Department of Commerce (Commerce) faced these challenges head-on. Because of the nature of China's economy, Commerce calculated dumping margins, as provided for in China's Accession Protocol, under a methodology that was not based on a strict comparison with domestic costs and prices, often referred to as a "non-market economy" (or NME) methodology. In the CVD investigations, Commerce engaged in a careful examination of the relevant aspect of China's market to determine whether reliable benchmarks existed in order to evaluate the existence of a benefit. Where no such benchmarks existed, Commerce identified reliable benchmarks outside China, again as provided for in China's Accession Protocol, in order to make a determination on subsidization.

8. In the course of each of these investigations, Commerce went to extraordinary lengths to seek from interested parties all the information it understood to be relevant to its analyses and to provide interested parties multiple opportunities to provide that information. To this end, Commerce routinely granted additional time whenever interested parties requested extensions of time to submit information:

- In the CVD investigation on *CWP*, Commerce granted the Government of China and Chinese company respondents extensions to respond to the questionnaire and any additional requests for information every time an extension was requested. In fact, Commerce, in two instances, granted extensions to parties after the parties had missed the original deadlines. In total, 16 extensions were granted over the course of the investigation.

- In the CVD investigation on *LWRP*, Commerce granted extensions to the Government of China and company respondents to respond to the questionnaire and any additional requests for information in every instance in which they were

[2] *Protocol on the Accession of the People's Republic of China*, WT/L/432 (November 23, 2001) ("*China Accession Protocol*").

requested. In all, 10 individual extensions, and 2 additional extensions beyond an original extension were granted over the course of the investigation.

- In the CVD investigation on *LWS*, extensions were granted in every instance in which one was requested. Commerce also extended the deadline to file case briefs pursuant to a request from one respondent. In total, 11 extensions were granted over the course of the investigation.

- In the countervailing duty investigation on *OTR Tires*, Commerce granted extensions to the questionnaire and any additional requests for information in every instance in which they were requested. Each party requested extensions to respond to the questionnaire and every additional request for information that the Department issued – the only exceptions were: 1) A request for information on a new subsidy allegation, issued to an affiliated party of Tianjin United Tire & Rubber International Co., Ltd. (TUTRIC); and 2) the fourth supplemental questionnaires issued to Guizhou Tire Co., Ltd. (GTC), TUTRIC, and Hebei Starbright Tire Co., Ltd. ("Starbright") (which were issued to give parties a final opportunity to resolve outstanding issues before verification). In all, 23 individual extensions, and 8 additional extensions beyond an original extension, were granted over the course of the investigation.

9. Commerce also declined to use facts available or draw adverse inferences in many situations, choosing instead to ask repeatedly for information from respondents that had failed to provide responsive information in previous submissions. To take but one example:

- A respondent in the *OTR Tires* CVD investigation, Starbright, was reluctant to provide necessary information in response to Commerce's questionnaire and requests for information pertaining to Starbright's purchase of the Hebei Tire factory. In a request for follow-up information issued to Starbright during the investigation, Commerce requested all memoranda, reports or presentations prepared by Starbright's parent company regarding the purchase, and Starbright provided little documentation and a great deal of argument in response to this request, instead claiming that "much of the information requested by the Department simply does not exist . . . ."[3]

- Commerce asked again for this information in another request for follow-up information, and in response Starbright claimed that to the extent the necessary documentation existed, it was unable to get that documentation, with the exception of a single due diligence report. For any other necessary

[3] *Second Supplemental Questionnaire to Starbright from Commerce (OTR Tires)*, dated January 9, 2008 (Exhibit US-36); *Starbright's Second Supplemental Questionnaire Response: OTR Tires CVD investigation*, dated February 7, 2008 at 14 (Exhibit US-40).

documentation, Starbright stated that its parent "has no other non-privileged documents responsive to this request."[4]

- Hebei Tire had previously been a state-owned enterprise, so information with regard to Starbright's ownership status was significant for much of Commerce's analysis. Commerce concluded that neither the Government of China, nor Starbright, despite repeated requests for the necessary information, had provided enough information to allow Commerce to calculate an accurate subsidy rate for Starbright. Therefore, Commerce determined it was not appropriate to conduct a verification of Starbright's information, and Commerce canceled verification.[5]

- A week after this cancellation, Starbright submitted another report, but only on the condition that Commerce refuse to allow counsel for the domestic industry to have access to the report. Accordingly, Commerce rejected the newest submission.[6]

- Nevertheless, Commerce, in response to requests from Starbright and the Government of China, offered to reconsider its decision to cancel verification, pending the submission of the missing information.[7] In response, Starbright finally submitted several new reports on the administrative record, the existence of which had been previously denied, along with several hundred pages of new information.[8]

- Commerce then agreed to conduct verification, and necessarily did so late in its proceedings, less than a week after making this decision.[9]

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[4] *Third Supplemental Questionnaire from Commerce to Starbright (OTR Tires)*, dated February 19, 2008 (Exhibit US-37); *Starbright's Fourth Supplemental Questionnaire Response, OTR Tires CVD Investigation*, dated February 28, 2008, at 18 (Exhibit US-41).

[5] *Letter from Barbara E. Tillman, Director, Department of Commerce to GPX/Hebei Starbright Tire Co., Ltd. (OTR Tires)*, dated March 7, 2008 (Exhibit US-27).

[6] *Letter from Thomas Gilgunn, Program Manager, Department of Commerce to GPX/Hebei Starbright Tire Co., Ltd. (OTR Tires) re: Rejection of Submission*, dated March 24, 2008 (Exhibit US-32).

[7] *See*, *e.g.*, *March 11, 2008 Memorandum to the File re: Ex-parte Meeting with Representatives of Hebei Starbright Tire Co., Ltd.* (Exhibit US-39); *March 12, 2008 Memorandum to the File re: Ex-parte Meeting with Representatives of Government of China* (Exhibit US-25); *Starbright's Comments on Department's Cancellation of Starbright Verification (OTR Tires)*, dated March 12, 2008 (Exhibit US-38); *Letter from Thomas Gilgunn, Program Manager, Department of Commerce to GPX/Hebei Starbright Tire Co., Ltd. re: Opportunity to Supplement Record (OTR Tires)*, dated March 24, 2008 (Exhibit US-35).

[8] *See Starbright's Fifth Supplemental Questionnaire Response, OTR Tires CVD investigation,* dated April 9, 2008 (including 32 attachments composed of hundreds of pages) (Exhibit US-42).

[9] *Memorandum to File re: Verification of Hebei Starbright Tire Co., Ltd. (OTR Tires),* dated April 17, 2008 (Exhibit US-28).

- In Commerce's *OTR Tires Final Decision Memorandum*, Commerce rejected the domestic industry's argument that it should apply adverse inferences to Starbright, and instead used the information which had been supplied by Starbright late in the proceeding in its final calculations.[10]

10. Commerce properly determined, on the basis of the voluminous records in each of the investigations at issue, that the relevant Chinese product was being dumped and subsidized.

11. China now challenges these determinations on substantive and procedural grounds.

- On substance, China essentially asks this Panel to require Commerce to ignore the specific features of China's economy, well documented on the records of the investigations. In particular, China seeks to have this Panel determine that, notwithstanding the provision of financial contributions by state-owned enterprises and state-owned commercial banks, the absence of reliable in-country benchmarks in many instances, and the nature of land-use rights in China, Commerce should have arrived at conclusions on subsidization as though those circumstances did not exist.

- On procedure, China faults Commerce, *inter alia*, for its consistent efforts to seek all the information necessary to make its determination, in particular, through Commerce's multiple requests for information in the course of its investigations. This complaint is all the more difficult to understand given the fact that one of the principal reasons for such requests is the failure of the Government of China and Chinese respondents to provide full and accurate responses to questions posed in the early stages of an investigation.

12. We demonstrate below that China's claims have no merit. In the remainder of this Introduction, we briefly discuss, in Section I.A, certain commitments in China's Accession Protocol that reflect Members' concerns with the application of WTO AD and CVD rules to imports from China. In order to correct the misleading characterization presented in China's First Submission, we next describe, in Section I.B, the U.S. decision to apply its CVD law to China once it had been demonstrated that China's economy had changed sufficiently to enable the identification of a financial contribution conferring a benefit. In Section I.C, we set out the factual background of the CVD investigations at issue. The procedural background of this dispute is set out in Section I.D. We conclude in Section I.E with a summary of our argument.

A. Relevant Commitments by China in Its Accession Protocol

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[10] *OTR Tires CVD Final Decision Memorandum* at Comments F.2 through F.12, pp. 121-153 (Exhibit CHI-4).

13. This is the first dispute to raise the special commitments China undertook in its Accession Protocol related to trade remedies. These extensive commitments were made to address Members' specific concerns regarding the integration of China into the international trading system as China transitions from a centrally-planned economy.

14. The international trading system as embodied in the WTO Agreement, and the GATT before it, generally presupposes the operation of market economy principles within and across borders . Although the founding contracting parties to the GATT included some countries with large scale government ownership, the GATT's rules did not anticipate the inclusion of economies that were organized entirely according to state trading principles.

15. In light of China's ongoing transition away from a centrally planned economy toward a "socialist" market economy, as well as the size and growth rate of China's economy, the Members of the WTO determined to take a "pragmatic approach" to China's accession that was "tailored to fit" China's specific situation.[11] This pragmatic approach is reflected in numerous commitments throughout China's Accession Protocol and the Report of the Working Party on the Accession of China ("Working Party Report"). These commitments were specifically intended to address Members' concerns regarding the nature of the Chinese economy and to provide effective remedial mechanisms to manage future trade frictions. Among others, these included provisions with respect to 1) the operations of SOEs and state-owned commercial banks (SOCBs); 2) subsidies and trade remedies; and 3) Transitional Review Mechanism commitments.

1. China's SOE and SOCB Commitments

16. The Working Party Report reflects WTO Members' concerns with the role of SOEs in China:

> In light of the role that state-owned and state-invested enterprises played in China's economy, some members of the Working Party expressed concerns about the continuing governmental influence and guidance of the decisions and activities of such enterprises relating to the purchase and sale of goods and services.[12]

Naturally, Members were concerned that the Chinese government's use of SOEs could tip the scales or otherwise frustrate market-determined outcomes in the purchase and sale of goods. More broadly, Members were concerned that government interference in commercial decision-making in China had the potential to disrupt market competition.

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[11] *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (October 1, 2001) ("*Working Party Report*"), para. 9.

[12] *Working Party Report*, para. 44.

17. To address these concerns, China committed that it:

> would ensure that all state-owned and state-invested enterprises would make purchases and sales based solely on commercial considerations . . . and that the enterprises of other WTO Members would have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement. The Working Party took note of these commitments.[13]

These commitments reflect Members' recognition of the significant potential and ability for the State in China to effectuate the State's broader policy objectives by controlling, through investment and ownership, the commercial behavior of SOEs.[14]

18. Members also generally expressed concern that:

> the special features of China's economy, in its present state of reform, still created the potential for a certain level of trade-distorting subsidization; this could have an impact not only on access to China's domestic market, but also on the performance of Chinese exports in the markets of other WTO Members, and should be subject to effective SCM Agreement disciplines.[15]

19. More specifically, Members were concerned that subsidies could be provided to, or from, SOEs and SOCBs. Members accordingly asked China to confirm that "when state-owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement."[16] China did not refuse this

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[13] *Working Party Report*, para. 46.

[14] The role of SOEs in China continues to be of concern. As noted in the most recent Trade Policy Review Report on China:

> Reform of the public sector, including state-owned enterprise (SOEs), remains a major challenge. Recent progress in the reform of SOEs by, *inter alia*, their reorganization, corporatization and privatization, has improved their performance; by reducing state involvement or freeing-up resources once owned by the State, the reform has also helped the development of the private (non-public) sector. Nonetheless, SOEs continue to play a dominant role in the economy (accounting for some 35% of GDP) and enjoy monopoly positions in certain sectors. By contrast, the private sector continues to face constraints, including in access to finance.

Trade Policy Review, Report by the Secretariat, China, WT/TPR/S/199/Rev.1, 12 August 2008, paragraph 18.

[15] *Working Party Report*, para. 171.

[16] *Id.*, at 172.

request for a commitment, instead stating that its "objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own profits and losses."[17]

2. China's Subsidy and Trade Remedy Commitments

20. Members were also concerned about direct subsidies.[18] At the time of its accession, China provided a limited subsidies notification. Not surprisingly, Members raised concerns about the comprehensiveness of the notification and identified significant subsidies that were not notified. These omissions included:

> state support through the banking system, notably government-owned banks, in the form of policy loans, the automatic roll-over of unpaid principal and interest, forgiven and non-performing loans, and the selective use of below-market interest rates. Some members also referred to unreported tax subsidies, investment subsidies and subsidies provided by sub-national governments, some of which favoured exporting firms.[19]

In response to Members' concerns, China stated that it "was attempting to reduce the availability of certain types of subsidies, in particular by reforming its tax system and making government-owned banks operate on a commercial basis," and committed to provide a full notification, as required by Article 25 of the SCM Agreement.[20]

21. In light of the fact that China's economy was still heavily dominated by the state, Members carefully considered and insisted upon numerous provisions that would permit effective remedies against unfairly traded imports from China. While China initially insisted that there be no rules specific to Chinese products, Members insisted upon, and ultimately obtained, such rules in the areas of safeguards, AD and CVDs.

22. The commitments in the areas of AD and CVDs reflected Members' recognition that prices and costs in China were not necessarily market-based. Therefore, the normal AD methodologies used to measure price discrimination, which rely on market prices and costs,

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[17] *Id.*

[18] Regarding subsidies, one commentator stated: "It is an enormous question, . . . China's government-owned, or state-operated or owned, enterprises are a big challenge to the system, and it is hard to believe that this will not shape some of the thinking about subsidies . . . some of the definitions in the subsidies code will have to be revised, if that is manageable. That is, of course unless paralysis prevents this from happening." John Jackson, "The Impact of China's Accession on the WTO," Ed. Deborah Z. Cass, et.al., *China and the World Trading System* (Cambridge, UK: 2003) at 26.

[19] *Working Party Report*, para. 173.

[20] *Id.* To date, China has submitted one notification (G/SCM/N/123), which did not include any subsidies from SOCBs, including policy banks, and did not include a single sub-central government subsidy program, despite the concerns of Members reflected in the Working Party Report eight years ago.

could not be applied so as to arrive at accurate and reliable dumping margins. Similarly, normal CVD methodologies, which measure subsidy benefits in reference to the marketplace, would likely be difficult to apply. Therefore, special rules and flexibilities for both the AD and CVD remedies needed to be agreed upon in the Accession Protocol if these traditional mechanisms were to have any meaningful and practical applicability.

23. Specifically, while noting China's continued transition towards a market economy, Members expressed the view that:

> in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.[21]

24. In paragraph 15(a) of the Accession Protocol, China agreed that:

> [i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China . . . .

A "methodology that is not based on a strict comparison with domestic prices or costs in China" is specifically permitted "if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product."[22] Thus, if market economy conditions do not prevail in the relevant industry, a Member conducting an AD investigation is explicitly authorized to develop its own methodology to estimate "normal value" in the measurement of price discrimination. This is necessary given the otherwise impossible task of applying a remedy that first looks at the "home market price," to a situation in which there is no market-determined home market price.

25. Similarly, China's Accession Protocol commitments include special rules and flexibilities to address subsidies. In this context, China agreed that:

> In proceedings under Parts II [prohibited subsidies], III [actionable subsidies, including "serious prejudice"] and V [countervailing duties] of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if

[21] *Working Party Report*, para. 150.

[22] *China Accession Protocol*, paragraph 15(a)(i).

> there are special difficulties in that application, the importing WTO Member may then 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. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.[23]

This language reflects the fact that the measurement of subsidies described in Article 14 of the SCM Agreement, in the context of a market economy, generally relies on the marketplace. Members understood that such reliance may not be appropriate in the case of China's market. The special rules and flexibilities agreed upon in the Accession Protocol were therefore designed to ensure the full, meaningful and practical applicability of traditional subsidy remedies to those situations in China in which a normal functioning market does not exist.

3. China's Transitional Review Mechanism Commitments

26. The special concerns that Members had regarding China are also reflected in the establishment of a unique Transitional Review Mechanism for China. In Annex 1A of the Working Party Report, for example, China agreed to provide information annually regarding the trade profile of China's SOEs and all five-year plans promulgated at the central and sub-central levels of government. In particular, China committed to provide on an annual basis:

> (h) the shares of imports and exports accounted for by the trading activities of state-owned enterprises
>
> (i) and annual economic development programmes, China's five-year programmes and any industrial or sectoral programmes or policies (including programmes relating to investment, export, import, productions, pricing or other targets, if any) promulgated by central and sub-central government entities.[24]

Access to China's five-year plans was considered critical, as often such plans identify favored industries, including specific companies, as well as the means by which the government plans to support and subsidize their further development.

27. In sum, the special features of China's economy presented unique challenges when it sought WTO membership. It was the most populous nation in the world starting to emerge from decades of almost exclusively State-driven economic planning. The early stages of economic

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[23] *China Accession Protocol*, paragraph 15(b).

[24] *Working Party Report*, Annex 1A, Section 1 (Economic Data).

reform were proving remarkably successful in achieving high levels of economic growth, fueled by a dramatic increase in exports. While this created opportunities for all WTO Members, it also presented the prospect of economic disruption and dislocation due to the fact that China's economy operated on principles different from those that underlie the WTO international trading system. Special rules as reflected in the Accession Protocol were agreed upon to ensure that the existing rules continued to have relevance and could be effectively applied in the context of China's economy. Thus, notwithstanding China's attempts to suggest otherwise, an understanding of the Protocol and the concerns of Members underlying the commitments contained therein is critical to a proper evaluation of the claims in this dispute.

B. The United States' Decision to Apply the CVD Law to China

28. In its first submission, China spends a considerable amount of time chronicling Commerce's decision to apply the U.S. CVD law to imports from China. The relevance of this discussion is questionable, given that China has not made a claim that this change in approach is inconsistent with any provision of the WTO agreements. Indeed, China does not directly challenge the United States' application of its CVD law to imports from China.[25] Nevertheless, because China's discussion of this matter is incomplete, the United States is compelled to respond.

29. In 1984, in a series of decisions, Commerce determined that it could not identify countervailable subsidies in certain Soviet-bloc states. Commerce explained at the time that the economies of these countries were controlled by the government to the extent that even if they attempted to provide their producers with an economic incentive to increase production, the producers would have neither the motive nor the capacity to respond.[26] In such systems, attempting to isolate a government financial contribution that gave rise to a benefit or, in the nomenclature of the time, a bounty or grant, was essentially impossible. In 1986, in *Georgetown Steel v. United States*, the U.S. Court of Appeals for the Federal Circuit affirmed Commerce's practice of not applying the CVD law to imports from non-market economies based on the Soviet-style centrally planned economies of those countries.

30. Commerce encountered the issue of whether it could identify in China countervailable subsidies, as defined in the SCM Agreement, for the first time in the CVD proceeding on *Coated Free Sheet Paper from the People's Republic of China* (*CFS Paper*).[27] In that proceeding, Commerce decided to change its practice dating from the time of the Tokyo Round Subsides Code (the Subsidies Code) not to apply U.S. CVD law to a country designated as a non-market economy for AD purposes.

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[25] Of course, as discussed in Section VIII, China does make such a challenge *indirectly* by arguing that the United States is not permitted to impose CVDs concurrently with AD duties that have been calculated not based on a strict comparison with domestic costs and prices in China.

[26] *See, e.g., Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,370 (1984) (Exhibit CHI-117).

[27] *See* China First Submission, paras. 340-345.

31. In its analysis, Commerce referred to both the *Georgetown Steel* judicial decision as well as its administrative determinations that were the subject of that decision:

> To determine that a countervailable subsidy had been bestowed, the Department needed to establish that: (a) the [nonmarket economy] government had bestowed a "bounty or grant" on a producer; and (b) that the bounty or grant was specific. The Soviet-style economies at that time made it impossible to apply these criteria because they were so integrated as to constitute, in essence, one large entity. In such a situation, *subsidies could not be separated out from the amalgam of government directives and controls*.
>
> "Bounties or grants" in Soviet-style economies had no meaning because, given the pervasive role of [nonmarket economy] governments in the economy in general, and those industries in particular, *an alleged subsidy essentially involved one arm of the government giving money to another arm.* The Federal Circuit recognized this, explaining that "[e]ven if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves." *Georgetown Steel*, 801 F.2d at 1316. In light of this, subsidies would have no meaning in such an economy. Similarly, *in an economy essentially comprised of a single entity, it made little sense to attempt to analyze the distribution of benefits for the purpose of applying the specificity test*.[28]

32. Few economies in the world today could be characterized by such a monolithic government presence coupled with a complete absence of market forces. In *CFS Paper*, Commerce found that the Chinese economy as of 2006 was "one in which constrained market mechanisms operate alongside (and sometimes, in spite of) government plans."[29] Moreover, Commerce explained that:

> private industry now dominates many sectors of the Chinese economy, and entrepreneurship is flourishing. Foreign trading rights have been given to over 200,000 firms. Many business entities in present-day China are generally free to direct most aspects of their operations and to respond to (albeit limited) market forces.[30]

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[28] *CFS Paper, Georgetown Steel Memorandum*, at 10 (emphasis added) (Exhibit US-8).

[29] *Id.*, at 9.

[30] *Id.*, at 10.

Given the presence of limited market forces and entrepreneurship, Commerce found that "China's economy, though riddled with the distortions attendant to the extensive intervention of the PRC Government, is more flexible than these Soviet-style economies."[31]

33. One element of such "flexibility" is the ability of producers in an economy to react to economic incentives. This characteristic can be assessed on a continuum. For example, a price may react to some extent to demand in the market, but demand may be artificially suppressed or heightened by non-market, government intervention. In such a case, the price is not meaningless; the enterprise purchasing a good at that price must contend with, and accommodate its business plans to, the price. At the same time, such a price is not a market-based measure of the worth of the good, *i.e.*, price formation was distorted by excessive government influence over the market. Thus, beginning in *CFS Paper*, Commerce found that the economy in modern China is in the process of transitioning. Commerce found that economic incentives are having greater effect because of the loosening of central planning and growth of the private sector, and that there is sufficient flexibility in the Chinese economy to separate economic activity from the amalgam of government directives and controls that previously defined the entire economy. The situation in China contrasts with the ossified Soviet-style economies where actors were not capable of reacting to economic incentives, and only responded lockstep to the mandates of government fiat.

34. It is difficult to see how an investigating authority can be faulted for taking into consideration the developments in an economy such as China's. Notwithstanding China's insinuation in its First Submission, Commerce's application of the CVD law to China has been driven by changing facts on the ground, as Commerce has sought to take into full account developments in China's subsidy programs and how the Chinese government administers support to sectors of the Chinese economy. The challenged determinations subject to this dispute reflect these developments.

C. Factual Background to the CVD Investigations

35. In June 2007, Commerce received four CVD applications filed on behalf of U.S. domestic producers that alleged that subsidized imports of circular welded carbon quality steel pipe ("*CWP*"),[32] light-walled rectangular pipe ("*LWRP*"),[33] laminated woven sacks ("*LWS*"),[34]

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[31] *Id.*, at 5.

[32] The *CWP* CVD petition was filed with Commerce on June 7, 2007. *See Notice of Initiation of Countervailing Duty Investigation: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 Fed. Reg. 36668 (July 5, 2007) ("*CWP CVD Notice of Initiation*") (Exhibit CHI-5).

[33] The *LWRP* CVD petition was filed with Commerce on June 27, 2007. *See Notice of Initiation of Countervailing Duty Investigation: Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 72 Fed. Reg. 40281(July 24, 2007) ("*LWRP CVD Notice of Initiation*") (Exhibit CHI-18).

[34] The *LWS* CVD petition was filed with Commerce on June 28, 2007. *See Laminated Woven Sacks from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 40839 (July 25, 2007) ("*LWS CVD Notice of Initiation*") (Exhibit CHI-33).

and certain new pneumatic off-the-road tires ("*OTR Tires*")[35] from China were causing injury to the respective U.S. industries.

36. Before initiating any of the investigations, Commerce invited Chinese government representatives to consult with regard to each of the applications.[36] On June 24, 2007, and July 16, 2007, Commerce representatives held consultations with Chinese government officials in Beijing, China with regard to each of the applications.[37]

37. From July 5, 2007, through July 31, 2007, Commerce initiated CVD investigations on the products covered by the petitions.[38]

- The *CWP* CVD investigation was initiated on July 5, 2007. Of the 37 programs alleged by petitioners to be countervailable subsidies, Commerce initiated an investigation into only 28 of them. Commerce declined to initiate investigations on eight programs, because the petitioners had not sufficiently alleged the elements necessary for the imposition of a CVD or did not support the allegation with reasonably available information.

- The *LWRP* CVD investigation was initiated on July 24, 2007. Of the 38 programs alleged by petitioners to be countervailable subsidies, Commerce initiated an investigation into 27 of them.

- The *LWS* CVD investigation was initiated on July 25, 2007. Commerce initiated an investigation into 23 alleged subsidies.

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[35] The *OTR Tires* CVD petition was filed with Commerce on June 18, 2007. *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 44122 (August 7, 2004) *("OTR Tires CVD Notice of Initiation*") (Exhibit CHI-49).

[36] *See Consultation Invitation re: Countervailing Duty Petition on Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, dated June 8, 2007 (Exhibit US-1); *Consultation Invitation re: Countervailing Duty Petition on Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, dated June 28, 2007 (Exhibit US-9); *Consultation Invitation re: Countervailing Duty Petition on Laminated Woven Sacks from the People's Republic of China*, dated June 29, 2007 (Exhibit US-19); and *Consultation Invitation re: Countervailing Duty Petition on Off the Road Tires from the People's Republic of China*, dated June 29, 2007 (Exhibit US-29).

[37] *See Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated June 24, 2007 (Exhibit US-5); *Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated July 16, 2007(Exhibit US-13); *Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated July 16, 2007 (Exhibit US-20); and *Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated July 16, 2007(Exhibit US-34).

[38] *CWP CVD Notice of Initiation*, 72 Fed. Reg. at 36668-71(Exhibit CHI-5); *LWRP CVD Notice of Initiation*, 72 Fed. Reg. at 40281 (Exhibit CHI-18); *LWS CVD Notice of Initiation*, 72 Fed. Reg. at 40840-41 (Exhibit CHI-33); and *OTR Tires CVD Notice of Initiation*, 72 Fed. Reg. at 44122 (Exhibit CHI-49).

- The *OTR Tires* CVD investigation was initiated on July 31, 2007. Of the 26 programs alleged by petitioners to provide countervailable subsidies, Commerce declined to initiate an investigation into 5 of them.[39]

38. In each investigation, Commerce initiated investigations only for those programs raised in the petitions for which it concluded sufficient information had been placed on the administrative record to support the alleged existence and specificity of certain countervailable subsidies. Commerce immediately began issuing questionnaires to the Chinese government and selected respondents in the various investigations.

39. For each of these investigations, the International Trade Commission conducted its own proceeding relating to injury, and in each case issued an affirmative preliminary determination that there was a reasonable indication that an industry in the United States was materially injured by reason of the allegedly dumped and subsidized imports from China.[40] China has not challenged any of these determinations of material injury by reason of unfairly traded imports.

40. In July and August 2007, in all four investigations, the Government of China either filed a notice of appearance with Commerce and/or indicated a desire to participate in the investigation proceedings and be subject to the administrative protective orders of those proceedings.[41] From that point onward, the Government of China was an active participant in each investigation.

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[39] *See CWP CVD Notice of Initiation*, 72 Fed. Reg. at 36668-71, dated July 5, 2007 (Exhibit CHI-5); *LWRP CVD Notice of Initiation*, 72 Fed. Reg. at 40281, dated July 24, 2007 (Exhibit CHI-18); *LWS CVD Notice of Initiation*, 72 Fed. Reg. at 40840-41, dated July 25, 2007 (Exhibit CHI-33); and *OTR Tires CVD Notice of Initiation*, 72 Fed. Reg. at 44122, dated August 7, 2007 (Exhibit CHI-49).

[40] *See Circular Welded Carbon-Quality Steel Pipe from China*, Investigation Nos. 701-TA-447 and 731-TA-1116 (Preliminary), 72 Fed. Reg. 43295 (August 3, 2007) (issued on July 31, 2007) (Exhibit US-7); *Light-Walled Rectangular Pipe and Tube from China, Korea, Mexico, and Turkey*, Investigation Nos. 701-TA-449 and 731-TA-1118-1121 (Preliminary), 72 Fed. Reg. 49310 (August 28, 2007) (issued on August 22, 2007) (Exhibit US-15); *Laminated Woven Sacks from China,* Investigation Nos. 701-TA-440 and 731-TA-1118-1122 (Preliminary), 72 Fed. Reg. 46246 (August 17, 2007) (issued on August 14, 2007) (Exhibit US-22); *and Certain Off-the-Road Tires from China*, Investigation Nos. 701-TA-448 and 731-TA-1117 (Preliminary), 72 Fed. Reg. 50699 (Sept. 4, 2007) (issued on August 27, 2007) (Exhibit US-44).

[41] *Entry of Appearance for the Government of China, Circular Welded Carbon Quality Steel Pipe from China*, dated July 27, 2007 (Exhibit US-2); *Administrative Protective Order Application for the Bureau of Fair Trade for Imports & Exports of the Ministry of Commerce of the People's Republic of China, Light-Walled Rectangular Pipe and Tube from China*, dated August 27, 2007 (Exhibit US-10); *Notice of Appearance and Application for Administrative Protective Order on Behalf of the Ministry of Commerce, Laminated Woven Sacks from the People's Republic of China*, dated August 22, 2007 (Exhibit US-16); *Entry of Appearance on Behalf of the Government of the People's Republic of China, New Pneumatic Off-the-Road Tires from the People's Republic of China*, dated August 31, 2007 (Exhibit US-26); *Application for Administrative Protective Order on Behalf of the Government of China, New Pneumatic Off-the-Road Tires from the People's Republic of China*, dated November 15, 2007 (Exhibit US-24); *Amended Application for Administrative Protective Order on Behalf of the Government of China, New Pneumatic Off-the-Road Tires from the People's Republic of China*, dated November 30, 2007 (Exhibit US-23).

41. During the course of these investigations, interested domestic industries became aware of additional, potentially countervailable, programs in China, and during the months of August, September and October 2007, filed new subsidy allegations on the administrative records of the ongoing investigations.[42]

42. In September, October and November 2007, Commerce determined that interested domestic industries had met the burden of providing sufficient information to warrant including some but not all of the newly alleged countervailable subsidies in the ongoing investigations.[43]

43. In November and December 2007, Commerce issued the preliminary determinations in each of the CVD investigations. In each preliminary determination, Commerce invited interested parties, including the Government of China, to comment on the determination. Further, Commerce held public hearings, upon request, in which interested parties, including the Government of China, participated.[44] In each case, Commerce set forth a briefing schedule, and with respect to the *OTR Tires* CVD investigation in particular, because of the complexities of the case, Commerce issued two sets of briefing schedules to assure that all of the issues before the agency were adequately addressed.[45]

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[42] The *CWP* petitioners filed their new subsidy allegations on August 31, 2007. *See Memorandum to Susan Kuhbach, Director, AD/CVD Operations, Office 1: New Subsidy Allegation*, dated September 7, 2007 (Exhibit US-3). The *LWRP* petitioners alleged a single additional subsidy on September 7, 2007. *Memorandum to Susan Kuhbach, Director, AD/CVD Operations, Office 1: New Subsidy Allegation*, dated Sept. 20, 2007 (Exhibit US-11). The *LWS* petitioners alleged the existence of additional programs on October 17, 2007. *See Memorandum to Barbara E. Tillman, Office Director: New Subsidy Allegation*, dated November 2, 2007 (Exhibit US-17). In the *OTR Tires* case, petitioners filed new subsidy allegations on August 24, 2007, and on September 5, 200721, another U.S. domestic producer of OTR tires submitted further allegations of additional subsidies. *See Memorandum to the File, Countervailing Duty Investigation on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation Analysis for New Subsidy Allegations*, dated October 5, 2007 (Exhibit US-30).

[43] *See Memorandum to Susan Kuhbach, Director, AD/CVD Operations, Office 1: New Subsidy Allegation*, dated September 7, 2007 (Exhibit US-3); *Memorandum to Susan Kuhbach, Director, AD/CVD Operations, Office 1: New Subsidy Allegation*, dated September 20, 2007 (Exhibit US-11); *Memorandum to Barbara E. Tillman, Office Director: New Subsidy Allegation*, dated November 2, 2007 (Exhibit US-17); *Memorandum to the File, Countervailing Duty Investigation on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation Analysis for New Subsidy Allegations*, dated October 5, 2007 (Exhibit US-30). On November 14, 2007, Commerce determined to include another new subsidy allegation in the ongoing *OTR Tires* CVD investigation with regard to a single Chinese company based on information placed on the record on October 23 and November 2, 2007. *See Memorandum to the File, Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation Analysis for New Subsidy Allegation*, dated November 14, 2007 (Exhibit US-31).

[44] The *CWP* CVD hearing was held on May 5, 2008, the *LWRP* CVD hearing was held on May 9, 2008, and the *LWS* CVD hearing was held on May 14, 2008. *See CWP CVD Final Determination*, 73 Fed. Reg. at 31966 (Exhibit CHI-7); *LWRP CVD Final Determination*, 73 Fed. Reg. at 35643 (Exhibit CHI-20) and *LWS CVD Final Determination*, 73 Fed. Reg. at 356430 (Exhibit CHI-35). No interested party expressed an interest in conducting a public hearing in the *OTR Tires* CVD investigation.

[45] *OTR Tires CVD Final Determination*, 73 Fed. Reg. at 40482 (Exhibit CHI-51).

44. In addition, in each preliminary determination, Commerce indicated that there remained certain outstanding investigated programs for which there was not yet enough information on the administrative record to allow Commerce to make a preliminary determination. Commerce stated that once the necessary information was placed on the administrative record, it would issue an interim analysis memorandum describing its preliminary findings on those programs and allowing parties to submit comments on that memorandum before it issued its final determinations.[46]

45. In January 2008, multiple teams of Commerce officials traveled to China to verify the questionnaire responses submitted by the Chinese central, provincial and local governments, as well as the responses submitted by investigated Chinese companies in the CVD investigations covering *CWP*, *LWRP* and *LWS*.[47]

46. In the *OTR Tires* CVD investigation, Commerce officials conducted two separate verifications – one in March 2008, in which Commerce officials verified questionnaire responses submitted by the Chinese central government, and one from April 24 through May 1, 2008, in which Commerce verified the responses of an investigated Chinese company, as well as the local governments with jurisdiction over that company.[48]

47. Commerce subsequently issued post-preliminary determination memoranda in the four CVD investigations, addressing outstanding programs for which insufficient information was on the record at the time the preliminary determinations had been issued.[49] In each, Commerce invited further comments from the interested parties specific to the programs addressed in the memoranda.

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[46] *CWP CVD Preliminary Determination*, 72 Fed. Reg. at 63885 (Exhibit CHI-6); *LWRP CVD Preliminary Determination*, 72 Fed. Reg. at 67710-11 (Exhibit CHI-19); *LWS CVD Preliminary Determination*, 72 Fed. Reg. at 67894 (Exhibit CHI-34); and *OTR Tires CVD Preliminary Determination*, 72 Fed. Reg. at 71375 (Exhibit CHI-50).

[47] The verifications for the *CWP* CVD investigation were conducted from January 14 through January 23, 2008. *See CWP CVD Final Determination*, 73 Fed. Reg. at 31966 (Exhibit CHI-7). The verifications for the *LWRP* CVD investigation were conducted from January 7 through January 18, 2008. *See LWRP CVD Final Determination*, 72 Fed. Reg. at 67110-11 (Exhibit CHI-20). The verifications for the *LWS* CVD investigation were conducted from January 16 through January 25, 2008. *See LWS CVD Final Determination*, 72 Fed. Reg. at 67894 (Exhibit CHI-35).

[48] *OTR Tires CVD Final Determination*, 72 Fed. Reg. at 40481-82 (Exhibit CHI-51).

[49] *Memorandum to David M. Spooner, Assistant Secretary for Import Administration re: Post-Preliminary Findings for the Provision of Land for Less than Adequate Remuneration and New Subsidy Allegations (CWP)*, dated April 9, 2008 (Exhibit US-4); *Memorandum to David Spooner, Assistant Secretary for Import Administration re: Post-Preliminary Analysis for the Provision of Land for Less than Adequate Remuneration (LWRP)*, dated April 21, 2008 (Exhibit US-12); *Memorandum to David Spooner, Assistant Secretary for Import Administration re: Post-Preliminary Analysis for the Provision of Land for Less than Adequate Remuneration*, dated April 22, 2008 (Exhibit US-18); *and Memorandum to David Spooner, Assistant Secretary for Import Administration re: Countervailing Duty Investigation of New Pneumatic Off-the-Road Tires from the People's Republic of China; Post-Preliminary Analysis of Non-Tradable Share Reform; Provision of Water to FIEs for Less than Adequate Remuneration; Grants to the Tire Industry for Electricity; and Various Provincial/Municipal Programs*, dated May 2, 2008 (Exhibit US-33).

48. In June and July 2008, Commerce published the final determinations in these CVD investigations. In each, Commerce addressed all interested party comments, including those of the Chinese government, and continued to find that certain programs were countervailable.[50]

49. The International Trade Commission subsequently notified Commerce that, in respect of each of the four investigations, it had found material injury to a U.S. industry as a result of the programs deemed countervailable by Commerce.[51] Accordingly, Commerce issued CVD orders in the challenged investigations covering certain exports of *CWP*, *LWRP*, *LWS*, and *OTR Tires* from China.[52]

D. Procedural Background to this Dispute

50. China submitted a request for consultations with the United States on September 19, 2008.[53] China's request for consultations identified four of Commerce's CVD investigations and four of Commerce's AD investigations as the subject of China's "as applied" claims under the covered agreements.[54] The United States and China held consultations on November 14, 2008, but were unable to resolve the matter.

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[50] *CWP CVD Final Determination*, 73 Fed. Reg. at 31966 (Exhibit CHI-7), *and* accompanying *Issues and Decision Memorandum* ("*CWP CVD Final Decision Memorandum*") (Exhibit CHI-1); *LWRP CVD Final Determination*, 73 Fed. Reg. 35642 (Exhibit CHI-20), *and* accompanying *Issues and Decision Memorandum* ("*LWRP CVD Final Decision Memorandum*") (Exhibit CHI-2).; *LWS CVD Final Determination*, 73 Fed. Reg. at 35639 (Exhibit CHI-35), *and* accompanying *Issues and Decision Memorandum* ("*LWS CVD Final Decision Memorandum*") (Exhibit CHI-3); and *OTR Tires CVD Final Determination*, 73 Fed. Reg. 40480 (Exhibit CHI-51), *and* accompanying *Issues and Decision Memorandum* ("*OTR Tires CVD Final Decision Memorandum*") (Exhibit CHI-4).

[51] *Certain Circular Welded Carbon-Quality Steel Pipe from China and Korea*, Investigation Nos. 701-TA-455 and 731-TA-1149-1150 (Final), 73 Fed. Reg. 31712 (June 3, 2008) (Exhibit US-6); *Light-Walled Rectangular Pipe and Tube from China*, Investigation Nos. 701-TA-449 and 731-TA-1118 (Final), 73 Fed. Reg. 45244 (August 4, 2008) (Exhibit US-14); *Laminated Woven Sacks from China*, Investigation Nos. 701-TA-450 and 731-TA-1149-1122 (Final), 73 Fed. Reg. 45473 (August 5, 2008) (Exhibit US-21); *and Certain Off-the-Road Tires from China*, Investigation Nos. 701-TA-448 and 731-TA-1117 (Final), 73 Fed. Reg. 51842 (Sept. 5, 2008) (Exhibit US-43). China does not challenge the injury determination in any of the investigations at issue.

[52] *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order*, 73 Fed. Reg. 42545 (July 22, 2008) ("*CWP CVD Amended Final Determination and Order*") (Exhibit CHI-8); *Light-Walled Rectangular Pipe and Tube from the People's Republic of China: Notice of Countervailing Duty Order*, 73 Fed. Reg. 45405 (August 5, 2008) (Exhibit CHI-21); *Laminated Woven Sacks from the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 45955 (August 7, 2008) ("*LWS CVD Order*") (Exhibit CHI-36); *and Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Countervailing Duty Order*, 73 Fed. Reg. 51627 (September 4, 2008) (Exhibit CHI-52).

[53] *See Request for Consultations by China*, WT/DS379/1, circulated September 22, 2008 ("*China Consultations Request*").

[54] *China Consultations Request*, at pp. 1-3. China subsequently clarified that "Commerce's determinations in the anti-dumping investigations are not in dispute" except with respect to Commerce's application of the CVD law to products also covered by the AD investigations. China First Submission, para. 27.

51. On December 9, 2008, China submitted a request for the establishment of a panel.[55] This request again identified the aforementioned eight investigations by Commerce but also included claims under a "measure" that China referred to as "an omission, the failure of the United States to provide legal authority for the US Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the US NME methodology simultaneously with the imposition of countervailing duties on the same product."[56] The panel request also included a new category of "as such" claims, all relating to the new "measure."[57]

52. On December 22, 2008, at the Dispute Settlement Body meeting at which China's request was first considered, the United States noted that the panel request included an item that did not appear to be a "measure" that was the subject of consultations with China in this dispute.[58] The United States observed that China had included an "omission" in its panel request that had not been identified in the consultations request, which had identified only the determinations and orders associated with the aforementioned four AD and four CVD investigations.

53. At the DSB meeting on January 20, 2009, in which China renewed its request for the establishment of a panel, the United States expressed its disappointment that China continued to request a panel "to examine a so-called 'absence' of 'legal authority for the Department of Commerce'" when "China's consultation request made no mention of this as a purported measure that was a subject of consultations under Article 4 of the DSU."[59] The United States noted its regret that although it had drawn attention to this inconsistency in China's documents, China did nothing to remedy this problem, but merely renewed its panel request a month later.[60] The DSB established this Panel at that meeting.[61]

E. Summary of the U.S. First Submission

54. This submission is organized into nine parts. Following this introductory section, we address each of China's claims in detail.

55. In **Section II**, the United States provides the legal bases for two procedural rulings requested from the Panel. Both rulings relate to China's sole "as such" claim: that the failure of

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[55] *Request for the Establishment of a Panel by China*, WT/DS379/2, circulated 12 December 2008 ("*China Panel Request*").

[56] *China Panel Request*, p. 3.

[57] *China Panel Request*, p. 7.

[58] Minutes of 22 December 2008 DSB Meeting, WT/DSB/M/261, circulated 6 March 2009, para. 50.

[59] Minutes of 20 January 2009 DSB Meeting, WT/DSB/M/263, circulated 25 March 2009, para. 69. This Panel was subsequently composed on 4 March 2009. *Id*., para. 70.

[60] *Id*., para. 69.

[61] *Id*., para. 70.

the United States to provide legal authority to avoid the imposition of an alleged "double remedy" is inconsistent with Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement and with Articles I and VI of the GATT 1994. First, the United States demonstrates that the purported "absence of legal authority" alleged by China is not a "measure" subject to WTO dispute settlement. Second, the United States shows that the "as such" claims relating to the "absence of legal authority" alleged by China are not within the Panel's terms of reference because of China's critical failure to include them within the scope of the dispute in its consultations request.

56. **Section III** demonstrates that Commerce properly found that certain Chinese state-owned enterprises and state-owned commercial banks are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Notwithstanding China's attempts to divert the Panel's attention to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, the ordinary meaning of the term "public," in its context and in light of the object and purpose of the SCM Agreement, indicates that the term "public body" includes entities owned by the government. Indeed, China even recognized in the Working Party Report that its state-owned enterprises and banks are "public bodies." Having properly found that the state-owned enterprises and banks at issue are "public bodies," Commerce did not need to analyze whether they were "entrusted or directed" to provide financial contributions. In addition, Commerce's treatment of sales made through trading companies was proper and fulfilled the requirements of Article 1 of the SCM Agreement.

57. China's predominant role in the market for certain inputs, lending, and land-use rights distorted prices and interest rates in China, as explained in **Section IV.** Because of the Chinese government's predominant role in these markets, Commerce relied upon out-of-country benchmarks to determine the extent to which the investigated companies benefited from the government-provided financial contributions. Contrary to China's arguments, Commerce's determinations were not inconsistent with Articles 1.1(b) and 14 of the SCM Agreement.

58. **Section V** addresses China's novel subsidy "credit" argument, which relates solely to Commerce's calculation of the benefit of the government provision of rubber for less than adequate remuneration in the *OTR Tires* CVD investigation . The United States demonstrates that Article 14 of the SCM Agreement does not require Commerce to provide a credit in the benefit calculation for instances in which China provided rubber for adequate remuneration, *i.e.,* instances in which China did not provide a subsidy. China's attempts to read such a requirement into the SCM Agreement are based on China's mistaken reliance on Appellate Body reports interpreting provisions of the AD Agreement that are unrelated to the calculation of a benefit in a CVD investigation. The troubling implications of China's interpretation, which China ignores, confirm that China's argument must be rejected, and, in any event, China fails to explain how the United States acted inconsistently with any provision of any covered agreement.

59. In **Section VI**, the United States responds to China's flawed argument that Commerce failed to correctly calculate the benefit in those instances where production inputs were provided first to trading companies and then purchased by producers subject to investigation. While China

argues that Commerce presumed the pass-through of a benefit when no such benefit was found to exist, Commerce in fact properly calculated the benefit conferred, specifically, by comparing the price a respondent producer paid for the input product with an appropriate benchmark price.

60. **Section VII** discusses Commerce's finding in the *OTR Tires* CVD investigation that the policy lending program was *de jure* specific to the tire industry and Commerce's finding that the provision of land-use rights in the *LWS* CVD investigation was geographically specific. In both investigations, Commerce clearly substantiated the specificity determinations on the basis of positive evidence, and those determinations are otherwise consistent with Article 2 of the SCM Agreement.

61. China's claim related to the concurrent application of AD and CVD duties, and the alleged "double remedy" that results, is addressed in **Section VIII**. China argues that, in respect of products from China, a Member must choose between (a) applying AD duties calculated not on the basis of a strict comparison with costs and prices and (b) applying CVDs. This argument ignores the clear authority of Members under the covered agreements, including China's Protocol of Accession, to seek both remedies fully where the conditions for each have been met.

62. In **Section IX** of this submission, the United States responds to several procedural claims made by China. First, the United States addresses China's claim that the United States acted inconsistently with Article 13.1 because it did not re-invite China for consultations each time Commerce accepted information about additional subsidies after initiation of the investigation. Contrary to China's understanding of Article 13.1, the obligation to invite China to consultations, which Commerce fulfilled in every instance, ended with the initiation of each investigation.

63. Second, the United States responds to China's claim that the United States violated Article 12.1.1 of the SCM Agreement by failing to provide at least thirty days for the Government of China and Chinese producers/exporters to reply to Commerce's questionnaires. The United States demonstrates that Article 12.1.1, read in the context of the entire SCM Agreement, covers only original questionnaires issued at the outset of an investigation. Commerce acted consistently with Article 12.1.1 in granting at least 30 days for all responses to those questionnaires.

64. Finally, this section concludes with a response to China's claim that by failing to request certain necessary information from respondents in the *CWP* and *LWRP* CVD investigations and consequently relying on facts available, the United States acted inconsistently with Article 12.1 and 12.7 of the SCM Agreement.

II. REQUEST FOR PRELIMINARY RULINGS

A. The Supposed "Failure ... to Provide Legal Authority" is Not A "Specific Measure at Issue in This Dispute"

65. Article 6.2 of the DSU requires a complaining party to identify in its panel request the "specific measures at issue" in the dispute. Only those "specific measures at issue" identified in the panel request fall within a panel's terms of reference.

66. In its panel request China references, as a "specific measure at issue" in this dispute, "the failure of the United States to provide legal authority for the US Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the US NME methodology simultaneously with the imposition of countervailing duties on the same product."[62] There are several problems with China's listing of this "measure" in its panel request. One is the failure to have consulted on it, as discussed separately. Another is that this does not even describe what China is complaining about. China's complaint is not about the existence of any "legal authority," but a requirement it believes to exist under U.S. law to apply AD and CVD measures in a way that results in the alleged "double remedy."

67. Additionally, China's "as such" claims of WTO-inconsistency are premised on the imposition of a supposed double remedy.[63] This double remedy is a necessary consequence, according to China, of the concurrent application of CVD and AD measures imposed pursuant to a particular methodology that does not use a strict comparison with costs and prices in China.[64]

68. However, as China's First Submission concedes, there is no such requirement under U.S. law. China complains that Commerce recently changed its approach such that Commerce would exercise its discretion – discretion that China itself admits has been recognized by U.S. courts – to concurrently apply AD and CVD measures to imports from China. China begins this discussion by noting that "U.S. law requires" Commerce to follow a certain approach to determining normal value, and cites a U.S. statutory provision in a footnote,[65] although China continues its subsequent explanation of the operation of U.S. law with no reference to any U.S. legal provision.[66]

69. Under these circumstances, it is incumbent upon China to identify those rules that require the United States to impose those concurrent AD and CVD measures.

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[62] *China Panel Request*, p. 3.

[63] *See* China First Submission, heading to Section VI.E.2 ("The Imposition of Double Remedies for the Same Alleged Subsidies Is Inconsistent with the SCM Agreement and Article VI of the GATT 1994").

[64] *See* China First Submission, paras. 326 ("By applying both [AD and CVD] remedies simultaneously, Commerce necessarily will offset any alleged subsidies through two separate duties") and 374 ("A double remedy will therefore arise in all cases in which Commerce applies the [AD and CVD] remedies simultaneously.") and heading to Section V.E.1 ("The Imposition of Double Remedies is Inherent in the Simultaneous Application of the NME Methodology and Countervailing Duties").

[65] China First Submission, para. 369 and footnote 314 thereto.

[66] China First Submission, paras. 370-371.

70. China cannot evade its responsibility to "identify the specific measure at issue" by alleging an "absence of legal authority to avoid a double remedy"[67] on the part of Commerce. This "absence of legal authority" is premised on the necessary imposition of a double remedy. Were no "double remedy" required to be imposed in the first instance, the "absence of legal authority to *avoid*" that imposition becomes meaningless. Therefore, it is only by virtue of a supposed *requirement* in U.S. law to impose a double remedy (*i.e.*, to apply concurrent AD and CVD measures) that China can assert the concomitant existence of some inability of Commerce "to *avoid* the imposition of a double remedy."

71. Permitting a challenge to the "absence of legal authority" alleged by China undermines the requirement in Article 6.2 of the DSU to "identify the specific measures at issue." It is well-established that this requirement is important, *inter alia*, for specifying for the responding party the scope of the defense it must prepare, and notifying potential third parties of the measures at issue so that they may make an informed decision as to whether they have a substantial interest in the dispute and want to reserve their third party rights. Responding parties and other Members do not receive such notice, however, where a Member may simply couch a "measure" in ephemeral concepts like the "absence of legal authority" when specific legal provisions presumably exist that give rise to the impairment of benefits at issue in a given dispute. Indeed, any requirement under law to do X could be re-phrased, as China does, as a refusal of the law to provide authority *not* to do X. If such re-phrasing were sufficient to bring a matter within a panel's terms of reference, a complaining party would effectively be excused from "identify[ing] the specific measures at issue" in its panel request, contrary to Article 6.2 of the DSU.

72. Therefore, the supposed "failure ... to provide legal authority," although characterized by China as the subject of its "as such" challenge, is not in fact a "specific measure at issue" in this dispute. The real basis for China's alleged concerns is to be found in its understanding – never explained, neither in the panel request nor in its First Submission – of how various U.S. laws operate collectively to require the imposition of a so-called double remedy. With respect to China's "as such" claims, these laws are presumably the instruments that give rise to the alleged impairment of China's benefits under the covered agreement and should therefore more properly have been identified as the "specific measures at issue." At no point in its panel request, however, did China identify any of those laws as measures at issue in this dispute.

73. For these reasons, the United States requests that the Panel find the "failure...to provide legal authority" described on page seven of China's panel request, and the "as such" claims described on pages seven and eight of that request, to be outside the Panel's terms of reference.

B. The Alleged "Failure ... to Provide Legal Authority" Was Not Identified in China's Consultations Request and Therefore Is Not Within the Panel's Terms of Reference

[67] *China Panel Request*, pp. 7-8.

74. China includes in its panel request an alleged "measure" that was not among the measures set out in its consultations request. In so doing, China would significantly alter the measures at issue in this dispute and expand its scope. The Panel should accordingly reject China's attempt to enlarge the Panel's terms of reference in this manner.

75. In requesting consultations, a Member must include an "identification of the measures at issue and an indication of the legal basis for the complaint."[68] Where consultations are held, a Member may request the establishment of a panel only "[i]f the consultations fail to settle the dispute."[69] In accordance with Article 7.1 of the DSU, a panel's standard terms of reference are limited to the "matter referred to the DSB" in the panel request.[70] That "matter" is composed, as provided in Article 6.2 of the DSU, of "the specific measures at issue and ... a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

76. It follows from these provisions that, as the Appellate Body has indicated, Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[71] As a "'prerequisite to panel proceedings,'" consultations play a critical role in the dispute settlement process because they "serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to 'define and delimit' the scope of the dispute between them."[72]

77. This purpose of consultations is frustrated where the complaining party introduces measures in its panel request that were not identified in the consultations request and which, by definition, could not have formed part of the basis for the parties' attempts to further define the scope of the dispute between them. The Appellate Body has made clear that, in such circumstances, those additional measures do not fall within the panel's terms of reference.[73]

78. The Appellate Body has further indicated that when making such a determination about the measures at issue, a panel should "compare the respective parameters of the consultations request and the panel request to determine whether an expansion of the scope or change in the essence of the dispute occurred through the addition of instruments in the panel request that were not identified in the consultations request."[74] As we demonstrate below, China attempts just such an expansion with its panel request in this dispute.

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[68] DSU, Article 4.4.

[69] DSU, Article 4.7.

[70] The Panel's terms of reference for this dispute, set out in WT/DS379/3, are the standard terms of reference provided in Article 7.1 of the DSU.

[71] *Brazil – Aircraft (AB)*, para. 131.

[72] *US – Customs Bond Directive (India) (AB)*, para. 293.

[73] *See, e.g.*, *US – Customs Bond Directive (India) (AB)*, para. 296; *US – Certain EC Products (AB)*, para. 82.

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

79. At the outset of this dispute, China explicitly limited the matter at issue to determinations and orders issued in connection with eight specific investigations by Commerce. In its consultations request, China noted that "[t]his request concerns the definitive anti-dumping and countervailing duties imposed by the United States pursuant to the final anti-dumping and countervailing duty determinations and orders issued by the US Department of Commerce in the investigations listed below," and listed the four AD investigations and four CVD investigations on *CWP*, *LWRP*, *LWS*, and *OTR Tires* from China.[75]

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[75] *China Consultations Request*, p. 1. Below are the specific determinations and orders identified by China in its consultations request:

Investigations A-570-910 and C-570-911 ("CWP")

- Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Federal Register 31970 (June 5, 2008).
- Notice of Antidumping Duty Order: *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Federal Register 42547 (July 22, 2008).
- *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 Federal Register 31966 (June 5, 2008).
- *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 Federal Register 42545 (July 22, 2008).

Investigations A-570-912 and C-570-913 ("OTR")

- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*: Final Affirmative Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Federal Register 40485 (July 15, 2008).
- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 73 Federal Register 51624 (September 4, 2008).
- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances, 73 Federal Register 40480 (July 15, 2008).
- *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*: Countervailing Duty Order, 73 Federal Register 51627 (September 4, 2008).

Investigations A-570-914 and C-570-915 ("LWRP")

- Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical

80. Following this listing in its consultations request, China laid out the legal basis of its complaint solely with respect to these "foregoing measures."[76] Nowhere in its consultations request did China refer to any other measures, or to any item characterized by China as a "measure." In one of the closing lines of its consultations request, China stated that it "reserves the right to raise additional claims and legal matters regarding the above-mentioned measures during the course of the consultations."[77] In so stating, China confirmed its intention to limit the scope of its challenge to the specific determinations and orders issued by Commerce. A plain reading of China's consultations request thus reveals what was—and, equally important, what was not—at issue in this dispute.

81. Notwithstanding the unambiguous limitation in its consultations request of the scope of the dispute to the eight identified investigations, in its panel request China went beyond those specific, identified eight investigations to add claims against a wholly new "measure" involving a so-called "omission": "the failure of the United States to provide legal authority for the US Department of Commerce to avoid the imposition of a double remedy when it imposes AD measures determined pursuant to the US NME methodology simultaneously with the imposition

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Circumstances, in Part: *Light–Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 Federal Register 35652 (June 24, 2008).

- *Light–Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea*: Antidumping Duty Orders, 73 Federal Register 45403 (August 5, 2008).
- *Light-Walled Rectangular Pipe and Tube From People's Republic of China*: Final Affirmative Countervailing Duty Investigation Determination, 73 Federal Register 35642 (June 24, 2008).
- *Light–Walled Rectangular Pipe and Tube from the People's Republic of China*: Notice of Countervailing Duty Order, 73 Federal Register 45405 (August 5, 2008).

Investigations A-570-916 and C-570-917 ("LWS")

- *Laminated Woven Sacks from the People's Republic of China*: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Federal Register 35646 (June 24, 2008).
- Notice of Antidumping Duty Order: *Laminated Woven Sacks From the People's Republic of China*, 73 Federal Register 45941 (August 7, 2008)
- *Laminated Woven Sacks from the People's Republic of China*: Final Affirmative Countervailing Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 Federal Register 35639 (June 24, 2008).
- *Laminated Woven Sacks From the People's Republic of China*: Countervailing Duty Order, 73 Federal Register 45955 (August 7, 2008).

[76] *China Consultations Request*, p. 3.

[77] *China Consultations Request*, p. 1 (emphasis added).

of CVD measures on the same product."[78] China's "as such" claims relate exclusively to this new "measure," which was not included in the consultations request.

82. China's addition of a new "measure" in the panel request denied the United States the opportunity to consult on the measure, an important element of the dispute settlement system. Indeed, the negotiators felt it was so important to have consultations on a measure that they made it a condition of being able to proceed to a panel in the first instance. A failure to include a measure in a consultations request deprives the parties of an opportunity to clarify the measure and the facts surrounding it as well as the opportunity to resolve any concerns over the measure. For these reasons consultations form an important jurisdictional predicate to a panel's terms of reference. China's request to include for the first time at the panel stage the so-called "omission" as a "measure" fails to satisfy the requirement for consultations. The "omission" is not within the terms of reference of the Panel.

83. In addition, failing to consult on the "omission" also deprives the United States of the ability to be informed of the scope of the dispute at the time of consultations. The Appellate Body has made clear that a consultations request serves an important function of informing the responding Member of what it can reasonably expect to be the scope of the particular dispute.[79] Indeed, the consultations request often provides the responding party with its first opportunity in the dispute settlement process to know the scope of the dispute so that it may begin adequately preparing its defense and taking steps towards focusing the dispute on the more specific areas of concern to the complaining party.

84. This opportunity is all the more critical here, where the new "measure" raised in the panel request appears to derive from an unspecified set of statutory provisions that, presumably in China's view, operate jointly so as to deprive Commerce of certain legal authority that China believes it should have. We also note that China appears to acknowledge that it was well aware of this "measure" long before consultations because the existence of this "measure," in China's view, is reflected in statements made by Commerce in the final determinations in the investigations at issue.[80] It is therefore mystifying why China would fail to identify[81] this "measure" in its consultations request because it clearly had the relevant information at the time it prepared its consultations request. Because China failed to include the new "measure" in its consultations request, the United States was not given adequate notice of China's concern in order to make full use of the consultation forum for an informed exchange of views on the

[78] *China Panel Request*, p. 3.

[79] *US – Customs Bond Directive (India) (AB)*, para. 293 ("A responding Member would not be in a position to anticipate reasonably the scope of a dispute if, by reason only of the inclusion of a specific measure in a consultations request, any legal instrument providing a general authority or legal basis for the specific measure would be deemed to be part of a panel's terms of reference.").

[80] *China Panel Request*, p. 3.

[81] DSU, Article 4.4.

existence of this "measure," or on the possible existence of other legal provisions that might have provided China with a more accurate understanding of U.S. law.

85. Finally, as a result of the addition of the new "measure" in its panel request, China converted the dispute from one limited to a series of "as applied" claims to a dispute that now includes a "measure" challenged "as such." "As such" challenges are notably distinct from "as applied" challenges. In this respect, the Appellate Body has emphasized that "'as such' challenges are serious" and that "the implications of such challenges are obviously more far-reaching than 'as applied' claims."[82] It is for such reasons that, in the context of a panel request, the Appellate Body has "urge[d] complaining parties to be especially diligent in setting out 'as such' claims in their panel requests as clearly as possible" and, in particular, has noted its expectation that "'as such' claims state unambiguously the specific measures of municipal law challenged by the complaining party."[83] It is difficult to imagine, for the same reasons, why a responding party should not at least be provided notice in a consultations request that part of the concerns underlying the complaining party's claims relates to a measure challenged "as such," so that consultations may be held to clarify that situation.

86. For these reasons, the United States respectfully requests that the Panel find the "absence of any legal authority" described on page seven of China's panel request, and the "as such" claims described on pages seven and eight of that request, to be outside the Panel's terms of reference.

III. COMMERCE'S FINANCIAL CONTRIBUTION DETERMINATIONS WERE NOT INCONSISTENT WITH THE SCM AGREEMENT

87. China claims Commerce's financial contribution determinations were inconsistent with the SCM Agreement. Specifically, China argues that Commerce's determinations that state-owned enterprises and state-owned commercial banks are "public bodies" were inconsistent with Article 1.1(a)(1) of the SCM Agreement. China further claims that, in the absence of a valid "public body" finding, Commerce's failure to perform an entrustment or direction analysis was also inconsistent with Article 1.1(a)(1). In addition, China challenges Commerce's determination that sales of inputs through trading companies constituted countervailable subsidies.

88. China's claims are without merit. As explained in detail below, Commerce's determinations in the challenged CVD investigations that certain Chinese state-owned enterprises and state-owned commercial banks were public bodies were based on a proper interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Because Commerce properly determined that certain state-owned enterprises and state-owned commercial banks were public bodies, no entrustment or direction analysis was required. In addition, Commerce's treatment of

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[82] *US – OCTG from Argentina (AB)*, para. 172.

[83] *US – OCTG from Argentina (AB)*, para. 173.

sales made through trading companies was proper and fulfilled the requirements of Article 1 of the SCM Agreement. Consequently, the Panel should reject China's claims and find that Commerce's determinations were not inconsistent with the SCM Agreement.

A. Commerce's Determinations in the Four CVD Investigations that Certain State-Owned Enterprises Are "Public Bodies" and Provided "Financial Contributions" Are Not Inconsistent with the SCM Agreement

1. Introduction

89. In the four CVD investigations at issue, Commerce investigated whether state-owned producers provided goods to the respondent subject merchandise producers for less than adequate remuneration. Specifically, in the *CWP* and *LWRP* CVD investigations, Commerce examined whether various producers provided hot-rolled steel to the respondents for less than adequate remuneration.[84] In the *OTR Tires* CVD investigation, Commerce examined whether various producers provided rubber to the respondents for less than adequate remuneration.[85] In the *LWS* CVD investigation, Commerce examined whether various producers provided petrochemicals to the respondents for less than adequate remuneration.[86]

90. In its final determinations in each of these CVD investigations, Commerce concluded that state-owned input producers provided certain goods to the respondents for less than adequate remuneration. China now challenges these determinations with respect to state-owned enterprises, arguing first that Commerce's findings that state-owned enterprises provided financial contributions through their provision of goods was inconsistent with the SCM Agreement. Specifically, China alleges that Commerce improperly concluded that state-owned enterprises are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. China further argues that because Commerce did not make any findings of government entrustment or direction of the state-owned enterprises, Commerce's financial contribution determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement.

91. China is incorrect. Commerce's determinations, in each of the four CVD investigations, that the state-owned enterprises in question are "public bodies" are not inconsistent with the SCM Agreement.[87] As demonstrated below, Commerce's findings are 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. Commerce's findings also are consistent with China's recognition in the

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[84] *See, e.g.*, *CWP CVD Final Decision Memorandum*, at 9-12 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 8-9 (Exhibit CHI-2).

[85] *See, e.g.*, *OTR Tires CVD Final Decision Memorandum*, at 9-12 (Exhibit CHI-4).

[86] *See, e.g.*, *LWS CVD Final Decision Memorandum*, at 18-21 (Exhibit CHI-3).

[87] Commerce used the U.S. statutory term "authority" in its determinations. *See* 19 U.S.C. § 1677(5)(B) (Exhibit US-45). The term "authority" is defined to include a "public entity." *Id.* A "public entity" is the same as a "public body."

Working Party Report that state-owned enterprises are public bodies.[88] China's proposed standard for determining whether an entity is a "public body" has no basis in the SCM Agreement.

2. The Interpretation of the Term "Public Body" in Article 1.1(a)(1) of the SCM Agreement

92. The ordinary meaning of the term "public body" in its context, and in light of the object and purpose of the SCM Agreement, demonstrates that this term refers to entities owned or controlled by the government. China advocates a two-part test for determining whether an entity is a "public body," drawing this test almost exclusively from the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles"). The Draft Articles, however, are not covered agreements and are not relevant to an interpretation of Article 1.1(a)(1) of the SCM Agreement. China's commitments in the Working Party Report, on the other hand, are directly relevant. In the Working Party Report, China recognized that its state-owned enterprises are public bodies.

(a) The Ordinary Meaning and Context of the Term "Public Body" and the Object and Purpose of the SCM Agreement

93. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law." Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such rules.[89] Article 31 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A corollary of this customary rule of interpretation is that an interpretation must give meaning and effect to all terms of the treaty.[90]

94. Analysis of whether an investigating authority properly determined that an entity is a "public body" therefore must begin with the text of the SCM Agreement. Article 1.1 of the SCM Agreement defines a subsidy as existing 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:
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> (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);

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[88] *Working Party Report*, para. 172.

[89] *US – Gasoline (AB)*, p. 17.

[90] *US – Gasoline (AB)*, p. 23.

> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or service other than general infrastructure, or purchases goods;
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> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the 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;
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> * * *
>
> (b) and a benefit is thereby conferred.[91]

95. Thus, the first question in any subsidy analysis is whether there is a financial contribution by a government or a public body. The SCM Agreement does not define the term "public body." However, the ordinary meaning of the term "public" includes the following: "belonging to, affecting, or concerning the community or nation."[92] The United States notes that China has provided several other definitions of the term "public."[93] Among these are: "Relating or belonging to an entire community, state, or nation;" and "of or relating to the people as a whole; that belongs to, affects or concerns the community or the nation."[94]

96. Significantly, one of the dictionaries relied upon by China defines "public" as follows: "In general, and in most of the senses, the opposite of *private* adj."[95] It is useful, therefore, to examine the ordinary meaning of the word "private." The most relevant definition of the term "private" is as follows: "Of a service, business, etc.: provided or owned by an individual rather than the State or a public body."[96] This is an important point, because the bodies at issue in this dispute are businesses. Accordingly, because the ordinary meaning of the term "public" is the opposite of "private," the meaning of the term "public" would include "provided or owned by the State or a public body rather than an individual."

97. However one examines the term "public," then, the ordinary meaning of that term includes the notion of belonging to, or owned by, the state. If an entity is owned by the state, the

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[91] SCM Agreement, Article 1.1.

[92] *The New Shorter Oxford English Dictionary*, at 2404 (1993) (Exhibit US-95).

[93] China First Submission, para. 50.

[94] China First Submission, para. 50.

[95] *Oxford English Dictionary*, Online Version (CHI-95).

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

ordinary meaning of the term "public" indicates that such entity can be a "public body" under the SCM Agreement.

98. The context of the term "public body" supports this interpretation. In Article 1.1(a)(1), the term "public body" is part of the disjunctive phrase "by a government or any public body. . . ." The SCM Agreement uses two different terms in referring to the type of entity that can provide a financial contribution. Clearly, then, the terms "government" and "public body" must have distinct and different meanings. As mentioned above, treaty interpretation should give meaning and effect to all terms of a treaty, and "a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility."[97]

99. It is here that China makes a fundamental error in its analysis of the context of the term "public body." China argues that Article 1.1(a)(1) "explicitly equates" the terms "government" and "public body," that the terms are "functional equivalents," and therefore that the essence of a "public body" should be the same as the essence of a government, namely to perform certain functions pursuant to government authority and power.[98] If this were the case, however, then there would have been no need for the use of two different terms in Article 1.1(a)(1) of the SCM Agreement. Pursuant to accepted rules of treaty interpretation, the terms "public body" and "government" *cannot* be equivalent.

100. Other relevant context, as China mentions, is the use of the term "private body" in the entrustment or direction provision of subparagraph (iv) of Article 1.1(a)(1). As explained above, the term "private body" is the opposite of the term "public body." The ordinary meaning of the term "private" includes the notion of being owned by individuals, not the state. Through the use of the opposite terms "public" and "private," the context of Article 1.1(a)(1) indicates that a "public body" can be an entity owned by the state.

101. The immediate context of the term "public body," therefore, indicates two important things. First, because of the use of the distinct terms "government" and "public body," the fact that state-owned enterprises and state-owned commercial banks are not the government is no bar to their being considered public bodies. Second, because of the use of the distinct terms "private body" and "public body," a public body is not a privately-owned entity — that is, a public body can be an entity owned by the government. Taken together, this means that a "public body" includes entities owned by the government, but not necessarily exercising functions of a governmental character. Not surprisingly, this is consistent with the ordinary meaning of the word "public."

102. China's commitments made pursuant to its accession to the WTO provide further context for Article 1.1(a)(1) of the SCM Agreement. China's Accession Protocol states: "This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report,

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[97] *Canada – Dairy (AB)*, para. 133. *See also US – Gasoline (AB)*, p. 23.

[98] *See* China First Submission, paras. 52-54.

shall be an integral part of the WTO Agreement."[99] In *China – Auto Parts*, both the Appellate Body and panel noted that the Accession Protocol and the commitments in the Working Party Report are integral parts of the WTO Agreement.[100] Accordingly, the Accession Protocol and commitments in the Working Party Report are important context in an interpretation of Article 1.1(a)(1) of the SCM Agreement.

103. The Working Party Report contains the following language:

> Some members of the Working Party, in view of the special characteristics of China's economy, sought to clarify that when state-owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement. The representative of China noted, however, that such financial contributions would not necessarily give rise to a benefit within the meaning of Article 1.1(b) of the SCM Agreement. He pointed out that China's objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own profits and losses. The Working Party took note of this commitment.[101]

Although this commitment by China does not use the exact language of Article 1.1(a)(1) of the SCM Agreement, the intent is clear. State-owned enterprises are government actors, or at least public bodies within the meaning of the SCM Agreement. Notably, the representative of China *did not dispute* that there is a financial contribution when a state-owned enterprise provides something, simply noting that "such financial contributions" might not necessarily confer a benefit.[102] China did not suggest, as it does now, that it would be necessary to find that state-owned enterprises are entrusted or directed by the government in order to find a financial contribution. At the very least, China's acceptance that actions by state-owned enterprises constitute financial contributions, without the need for an entrustment or direction finding, is a recognition that Chinese state-owned enterprises are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

104. China unsurprisingly ignores the Working Party Report in its submission. Rather, it argues that the General Agreement on Trade in Services ("GATS") provides context for the meaning of the term "public body."[103] In the GATS Annex on Financial Services, there is a definition of "public entity," and China argues that this definition should inform the analysis of the term "public body" in the SCM Agreement. China's argument fails for at least two reasons. First, the terms are not the same. It is difficult to see why two different terms in two agreements

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[99] *China Accession Protocol*, Part I, Article 1.2.

[100] *China – Auto Parts (AB)*, paras. 213-214; *China – Auto Parts (Panel)*, paras. 7.740-41.

[101] *Working Party Report*, para. 172.

[102] *Working Party Report*, para. 172.

[103] *See* China First Submission, paras. 62-67 (relying upon paragraph 5(c)(i) of the GATS Annex on Financial Services and upon Article I:3(a) of the GATS).

with entirely different fields of application should be considered to have the same meaning. Second, China overlooks the fact that the definition of "public entity" in the GATS Annex for Financial Services is "[f]or purposes of this Annex."[104] This language suggests that the drafters did not intend to create implications for other parts of the WTO Agreement, such as the SCM Agreement.

105. Moreover, China's argument, drawn from the GATS, that an entity is only a "public body" when it is engaged in government functions, but not in commercial activities, is identical to an argument rejected by the panel in *Korea – Commercial Vessels*.[105] *Korea – Commercial Vessels* is discussed in more detail below, but for now it is sufficient to note that China's argument confuses the distinct legal concepts of financial contribution and benefit. It is important not to conflate the financial contribution and benefit elements of a subsidy.

106. China's reliance upon Article I:3(a) of the GATS as relevant context merits little attention. This provision of the GATS makes no mention of the term "public body," nor is there any basis in the text or otherwise to consider that it sheds light on the meaning of that term in the SCM Agreement. (We also note in passing that China is incorrect to assert that, under the GATS, Members have "responsibility" (to borrow China's non-WTO terminology) for non-governmental bodies only when non-governmental bodies are exercising delegated authority; *see, e.g.*, GATS Article VIII, which establishes various obligations relating to the actions of monopolies and exclusive service providers).

107. Turning to the object and purpose of the SCM Agreement, the Appellate Body has said that it is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[106] Similarly, in *Brazil – Aircraft*, the panel found that "the object and purpose of the SCM Agreement is to impose multilateral disciplines on trade-distorting subsidization."[107]

108. Accordingly, the Appellate Body and panels have sought to ensure that the SCM Agreement not be interpreted rigidly or formalistically in a manner that would undermine its disciplines on trade-distorting subsidization. In *Canada – Autos*, the Appellate Body rejected an interpretation of Article 3.1(b) of the SCM Agreement that "would make circumvention of obligations by Members too easy."[108] In *Australia – Leather*, the panel declined to make a

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

[105] *See Korea – Commercial Vessels*, para. 7.46 (rejecting Korea's interpretation of "public body" drawn from paragraph 5(c)(i) of the GATS Annex on Financial Services because "[b]y defining 'public body' on the basis of whether or not an entity operates on commercial terms, Korea is introducing considerations of benefit into the analysis of the private/public status of an entity").

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

[107] *Brazil – Aircraft (Panel)*, para. 7.80.

[108] *Canada – Autos (AB)*, para. 142.

finding of export contingency exclusively on the legal instruments or administrative arrangements surrounding the subsidy, stating that "[s]uch a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a) . . . ."[109] In *US – Softwood Lumber CVD Final* , the Appellate Body explained that "the object and purpose of the *SCM Agreement*, . . . 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."[110] The Appellate Body emphasized in *Softwood Lumber CVD Final* the right of WTO Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[111] Consistent with this object and purpose, and the need to prevent circumvention of the SCM Agreement, the term "public body" should be interpreted so that subsidizing governments cannot hide behind their ownership interests in enterprises to avoid the reach of the SCM Agreement.

109. In sum, the ordinary meaning of the term "public body," together with its context and the object and purpose of the SCM Agreement, indicates that a public body is an entity that is owned by the government, but not necessarily authorized to exercise, or in fact exercising, government functions. The Working Party Report on China's accession provides, at the least, a recognition by China that its state-owned enterprises are public bodies that provide financial contributions, and even a commitment by China to this effect.

(b) The Draft Articles on Responsibility of States for Internationally Wrongful Acts Are Not Relevant Rules of International Law for Purposes of Interpreting the Term "Public Bodies" in Article 1.1(a)(1) of the SCM Agreement

110. Contrary to China's claim, the Draft Articles are not relevant rules of international law for purposes of interpreting the term "public bodies." They are not a covered agreement, and by their own terms they do not apply in this situation. China's reliance upon, and interpretation of, the Draft Articles are flawed.

111. Article 31 of the Vienna Convention states that:

> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

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[109] *Australia – Leather*, para. 9.56

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

[111] *Id.*

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

112. The Draft Articles are not an agreement relating to the SCM Agreement made in connection with the conclusion of the SCM Agreement, nor an instrument made by any parties relating to the SCM Agreement. The Draft Articles are not one of the "covered agreements" set forth in Appendix 1 to the DSU. They are not "context" as that term is used in the Vienna Convention.

113. Nor are the Draft Articles a subsequent agreement or practice regarding the interpretation or application of the SCM Agreement. A report of which the United Nations General Assembly merely "took note" in 2001 cannot inform the meaning of provisions of the WTO agreements that entered into force almost six years earlier.

114. China claims that the Draft Articles are a "relevant rule of international law" that are applicable in this case. In fact, China does more than just argue that the Draft Articles are relevant rules for interpretation of Article 1.1(a)(1); it lifts the standards in the Draft Articles and reads them almost verbatim into the SCM Agreement. China's interpretation is incorrect. By their own terms, the Draft Articles are inapplicable to an interpretation of Article 1.1(a)(1) of the SCM Agreement.

115. First, the Draft Articles are clear that their purpose is *not* to define the primary rules establishing obligations under international law, but rather to define when a state (as opposed to some other entity) is responsible for a breach of those primary rules.[112] In the context of countervailing duties under the SCM Agreement, the primary rule is contained in Article 10 of the SCM Agreement — namely, that Members shall ensure that imposition of a countervailing

[112] *See Draft Articles, General Commentary*, para. 1 ("These articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility."). The commentaries also quote one of the architects of the *Draft Articles* as saying that the *Draft Articles* specify "'the principles which govern the responsibility of States for internationally wrongful acts, *maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility*. . . ." *Id.*, para. 2 (emphasis added).

duty "is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement," including Article 1.1(a)(1). The question in this dispute is whether the United States breached this primary obligation, and the Draft Articles have nothing to say about *whether* such a breach occurred.

116. Second, the Draft Articles contain a *lex specialis* clause. Specifically, Article 55 of the Draft Articles states as follows:

> 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 commentaries to this article explain that "a particular treaty might impose obligations on a State but define the 'State' for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II."[113]

117. Even assuming that the granting of a financial contribution is a wrongful act within the meaning of the Draft Articles and the Draft Articles are not otherwise inapplicable, the SCM Agreement is a special rule of international law that governs when a financial contribution occurs. It defines the "State" in a way that may produce different consequences from the Draft Articles. That is, it uses the phrase "a government or any public body within the territory of a Member. . . ."[114] As demonstrated above, the term "public body" has its own proper interpretation, in accordance with its ordinary meaning when read in its context and in light of the object and purpose of the SCM Agreement. The standards in the Draft Articles thus have no relevance or application to the special rule in Article 1.1(a)(1) of the SCM Agreement.

118. For these reasons, the Draft Articles are not relevant rules of international law to be used as an aid in interpreting Article 1.1(a)(1) of the SCM Agreement. China is incorrect in arguing that the Appellate Body in *US – DRAMS CVD* endorsed the principles in the Draft Articles.[115] The Appellate Body did no such thing. In a footnote that constitutes *dicta*, the Appellate Body noted the unremarkable proposition that the conduct of private bodies is presumptively not attributable to the State and cited to the commentaries on the Draft Articles.[116] The United States does not dispute that the conduct of private parties normally is not attributable to the State. But that is not the question in the present dispute. The question in *US – DRAMS CVD* was whether certain private bodies were entrusted or directed by the government within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, such that their provision of loans and equity was

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[113] *Draft Articles*, Article 55, Commentary, para. 3. The particular *Draft Articles* relied upon by China, Article 5 and 8, are part of Chapter II.

[114] SCM Agreement, Article 1.1(a)(1).

[115] *See* China First Submission, para. 72.

[116] *US – DRAMS CVD (AB)*, para. 112, n.179.

attributable to the government.[117] The question in this dispute is whether certain entities constitute "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. The Appellate Body did not speak to that question in *US – DRAMS CVD*.

119. Nor did the Appellate Body find that the Draft Articles are relevant rules of international law. The Appellate Body's comment appears in passing, which makes its reference to the Draft Articles all the less compelling. Moreover, China does more than merely note the existence of the Draft Articles (which is all the Appellate Body has done). China actually reads them into the SCM Agreement as integral parts of the text. For example, it reads Article 5 of the Draft Articles into the meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, and it reads Article 8 of the Draft Articles into the meaning of the term "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement.[118]

120. In sum, the Draft Articles are not relevant to an interpretation of the term "public body." On the other hand, China's Accession Protocol and its commitments in the Working Party Report are "an integral part of the WTO Agreement" and therefore are highly relevant. China recognized that state-owned enterprises can be "public bodies" in the Working Party Report.[119] China ignores this in its submission. The conclusion to draw from the ordinary meaning and context of the term "public body," including the Working Party Report, and from the object and purpose of the SCM Agreement, is that a public body can be an entity owned by the government. There is no requirement that the entity be authorized to exercise functions of a governmental character or be performing acts in the exercise of that authority.

(c) The Panel's Interpretation of the Term "Public Bodies" in *Korea – Commercial Vessels* Is Consistent with the Ordinary Meaning of That Term in Its Context and in Light of the Object and Purpose of the SCM Agreement

121. The meaning of the term "public body" was one of the issues in the *Korea – Commercial Vessels* dispute.[120] The panel there concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)."[121] That panel's reasoning 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. Majority government ownership can demonstrate control.

122. In *Korea – Commercial Vessels*, the panel considered whether certain financial institutions are "public bodies" within the meaning of the SCM Agreement. When reaching its conclusion that a public body is an entity controlled by the government, the panel rejected some

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[117] *See, e.g.*, *US – DRAMS CVD (AB)*, para. 88.

[118] *See* China First Submission, paras. 74-77.

[119] *Working Party Report*, para. 172.

[120] *See Korea – Commercial Vessels*, paras. 7.44-7.56, 7.351-7.355, 7.424-7.426.

[121] *Korea – Commercial Vessels*, para. 7.50.

alternative interpretations of the term. It rejected Korea's argument that an entity is not a "public body" if it engages in market activities on commercial terms.[122] The panel explained that Korea essentially was arguing that the panel should apply the "benefit" test in a "public body" analysis. "Thus, on one day the entity could provide financing on market terms and constitute a 'private' entity, whereas on the next day it could make cash grants and then constitute a 'public' body."[123] Rather than adopt this nonsensical approach, the panel reasoned that "benefit" and "public body" should be "separate legal elements," and that "the question of whether an entity is a public body should not depend on an examination of whether that entity acts pursuant to commercial principles."[124] China repeats Korea's failed argument when it argues that an entity is only a public body when it engages in government functions, not commercial activities.[125]

123. The *Korea – Commercial Vessels* panel also rejected an argument that pursuit of a public policy objective is essential to a public body determination. It stated that "[a]lthough a public policy objective or creation through public statute might also be indicative of the public nature of an entity, this may not always be the case."[126] These elements discussed by that panel — (1) creation by public statute, and (2) pursuit of a public policy objective — are similar to China's proposed elements of (1) legal authority to exercise functions of governmental or public character, and (2) actions performed in exercise of such authority.[127]

124. Rather, the panel in *Korea – Commercial Vessels* reasoned that in all cases, public body status "can be determined on the basis of government (or other public body) control."[128] In analyzing control, the panel gave the most weight to government ownership of the body.[129] For example, it called the fact that one bank was almost fully government-owned "highly relevant and arguably determinative" in the question of government control.[130]

125. The panel analyzed other factors indicating control, all of which flowed from the fact of government ownership. For example, it cited evidence that the government appointed various entities' managers and directors.[131] It cited evidence that the government approved and oversaw the entities' operations plans.[132] The key element in the panel's analysis, however, was

[122] *See Korea – Commercial Vessels*, para. 7.44.

[123] *Korea – Commercial Vessels*, para. 7.45.

[124] *Korea – Commercial Vessels*, para. 7.44.

[125] China First Submission, paras. 64-65.

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

[127] *See, e.g.*, China First Submission, para. 40.

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

[129] *See Korea – Commercial Vessels*, paras. 7.50, 7.172, 7.353, 7.356.

[130] *Korea – Commercial Vessels*, para. 7.356.

[131] *See Korea – Commercial Vessels*, paras. 7.172, 7.353.

[132] *See Korea – Commercial Vessels*, paras. 7.50-7.51, 7.172, 7.353, 7.356.

government ownership.[133] Government ownership gives the government the ability to appoint managers and directors and thereby to oversee operations. It would be an unusual situation where the owners of the entirety of, or a majority share in, a company could not appoint the leadership (and thereby oversee operations), or could not control the company.

126. The *Korea – Commercial Vessels* panel's interpretation of the term "public body" is consistent with the ordinary meaning of that term in its context and in light of the object and purpose of the SCM Agreement. As demonstrated, the ordinary meaning of "public" includes the notion of belonging to, or being owned by, the state. The standard of government control adopted by the *Korea – Commercial Vessels* panel is essentially the same thing, because an owner can control that which it owns. The context of the term "public body" indicates that a public body is an entity owned by the government, but not necessarily exercising government functions. This is consistent with the *Korea – Commercial Vessels* panel's rejection of "public body" standards based upon consideration of non-commercial behavior or pursuit of a public policy purpose. A standard of government ownership or control is consistent with the object and purpose of the SCM Agreement because it will ensure that subsidizing governments cannot hide behind their ownership interests, while at the same time not treating any entity with which a government has a merely tangential relationship as a public body.

127. China argues that the panel's conclusion in *Korea – Commercial Vessels* regarding government ownership or control should not be followed because that panel did not acknowledge the Draft Articles.[134] On the contrary, the panel appropriately did not rely upon the Draft Articles. As shown above, the Draft Articles are not relevant to the meaning of the term "public body" pursuant to Article 1.1(a)(1) of the SCM Agreement. China also argues that for one institution, KEXIM, the panel in *Korea – Commercial Vessels* examined whether it was empowered to exercise functions of a public character.[135] But the panel nevertheless adopted a control or ownership standard, not a public character standard.[136]

128. Moreover, a critical element in the present case is China's recognition in the Working Party Report that Chinese state-owned enterprises are public bodies. China's concession is logical; as the United States has shown, the ordinary meaning of the term "public body" includes entities owned by the government.

3. The Panel Should Reject China's Proposed Standard for Determining Whether an Entity Is a "Public Body"

[133] With respect to each entity, the panel examined government ownership first. *See Korea – Commercial Vessels*, paras. 7.50, 7.172, 7.353, 7.356.

[134] China First Submission, para. 83.

[135] China First Submission, para. 81.

[136] *Korea – Commercial Vessels*, para. 7.55; *see also id.*, paras. 7.50, 7.172, 7.353, 7.356.

129. The Panel in this dispute should find that a "public body" includes an entity that is wholly or majority owned by the government. Such a finding would be consistent with the ordinary meaning of the term "public body" in its context, in light of the object and purpose of the SCM Agreement, and in light of the Working Party Report, and would be consistent with the approach of the panel in *Korea – Commercial Vessels*.

130. China, however, proposes a two-part standard: (1) that an entity must be authorized by the law of the State to exercise functions of a governmental or public character; and (2) the acts in question must be performed in the exercise of such authority.[137] Such a standard is inconsistent with the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement. As discussed above, China's position nullifies the use of two different terms — "government" and "public body" — in Article 1.1(a)(1) of the SCM Agreement and treats them as equivalents. China fails to recognize that the term "private body" in Article 1.1(a)(1)(iv) is the opposite of "public body," and that an entity owned by the state is not a private body. Although China claims that its standard is consistent with the ordinary meaning of the term "public," it fails to recognize that one of its own dictionaries defines "public" as the opposite of "private."

131. China repeatedly asserts that the issues of ownership and control are not relevant to a "public body" analysis, but only to an "entrustment or direction" analysis pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement.[138] This is wrong. Most of China's argument on this point flows from its mistaken reliance upon the Draft Articles, in particular Article 5, which China analogizes to the public body question, and Article 8, which it analogizes to the entrustment or direction question. As already shown, the Draft Articles are not relevant to this issue.

132. *US – DRAMS CVD* will be discussed more below, but for now it is sufficient to note that both the panel and Appellate Body recognized a distinction between, on the one hand, entities which potentially could be public bodies because they were owned or controlled by a government and, on the other hand, entities which could not be public bodies because they were not owned or controlled by a government. The Appellate Body noted that there were three classes of creditors in that case.[139] This followed from Commerce's grouping of the creditors in the CVD investigation. There were: (A) public bodies; (B) government-owned or controlled creditors; and (C) creditors not owned or controlled by the government.[140] Some of the creditors in Group B were 100 percent owned by the government.[141] As mentioned by the Appellate Body, the panel "noted that, in its view, the USDOC might have been entitled to treat these 100 percent-owned firms as 'public bodies', but having refused to so classify them, the USDOC was required to

[137] China First Submission, para. 40.

[138] *See* China First Submission, paras. 60-61, 74, 78.

[139] *See US – DRAMS CVD (AB)*, para. 131; *US – DRAMS CVD (Panel)*, para. 7.8.

[140] *See US – DRAMS CVD (AB)*, para. 131.

[141] *See US – DRAMS CVD (AB)*, para. 131.

establish entrustment or direction with respect to such creditors."[142] Although this statement does not constitute a finding by the Appellate Body or the panel in that case, it suggests that the distinction there was between creditors that were owned or controlled by the government, on the one hand, and creditors that were not owned or controlled by the government, on the other hand. Those in the first group could be public bodies and those in the second group were entrusted or directed by the government or by public bodies.[143]

133. This distinction is important because China posits a dichotomy whereby ownership or control is relevant only to the question of entrustment or direction, but not to the question of whether an entity is a public body.[144] This is a false dichotomy. In actuality, ownership and control, while perhaps relevant in an entrustment or direction analysis, are the central factors in a public body analysis. This approach was recognized by the panel and the Appellate Body in *US – DRAMS CVD*, and rightly was adopted by the panel in *Korea – Commercial Vessels*. Control, indicated by whole or majority ownership, can lead to a public body analysis, while the giving of responsibility to, or exercising authority over, an entity that is not necessarily government-owned or controlled will lead to an entrustment or direction analysis.

134. China's reliance upon the irrelevant Draft Articles cannot overcome this proper interpretation of Article 1.1(a)(1) of the SCM Agreement. Our interpretation is consistent with the ordinary meaning of the term "public." It is consistent with the context of that term. It is consistent with China's commitments in the Working Party Report. It is consistent with the object and purpose of the SCM Agreement. And it is consistent with prior interpretations by the Appellate Body and by panels. China wants the term "public body" to be equivalent to a government agency, but then there would have been no need to use the distinct term "public body" in Article 1.1(a)(1). The panel should reject China's interpretation.

4. Commerce's "Public Body" Findings with Respect to Chinese State-Owned Enterprises in the Four CVD Investigations Are Consistent with the SCM Agreement

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[142] *US – DRAMS CVD (AB)*, para. 131, n.225 (*citing US – DRAMS CVD (Panel)*, para. 7.8, n.29 and para. 7.62, n.80).

[143] The panel in *EC – DRAMS* approached the issue in exactly the same way. It stated: "We do not wish to imply that it would not be possible or justified to treat a 100 percent government owned entity as a public body, depending on the circumstances." *EC – DRAMS*, para. 7.119, n. 129. However, because the investigating authority in that dispute had analyzed whether the 100 percent government-owned entity was entrusted or directed, that panel did the same. The panel further explained: "A similar consideration applies to our discussion and analysis of Chohung Bank and the KEB in which the government of Korea held 80 percent and 43 percent of the shares, respectively, at the time of the investigation." *Id.*

[144] This is apparent throughout China's submission. *See* China First Submission, paras. 60-61, 74, 78. For example, China states: "While ownership is relevant to the question of control, and thus to the inquiry in Article 1.1(a)(1)(iv) whether a private body has been 'directed' to perform practices of a governmental character, ownership has little relevance in determining whether an entity is a public body." China First Submission, para. 61 (footnote omitted). *See also* China First Submission, para. 91, n. 69.

135. Commerce's determinations that certain state-owned enterprise producers of hot-rolled steel, rubber, and petrochemicals are "public bodies" are consistent with Article 1.1(a)(1) of the SCM Agreement. Commerce applied a rule of majority ownership to determine whether an entity was a public body.[145] If the government was the majority owner, then that producer was a public body. Given that Commerce's "public body" findings are consistent with the SCM Agreement, there was no need for Commerce to determine whether the government entrusted or directed the state-owned enterprises to provide goods for less than adequate remuneration.

136. As demonstrated above, the ordinary meaning of the term "public" indicates that the term "public body" refers to entities owned by the government. The context of that term and the object and purpose of the SCM Agreement support this interpretation. The term "public" is the opposite of "private," and an entity owned by the government is not a private body. If the term "public body" were intended to mean an entity acting pursuant to government authority conferred by law, then there would have been no need to use the distinct terms "public body" and "government." Significantly, China recognized in the Working Party Report that its state-owned enterprises are public bodies. Such an interpretation is consistent with the standard adopted by the panel in *Korea – Commercial Vessels*. For all these reasons, Commerce's determinations that state-owned enterprises providing inputs are "public bodies" are consistent with the SCM Agreement.

137. China alleges that Commerce should have applied a fact-intensive inquiry to determine whether the input producers were empowered by Chinese law to exercise governmental authority and in fact were exercising that authority, rather than its rule of majority ownership.[146] It claims that Commerce abandoned a five-factor standard that it had used in prior cases, which examined more than ownership.[147] Commerce's use of a five-factor approach in prior cases is irrelevant in the present dispute.[148] The only question for the panel is whether Commerce's determination in the challenged investigations that the Chinese state-owned enterprises are "public bod[ies]" is consistent with the SCM Agreement.

138. Nevertheless, the United States will briefly discuss the five-factor test so as to clarify some of the statements in China's submission for the panel. This discussion will further

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[145] *See CWP CVD Final Decision Memorandum*, at Comment 7 ("[W]e have applied a rule of majority ownership to determine whether a government-owned HRS supplier is an 'authority'....") (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at Comment 6 ("[W]e have applied a rule of majority ownership to determine whether a government-owned HRS supplier is an 'authority'....") (Exhibit CHI-2); *OTR Tires CVD Final Decision Memorandum*, at Comment D.2 ("Therefore, for purposes of this final determination, the Department has evaluated the government ownership of a rubber producer to determine whether it qualifies as an 'authority'....") (Exhibit CHI-4); *LWS CVD Final Decision Memorandum*, at Comment 12 ("[W]e have applied a rule of majority ownership to determine whether a government-owned petrochemical input supplier is an 'authority'....") (Exhibit CHI-3).

[146] *See, e.g.*, China First Submission, paras. 86-88.

[147] *See* China First Submission, paras. 89-91.

[148] China appears to agree that the five-factor test is not before the panel. *See* China First Submission, para. 91, n. 69.

demonstrate why Commerce's application of a rule of majority ownership in these cases is consistent with the SCM Agreement.

139. In Commerce's CVD investigation of dynamic random access memory semiconductors ("DRAMS") from Korea, it analyzed five factors to determine whether entities were public bodies.[149] This approach was based upon factors analyzed in earlier cases. Specifically, the approach came from a 1987 CVD investigation of fresh cut flowers from the Netherlands[150] and a 1992 CVD investigation of pure magnesium and alloy magnesium from Canada.[151] The first thing to recognize is that these two CVD investigations pre-dated by many years the adoption in the SCM Agreement of the "public body" and "entrusts or directs" language, as well as the equivalent language in U.S. domestic law.

140. In the older flowers CVD investigation, Commerce was faced with a situation where the relevant entity was 50 percent owned by the government.[152] Accordingly, it was necessary to examine other factors, because majority ownership by the government was not present. Commerce concluded that the government provided subsidies "through" this entity.[153] There is no way to tell whether this conclusion would be a "public body" finding or an "entrustment or direction" finding under today's standards. Then, in the magnesium CVD investigation, Commerce found that an entity was a "government entity" (which is probably more akin to today's "public body" term) based largely upon government ownership and control.[154]

141. These two Commerce decisions are not indicative of any Commerce interpretation of the "public body" language in the SCM Agreement. Since the adoption of the SCM Agreement, Commerce, of course, analyzed five factors in DRAMS from Korea. It also, as China notes, concluded that some 100 percent government-owned banks in that case were not public bodies. But there is a critical factor in DRAMS from Korea, which explains why 100 percent owned government banks were not necessarily public bodies. As Commerce stated in that CVD

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[149] *See Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16,766, 16,772 (Dep't of Commerce April 7, 2003) (preliminary determination) (Exhibit US-49); *Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 37122 (Dep't of Commerce July 23, 2003) (final determination) (Exhibit US-58) and attached Issues and Decision Memorandum, at 16-17 (Exhibit US-59).

[150] *Certain Fresh Cut Flowers From the Netherlands*, 52 Fed. Reg. 3301 (Dep't of Commerce Feb. 3, 1987) (final determination) (Exhibit US-50).

[151] *Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 30946 (Dep't of Commerce July 13, 1992) (final determination) (Exhibit US-53).

[152] *Certain Fresh Cut Flowers From the Netherlands*, 52 Fed. Reg. 3301, 3302 (Dep't of Commerce Feb. 3, 1987) (final determination) (Exhibit US-50).

[153] *Certain Fresh Cut Flowers From the Netherlands*, 52 Fed. Reg. 3301, 3303 (Dep't of Commerce Feb. 3, 1987) (final determination) (Exhibit US-50).

[154] *Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 30946, 30954 (Dep't of Commerce July 13, 1992) (final determination) (Exhibit US-53).

investigation, "*temporary [government] ownership of the banks due to the financial crisis* is not, by itself, indicative that these banks are [government] authorities."[155]

142. Accordingly, when one examines the history of this issue, it becomes clear that Commerce's analysis of more factors than ownership was born out of a case (the flowers from the Netherlands CVD investigation) in which there was a 50-50 ownership split between the government and a private entity. Then, in the DRAMS from Korea CVD investigation, an analysis of more than ownership, and even of entrustment or direction for some banks, was necessary due to the fact that the Korean government had assumed many temporary ownership stakes as a result of the Korean financial crisis.

143. As mentioned above, the panel in *US – DRAMS CVD* noted that "[d]epending on the circumstances, 100 percent government ownership might well have justified the treatment of such creditors as public bodies."[156] This is logical, given the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement. Subsequently, in a CVD administrative review of hot-rolled carbon steel flat products from India, Commerce found that a mining company in which the government owned 98 percent of the shares, and which was governed by the Ministry of Steel, was a public body, without reference to any more factors.[157]

144. This discussion illustrates that Commerce did not abandon any five-factor analysis. A five-factor analysis in the cases in this dispute was neither pertinent nor necessary. In any event, as stated at the outset, any five-factor analysis or abandonment thereof is irrelevant to the question before the panel in this dispute, that is, whether Commerce's application of a rule of majority ownership to Chinese state-owned companies is consistent with the SCM Agreement. More importantly, the above discussion concerning the DRAMS from Korea CVD investigation demonstrates that there may be situations in which government ownership, even majority government ownership, may not be determinative of the public body question. But this is not such a case.

145. China also complains that Commerce improperly placed the burden upon the Government of China to provide evidence pertaining to the public body question.[158] However, given China's

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[155] *See Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16766, 16772 (Dep't of Commerce April 7, 2003) (preliminary determination) (Exhibit US-49).

[156] *US – DRAMS CVD (Panel)*, para. 7.8, n.29. *See also id.*, para. 7.62, n.80; *US – DRAMS CVD (AB)*, para. 131, n.225. The panel in *US – DRAMS CVD* stated that "[o]n the basis of the criteria provided for in US law, however, the DOC treated these 100 percent owned Group B creditors as private bodies." *US – DRAMS CVD (Panel)*, para. 7.8, n.29. This statement is incorrect. There is nothing in U.S. domestic law requiring 100 percent government-owned bodies to be private bodies. In any event, the panel's mistake was minor and not relevant to the outcome of that dispute.

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

[158] *See* China First Submission, paras. 94-101.

recognition in the Working Party Report that state-owned enterprises can be treated as public bodies, Commerce's approach was entirely reasonable. There was no evidence on the record to suggest that Chinese state-owned enterprises should be treated any differently during the four CVD investigations at issue than what China committed to at the time of its accession to the WTO.

146. For these reasons, Commerce's findings that Chinese state-owned enterprises are "public bodies" are not inconsistent with the SCM Agreement. Accordingly, Commerce had no obligation to consider whether these entities were entrusted or directed to provide financial contributions.

B. Commerce Properly Determined that Sales of Hot-Rolled Steel and Rubber by the Public Body Input Producers, Through Trading Companies, Constitute Financial Contributions

147. As explained above, Commerce properly determined that certain state-owned enterprises are "public bodies" within the meaning of the SCM Agreement.[159] Accordingly, sales of goods by these state-owned enterprises constitute "financial contributions" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Some of these sales were made to the respondent firms through privately-owned trading companies in China. This section will demonstrate that Commerce properly determined that the sales by the state-owned enterprises constituted financial contributions to the intermediary trading companies, and, as explained fully below, a benefit thereby was conferred upon the respondent subject merchandise producers.[160]

148. In three of the CVD investigations at issue — *CWP*, *LWRP*, and *OTR Tires* — Commerce countervailed transactions involving sales of inputs by the state-owned producers, through intermediary trading companies, to the respondents. Commerce's reasoning was the same in each of these three cases. As it stated in the *OTR Tires* CVD investigation, "the GOC's financial contribution (provision of a good) is made to the trading company suppliers that purchase the rubber, while all or some portion of the benefit is conferred on the OTR tire producers who purchase rubber from the trading companies."[161] Commerce explained that the producer is the key link in the sales chain, such that when the producer is state-owned, there is a financial contribution by a public body.[162]

149. China now challenges Commerce's determinations that sales of inputs through trading companies are countervailable subsidies. China argues that Commerce presumed that because

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[159] *See supra*, Section III.A.

[160] *See infra*, Section VI.

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

[162] *See OTR Tires CVD Final Decision Memorandum*, at Comment D4 (Exhibit CHI-4); *CWP CVD Final Decision Memorandum*, at 10 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 8 (Exhibit CHI-2).

the trading companies received financial contributions the respondent firms also received financial contributions.[163] China further argues that Commerce was required to examine whether the state-owned enterprises "entrusted or directed" the trading companies to provide goods to the respondent subject merchandise producers.[164] China's argument, however, is premised upon a faulty understanding of the SCM Agreement.

150. The crux of Commerce's finding is that, in transactions involving trading companies, there is a financial contribution from the state-owned enterprise producers, and a benefit conferred upon the respondent producers of the subject merchandise. This is a proper application of Article 1.1 of the SCM Agreement. Pursuant to Article 1.1, the two elements of a subsidy are a "financial contribution" and a "benefit." A financial contribution must come from a government, a public body, or a private body that is entrusted or directed by the government or by a public body. There is no indication in Article 1.1(a) of who must *receive* a financial contribution. The Article speaks only to who *grants* a financial contribution.

151. Of course, the financial contribution must confer a benefit. Just as Article 1.1(a) does not specify who must receive a financial contribution, Article 1.1(b) contains no language describing *upon whom* the benefit must be conferred.[165] Rather, it simply requires that "a benefit is thereby conferred" on someone.

152. The Appellate Body has reasoned that a benefit must be conferred on legal or natural persons.[166] At the same time, the Appellate Body did not conclude that only one such person can receive a benefit from a particular financial contribution. On the contrary, in *US – Countervailing Measures*, it stated that there was nothing in its earlier findings "indicating that the 'benefit' of a financial contribution, as contemplated in Article 1.1(b) of the SCM Agreement, should necessarily be 'received and enjoyed' by the *same* person or, put differently, there is nothing indicating that the 'benefit' cannot be 'received and enjoyed' by two or more distinct persons."[167]

153. The Appellate Body's interpretation is consistent with the language of Article 1.1 of the SCM Agreement. As just explained, Article 1.1 does not specify who must receive a financial contribution. Nor does it specify upon whom a benefit must be conferred. The correct interpretation of Article 1.1 is the one reached by the Appellate Body — Article 1.1 of the SCM Agreement does not limit a benefit to one recipient, or even to the recipient of the financial contribution.

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[163] *See, e.g.*, China First Submission, paras. 105-107.

[164] *See* China First Submission, para. 110.

[165] *See US – Countervailing Measures (AB)*, para. 112 ("The SCM Agreement does not include a specific definition of the 'recipient' of a 'benefit'.").

[166] *See US – Countervailing Measures (AB)*, paras. 109-110; *US – Lead Bars (AB)*, paras. 56-58.

[167] *US – Countervailing Measures (AB)*, para. 110.

154. The panel in *Mexico – Olive Oil* followed this approach. It interpreted the Appellate Body's findings as meaning 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."[168]

155. With these principles in mind, it is clear that Commerce properly found that trading company transactions result in a financial contribution by the public body state-owned enterprise, with all or some of the benefit conferred on the respondent subject merchandise producer. China claims that Commerce "presumed" a financial contribution *from* the trading companies in these transactions.[169] China simply misses the point. Commerce found a financial contribution *to* the trading companies. This satisfies the financial contribution requirement of Article 1.1 of the SCM Agreement. As explained below, a benefit from this financial contribution was "thereby conferred" upon the respondent firms.[170]

156. China argues that Commerce was required to find that the public bodies "entrusted or directed" the trading companies to sell goods to the respondents.[171] China ignores the fact that the SCM Agreement contemplates situations in which the benefit might be received by different recipients. China appears to assume that Article 1.1 of the SCM Agreement requires there to be only one recipient, and that this recipient must receive both the financial contribution and the entire amount of the benefit. China has offered no basis for this assumption.

157. Rather, in this case, the financial contribution occurred with the sale of goods (whether hot-rolled steel or rubber) by the public body state-owned enterprises to the intermediary trading companies. This government provision of goods then conferred benefits upon the respondent producers of *CWP*, *LWRP*, and *OTR Tires*, when the trading companies sold the goods to these respondents. Although the intermediary trading companies received the financial contribution and perhaps some benefit, this possibility does not preclude the respondent subject merchandise producers from receiving a benefit. The benefit, which will be discussed in greater detail below, existed to the extent that the prices paid by the respondent companies for the hot-rolled steel or for the rubber were less than the benchmark prices.

158. This is not to suggest that the benefit, pursuant to Article 1.1(b) of the SCM Agreement, will always be conferred on someone other than the recipient of the financial contribution, or that there will always be more than one party that benefits from a financial contribution. Most often, the recipient of the financial contribution will be the same person as the recipient of the benefit. But the SCM Agreement plainly encompasses situations like the one in the present case, where the transactions between the state-owned input producers, the intermediate trading companies,

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[168] *Mexico – Olive Oil (Panel)*, para. 7.152.

[169] *See* China First Submission, para. 105.

[170] *See* Section VI, *infra*.

[171] *See* China First Submission, paras. 104, 107-108.

and the subject merchandise producers are connected such that a benefit is conferred on an entity other than, or in addition to, the recipient of the financial contribution.

159. For these reasons, Commerce's financial contribution findings with respect to the trading company transactions are not inconsistent with the SCM Agreement. Commerce did not unlawfully presume a financial contribution; nor was it required to find that the state-owned enterprises entrusted or directed the trading companies to provide goods.

C. Commerce's Determination that State-Owned Commercial Banks Are "Public Bodies" Is Not Inconsistent with the SCM Agreement

1. Introduction

160. China challenges Commerce's finding in the *OTR Tires* final determination that loans provided by SOCBs constitute countervailable subsidies.[172] As the first prong of this challenge, China argues that Commerce's determination that SOCBs are "public bodies" is inconsistent with the SCM Agreement.[173] China further argues that because Commerce failed to make a finding that the Chinese government entrusts or directs SOCBs to provide loans, Commerce's financial contribution finding was inconsistent with the SCM Agreement.[174]

161. China's challenge to Commerce's finding that SOCBs are "public bodies," just like its challenge regarding state-owned enterprises, is misplaced. The United States has already explained why China's interpretation of the term "public body" is inconsistent with the ordinary meaning of that term in its context and in light of the object and purpose of the SCM Agreement. As demonstrated above, a "public body" includes an entity owned by the government.

162. In this respect, it is useful to recall the language in the Working Party Report. Members sought to clarify not only that state-owned enterprises were public bodies, but also that state-owned banks were public bodies capable of providing financial contributions.[175] China did not

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[172] In the four CVD investigations at issue, Commerce investigated whether loans provided by state-owned commercial banks ("SOCBs") in China to the various respondents constituted countervailable subsidies. In the *CWP* CVD investigation, *OTR Tires* CVD investigation, and *LWS* CVD investigation, Commerce concluded, for various reasons, that SOCBs provided countervailable subsidies in the form of loans. *See CWP CVD Final Decision Memorandum*, at 14-15 and Comment 8 (Exhibit CHI-1); *OTR Tires CVD Final Decision Memorandum*, at 13-15 and Comments E.2-E.5 (Exhibit CHI-4); *LWS CVD Final Decision Memorandum*, at 21-26 and Comments 18-20 (Exhibit CHI-3). In the *LWRP* CVD investigation, Commerce concluded that any government program to provide loans to the steel industry was "not used" by the respondents. *See LWRP CVD Final Decision Memorandum*, at Comment 14 (Exhibit CHI-2).

[173] *See* China First Submission, paras. 178-197.

[174] *See, e.g.*, China First Submission, paras. 179-183, 193, 197.

[175] *Working Party Report*, WT/ACC/CHN/49 (Oct. 1, 2001), para. 172.

dispute this point, merely noting "that such financial contributions would not necessarily give rise to a benefit within the meaning of Article 1.1(b) of the SCM Agreement."[176]

163. China's recognition that its SOCBs constitute public bodies is not surprising. As the United States explains below, the Government of China holds dominant ownership stakes in the SOCBs. Even outside commentators have remarked that the government's ownership of banks is "exceptional."[177] China does not dispute this. Given China's ownership of its banks, these banks are "public bodies."

2. Commerce Properly Concluded in the *OTR Tires* Final Determination that SOCBs in China Are "Public Bodies" within the Meaning of Article 1.1(a)(1) of the SCM Agreement

164. Commerce's determination that Chinese SOCBs are "public bodies" is not inconsistent with the SCM Agreement. China's argument mischaracterizes Commerce's finding with regard to SOCBs and is based upon China's incorrect interpretation of the term "public body."

165. China argues that Commerce's public body finding with respect to SOCBs in the *OTR Tires* final determination was based upon two factors: (1) whether there was a policy in place to provide preferential lending to the industry; and (2) whether there was evidence that the SOCBs provided preferential loans to producers in the industry pursuant to this policy.[178] China is incorrect.

166. In the *OTR Tires* final determination, Commerce did not use any such test to determine whether SOCBs constituted "public bodies." Rather, Commerce relied upon "all information on the record" and its finding in the 2007 *CFS Paper* CVD investigation.[179] Commerce stated that "[a] complete analysis of the facts and circumstances of the Chinese banking system that have led us to find that Chinese policy banks and SOCBs constitute a government authority is included" in the *CFS Paper Final Decision Memorandum*.[180] Commerce then reached the same conclusion in the *OTR Tires* CVD investigation that it reached in the *CFS Paper* CVD investigation, finding that SOCBs are public bodies.

167. In the *CFS Paper* CVD investigation, Commerce analyzed whether the Chinese government controlled the SOCBs. Government ownership of the banks, of course, figured prominently in this analysis.[181] Other factors included the legacy of state control over the banks,

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[176] *Working Party Report*, WT/ACC/CHN/49 (Oct. 1, 2001), para. 172.

[177] *OECD Economic Surveys: China*, at 140 (2005) (*OTR Tires* CVD Record Pub. Doc. 1) (footnote omitted) (Exhibit US-54) .

[178] *See* China First Submission, para. 185.

[179] *See OTR Tires CVD Final Decision Memorandum*, at Comment E.2 (Exhibit CHI-4).

[180] *See OTR Tires CVD Final Decision Memorandum*, at Comment E.2 (Exhibit CHI-4).

[181] *See CFS CVD Final Decision Memorandum*, at Comment 8 (Exhibit CHI-93).

the incomplete banking sector reforms in China, and government involvement in bank decision-making.[182] Commerce's finding in the *OTR Tires* CVD investigation, therefore, was based upon these same factors.

168. The major SOCBs in China, often referred to as the "Big Four," are the Bank of China, the China Construction Bank, the Industrial and Commercial Bank of China, and the Agricultural Bank of China.[183] These four banks account for much of all bank assets in China.[184] They were created in the 1970s and 1980s "as state-owned banks with policy lending mandates. . . ."[185] Prior to their creation, the People's Bank of China was the sole bank in China. With the creation of the "Big Four," the People's Bank of China became the country's central bank, and each of the Big Four specialized in supplying credit to a different sector of the Chinese economy.[186]

169. In its First Submission, China has provided the government's ownership stakes in each of the "Big Four" banks.[187] It therefore is undisputed that the Government of China owns the vast majority of shares in each of the SOCBs. Specifically, as of the end of 2006, the Government of China owned 68 percent of the Bank of China, 74 percent of the China Construction Bank, 75 percent of the Industrial and Commercial Bank of China, and 100 percent of the Agricultural Bank of China.[188]

170. Indeed, outside observers have noted the substantial government ownership of banks in China. The OECD in a 2005 report stated that "[t]he extent of state ownership in China's financial system is exceptional. All but one of the major commercial banks are controlled by central or local governments, as are virtually all smaller commercial banks."[189] At the time of the

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[182] *See CFS CVD Final Decision Memorandum*, at Comment 8 (Exhibit CHI-93).

[183] *See* Wendy Dobson and Anil K. Kashyap, *The Contradiction in China's Gradualist Banking Reforms* (2006) (*OTR Tires* CVD Record Pub. Doc. 290) (Exhibit US-48); *Trade Policy Review: Report by the Secretariat on the People's Republic of China (Revision)*, WT/TPR/S/161/Rev.1, at 20-21 (26 June 2006) (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-57); *OECD Economic Surveys: China* (2005), at 139 (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-54).

[184] *See Trade Policy Review: Report by the Secretariat on the People's Republic of China (Revision)*, WT/TPR/S/161/Rev.1, at 20-21 (26 June 2006) (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-57) ("In particular, the capital market remains heavily dependent on the banking system, which is still under-developed and relatively inefficient; it is dominated by the same four state-owned institutions, whose combined market share is 54%."); *see also OECD Economic Surveys: China* (2005), at 139, Table 3.2 (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-54).

[185] Wendy Dobson and Anil K. Kashyap, *The Contradiction in China's Gradualist Banking Reforms*, at 4 (2006) (*OTR Tires* CVD Record Pub. Doc. 290) (Exhibit US-48).

[186] *See Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China, China's Status as a Non-Market Economy*, at 50-51 (Aug. 30, 2006) ("*NME Status Memo*") (Exhibit US-69).

[187] *See* China First Submission, para. 165.

[188] *See* China First Submission, para. 165.

[189] *OECD Economic Surveys: China* (2005), at 140 (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-54) (footnote omitted). Note that the OECD used the term "commercial banks" to refer to more than just the SOCBs. *See id.* at 138.

OECD report, the four SOCBs were "wholly owned by [the] central government" and accounted for "almost three-quarters of commercial bank assets."[190] Another writer commented that one of the main features of the Chinese banking system is that it is "predominantly state owned."[191]

171. As the United States demonstrated above, majority government ownership qualifies an entity as a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. China repeats here the same arguments it made with respect to majority ownership of state-owned enterprises. However, as explained above, Commerce's application of a rule of majority ownership is consistent with the ordinary meaning of the term "public" in its context and in light of the object and purpose of the SCM Agreement. The Draft Articles are not relevant here. On the other hand, China's recognition in the Working Party Report that SOCBs are public bodies is highly relevant.

172. Accordingly, Commerce's determination that Chinese SOCBs are "public bodies" is not inconsistent with Article 1.1(a)(1) of the SCM Agreement. In addition to its argument regarding the meaning of the term "public body," China appears to argue that Commerce's benefit analysis undermines its public body determination. It claims that GTC did not receive loans at interest rates any more favorable than did other companies in China.[192] Similarly, it claims that SOCBs cannot be "public bodies" if they make loans to creditworthy enterprises on commercial terms, but rather must make loans on "preferential terms in furtherance of public policy objectives" to be considered "public bodies."[193]

173. China here confuses the "public body" question with the question of benefit. This is the same mistaken interpretation of Article 1.1 of the SCM Agreement rejected by the panel in *Korea – Commercial Vessels*.[194] This Panel likewise should reject this argument. The public body question seeks to determine the identity or character of an entity. It does not seek to determine whether that entity's actions are commercial or not. The commercial nature of the entity's actions may be relevant to a benefit analysis. China's position would lead to the strange result that "at different times, the same financial entity could be both a public and a private body, depending on how that entity were conducting itself in the market."[195]

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[190] *OECD Economic Surveys: China* (2005), at 140 (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-54) (footnote omitted).

[191] Steven Barnett, *Banking Sector Developments*, in *China's Growth and Integration into the World Economy: Prospects and Challenges*, International Monetary Fund Occasional Paper No. 232, at 45 (2004) (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-46).

[192] *See, e.g.*, China First Submission, para. 169.

[193] *See* China First Submission, para. 188.

[194] *See Korea – Commercial Vessels*, para. 7.44 ("Thus, the question whether an entity is a public body should not depend on an examination of whether that entity acts pursuant to commercial principles.").

[195] *Korea – Commercial Vessels*, para. 7.45.

174. Further, it bears mention that Commerce cited other evidence in support of its determination. Although not essential to a public body finding, some of this evidence is summarized below.

175. Due in part to the dominating ownership shares of the Government of China, there historically has been a close relationship between SOCBs and the government. For example, the OECD explained:

> Traditionally, SOCBs have functioned as government agencies whose principal mandate was to support government economic and social objectives. The chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their choice. Moreover, the traditionally close ties between government and bank officials at the local level have created a culture that has given local government officials substantial influence over bank lending decisions.[196]

176. Similarly, one expert stated "that in the past a lot of [bank] branch managers were appointed by the local government and that local government had the power to assess bank managers, giving bank managers an incentive to keep up good relations with local government officials."[197] Another expert noted that "the relationship between local governments and local bank branches in China has always been a close one, with senior bank managers being dependent on local government support."[198]

177. Further, as a consequence of the substantial state ownership of banks, the government is able to exert control over bank management. The OECD reports: "The management of the banks is not conducted by professional managers with a clear mandate to return value to shareholders, but by government officials whose goal is to achieve a balance of economic and non-economic objectives."[199] As described above, traditionally there were close relationships between bank branch managers and local government officials. These relationships persist to varying degrees, depending on the locality, according to one expert. This expert stated that although there are some bank branches that operate independently, "[t]here are some localities where all financing is occurring in collusion with the local government."[200]

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[196] *OECD Economic Surveys: China* (2005), at 141 (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-54) (footnote omitted).

[197] *See CFS CVD Private Financial Experts Verification Report*, dated August 21, 2007, at 3 (*OTR Tires* CVD Record Pub. Doc. 290) (Exhibit US-47).

[198] *See CFS CVD Private Financial Experts Verification Report*, dated August 21, 2007, at 12 (*OTR Tires* CVD Record Pub. Doc. 290) (Exhibit US-47).

[199] *See China in the Global Economy: Governance in China* (OECD), at 382 (*OTR Tires* CVD Record Pub. Doc. 290) (Exhibit US-55).

[200] *See CFS CVD Private Financial Experts Verification Report*, dated August 21, 2007, at 15 (*OTR Tires* CVD Record Pub. Doc. 290) (Exhibit US-47).

178. The Commercial Banking Law of the People's Republic of China states that banks are required to "carry out their loan business upon the needs of national economy and the social development and under the guidance of State industrial policies."[201] Paradoxically, this law also nominally protects banks from government interference. But evidence on the record indicated that SOCBs remain subject to government control. One expert noted that "[b]anks in China are intended to operate on a commercial basis, but the political aspect still exists. Bank officials have a lot more autonomy from government, but banks still prefer not to generate opposition from local government officials and still find advantages in earning their support."[202]

179. Similarly, an IMF survey noted that "[i]n the 1997-2004 data, it is difficult to find solid empirical evidence of a strong shift to commercial orientation by SCBs."[203] Another IMF report praised the bank reforms that had occurred to date, but recommended "the continued scaling-back, and eventual elimination, of government involvement in the management and business operations of the banks."[204]

180. Clearly, then, there is evidence that through its ownership of the SOCBs, the Government of China is able to exert control over those banks. For all of these reasons, Commerce's finding in the *OTR Tires CVD Final Determination* that Chinese state-owned commercial banks are "public bodies" is consistent with the SCM Agreement. Accordingly, Commerce had no obligation to consider whether these entities were entrusted or directed to provide financial contributions.

IV. COMMERCE'S USE OF OUT-OF-COUNTRY BENCHMARKS TO MEASURE THE BENEFIT OF THE GOVERNMENT PROVISION OF INPUTS, LOANS, AND LAND-USE RIGHTS WAS NOT INCONSISTENT WITH THE SCM AGREEMENT

181. China makes several claims related to Commerce's use of out-of-country benchmarks to measure the benefit of the government provision of inputs, loans, and land-use rights in the challenged investigations. Specifically, China claims that Commerce acted inconsistently with Article 14(d) of the SCM Agreement by rejecting the use of prices in China as benchmarks to determine the benefit conferred when SOEs, which Commerce determined were public bodies,

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[201] *CFS CVD Final Decision Memorandum*, at Comment 8 (Exhibit CHI-93). *See also NME Status Memo*, at 53 (Exhibit US-69).

[202] *CFS CVD Private Financial Experts Verification Report*, dated August 21, 2007, at 3 (*OTR Tires* CVD Record Pub. Doc. 290) (Exhibit US-47).

[203] Richard Podpiera, IMF Working Paper, *Progress in China's Banking Sector Reform: Has Bank Behavior Changed?*, at 4 (March 2006) (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-52).

[204] International Monetary Fund, *People's Republic of China: 2006 Article IV Consultation - Staff Report* (October 2006) at 4 (*OTR Tires* CVD Record Pub. Doc. 1) (Exhibit US-51).

provided input products in the *CWP*, *LWRP*, and *LWS* CVD investigations.[205] China also claims that Commerce acted inconsistently with Article 14(b) of the SCM Agreement by rejecting Chinese interest rates as benchmarks to determine the benefit conferred when SOCBs, which Commerce determined were public bodies, provided loans in the *OTR Tires*, *LWS*, and *CWP* CVD investigations.[206] Finally, China claims that Commerce acted inconsistently with Article 14(d) of the SCM Agreement by rejecting land-use rights prices in China as benchmarks to determine the benefit conferred by the government provision of land-use rights in the *LWS* and *OTR Tires* CVD investigations.[207]

182. China's claims are without merit, unsupported by the text of the SCM Agreement and China's Accession Protocol, and should be rejected. As explained in detail below, Commerce's determinations to use benchmarks other than prices or interest rates available in China were based on findings that the predominant role of the Chinese government in various markets distorted prices and interest rates in China. Commerce made each benchmark determination on a case-by-case basis, based on the facts of each investigation. Commerce used Chinese prices whenever they were available and appropriate as market benchmarks.[208] Where the facts demonstrated that Chinese prices were distorted by the government's predominant role in a market and unsuitable as commercial benchmarks, however, Commerce used market-derived prices from outside of China. Commerce's determinations were consistent with Article 14 of the SCM Agreement, as interpreted by the Appellate Body in *US – Softwood Lumber CVD Final*.

A. The SCM Agreement Permits the Use of Out-of-Country Benchmarks for Measuring Benefit

183. Article 14 of the SCM Agreement, entitled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient," contains the obligations related to the calculation of a subsidy benefit. In relevant part, Article 14 provides:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

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[205] China First Submission, para. 123.

[206] China First Submission, para. 250.

[207] China First Submission, para. 306.

[208] *See OTR Tires CVD Final Decision Memorandum*, at 79-80 (Exhibit CHI-4).

(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

* * *

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

184. The chapeau of Article 14 refers to "any method" used by an investigating authority, and describes the content of the subparagraphs of Article 14 as "guidelines." The Appellate Body has explained that "[t]he reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[209] Moreover, the Appellate Body has emphasized the importance of the word "guidelines":

> [T]he term 'guidelines' suggests that Article 14 provides the 'framework within which this calculation is to be performed', although the 'precise detailed method of calculation is not determined' . . . . [T]hese terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, we find merit in the United States' submission that the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'.[210]

185. The Appellate Body has summarized the flexibility provided to investigating authorities under Article 14 as follows:

> The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article

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

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

> 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations.[211]

186. While Article 14 sets forth guidelines for the calculation of benefit, neither Article 14 nor any other provision of the SCM Agreement defines the term "benefit." Article 31(1) of the *Vienna Convention* provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ordinary meaning of "benefit" is something that is "to advantage of, or profit to, recipient."[212] The panel in *Canada–Aircraft* explained that "to determine whether a financial contribution (in the sense of Article 1.1(a)(1)) confers a 'benefit', *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution."[213] However, to determine the position that the recipient would have been in "but for the financial contribution," it is necessary to select a commercial benchmark for comparison.[214]

187. In fact, the Appellate Body explained in *Canada–Aircraft* that such a comparison should come from a market undistorted by the government's financial contribution:

> We . . . believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient *"better off" than it would otherwise have been, absent that contribution*. In our view, *the marketplace provides an appropriate basis for comparison* in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[215]

Even though the Appellate Body referred in *Canada–Aircraft* to Article 1.1, this understanding of benefit is equally applicable to Article 14 of the SCM Agreement. Article 14 provides guidelines for determining the existence of a "benefit to the recipient conferred *pursuant to paragraph 1 of Article 1*. . . " (emphasis added). This text explicitly ties the guidelines in Article 14 to the term "benefit" in Article 1.1(b). Thus, the word "benefit" in Article 14 should be understood as providing guidance to investigating authorities as to how to measure to what extent the subsidy recipient is "better off" than it would have otherwise been.

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[211] *Japan – DRAMs (AB)*, para. 191.

[212] *Black's Law Dictionary*, 108 (6th ed. 1991) (Exhibit US-62).

[213] *Canada – Aircraft (Panel)*, para. 9.112.

[214] *Id*. "In our view, the only logical basis for determining the position the recipient would have been in absent the financial contribution is the market."

[215] *See Canada – Aircraft (AB)*, para. 157 (emphasis added).

188. Commerce will normally measure whether the government provision of goods, loans, or land-use rights confers a benefit by comparing the price paid for government-provided goods or land-use rights, or the interest rate on government-provided loans, with a price or interest rate drawn from the commercial market within the Member country that provides the subsidy ("in-country market").[216] However, this is only possible if there is a "marketplace [that] provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred' . . . ."[217]

189. When a government's role in its domestic market is so predominant as to distort the operation of that market, the use of in-country market benchmarks to measure the benefit would reflect the government's distortion and would not allow a determination of whether the recipient of a financial contribution was "better off." As the Appellate Body has explained, "[w]henever 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."[218] The Appellate Body recognized that:

> [T]here may be situations in which there is no way of telling whether the recipient is 'better off' absent the financial contribution. This is because the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.[219]

In this situation, use of an in-country price or interest rate would not measure the benefit, because the investigating authority would simply be comparing the government price with itself.

190. In such a situation, the Appellate Body has found that Article 14 of the SCM Agreement permits a Member to use out-of-country benchmarks to measure a benefit.[220] The Appellate Body explained that it is not necessary to establish that the government is the sole provider of the merchandise, but only that private prices are distorted because of the government's predominant role in the market.[221] In particular, the Appellate Body stated that:

> [A]n investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that

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[216] 19 C.F.R. § 351.511(a)(2)(i) ("The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question.").

[217] *Canada – Aircraft (AB)*, para. 157.

[218] *US – Softwood Lumber CVD Final (AB)*, para. 100.

[219] *US – Softwood Lumber CVD Final (AB)*, para. 93 (emphasis in original), *see also* para. 101.

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

[221] *US – Softwood Lumber CVD Final (AB)*, para. 100.

> those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods.[222]

The Appellate Body noted that reliance on external benchmarks may be necessary in such circumstances, because "in certain situations where government involvement in the market is substantial, the prices of private suppliers may be artificially suppressed because of the prices charged for the same goods by the government."[223] Relying on distorted domestic prices in such situations was not required, because if an authority did so, "the comparison contemplated by Article 14 would become circular."[224]

191. The available evidence will establish whether a government's predominant role in a market has distorted that market along with any private prices that might be available, necessitating use of an out-of-country comparison.[225] In *US – Softwood Lumber CVD Final*, the Appellate Body explained that "[t]he determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."[226]

192. Reading Article 14 of the SCM Agreement as permitting the use of out-of-country benchmarks where prices are distorted because of the government's predominant role in the market is consistent with the object and purpose of the SCM Agreement. In *US – Softwood Lumber CVD Final*, the Appellate Body explained that:

> [T]he object and purpose of the *SCM Agreement*, . . . 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. This is because the determination of the existence of a benefit is a necessary condition for the application of countervailing measures under the *SCM Agreement*. If the calculation of the benefit yields a result that is artificially low, or even zero, . . . then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement.[227]

Where the predominant role of the government providing the subsidy in a market distorts the prices in that market, it may not be possible to select a benchmark from that market for comparison that would permit an investigating authority to calculate and "fully offset" the benefit.

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

[223] *US – Softwood Lumber CVD Final (AB)*, para. 94.

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

[225] *US – Softwood Lumber CVD Final (AB)*, para. 102.

[226] *US – Softwood Lumber CVD Final (AB)*, para. 102.

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

193. To summarize, the Appellate Body has previously found that Article 14 of the SCM Agreement provides flexibility, it should not be interpreted nor applied in an overly restrictive manner, and it permits the use of out-of-country benchmarks in certain situations. In light of these principles, and as explained below, Commerce found that Chinese prices for certain input products, Chinese interest rates, and Chinese land-use rights prices were distorted because of China's predominant role in the markets for those input goods, the lending market, and the land-use rights market. Therefore, it was necessary for Commerce to select of out-of-country benchmarks to determine whether a benefit existed and, if so, to measure it. Commerce's determinations were consistent with the obligations of the United States under Article 14 of the SCM Agreement.

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

194. China's Accession Protocol is an integral part of the WTO Agreement[228] that sets forth additional terms and conditions to which China agreed as part of its accession to the WTO.[229] The Protocol represents the results of negotiations between WTO Members and China,[230] and includes legal obligations undertaken by China. Of relevance here is that, in addition to agreeing to be bound by the text of the SCM Agreement, China also agreed to additional terms and conditions concerning the use of out-of-country benchmarks in CVD investigations. These terms and conditions are set forth in paragraph 15(b) of the Accession Protocol, which provides as follows:

> In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member *may then 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*

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[228] *China Accession Protocol*, para. 1.2 ("This Protocol. . . shall be an integral part of the WTO Agreement."). In addition, Article XII:1 of the *Marrakesh Agreement Establishing the World Trade Organization* provides that "[a]ny State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO." Therefore, the *Accession Protocol* is enforceable in WTO dispute settlement proceedings. *See, e.g., China – Auto Parts (AB)*, para. 253 (ruling on a provision of the Working Party Report that was incorporated by reference into the *Accession Protocol* and therefore, enforceable in WTO dispute settlement proceedings).

[229] *China Accession Protocol*, Decision ("The People's Republic of China may accede to the Marrakesh Agreement Establishing the World Trade Organization on the terms and conditions set out in the Protocol annexed to this decision").

[230] *Id*. ("*Noting* the results of the negotiations directed toward the establishment of the terms of accession of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organization and having prepared a Protocol on the Accession of the People's Republic of China.") (emphasis in original).

> *available as appropriate benchmarks*. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering *the use of terms and conditions prevailing outside China.*[231]

This provision confirms the permissibility of using out-of-country benchmarks to measure any benefit in CVD investigations concerning imports from China because it references all of the subparagraphs of Article 14 of the SCM Agreement. Paragraph 15(b) also expressly recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks."

195. The Working Party Report,[232] referenced in the Accession Protocol,[233] provides context for the interpretation of the Accession Protocol. The Working Party Report explains that:

> Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.[234]

This text reflects Members' concern about potential distortion of prices in the Chinese market. Paragraph 15(b) of the Accession Protocol, read in the context of the Working Party Report, addresses these concerns by acknowledging the right of Members to select out-of-country benchmarks where appropriate.

196. China argues that "the United States may not, in these proceedings, seek to defend its use of non-Chinese benchmarks other than on the basis that the use of an external benchmark was, in its view, consistent with a proper interpretation of Article 14 of the SCM Agreement."[235] In other words, China suggests that the United States may not make reference to China's Accession

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[231] *China Accession Protocol*, at para. 15(b) (emphasis added).

[232] Article 31 of the *Vienna Convention* provides that the context of a treaty includes "any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

[233] *China Accession Protocol*, at Preamble ("The World Trade Organization . . . and the People's Republic of China . . . Taking note of the Report of the Working Party on the Accession of China in document WT/ACC/CHN/49 . . .").

[234] *Working Party Report*, para. 150.

[235] China First Submission, para. 30.

Protocol in support of Commerce's benchmark determinations. China's position is unsupportable, both as a matter of law and as a matter of fact.

197. As the Appellate Body has explained, "[a] respondent is entitled to answer the complainant's case and is not confined to addressing the specific facts and arguments put forward by the complainant, provided that the response is *relevant* to the issues in dispute."[236] China's Accession Protocol is "an integral part of the WTO Agreement" and sets forth the "terms and conditions" on which China was permitted to "accede to the Marrakesh Agreement Establishing the World Trade Organization."[237] Thus, the Protocol is highly "relevant" to the issues in this dispute.

198. In addition, the arguments and issues considered by an investigating authority during the course of a CVD investigation may be different from the arguments and issues raised in a WTO dispute settlement proceeding. Consequently, contrary to what China asserts, a Member is not prevented from raising arguments and issues in WTO dispute settlement that were not raised during the CVD investigation. As the Appellate Body has explained, "Arguments before national competent authorities may be influenced by, and focused on, the requirements of the national laws, regulations and procedures. On the other hand, dispute settlement proceedings brought under the DSU concerning . . . measures imposed under the [WTO Agreements] may involve arguments that were not submitted to the competent authorities by the interested parties."[238] While the Appellate Body was reviewing the application of a safeguard measure in that dispute, its reasoning applies with equal force to CVD investigations. Moreover, it is "not necessarily the case" that "there is always continuity between claims raised in an underlying [trade remedy] investigation and claims raised by a complaining party in a related dispute brought before the WTO."[239] This is because "[t]he parties involved in an underlying [trade remedy] investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in [a trade remedy] investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute."[240]

199. Contrary to China's implication, the discussion of China's Accession Protocol by the United States now does not constitute "a new rationale or explanation *ex post* to justify [Commerce's] determination."[241] Commerce explained the bases for its determinations in the final determinations themselves and the accompanying decision memoranda, and Commerce's determinations are justified by the evidence on the administrative records of the investigations,

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[236] *Japan – Apples (AB)*, para. 136 (emphasis in original).

[237] *China Accession Protocol*, para. 1.2; *Accession of the People's Republic of China, Decision of 10 November 2001*, WT/L/432.

[238] *US – Lamb Meat (AB)*, para. 113 (reviewing a Member's safeguard measure).

[239] *Thailand – H-Beams (AB)*, para. 94 (reviewing a Member's AD measure).

[240] *Id.*

[241] China First Submission, para. 30.

not by China's Accession Protocol or by any other covered agreement. Beyond this, however, China is incorrect as a matter of basic fact. In each of the determinations in the *OTR Tires*, *LWS*, and *LWRP* CVD investigations, on the very pages cited by China, Commerce noted that "a case-by-case approach is what China agreed to in its Accession Protocol, which explicitly provides for use of external benchmarks, where there are special difficulties in applying standard CVD methodology."[242]

200. In any event, in light of China's pursuit of these WTO dispute settlement proceedings, it has only now become necessary for the United States to discuss provisions of the WTO Agreements and the consistency of Commerce's benchmark determinations with them. As noted above, in doing so, the United States is free to make arguments under all covered agreements "*relevant* to the issues in dispute," including China's Accession Protocol.

C. In Each of the Investigations in Question, Commerce Determined, Based on Record Facts, That China's Predominant Role in the Relevant Chinese Market Distorted Certain Prices and Interest Rates and Necessitated the Use of Out-of-Country Benchmarks

201. China alleges that Commerce applied a "*per se* rule" that only considered the degree of state ownership of the industries.[243] China mischaracterizes Commerce's decisions and ignores the detailed rationale Commerce provided for each of its factual conclusions. Commerce reviewed all record evidence and determined appropriate benchmarks on a case-by-case basis in each of the challenged investigations. Moreover, China ignores its Accession Protocol, which expressly recognizes the right of a Member to use out-of-country benchmarks.[244]

202. As a first step in determining whether "private prices in [China were] distorted because of the government's predominant role,"[245] Commerce assessed the extent to which prices or interest rates on loans in particular sectors of the market were controlled either directly or indirectly through laws and regulations or through government ownership and control of domestic production.[246] However, this was only one part of Commerce's analysis. Commerce also evaluated all record evidence to determine whether other factors influenced whether the government has a predominant role in the market.

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[242] *OTR Tires CVD Final Decision Memorandum*, at 42 (*citing China Accession Protocol*, para. 15) (Exhibit CHI-4); *LWS CVD Final Decision Memorandum*, at 40 (*citing China Accession Protocol*, para. 15) (Exhibit CHI-3); *LWRP Final Decision Memorandum*, at 17 (*citing China Accession Protocol*, para. 15) (Exhibit CHI-2).

[243] China First Submission, paras. 125, 269, and 304.

[244] *China Accession Protocol*, para. 15(b).

[245] *US – Softwood Lumber CVD Final (AB)*, para. 90 (citation omitted).

[246] *See, e.g.*, *LWRP CVD Final Decision Memorandum*, at Comment 7, at 35-36 (explaining that Commerce was "examining record information regarding all potential benchmark prices" and first assessing the extent of government-ownership of production in the hot-rolled steel sector) (Exhibit CHI-2).

203. In the *OTR Tires* CVD Investigation, for example, Commerce determined that government-owned producers accounted for "a significant portion of the natural and synthetic rubber produced domestically."[247] However, record evidence showed that imports of both natural and synthetic rubber exceeded domestic production.[248] "Thus, given the large penetration of imports of natural rubber and synthetic rubber in the PRC rubber markets and the lack of other evidence on the record to show that [government-owned producers] or government agencies through other methods had control of, or otherwise distorted, these markets during the [period of investigation, Commerce did] not find government distortion of the PRC rubber markets."[249] Consequently, Commerce relied upon the investigated companies' actual import prices and domestic purchase prices from private producers as benchmarks when determining whether a benefit was conferred by the rubber purchased from government-owned producers, even though the government owned the producers of a significant portion of domestically produced rubber.[250]

204. In the case of the government provision of hot-rolled steel, petrochemicals, policy loans, and land-use rights, however, Commerce determined, based on all of the evidence on the record of the investigations, that domestic prices and interest rates in China were distorted because of the predominant role of the Chinese government in the markets, rendering those domestic prices and interest rates unsuitable as benchmarks. Consequently, Commerce determined that it was necessary to use out-of-country benchmarks to measure benefit.

1. Commerce's Determinations to Use Out-of-Country Benchmarks to Measure the Benefit of Government-Provided Hot-Rolled Steel in the *CWP* and *LWRP* CVD Investigations Were Consistent with the SCM Agreement

205. In the *CWP* and *LWRP* CVD investigations, Commerce measured the benefit conferred to producers of subject merchandise by the government provision of hot-rolled steel inputs.[251] Commerce determined, based on record evidence, that the Government of China played a predominant role in the market for hot-rolled steel in China, and this distorted private prices in the Chinese market. Therefore, Commerce used out-of-country benchmarks to measure whether any benefit was conferred.

(a) Record Evidence Demonstrated That Private Prices for Hot-Rolled Steel in China Were Distorted by the Government of China's Predominant Role in the Market

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

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *CWP CVD Final Decision Memorandum*, at 9-12 (Exhibit CHI-1), and *LWRP CVD Final Decision Memorandum*, at 8 (Exhibit CHI-2).

206. In the *CWP* and *LWRP* CVD investigations, Commerce first sought information on the role of the government in the hot-rolled steel market. In its written response to Commerce's questions, China reported that the China Iron and Steel Association (CISA) determined that approximately 71 percent of the hot-rolled steel produced in China in 2006 was manufactured by state-owned producers.[252] However, at verification, Commerce asked CISA how it determined whether a producer was state-owned or private and the CISA representative explained that it does not classify member companies as state-owned or private.[253] Rather, Commerce was informed that the reported ownership structure of CISA members was developed by China's legal counsel through public sources.[254] By misidentifying CISA as the entity that classified the producers as state-owned or private, when China's legal counsel actually classified the companies, China failed to accurately respond to Commerce's questionnaire or provide verifiable information. For these reasons, Commerce rejected the data that the GOC supplied on the level of state-ownership of hot-rolled steel producers. Although the Chinese Government failed to provide accurate, necessary information regarding its control of the hot-rolled steel sector, Commerce was able to rely on the available facts to determine that over 96 percent of hot-rolled steel production in China was accounted for by government-owned companies.[255]

207. After determining that the Government of China was the predominant owner of production in the hot-rolled steel market in China, Commerce reviewed other record evidence to establish whether there were in-country benchmarks upon which it could rely. Commerce assessed whether a comparison price could be selected from the *four* percent of the market accounted for by private hot-rolled steel production, consistent with its preference to select an in-country comparison price.[256] However, "because of the government's overwhelming involvement in the [Chinese hot-rolled steel] market, 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)."[257] 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.[258]

208. Commerce also looked at import data both to determine what role imports played in the market as well as to consider whether import prices could be used to determine the benefit

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[252] *CWP China Supplemental Questionnaire Response*, dated December 18, 2007, at 34-35 and Exhibit S-40 (Exhibit US-63).

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

[254] *CWP China Verification Report*, at 7-8 (Exhibit US-64).

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

[256] *Id*. and 19 C.F.R. § 351.511(2)(I) (Exhibit US-61).

[257] *CWP CVD Final Decision Memorandum*, at Comment 7, p. 64 (citation omitted) (Exhibit CHI-1); *see also LWRP CVD Final Decision Memorandum*, at 35-36 (Exhibit CHI-2).

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

attributable to the government provision of hot-rolled steel. Because the volume of imports equaled only three percent of total Chinese hot-rolled steel production,[259] Commerce concluded that "the import quantities are small relative to Chinese domestic production of [hot-rolled steel]."[260] Therefore, there was no commercial market for hot-rolled steel in China from which Commerce could select a benchmark price.[261]

209. China argues that it does not set prices for steel, and that "prices varied by producer, by month and by region, with no clear pattern of higher or lower prices for state-owned mills and private producers."[262] Additionally, China describes its steel industry as highly fragmented, and asserts that the five largest government producers are publicly-listed and operate under the PRC Company Law.[263] Therefore, China asserts that the private steel producers could set their own prices. However, none of these factors are sufficient to overcome China's 96 percent ownership of production in the hot-rolled steel market.[264]

210. Commerce did not find that the central government sets a country-wide price for hot-rolled steel. Rather, Commerce found that the government played a predominant role in the market and explained that "[i]n such instances, it is reasonable to conclude that domestic prices for comparable goods provided from private sources are effectively determined by the government provided prices."[265] China's claim that no government agency sets hot-rolled steel prices ignores reality, *i.e.*, the government's predominant role in the market affects prices. Because government-owned producers accounted for over 96 percent of production,[266] it is not necessary for the government to set a uniform price for its predominant role to distort the market. Even if the market is "highly fragmented," 96 percent of it is controlled by government. The Appellate Body has recognized that in this type of situation, "private prices are distorted because the government's participation in the market as the provider of the same or similar goods is so predominant that private suppliers will align their prices with those of the government-provided goods, [and] it will not be possible to calculate benefit having regard exclusively to such prices."[267] Thus, these facts raised by China do not address the question Commerce was required

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[259] *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).

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

[261] As we explain below, however, Commerce did use import prices when calculating the investigated company's benchmark.

[262] China First Submission, para. 125.

[263] *Id.*

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

[265] *CWP CVD Final Decision Memorandum*, at 65 (Exhibit CHI-1).

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

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

to address, namely, whether private prices in the hot-rolled steel market were distorted by the government ownership of 96 percent of the production of hot-rolled steel.

211. China also cites samples of pricing data, arguing that "prices varied by producer, by month, and by region with no clear pattern of higher or lower prices for state-owned mills and private producers,"[268] to show that there is not a uniform price for hot-rolled steel. However, as explained above, Commerce had to resort to available facts because China misidentified the source of necessary information related to its ownership of the hot-rolled steel sector.[269] It is surprising that China is able now to demonstrate pricing trends for private producers when, during the investigation, a CISA representative explained that CISA does not classify producers as state-owned or private.[270] Finally, China does not explain how the fact that certain state-owned hot-rolled steel producers are publicly listed or operate under the PRC Company Law[271] addresses the fact that the hot-rolled steel sector is predominantly government-owned, resulting in the distortion of private prices.

212. China quotes the Appellate Body report in *US–Softwood Lumber CVD Final*, in which the Appellate Body stated that "[d]istortion, in other words, can never be presumed, and instead must be 'established' through factual inquiry and analysis."[272] The United States agrees. Commerce did not presume distortion in the hot-rolled steel market. As the Appellate Body explained in the same paragraph that China quotes, private prices can be distorted when "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."[273] That is what Commerce found in the case of hot-rolled steel market, wherein the government essentially was the market, owning 96 percent of domestic production,[274] with only negligible imports.[275] Because there was no commercial market within China from which to select a benchmark to measure benefit, Commerce looked at alternative, out-of-country prices that were available on the record.

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[268] China First Submission, para. 125.

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

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

[271] China First Submission, para. 125.

[272] China First Submission, para. 120 (citing *US–Softwood Lumber CVD Final (AB)*, para. 115).

[273] *US – Softwood Lumber CVD Final (AB)*, para. 115.

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

[275] *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).

(b) The Benchmarks Commerce Used to Measure the Benefit of Government-Provided Hot-Rolled Steel Were Consistent with Article 14(d) of the SCM Agreement

213. China states that "[t]he unlawfulness of Commerce's distortion finding and consequential rejection of Chinese private prices makes it unnecessary for the Panel to inquire whether each alternative benchmark Commerce selected in the three investigations satisfied the requirements set forth in Article 14(d), as established in *US – Softwood Lumber [CVD Final (AB)]*."[276] Yet, China then "notes for the record that while the Panel need not address the issue in this proceeding, none of the alternative benchmarks selected by Commerce possibly could pass muster under this standard."[277]

214. It is unclear from these statements whether China is claiming that the benchmarks Commerce selected are inconsistent with Article 14(d) of the SCM Agreement, or whether China is limiting its claim to Commerce's rejection of Chinese private prices. In any event, China has not stated a *prima facie* case that Commerce's selection of benchmarks could not "pass muster" under the guideline in Article 14(d) of the SCM Agreement; its presentation on this matter amounts to a single footnote containing bare assertions.[278] Simply alleging that a benchmark is not consistent with the Agreement is not sufficient to satisfy China's burden of proof. "It is well established that the party asserting the affirmative of a claim or defence bears the burden of establishing both the legal and factual elements of that claim or defence."[279] Had China wished to establish that these benchmarks were not consistent with the Agreement, it should have done so in this submission instead of simply inserting a footnote with a cursory statement.

215. Furthermore, China's assertion that Commerce did not "make any effort whatsoever to ensure that these benchmarks related to prevailing market conditions in China"[280] is without foundation. In both *CWP* and *LWRP*, Commerce relied upon world market prices from the Steel Benchmarker, which provides a global index of the prices available in the Atlantic and Pacific Basin.[281] Commerce additionally accounted for "prevailing market conditions," consistent with Article 14(d) of the SCM Agreement, by using comparable types of steel, adjusting for transportation charges and import duties, and relying upon import prices, where available.[282]

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[276] China First Submission, para. 130.

[277] China First Submission, para. 130.

[278] China First Submission, para. 130.

[279] *US – Customs Bond Directive (India) (AB)*, para. 300 (citation omitted).

[280] China First Submission, para. 130, n. 117.

[281] *CWP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-2); *see, e.g., CWP Petitioner's Submission of Factual Information*, at Exh. 46 (Jan. 7, 2008) (Exhibit US-67).

[282] *CWP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-1); and *LWRP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-2).

216. For both *CWP* and *LWRP*, Commerce selected comparable hot-rolled steel prices. Commerce used prices for hot-rolled steel that was 5mm thick and 1200-1500 mm wide to measure whether there was a benefit from the hot-rolled steel inputs that were provided by the government.[283] Commerce used this steel for the benchmark in *LWRP* even though it was slightly thicker than the pipe at issue because there were no prices on the record for the thinner hot-rolled steel.[284] This was, however, a conservative choice because "additional rolling would be required to produce the thinner [hot-rolled steel] used in LWR production and therefore, the market price for thinner [hot-rolled steel] would presumably be higher."[285] Similarly, the steel used as the benchmark price was a bit wider than the steel used to produce *CWP*.[286] Commerce explained that this also was a conservative price because it "represents a price for [hot-rolled steel] before any rolling or slitting occurs."[287] Such additional processing, necessary to produce the steel that was purchased from the government-owned suppliers, would add costs and presumably also increase the price. Therefore, the comparison prices from Steel Benchmarker are reasonably presumed to be lower than the price for the exact width and thickness of the hot-rolled steel used to produce *CWP* or *LWRP*.

217. Commerce also adjusted for transportation charges in *CWP* by adding delivery charges and import duties to the Steel Benchmarker prices so that they were on the same terms as if the steel had been imported.[288] Commerce was not able to make such an adjustment in *LWRP* because the necessary information was not on the record.[289] However, not making the adjustment was conservative because it resulted in a comparison price without these additional but justified fees being added to the benchmark price.

218. Additionally, one of the investigated companies in *CWP* imported hot-rolled steel that Commerce used in determining the comparison price.[290] Commerce first compared the import data to the Steel Benchmaker prices and found they were comparable, explaining that "the weighted average import price is higher than the average Steel Benchmarker price."[291] Because neither was a domestic price, Commerce averaged the investigated company's actual import price with the Steel Benchmarker price for the month(s) for which import prices were available.[292]

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[283] *Id*. The actual sizes of the steel used by the investigated companies were treated as BCI in the underlying proceedings.

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

[285] *Id*., at p. 37.

[286] *CWP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-1).

[287] *Id*., at p. 57.

[288] *CWP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 9 (Exhibit CHI-2); *and* 19 C.F.R. §351.511(a)(2)(iv) (Exhibit US-61).

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

[290] *CWP CVD Final Decision Memorandum*, at Comment 7 (Exhibit CHI-1).

[291] *Id*., at p. 66.

[292] *Id*. *See also*, *CWP CVD Amended Final Determination and Order*, 73 Fed. Reg. at 42,546 (Exhibit CHI-8).

219. By selecting world market prices for comparable steel and adjusting for "prevailing market conditions" where the record information permitted such adjustments, as well as using actual import data for one of the respondents in conjunction with world market prices, Commerce ensured that the comparison price would "relate or refer to or be connected with the prevailing market conditions"[293] in China. Hence, Commerce acted consistently with the requirements of Article 14(d) of the SCM Agreement.

2. Commerce's Determination to Use Out-of-Country Benchmarks to Measure the Benefit of Government-Provided Petrochemical Inputs in the LWS CVD Investigation was Consistent with the SCM Agreement

220. In the *LWS* CVD investigation, Commerce measured the benefit conferred to producers of subject merchandise by the government provision of petrochemical inputs, including the provision by SOEs of biaxial-oriented polypropylene (BOPP).[294] Commerce determined, based on record evidence, that the Government of China played a predominant role in the market for BOPP in China, and that this distorted private prices in the Chinese market. Therefore, Commerce used out-of-country benchmarks to measure benefit.

(a) Commerce Found that Record Evidence Demonstrated that Private Prices for BOPP in China were Distorted by the Government of China's Predominant Role in the Market

221. Commerce first sought to ascertain the extent of government ownership of BOPP production in China. Commerce requested that China provide information about the production and sale of BOPP in China, including whether the producers are state-owned enterprises.[295] In response, China stated only that it does not set the purchase prices for BOPP in China and that it "does not maintain data on the percentage of total domestic consumption of PP, PE, and BOPP being supplied by state-owned enterprises."[296] China, therefore, did not provide the requested information.

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[293] *US – Softwood Lumber CVD Final (AB)*, para. 103 (conclusion of the discussion of the meaning of "in relation to" in Article 14(d) of the SCM Agreement).

[294] Although China does not challenge Commerce's out-of-country benchmark for polyethylene (PE), *see* China First Submission, paras. 127-128, the United States notes that Commerce determined that the out-of-country benchmark for PE was lower than the prices from the government-owned producers. As a result, Commerce determined that no benefit was conferred. *See LWS Final Decision Memorandum*, at 18-21 (Exhibit CHI-3). Commerce also investigated the provision of polypropylene (PP), but found that because all purchases were from private parties, there was no financial contribution from a public body within the meaning of Article 1.1 of the SCM Agreement. *Id*.

[295] *LWS GOC Response Regarding New Subsidy Allegation*, dated November 16, 2007, at 5-6 (Exhibit US-72).

[296] *LWS CVD Final Decision Memorandum*, at Comment B, p. 69 (Exhibit CHI-3).

222. Commerce next requested that China provide the names of "the top ten SOE petroleum chemical companies in terms of sales and quantity produced."[297] Instead of providing a list of the top ten state-owned petrochemical companies, China stated that it "continues to work on this question and will provide the answer as soon as possible," but it never provided the requested information.[298] Commerce gave China yet another opportunity to provide the percentage of state ownership in the petrochemical industry, but China simply replied "that not all polypropylene, polyethylene and BOPP was produced by SOEs."[299]

223. Despite having been given multiple opportunities to clarify the extent of state ownership in the petrochemical industry, China failed to do so. As a result, the 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.[300] Therefore, 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."[301] 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)."[302]

224. China points out that there is no single government-set price for BOPP and there is no agency that sets the price for BOPP.[303] However, Commerce did not find that the government sets a country-wide price for BOPP, but that the government's predominant role in the market distorted prices for BOPP.[304] Because one government-owned producer accounted for over 90 percent of the petrochemical production,[305] it would not be necessary for the government to set a uniform price for its predominant role to distort the market. Again, the Appellate Body has recognized that where the government plays a predominant role in the market, private producers will "align their prices to the point where there may be little difference, if any, between the government price and the private prices."[306]

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

[298] *LWS Final Decision Memorandum*, at Comment 13, at 69-70 (citing *GOC Supplemental Questionnaire Response*, dated January 2, 2008, at 10) (Exhibit CHI-3).

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

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

[301] *LWS Final Decision Memorandum*, at 70 (Exhibit CHI-3). Because Commerce determined that one SOE controlled 90 percent of the petrochemical market, it was unnecessary to evaluate import penetration in the petrochemical market when determining that the government had a predominant role in that market. *See id.* at 19.

[302] *LWS Final Decision Memorandum*, at 20 (Exhibit CHI-3). *See also*, *US – Softwood Lumber CVD Final (AB)*, para. 100.

[303] *LWS Final Decision Memorandum*, at 20 (Exhibit CHI-3).

[304] *See LWS Final Decision Memorandum*, at 19-20 (Exhibit CHI-3).

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

[306] *US – Softwood Lumber CVD Final (AB)*, para. 100.

225. China also argues that "significant private investment exists in the petrochemical industry in China, including some 968 private suppliers."[307] However, despite Commerce's repeated requests, China failed to provide any evidence during the investigation demonstrating the percentage of the petrochemical market accounted for by government-owned producers.[308] Additionally, although there may be over 900 petrochemical suppliers, a representative of the plastics industry in China confirmed that there were only approximately 100 producers of BOPP in China.[309] Regardless, because China failed to provide the requested information, the record does not specify the size of the private sector for this market. Therefore, there was no evidence to counter record evidence that *one* Chinese petrochemical producer accounted for *90 percent* of domestic production in China.[310]

226. Consequently, based on the evidence on the record, Commerce determined that China's predominant role in the BOPP market distorted private prices, which necessitated the use of out-of-country benchmarks to measure benefit.

(b) The Benchmarks Commerce Used to Measure the Benefit of Government-Provided BOPP Were Consistent with Article 14(d) of the SCM Agreement

227. As noted above, it is not clear from China's statements in paragraph 130 whether it is making any claim of inconsistency with Article 14(d) of the SCM Agreement beyond its argument related to Commerce's determination to reject private prices for BOPP in the Chinese market. China's bare assertion that the benchmarks Commerce selected could not "pass muster" fails to state a *prima facie* case and is without foundation.

228. Because there were no in-country prices suitable for use as benchmarks, and respondent producer Aifudi did not import BOPP, Commerce relied upon world market prices to determine whether the government provision of BOPP provided a benefit consistent with Article 14(d).[311] Specifically, Commerce used world market prices for BOPP from the World Trade Atlas.[312]

229. Commerce adjusted those prices to reflect what the company "would have paid on the world market for these inputs."[313] Specifically, Commerce added the relevant import charges,

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[307] China First Submission, para. 127.

[308] *See LWS Final Decision Memorandum*, at 20 and Comment 13 (Exhibit CHI-3).

[309] *Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Central Government*, at 40 (Mar. 4, 2008) (Exhibit US-71).

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

[311] *See LWS Final Decision Memorandum*, Comment 14, at 72 (Exhibit CHI-3).

[312] *LWS Final Decision Memorandum*, at 20 (Exhibit CHI-3).

[313] *LWS Final Decision Memorandum*, at 20 (Exhibit CHI-3).

value-added tax, and freight for delivery to China.[314] Therefore, Commerce ensured that the comparison price, consistent with Article 14(d), would "relate or refer to or be connected with the prevailing market conditions in that country. . . ."[315]

3. Commerce's Calculation of the Benefit Conferred by Government-Provided Loans in the *CWP*, *OTR Tires*, and *LWS* CVD Investigations was Consistent with the SCM Agreement

230. In the *CWP, OTR Tires*, and *LWS* CVD investigations, Commerce measured the benefit that government-provided loans conferred to producers of subject merchandise. Commerce determined, based on record evidence, that the government of China played a predominant role in the lending market in China, which distorted interest rates in the Chinese market. Specifically, the facts demonstrated that China owns the banks responsible for the vast majority of the lending in China and has significant control over how that lending is performed.[316] Moreover, China's strict regulation of lending rates and deposit rates further distorted loan rates in China. Therefore, Commerce determined, based upon record evidence, that there were no reliable in-country "comparable commercial loans,"[317] and it used out-of-country benchmarks to measure benefit.[318]

(a) Article 14(b) of the SCM Agreement Recognizes the Need to Determine the Benefit of Government-Provided Loans by Comparison to Commercial Loans

231. As an initial matter, the United States notes that Article 14(b) of the SCM Agreement, which provides guidelines for determining whether a government-provided loan confers a benefit, contains no reference to the "country of provision." Rather, the guideline for measuring the benefit of a loan under Article 14(b) is a comparison of the price of the government-provided loan with "the amount the firm would pay on a comparable *commercial loan* which the firm could actually obtain on the market" (emphasis added). Thus, in contrast with Article 14(d), the text of Article 14(b) contains no such geographical limitation.

232. Commerce's first preference when measuring the benefit of a government-provided loan is to use an interest rate from a loan taken by the firm from a lending institution in a commercial

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[314] *LWS Final Decision Memorandum*, at 20 (Exhibit CHI-3).

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

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

[317] SCM Agreement, Article 14(b).

[318] *See, e.g., CWP CVD Final Decision Memorandum*, at 6 (Exhibit CHI-3); *LWS CVD Final Decision Memorandum*, at 11 (Exhibit CHI-3); *and OTR Tires CVD Final Decision Memorandum*, at Comment E.3 (Exhibit CHI-4).

market.[319] Identifying a benchmark loan in the commercial market is consistent with the guidance in Article 14(b) that a comparison should be made to a "commercial loan." "Commercial" is defined as "interested in financial return," "likely to make a profit," and "regarded as a mere matter of business."[320] Therefore, a commercial loan should be based on business concerns, such as the profitability of the loan. However, when a loan is made in a lending market that is distorted by the government's role in that lending market, factors unrelated to pure business concerns may influence lending decisions.

233. Where the in-country market for loans is distorted by the government's predominant role, there are no in-country "commercial loans" that are free of distortion to use to measure the benefit. While *US – Softwood Lumber CVD Final* concerned the government provision of goods, the Appellate Body's reasoning is equally applicable to the government provision of loans:

> [T]here may be situations in which there is no way of telling whether the recipient is 'better off' absent the financial contribution. This is because the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.[321]

234. Article 14(b) of the SCM Agreement cannot be interpreted to require the use of loans distorted by the government's intervention to measure the benefit, because that would require a comparison with something other than a "commercial loan," and would prevent the investigating authority from determining whether the recipient is "better off." Such an interpretation would not read the text of Article 14 in light of the object and purpose of the SCM Agreement, because it would prevent the injured Member from properly measuring the benefit of the financial contribution and fully offsetting the effect of the subsidy.

(b) Commerce Found that Record Evidence Demonstrated Pervasive Distortion of the Banking Sector Necessitating the Use of Out-of-Country Benchmarks in the CWP, OTR Tires, and LWS CVD Investigations

235. China asserts that Commerce applied a standard that required loans in China to be "fully market-determined"[322] and made "in absence of government intervention."[323] However, Commerce never set such a standard. Commerce's statement that "the way interest rate formation is regulated in China both distorts lending rates and provides an explicit recognition

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[319] 19 C.F.R. § 351.505(a)(2)(ii) (Exhibit US-60).

[320] *The New Shorter Oxford English Dictionary,* at 451 (Exhibit US-95).

[321] *US – Softwood Lumber CVD Final (AB)*, para. 93 (emphasis in original). *See also id.*, para. 101.

[322] China First Submission, para. 253.

[323] *Id.*, para. 254.

that banks in China are not yet fully able to set interest rates on a market basis" was in response to the GOC's argument that the banking sector had "become fully market-based."[324] Commerce did not reject loan rates within China because they were not "fully" market-based. Commerce rejected them because the predominant role of the Chinese government in the lending market caused distortion. Likewise, Commerce did not, as China claims, presume that "*all* loans by state-owned commercial banks in China are made on non-commercial terms, merely by virtue of state ownership."[325] Such a statement ignores the in-depth analyses Commerce provided in its decisions demonstrating that the government's controls on the banking sector are so pervasive as to distort the lending sector.[326]

236. When evaluating potential benchmark loans in China, Commerce determined that it could not use any of the loans from the SOCBs because they are the very loans from which Commerce was attempting to measure whether any benefit was conveyed.[327] In each of the relevant determinations – *CWP, OTR Tires*, and *LWS* – Commerce adopted the reasoning it had applied in an earlier investigation of *CFS Paper from China*.[328] In *CFS Paper from China*, Commerce explained that in its analysis of whether China should be granted market economy status, it reviewed the role of the government in the banking sector and concluded that China's intervention in the lending market distorted that market. Commerce's findings relied largely upon three major facts: 1) China's banking sector remains almost entirely state-owned; 2) there is extensive government regulation of interest rates; and 3) foreign bank lending in China is subjected to the same distortions as domestic bank lending and, therefore, is similarly unsuitable for determining the benefit.[329]

237. Commerce examined record evidence, which demonstrated that China's banking sector remains almost entirely state-owned.[330] Organisation for Economic Co-Operation and

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[324] *CFS CVD Final Decision Memorandum*, at Comment 10, p. 68 (Exhibit CHI-93).

[325] China First Submission, para. 269.

[326] *See, e.g., CWP CVD Final Decision Memorandum*, at 6 (Exhibit CHI-1); *LWS CVD Final Decision Memorandum* at 11 (Exhibit CHI-3); and *OTR Tires CVD Final Decision Memorandum*, at Comment E.3 (Exhibit CHI-4).

[327] *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).

[328] Commerce first addressed China's lending sector in *CFS Paper from China*. *CFS CVD Final Decision Memorandum*, at 5-7 and Comment 10 (Exhibit CHI-93). Commerce's decisions in *CWP, OTR Tires*, and *LWS* rely upon those findings. *See CWP CVD Final Decision Memorandum*, at 6-8 and Comment 8 (Exhibit CHI-1); *LWS CVD Final Decision Memorandum*, at 11-13 and Comment 20 (Exhibit CHI-3); and *OTR Tires CVD Final Decision Memorandum*, at 13 and Comments E.1 and E.2 (Exhibit CHI-4).

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

[330] *CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93); *see also NME Status Memo* (*citing Economic Survey of China*, at 139 (Paris: OECD) (2005)) (Exhibit US-69). In the *Lined Paper* investigation, Commerce reviewed China's status as a non-market economy under U.S. law. The analysis in this memorandum was relied upon when Commerce determined whether China's lending rates could be relied upon as benchmarks. *See, e.g., CFS CVD Final Decision Memorandum*, at Comment 6, p. 35 (Exhibit CHI-93); *see also, CWP CVD Final*

Development ("OECD") data demonstrated that state ownership in the Chinese banking sector is much more widespread than in any other major world economy.[331] Some of the largest SOCBs underwent reorganization to become corporate entities and the government divested some of its shareholding, yet the government remains the primary shareholder.[332] Although China has permitted foreign investment in Chinese banks, it is tightly constrained, with total foreign ownership limited to 25 percent in existing SOCBs.[333] Also, foreign investors are prevented from acquiring a majority share. China has firmly signaled its intention to "retain majority control of the state banks in the long run."[334]

238. Commerce considered all other record evidence as well to determine how government ownership affected the lending market in China. As a result of China's predominant ownership of the banks, there is a long history in China of the government using the banks to allocate resources in the economy in accordance with its policy objectives.[335] For example, Commerce determined that banks continued to lend to unprofitable SOEs and fund investment projects supported by provincial and local governments.[336] Moreover, despite the fact that, in 2003, China created a new government agency, the China Bank Regulatory Commission ("CBRC"), to monitor banking reform in China, Commerce found record evidence demonstrated that the recently created agency had not yet had time to fully transform the operations of the banking sector given deeply rooted legacies of government control of the banking sector and the hundreds of thousands of employees at the major Chinese banks.[337] For example, the CBRC identified numerous problems in risk management and control in its inspections of the banks, and these problems are referenced in the SOCBs' own publications.[338]

Decision Memorandum, at 7, n.17 (Exhibit CHI-1).

[331] *Id*.

[332] *CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93). *See also*, *NME Status Memo*, at 61 (*citing The Economist Intelligence Unit, Viewswire, China Industry: Government Vows to Retain Stakes in Largest Banks* (Apr. 28, 2006)) (Exhibit US-76).

[333] *CFS CVD Final Decision Memorandum*, at Comment 10 (citing China's Questionnaire Resp., at Exh. 7 (May 29, 2007)) (Exhibit CHI-93). *See also*, *NME Status Memo*., at 60 (*citing The Economist Intelligence Unit, Business China: It's so Far, so Good for China's Banking Sector* (Mar. 27, 2006)) (Exhibit US-69).

[334] *NME Status Memo*., at 61 (*citing The Economist Intelligence Unit, Business China: Go Away, Crocodiles?* (Mar. 27, 2006) (*citing* Wen Jiabao, Chinese Premier)) (Exhibit US-69). *See also CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93).

[335] *NME Status Memo*., at 60 (*citing Economic Survey of China*, at 141 (Paris, OECD) (2005)) (Exhibit US-69).

[336] *NME Status Memo*., at 9, 51, 53 and 60 (citing various news articles) (Exhibit US-69).

[337] *CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93). *See also NME Status Memo*., at 60 (*citing Economic Survey of China*, at 141 (Paris, OECD) (2005) *and People's Republic of China: 2005 Article IV Consultation – Staff Report; Staff Supplement; and Public Information Notice on the Executive Board Discussion*, at 19 (Washington, DC International Monetary Fund) (Nov. 2005)) (Exhibit US-69).

[338] *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).

239. In addition to maintaining significant ownership of the banking sector, Commerce determined that China also controls the banks' lending through the regulation of interest rates. China's regulation of interest rates prevents banks in China from setting interest rates on a commercial basis.[339] Specifically, Commerce found that China maintains both a deposit rate cap and a lending rate floor, guaranteeing the banks a considerable profit margin on each of their loans.[340] Therefore, banks in China do not compete on deposit rates and have access to the savers' capital at very little cost because the government has tightly restricted alternative investment channels.[341] Chinese savers had few options beyond depositing their savings with the banking system.[342] By channeling China's savings into the banking sector and setting a deposit rate cap, China has ensured that banks can retain considerable profits while lending at the floor rate.

240. These regulatory controls were necessary because the SOCBs were not at a point where they could lend without such controls.[343] It is important to recognize that the floor on lending rates and the cap on deposit rates that China establishes by law is fundamentally different from what are considered traditional regulatory controls. China's system guarantees banks profit on their loans by prohibiting competition on deposit rates above the cap or loan rates below the floor.[344] An official from the People's Bank of China, which sets the floor and cap rates, conceded that these limits set China apart from other countries and this is necessary because the banks have not yet fully implemented risk control.[345]

241. The banks also confirmed that the banking sector in China does not operate on a commercial basis. For example, an official from the Industrial and Commercial Bank of China stated that "market disorder" would result if these controls did not exist.[346] Further, officials from the China Construction Bank explained that these restrictions are necessary to prevent excess competition from "hurting" the banks.[347] If competition were permitted on the deposit rates above the cap, it might force banks to raise interest rates to clear sufficient profit on the loans. However, because China controls these rates, the lending market has not reached an

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[339] *CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93).

[340] *Id.* (*citing Policy Lending Verification Report*, at 2-3) (Exhibit CHI-93).

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

[342] *Id.* (*citing China's Mar. 15, 2007 Submission*, at Exh. 20, which cited to China Construction Bank Annual Rept., at 48) (Exhibit CHI-93).

[343] *CFS CVD Final Decision Memorandum*, at Comment 10, p. 68 (*citing Policy Lending Verification Report*, at 2-3) (Exhibit CHI-93).

[344] *Id.*(Exhibit CHI-93).

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

[346] *Id*. (citing "Policy Lending Verification Report," at 11-12) (Exhibit CHI-93).

[347] *Id*. (Exhibit CHI-93).

equilibrium and it is impossible to predict where the rates would be but for this significant government intervention.

242. Commerce also examined lending by foreign banks that are located in China, but concluded that it is not suitable for measuring benefit because the few foreign banks in China operate in the same distorted environment and under the same regulations as the SOCBs.[348] Additionally, foreign banks' share of assets and lending is negligible compared with the SOCBs.[349] The OECD has also observed that foreign banks still operate mostly in niche markets and generally do not compete directly with the SOCBs.[350]

243. Because of China's predominant role in the lending market, there were no "comparable commercial loans" actually obtained by the producers of subject merchandise upon which Commerce could rely as benchmarks.[351] Commerce's next preference, in the absence of any in-country comparable commercial loans actually obtained by the producer of subject merchandise, is to use a national average interest rate.[352] However, because "the GOC's predominant role in the banking sector results in significant distortions that render the lending rates in [China] unsuitable as market benchmarks"[353] there are no comparable commercial loans, and thus, there is no reliable national average interest rate for determining the benefit because any national average rate would be based on loans from this distorted market.[354] Consequently, Commerce determined that it was necessary to use out-of-country benchmarks to measure benefit.

(c) The Benchmarks Commerce Used to Measure the Benefit of RMB-Denominated Loans Were Consistent with Article 14(b) of the SCM Agreement

244. After Commerce established that it would not be possible to use RMB-denominated loans provided in China, it developed an out-of-country benchmark interest rate to measure benefit. To do so, Commerce used a group of interest rates, rather than just one out-of-country interest rate,

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[348] *See, e.g., CWP CVD Final Decision Memorandum*, at 6 (Exhibit CHI-1); *and OTR Tires CVD Final Decision Memorandum*, at Comment E.3 (Exhibit CHI-4).

[349] *CFS CVD Final Decision Memorandum*, at Comment 10 (Exhibit CHI-93).

[350] *Id. See also*, *NME Status Memo*., at 60 (citing *Economic Survey of China*, at 150-151 (Paris, OECD) (2005)) (Exhibit US-69).

[351] *See, e.g., CWP CVD Final Decision Memorandum*, at 6 (Exhibit CHI-1); *LWS CVD Final Decision Memorandum*, at 11 (Exhibit CHI-3); *and OTR Tires CVD Final Decision Memorandum*, at Comment E.3 (Exhibit CHI-4).

[352] *See* 19 CFR §351.505(a)(3)(ii) (Exhibit US-60).

[353] *OTR Tires CVD Final Decision Memorandum*, at Comment E.3, p. 104 (Exhibit CHI-4) (citations omitted).

[354] *See, e.g., OTR Tires CVD Final Decision Memorandum*, at Comment E.3 (Exhibit CHI-4); *and LWS Final Decision Memorandum*, at Comment 20 (Exhibit CHI-3).

because various factors can impact national averages for interest rates.[355] Commerce controlled for the most significant factors by selecting a group of inflation-adjusted interest rates in countries with similar per capita gross national incomes ("GNIs") to China.[356] Commerce then performed a regression analysis[357] of those rates, GNI data, and World Bank governance indicators to determine a yearly comparison interest rate, as explained below.[358]

245. Commerce selected countries that had similar GNIs to China. Commerce noted that there is a broad inverse relationship between income levels and lending rates – countries with lower per capita GNI tend to have higher interest rates than countries with higher per capita GNI, a fact demonstrated by the lending rates across countries, as reported in the International Financial Statistics ("IFS").[359] Commerce determined which countries were similar to China in terms of GNI, based on the World Bank's classification of countries as: low income; lower-middle income; upper-middle income; and high income. China falls in the lower-middle income category, a group that included 55 countries as of July 2007.[360]

246. Many in this group of countries reported short-term lending and inflation rates to the IFS.[361] Commerce excluded those countries that were anomalous[362] or were considered to be non-market economies for AD purposes for any part of the investigation period.[363] Commerce adjusted the calculation so that a country's data were only taken out of the analysis for the years in which the interest rate was considered aberrational.[364] The comparison interest rate also excluded any economy that did not report lending and inflation rates to the IFS for the years for which a comparison interest rate was needed and only included countries classified as lower-

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[355] *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).

[356] *Id.*

[357] 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).

[358] *Id.*

[359] *See, e.g., LWS CVD Final Decision Memorandum*, at 12 (Exhibit CHI-3); *CWP CVD Final Decision Memorandum*, at 8 (Exhibit CHI-1); *and OTR Tires CVD Final Decision Memorandum*, at 8 (Exhibit CHI-4).

[360] *See, e.g., CWP CVD Final Decision Memorandum*, at 8 (citation omitted) (Exhibit CHI-1).

[361] *Id*.

[362] For example, in the 2005 calculation, the inflation-adjusted interest rates from Angola and Brazil were considered aberrational and were excluded from the analysis because they were nearly double the rate of the next lower country. *See LWS CVD Final Decision Memorandum*, at 13 (Exhibit CHI-3).

[363] For example, in *CWP*, this excluded China, Armenia, Azerbaijan, Belarus, Georgia, Moldova, Turkmenistan, and Ukraine. *See CWP CVD Final Decision Memorandum*, at 8 (Exhibit CHI-1).

[364] *See, e.g., OTR Tires CVD Final Decision Memorandum*, at Comment E.4 (Exhibit CHI-4).

middle income during that year.[365] Finally, Commerce adjusted for inflation as a proxy for an adjustment for exchange rate expectations.[366]

247. Commerce took additional steps to ensure that the constructed benchmark approximated a "comparable commercial loan which the firm could actually obtain on the market."[367] Specifically, it performed a regression analysis of the data, accounting for the countries' GNI and their various governance indicators used by the World Bank. As Commerce noted: "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."[368] 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.[369] As Commerce explained: "Banks and other lenders in each of the countries included in the constructed benchmark will take into account various factors such as the 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."[370] Therefore, to the extent that these indicators vary across countries, they will affect the perceived risk of lending in a particular country and that will be reflected in the interest rate.[371] Moreover, the U.S. Federal Reserve Board's analysis on these measures of institutional quality against interest rates found the correlation to be that "higher quality institutions are associated with lower real interest rates."[372]

248. 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.[373] Through these means, Commerce calculated comparison

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[365] *Id.* at 8.

[366] 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).

[367] SCM Agreement, Article 14(b).

[368] *CFS CVD Final Decision Memorandum*, at Comment 10, p. 71 (Exhibit CHI-93).

[369] *Id.*

[370] *OTR Tires CVD Final Decision Memorandum*, at Comment E.4, p. 110 (Exhibit CHI-4).

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

[372] *CFS CVD Final Decision Memorandum*, at Comment 10, p. 71 (Exhibit CHI-93) (*referencing The Construction of the Benchmark Interest Rates in CVD Cases Regarding Government-Directed Loans*, Division of International Finance, Federal Reserve Board, at 2 (Exhibit US-74). Further, China's claim that Commerce provided no explanation of the relevance of the World Bank indicators is belied by the record. China First Submission, para. 266.

[373] *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

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.

249. China argues that the benchmarks used by Commerce were not comparable to the government-provided loans received by producers of subject merchandise because they were not denominated in the same currency as the RMB-denominated loans under investigation and producers of subject merchandise could not "actually obtain" such loans "on the market." China asserts that the terms "comparable" and "actually obtain on the market" in Article 14(b) of the SCM Agreement require that the benchmark be denominated in the currency of the government-provided loan, which in this case is RMB.[374]

250. While it would be appropriate in certain cases to use a benchmark loan that is denominated in the same currency as the government-provided loan, nothing in Article 14(b) requires the use of a benchmark loan denominated in any particular currency. Article 14 sets forth "guidelines," but Members have flexibility to account for the particular facts of a situation to ensure a comparison with a "commercial loan" that will permit a determination of whether the recipient is "better off."

251. China argues that the benchmark loan must be denominated in RMB to support its assertion that Commerce was required to use an in-country benchmark to measure the benefit of RMB loans. In China's view:

> The relevant geographic market for loans denominated in a particular currency will . . . depend upon the geographic availability of loans denominated in that currency. With respect to RMB-denominated loans, the relevant geographic market is the commercial lending market in China. Under Article 14(b), Commerce was required to identify comparable commercial loans as benchmarks for RMB-denominated loans from within this market.[375]

252. China's position is untenable. Under China's interpretation, assuming the absence of any commercial loans in a particular currency, if a government provides loans in that currency, it would not be possible for another Member to measure benefit at all. Not only does the text of Article 14 not require that interpretation, but such an outcome would be incongruous with the flexible nature of the guidelines in Article 14 and the object and purpose of the SCM Agreement to permit Members to fully offset the benefit of injurious subsidies.

253. The Appellate Body's determination in *US–Softwood Lumber CVD Final* that it is permissible for Members to use out-of-country prices to measure the benefit of government-

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CHI-1); and *OTR Tires CVD Final Decision Memorandum*, at Comment E.4 (Exhibit CHI-4).

[374] China First Submission, paras. 234, 239.

[375] China First Submission, para. 239 (In the same paragraph, China explains that RMB can only be borrowed in China).

provided goods was made in the context of Article 14(d) of the SCM Agreement – a provision that calls for the comparison price to represent the prevailing market conditions for the good or service "in the country of provision."[376] As explained above, based on the entirety of Article 14, the Appellate Body found that this specific language does not require investigating authorities to select only in-country comparisons.[377] There is no basis for interpreting Article 14(b), which lacks any language on the country of investigation, as imposing a more restrictive geographical limitation on the measurement of the benefit of government-provided loans.

254. China's position that Members may only use in-country benchmarks to measure the benefit of RMB-denominated loans is also inconsistent with the terms of its Accession Protocol. Paragraph 15(b) of the Accession Protocol specifically recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks," and therefore, Members may need to use "terms and conditions prevailing outside China" when determining the benefit of a government-provided loan under Article 14(b) of the SCM Agreement. China's interpretation that the benefit of government-provided RMB-denominated loans must be measured by comparison only with in-country RMB loans excludes all RMB lending from the scope of that provision, and there is no basis in the text of the Accession Protocol for such an exclusion.

255. For the reasons given, the United States respectfully requests that the panel find that the benchmarks Commerce used to measure the benefit of government-provided RMB-denominated loans were consistent with Article 14(b) of the SCM Agreement.

(d) The Benchmarks Commerce Used to Measure the Benefit of Dollar-Denominated Loans Were Consistent with Article 14(b) of the SCM Agreement

256. In the *OTR Tires* CVD investigation, in addition to RMB loans, GTC, one of the foreign producers, received short-term loans denominated in U.S. dollars from SOCBs.[378] After Commerce established that it would not be possible to use U.S. dollar-denominated loans provided in China as benchmarks, it developed an out-of-country benchmark interest rate to measure benefit.

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

[377] *See, e.g., US – Softwood Lumber CVD Final (AB)*, paras. 91-92 (explaining that the "reference to 'any' method from the chapeau clearly implied more than one method consistent with Article 14 is available. . . ." and that "use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'.")

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

257. Commerce first looked at foreign currency lending from the same group of "lower middle-income countries" that it used for its benchmark for RMB loans.[379] However, sufficient data were not available. Therefore, Commerce used the one-year average of the daily interest rates for lending from the London Interbank Offering Rate (LIBOR).[380] This was a rate in U.S. dollars, the same currency as the loans received from the SOCBs.

258. LIBOR represents the rate at which large banks lend to each other and is therefore lower than the rate at which banks would lend to private companies. For example, GTC's loans were "based on the [LIBOR] plus a spread (typically, about 50 basis point)."[381] To adjust the LIBOR rate to one that a private company might receive, Commerce determined the average spread between the LIBOR rate and the one-year corporate bond rates for companies with a BB rating.[382] The bond rate represents the rate that a company would pay to borrow money in the bond market. Commerce then added this average spread to the LIBOR rate to measure the benefit.[383] Commerce determined that because BB-rated bonds are the highest non-investment-grade bonds and near the middle of the overall range of bonds, they are the most appropriate basis for calculating the spread over LIBOR.[384] This benchmark thus represents the rate from a bank to a company with average performance.

259. China objects to Commerce's use of a yearly average LIBOR rate rather than a daily average LIBOR rate.[385] China argues that use of a daily rate was required by Article 14(b) of the SCM Agreement. More than this, China asserts that "[a] 'comparable commercial loan,' for this purpose, would be a LIBOR-based, dollar-denominated loan with the same maturity date and *the same interest rate terms*."[386] Thus, China argues that the SCM Agreement requires that, to determine the benefit of the government-provided loan, Commerce was required to compare the loan with itself. It is not surprising that China concludes that Commerce should have found no benefit as a result of such a comparison.

260. China's argument is without support. Article 14(b) of the SCM Agreement contains no preference for a daily average over a yearly average. As noted above, Article 14 of the SCM Agreement provides guidelines, which afford Members a great deal of flexibility. As the panel in *EC-DRAMs* explained:

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[379] *Id.*

[380] *Id.*

[381] China First Submission, para. 201.

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

[383] *Id.*

[384] *Id.*

[385] China First Submission, paras. 240-243.

[386] China First Submission, para. 242 (emphasis added).

> In the absence of a comparable commercial loan, it may well be difficult to apply for example Article 14(b) dealing with loans and referring the investigating authority to a comparable commercial loan that could actually be obtained on the market. . . . In light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the SCM Agreement, we consider that *an investigating authority is entitled to considerable leeway* in adopting a reasonable methodology.[387]

261. The benchmark developed by Commerce for these loans matched the duration, currency denomination, and was structured on the same basis as GTC's loans (LIBOR plus a spread).[388] Commerce's regulation explains that annual averages normally are used to determine the benefit of government-provided loans.[389] In this case, the data on daily LIBOR rates was not on the record of the underlying proceeding because no party argued that Commerce should deviate from Commerce's normal practice pursuant to its regulation. In light of the flexibility afforded by Article 14, the Panel should find that Commerce compared the government-provided loan to "a comparable commercial loan which the firm could actually obtain on the market," and that such comparison was consistent with the guideline in Article 14(b) of the SCM Agreement.

4. Commerce's Calculation of the Benefit of the Government Provision of Land-Use Rights in the *OTR Tires* and *LWS* CVD Investigations Was Consistent with the SCM Agreement

262. In the *OTR Tires* and *LWS* CVD investigations, Commerce measured the benefit conferred to producers of subject merchandise by the government provision of land-use rights. Commerce determined, based on record evidence, that the Government of China played a predominant role in the market for land-use rights in China, and this distorted prices in the Chinese market. Therefore, Commerce used out-of-country benchmarks to measure benefit.[390]

(a) Commerce Found that Record Evidence Demonstrated Pervasive Distortion of the Market for Land-Use Rights in China Necessitating the Use of Out-of-Country Benchmarks in the OTR Tires and LWS CVD Investigations

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

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

[389] *See* 19 C.F.R. §351.505(a)(2)(iv) (Exhibit US-60).

[390] China has not challenged Commerce's findings that the government provision of land-use rights was a financial contribution, but instead challenges only the methodology used to determine whether land-use rights were provided for adequate remuneration. (China First Submission, paras. 279-319).

263. When measuring the benefit of the provision of goods or services, consistent with Article 14(d) of the SCM Agreement, Commerce "will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question."[391] However, upon investigation, in the *OTR Tires* and *LWS* CVD investigations, Commerce discovered that there were no usable in-country prices for land-use rights because 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."[392] The basis for finding distortion in the land-use rights market as a result of the government's predominant role was the same in both the *OTR Tires* and *LWS* CVD investigations. 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.

264. 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.[393] Companies therefore lease land from the government for a period of years – referred to as purchasing land-use rights.[394] Commerce next considered all other record evidence to determine whether the predominant role of the government distorted prices for land-use rights in China.

265. There is both a primary market for land-use rights (*i.e.,* rights transferred from the government to a private enterprise) as well as a secondary market (*i.e.,* rights transferred between private enterprises).[395] Use of a price from the primary market would have reflected the government's financial contribution because it is the sole provider of land-use rights in that market. Therefore, Commerce evaluated whether prices in the secondary market could be used

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[391] *See* 19 CFR §351.511(a)(2) (Exhibit US-61).

[392] *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).

[393] *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).

[394] There are two different types of land-use rights – allocated and granted. Granted land-use rights require a large up-front fee, but carry no annual fees aside from taxes. Such land-use rights can be transferred or mortgaged, and are akin to an outright purchase of land. In contrast, allocated land-use rights are transferred to state entities, do not expire, may not be leased or mortgaged and are subject to an annual fee. Allocated land-use rights, therefore, more closely resemble a lease or rental arrangement than a one-time purchase. *See NME Status Memo*., at 43-44 (Exhibit US-69).

[395] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (Exhibit CHI-34); *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 43 (*citing* Ho, Samuel P.S., and Lin, George C.S., *Emerging Land Markets in Rural and Urban China: Policies and Practices, The China Quarterly* (2003), at 688) (Exhibit US-69).

to measure whether the government provided land-use rights for adequate remuneration.[396] Although China has implemented some land-use rights reforms, there remains a wide divergence between the legal reforms and the implementation of such reforms.[397] As explained below, 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.[398]

266. Commerce first examined the transfer of agricultural land-use rights for non-agricultural use. It found that farmers' land-use rights are still not secure, and that lack of appropriate compensation for farmers is an ongoing issue in China.[399] Villages and other local governments have often exercised broad, unrestricted powers to expropriate land-use rights from farmers and sell the land-use rights to firms or land developers, often with little or no compensation to the farmer.[400] If farmers had land-use rights that were well-defined and effectively enforced, logically there would be less land available for non-agricultural use and higher prices for granted land-use rights (*i.e.*, those rights transferred to private entities).[401] Additionally, Commerce found that local governments retain the authority to allow agricultural land designated as "collectively owned" to be changed to "state-owned," which is a requirement if the land-use right is to be sold for non-agricultural use.[402] Thus the government retains control over the supply of land-use rights for sale for non-agricultural use.

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[396] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (Exhibit CHI-34); *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).

[397] *See LWS CVD Final Decision Memorandum*, at 16 (*citing Land Benchmark Memorandum*, at 46) (Exhibit CHI-3), and *OTR Tires CVD Preliminary Determination*, 72 FR at 71,368 (unchanged in the final results) (Exhibit CHI-50).

[398] *See id.*

[399] *See LWS CVD Final Decision Memorandum*, at 16 (citing *LWS CVD Preliminary Determination*, 72 FR at 67,907) (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).

[400] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4); *see also NME Status Memo*., at 45 (*citing* Ding Chengri and Song, Yan, *Emerging Land & Housing Markets in China*, Cambridge, MA: Lincoln Institute of Land Policy (2005), at 26; *and* Guo Xiaolin, *Land Expropriation and Rural Conflicts in China*, The China Quarterly (2001), at 427-28) (Exhibit US-69).

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

[402] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4). *See also*, *NME Status Memo*., at 42 (*citing* Guo, Xiaolin, *Land Expropriation and Rural Conflicts in China*, The China Quarterly (2001), at 424) (Exhibit US-69).

267. In the past, China allocated land-use rights to SOEs for a nominal one-time charge and annual fee.[403] "Allocated" land-use rights did not expire, could not be leased or mortgaged, and could be transferred (or shared for commercial purposes) only if they were first converted to "granted" land-use rights.[404] The power to effect conversion of allocated land-use rights to granted land-use rights rested solely with the government.[405] Therefore, China had control over the supply of land that was converted to granted land-use rights, and therefore available for use by private companies, providing it with significant control over the prices in the secondary market.

268. In July 2002, China's new land regulations entered into force.[406] These regulations mandated that land-use rights for commercial land must be granted by means of auction, a tendering process or a new kind of listing process.[407] However, in July 2006, China again issued regulations reiterating these requirements for sales of commercial land-use rights.[408] The re-issuance was necessary because "[i]n most regions, the government has transferred land through negotiation with investors, which led to rampant corruption. . . . only 35 percent of [the government transfer of land in 2005] was dealt through bidding and auctions."[409]

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

[404] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4). *See also NME Status Memo*., at 43 (*citing The Economist Intelligence Unit, Country Commerce: China*, (2006) at 37) (Exhibit US-69).

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

[406] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (*citing China's Land Law: An Overview*, Habitat International Coalition (Nov. 23, 2007), at 3) (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

[407] *See LWS CVD Preliminary Determination*, 72 FR at 67,907 (*citing China's Land Law: An Overview*, Habitat International Coalition (Nov. 23, 2007), at 3) (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

[408] *See LWS CVD Preliminary Determination*, 72 FR at 67,908 (*citing Asian Industrial Property Market Flash*, CB Richard Ellis (Q1 2007), at 2) (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR Tires CVD Preliminary Determination*, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

[409] *See LWS CVD Preliminary Determination*, 72 FR at 67,908 (*citing Law to Expose Illegal Land Deal*, China Daily (Aug. 1, 2006)) (Exhibit CHI-34) (cited by *LWS CVD Final Decision Memorandum*, at 15 (Exhibit CHI-3)); *see also OTR Tires CVD Final Decision Memorandum*, at Comment H.7, p. 189-90 (*relying upon OTR*

269. Local governments most often transfer land-use rights through non-transparent negotiations with investors despite guidance that land-use rights should be transferred through a transparent bidding or auction process.[410] This has led to widespread corruption where much of the compensation is retained by local government officials.[411] As the State-run *China Daily* reported just a few months prior to the period of investigation for *LWS* and *OTR Tires*:

> [M]arket-based practices in China are still in the embryonic stage. In most regions, the government has transferred land through negotiation with investors, which led to rampant corruption. [Ministry of Land and Resources] statistics indicated that the government transferred 163,000 hectares of land nationwide last year, but only 35 percent of it was dealt through bidding and auctions. The ministry considered this an achievement, representing an increase from 14.5 percent in 2002.[412]

270. Even with the government's greater use of auctions, tenders, and listings to sell land-use rights, the process behind such transfer mechanisms limits who can participate. One market report describes the "land use right transfer announcements" of 120 industrial land plots posted in 2007, noting that "the announcements included requirements concerning investment amount and potential bidders' industries."[413] Thus, even these more open transfer mechanisms contained significant restrictions on who could participate. In short, record evidence reviewed by Commerce indicated that the new laws and regulations governing the transfer of land-use rights were not being followed.[414]

Tires CVD Preliminary Determination, 72 FR 71,367-71,370 (Exhibit CHI-50)) (Exhibit CHI-4).

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

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

[412] *LWS CVD Preliminary Determination,* 72 FR at 67,908 (*quoting Law to Expose Illegal Land Deal*, China Daily (Aug. 1, 2006), attachment 4 to the Land Benchmark Memorandum) (Exhibit CHI-34); *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).

[413] *See LWS CVD Preliminary Determination*, 72 FR at 67,908 (*cited by LWS CVD Final Decision Memorandum*, at 15) (*citing Asian Industrial Property Market Flash*, CB Richard Ellis (Q2 2007) at 5) (Exhibit CHI-34); *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).

[414] Indeed, the land-use rights provided to the company being investigated in *LWS* provided an example of the government's failure to follow the laws governing the transfer and sale of land-use rights. In the *LWS* CVD investigation, evidence demonstrated that for the industrial park in which one of the investigated companies was located, the sale of land-use rights in the park had not been completed in accordance with the regulations and policies set at the national level. A provincial land bureau representative for that region stated that national

271. For these reasons, the record evidence demonstrated that China retains a predominant role in the primary market for land-use rights, which also distorts the supply and pricing of land-use rights in the secondary market.[415] Therefore, Commerce determined that it could not rely on Chinese land-use rights prices to measure the benefit of the land-use rights provided to the producers in the *OTR Tires* and *LWS* CVD investigations.

272. China argues that Commerce's reliance on out-of-country benchmarks when determining the adequacy of remuneration for government-provided land-use rights was inconsistent with the SCM Agreement.[416] Similar to its position on RMB lending, China asks this panel to find that Article 14(d) of the SCM Agreement prevents Members from ever using an out-of-country benchmark to measure the benefit of land-use rights provided by a government.[417] China's position cannot be sustained.

273. As noted above, the Appellate Body has found previously that Article 14(d) of the SCM Agreement permits Members to use out-of-country benchmarks to measure the benefit when private prices are distorted because of the government's predominant role in the market.[418] There is nothing in the text of Article 14(d) to suggest that land-use rights are exceptional, or that they should be treated differently than other goods.

274. China argues that land-use rights should be treated differently under Article 14(d) of the SCM Agreement because land is a "non-tradable good" and the "value is inherently locational."[419] In *US–Softwood Lumber CVD Final*, the Appellate Body rejected a similar argument that standing timber is attached to the land and incapable of being traded across borders.[420] The Appellate Body explained that excluding this non-tradeable good would "permit the circumvention of the subsidy disciplines. . . ."[421] Thus, it is not necessary that a good be tradable across borders for it to be covered by the SCM Agreement.

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regulations and policies are supposed to be used for the pricing of land-use rights, and that "[b]efore the land is sold, it has to be appraised based on laws from the national level." However, there was no appraisal of the land-use rights, demonstrating that the regulations meant to reform the sale of land-use rights were not followed. *See LWS CVD Final Decision Memorandum*, at 16-17 (citing Provincial and Local Government Verification Report, at 8-10) (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).

[415] *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).

[416] China First Submission, paras. 307-308.

[417] "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 Submission, para. 307.

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

[419] *Id.*

[420] *US – Softwood Lumber CVD Final (AB)*, para. 57. *See also,* para. 67.

[421] *Id.*, para. 64.

275. China's restrictive interpretation of Article 14(d) of the SCM Agreement is not supported by the text of the Article, particularly when read in the light of the object and purpose of the SCM Agreement, which is to allow Members to fully offset the amount of a subsidy by applying countervailing duties.[422] Where a government's predominant role in the land-use rights market distorts land-use rights prices, the use of those distorted prices to measure the benefit of the government-provided land-use rights would not measure the full benefit conferred. "If the calculation of the benefit yields a result that is artificially low, or even zero . . . then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[423] China's position, if accepted, would simply eliminate the possibility of countervailing the subsidized provision of land-use rights.

276. China's position that Members may only use in-country benchmarks to measure the benefit of government-provided land-use rights is also inconsistent with the terms of its Accession Protocol. Paragraph 15(b) of the Accession Protocol specifically recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks," and therefore, Members may need to use "terms and conditions prevailing outside China" when determining the benefit of government-provided land-use rights under Article 14(d) of the SCM Agreement. China's interpretation that the benefit of government-provided land-use rights must be measured by comparison only with in-country land-use rights prices excludes all government-provided land-use rights from the scope of that provision, and there is no basis in the text of the Accession Protocol for such an exclusion.

(b) The Benchmarks Commerce Used to Measure the Benefit of Government-Provided Land-Use Rights Were Consistent with Article 14(d) of the SCM Agreement

277. When there are no reliable market prices within the country to use to determine the benefit, consistent with Article 14(d), Commerce looks to external benchmarks. Commerce's next preference is to rely upon a "world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question."[424] However, land, being *in situ*, is not simultaneously available to an in-country purchaser while located and sold out-of-country on the world market.[425] Thus there was no "world market price" upon which Commerce could rely.

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

[423] *US – Softwood Lumber CVD Final (AB)*, para. 95.

[424] *See* 19 CFR §351.511(a)(2)(ii) (Exhibit US-61).

[425] *See LWS CVD Final Decision Memorandum*, at 15 (*citing LWS CVD Preliminary Determination*, 72 FR at 67908 (Exhibit CHI-34)) (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).

278. After reviewing available information on the records of the respective proceedings, Commerce determined that the most appropriate method to measure the benefit for the granted land-use rights in the *OTR Tires* and *LWS* CVD investigations would be to compare respondents' land-use rights to the sales of certain industrial land in industrial estates, parks and zones in Thailand.[426] In arriving at this conclusion, Commerce evaluated several criteria, including the 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"[427] China's prevailing market conditions, consistent with Article 14(d) of the SCM Agreement.

279. 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. Generally speaking, the higher the population density and per capita GNI, the higher the demand and price for urban land. For these reasons, Commerce used 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.[428]

280. First, Commerce noted that China and Thailand have similar levels of per capita GNI, namely, $2010 and $2990, respectively.[429] More specifically, both respondents in the *LWS* investigation were located in Shandong province, which had a higher than average per capita GNI of approximately $2900, which is closer to that of Thailand's per capita GNI of $2990.[430] With respect to other factors that may speak to regional comparability, population densities in China and Thailand are roughly comparable, with 141 persons per square kilometer (k2) in China and 127/k2 in Thailand.[431] Also, population density is higher than national averages in both Shandong and Zone 1 in Thailand, which includes the Bangkok area, at 562/k2 and 908/k2, respectively.[432]

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[426] *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)).

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

[428] *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).

[429] *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).

[430] *Id*. (*citing Market Profiles on Chinese Cities and Provinces*, tdctrade.com (2007)).

[431] *Id*.

[432] *Id*. (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)).

281. Finally, Commerce learned that producers, in general, consider a number of markets, including Thailand, as an option for diversifying production bases in Asia beyond China.[433] Thus, the same producers may compare prices across borders when deciding what land to buy or lease, as is the case in China. 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 *Tires* investigations.[434]

282. Not only did Commerce match the type of land for sale (*i.e.,* industrial zones), it also accounted for the structure of the transaction – whether it involved allocated or granted land-use rights. Some of the land-use rights at issue in *OTR Tires* were allocated land-use rights and more closely resembled a lease or rental arrangement than a one-time purchase.[435] To assess the appropriate rental value of the allocated land-use rights, Commerce looked for comparisons in Thailand that would provide a comparable "property yield" for commercial land.[436] A property yield is the annual cash flow from rent that a land owner should expect to earn.[437] Commerce evaluated the available property yield data, but none specifically involved industrial land.[438] Therefore, Commerce used the dividend yields from real estate investment trusts ("REITs") because they were a reasonable proxy for property yields for industrial land in Thailand.[439]

283. REITs are trusts that are dedicated to owning and/or operating income-producing real estate, and their dividends are based on the income, often rent, generated from the real estate holdings.[440] REITs in Thailand hold a variety of commercial real estate, including real estate dedicated to industrial production and manufacturing.[441] Although these REITs' portfolios also hold non-industrial real estate, Commerce determined that there is a wide range of returns and, furthermore, there is nothing on the record to indicate that industrial land would yield a higher or lower income than other types of real property in Thailand.[442] Therefore, Commerce concluded

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[433] *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).

[434] *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).

[435] *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)).

[436] *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)).

[437] *Id.*

[438] *Id.* (*citing Thailand Investment MarketView*, (Q3 2007), at 3) (Exhibit CHI-50) (*cited by OTR Tires CVD Final Decision Memorandum*, at Comment H.7 (Exhibit CHI-4)).

[439] *See id.*

[440] *Id.*

[441] *Id.*

[442] *Id.*

that the dividend yields from such REITs provided a reasonable basis to estimate property yields for industrial land in Thailand.[443]

284. By selecting land prices in a country with a comparable per capita GNI and population density and by using prices for comparable types of land (*e.g.,* industrial zones, allocated versus granted land-use rights), the comparison prices reasonably reflected the "prevailing market conditions for the good or service in question," while at the same time ensuring that the benefit calculation did not contain distortions caused by China's predominant role in the market. These comparison prices were consistent with Article 14(d) of the SCM Agreement and enabled Commerce to capture the full amount of the benefit in accordance with the object and purpose of the SCM Agreement.[444]

285. China criticizes Commerce's use of Thai land prices as benchmarks. China's criticisms are largely in support of its argument that it would be impossible to determine an out-of-country land-use rights benchmark "in relation to prevailing market conditions for the good" in China.[445] As explained above, however, China's position is untenable and was rejected by the Appellate Body in *US – Softwood Lumber CVD Final*. The Appellate Body interpreted Article 14(d) of the SCM Agreement as requiring only that the benchmark price "relate or refer to, or be connected with, the prevailing market conditions in the country of provision."[446] The term "in relation to" means that adequate remuneration must be determined "with reference to" or "taking account of" conditions of sale in the country of provision.[447] As just explained, Commerce took account of the prevailing market conditions for land-use rights in China when selecting the out-of-country price.

286. China also argues that several other factors, such as capital control measures that limit foreign ownership of companies in Thailand or various incentives that governments provide to companies, must be taken into account as well, but does not cite to where any such information is located on the record such that Commerce would have been able to make such adjustments.[448] Investigating authorities are restrained in their ability to adjust prices because of the limited information before them. There is not always a perfect set of data upon which to rely. Thus, it may not always be possible to adjust for all of the items listed in Article 14(d) of the SCM Agreement.[449] However, that should not preclude a Member from selecting a comparison price.

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[443] *Id*.

[444] *US – Softwood Lumber CVD Final (AB)*, para. 95.

[445] China First Submission, para. 319.

[446] *US – Softwood Lumber CVD Final (AB)*, para. 96.

[447] *The New Shorter Oxford English Dictionary* defines "in relation to" as meaning "as regards." In turn, it defines "as regards" as "concerning" and defines "concerning" as "in reference to." *The New Shorter Oxford English Dictionary,* at 467, 2526, 2534 (Exhibit US-95)

[448] China First Submission, paras. 312-314.

[449] Moreover, it would be inappropriate to make adjustments that would impose upon the out-of-country benchmark the distortions of the Chinese market.

A prior panel has recognized that, "[i]n light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the SCM Agreement, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology."[450]

287. 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. COMMERCE WAS NOT REQUIRED TO PROVIDE A CREDIT IN THE BENEFIT CALCULATIONS FOR INSTANCES IN WHICH CHINA PROVIDED RUBBER PRODUCTS FOR ADEQUATE REMUNERATION IN THE *OTR TIRES* CVD INVESTIGATION

288. China claims that Commerce used "an arbitrary and unlawful methodology" in the *OTR Tires* CVD investigation.[451] Specifically, China asserts that Commerce "included in its benefit calculation only purchases of rubber that were below the benchmark price, while ignoring all purchases of rubber that were above the benchmark price."[452] China argues that:

> [T]o determine whether the provision of goods for less than adequate remuneration provided a subsidy to the manufacture or production of the "product as a whole," Commerce was obligated to conduct an *aggregate* analysis of *all* of the transactions involving the purchase of rubber inputs over the period, including those that were made for more than the benchmark price, and not merely those that were made for less than the benchmark price.[453]

China concludes that "Commerce's failure to do so resulted not merely in the inflation of a margin of subsidization for the product as a whole, but in the creation of a subsidy margin where none existed."[454]

289. China's claim is without merit. Commerce was under no obligation to provide a credit in its benefit calculations for instances in which China provided rubber for adequate remuneration, *i.e.*, when China did not provide a subsidy. No such obligation exists under the covered agreements. China's position is based on a misreading of the SCM Agreement and the GATT 1994, coupled with a misapplication of Appellate Body reports. Contrary to China's arguments, the benefit calculations in the *OTR Tires* CVD investigation were consistent with the United States' WTO obligations.

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[450] *EC – DRAMs*, para. 7.213.
[451] China First Submission, para. 139.
[452] China First Submission, para. 139.
[453] China First Submission, para. 152.
[454] China First Submission, para. 153.

A. Article 14 of the SCM Agreement Contains No Obligation to Conduct an Aggregate Analysis nor to Provide a Credit When a Government Provides Goods for Adequate Remuneration

290. Article 14 of the SCM Agreement, entitled "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient," contains the obligations related to the calculation of a subsidy benefit. Subsection (d) of Article 14 concerns the calculation of a benefit when a Member provides a good for less than adequate remuneration. In relevant part, Article 14 provides:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
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> * * *
>
> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

291. As explained above, the Appellate Body has found that Article 14 of the SCM Agreement affords Members a great deal of flexibility in the calculation of benefit.[455] Importantly, Article 14 must be read in light of 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."[456] Furthermore, "[i]f the calculation of the benefit yields a result that is artificially low, or even zero . . . then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[457]

[455] *See* Section IV.1 *supra* (*citing US – Softwood Lumber CVD Final (AB)*, paras. 91-92 *and Japan – DRAMs (AB)*, para. 191).

[456] *Appellate Body Report, US – Softwood Lumber CVD Final (AB)*, para. 95.

[457] *Appellate Body Report, US – Softwood Lumber CVD Final (AB)*, para. 95.

292. Applying the Appellate Body's guidance on the proper interpretation of Article 14 of the SCM Agreement, the Article 21.5 panel in *US – Countervailing Measures on Certain EC Products* concluded that it was consistent with the SCM Agreement for an investigating authority to segment a share offering into four categories of transactions in order to evaluate whether the change in ownership effected through the share offering extinguished the benefit of prior, non-recurring subsidies. In particular, the panel found that there was no legal basis to require the investigating authority to conduct its analysis on either a segmented or non-segmented basis, as long as the authority's methodology was transparent and "not unreasonable." Indeed, that panel could not "find any legal basis to require the USDOC to conduct its analysis in a particular manner."[458]

293. Thus, Article 14 of the SCM Agreement provides investigating authorities flexibility in the methodology applied to calculate the benefit of a subsidy. Article 14 does not prescribe any particular level of aggregation at which the calculation of subsidy benefit must be conducted, but instead permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided.

294. Furthermore, the text of Article 14 of the SCM Agreement contains no obligation to consider instances in which a government provides no benefit. Nor does Article 14 contain any obligation to provide a credit when calculating the benefit of a subsidy.[459] Instead, the text of Article 14 explicitly pertains to the calculation of the "benefit" to the recipient. The Appellate Body has explained that the ordinary meaning of "benefit" includes:

> an "advantage", "good", "gift", "profit", or, more generally, "a favourable or helpful factor or circumstance". Each of these alternative words or phrases gives flavour to the term "benefit" and helps to convey some of the essence of that term. These definitions also confirm that the Panel correctly stated that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage."[460]

The concept of "benefit" relates only to situations in which a firm receives a "favourable or helpful factor or circumstance" or "an advantage," rather than a detriment or disadvantage. Thus, it is plain that the text of Article 14 of the SCM Agreement contains no obligation for Members to provide a credit (or offset) for instances in which a government does *not* confer a favorable circumstance or advantage (*i.e.*, instances where the government provides no benefit) when calculating a subsidy benefit.

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[458] *US – Countervailing Measures (Article 21.5)*, para. 7.121.

[459] For example, Article 14 of the SCM Agreement is entitled "Calculation of the Amount of a Subsidy in Terms of the *Benefit* to the Recipient." (emphasis added). There is no reference in Article 14 of the SCM Agreement to instances when a government provides "no benefit" nor is there any reference to providing a credit to Members when they provide a good for adequate remuneration.

[460] *Canada – Aircraft (AB)*, para. 153 (citations omitted).

295. In sum, Article 14 of the SCM Agreement imposes no obligation on Members to conduct an "aggregate" analysis nor to provide credit in the benefit calculation when a government provides goods for adequate remuneration. Indeed, China does not argue that such a requirement is contained in Article 14. Rather, China attempts to find the obligation to "conduct an *aggregate* analysis of *all* transactions" in other provisions of the SCM Agreement. However, China's arguments are unavailing.

B. The Use of the Term "Product" in the SCM Agreement and the GATT 1994 Does Not Impose an Obligation on Commerce to Provide a Credit in the Benefit Calculation for Instances in Which China Sold Rubber for Adequate Remuneration

296. As there is no requirement in Article 14 of the SCM Agreement to conduct an "aggregate analysis" nor to provide credit in the benefit calculation when a government provides goods for adequate remuneration, China is forced to look elsewhere in the SCM Agreement and the GATT 1994 to find such an obligation. Specifically, China argues that the use of the term "product" in Article VI:3 of the GATT 1994 and Articles 10, 19.3 and 19.4 of the SCM Agreement required Commerce to provide a credit in the benefit calculation for those instances in which China sold rubber for adequate remuneration.[461] China's argument is without merit.

297. In support of its contention, China attempts to draw an analogy to a series of Appellate Body reports related to the calculation of AD margins.[462] For the most part, China simply replaces the word "dumping" with the word "subsidization" in quotes taken from the Appellate Body's reports.[463] China then asserts that "'subsidization,' no less than 'dumping,' is therefore 'defined in relation to a product *as a whole*,' and . . . 'margins of subsidization,' no less than 'margins of dumping,' likewise 'can be found only for the product under investigation as a whole.'"[464]

298. China's reliance on the Appellate Body's zeroing reports is misplaced. The legal provisions on which those decisions are based apply solely to AD determinations. Specifically, the Appellate Body's decisions rely on articles of the AD Agreement and Articles VI:1 and VI:2 of the GATT 1994. These provisions do not apply to CVD determinations. Moreover, the term "margins of subsidization," which China invents using altered quotations from Appellate Body reports, does not exist in the SCM Agreement nor in the GATT 1994.[465] Indeed, the term "margin" does not appear in the SCM Agreement at all.

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[461] *See, e.g.,* China First Submission, paras. 145-146.
[462] China First Submission, paras. 147-150.
[463] China First Submission, para. 147, 150.
[464] China First Submission, para. 147.
[465] China First Submission, paras. 147, 150.

299. Accepting China's argument means that the mere use of the term "product" in other provisions of the SCM Agreement and the GATT 1994 overrides the "latitude"[466] and "leeway"[467] of the guidelines set forth in Article 14 of the SCM Agreement and imposes a precise and far-reaching obligation when calculating the amount of the subsidy. China offers no explanation for how its reading of these other provisions of the SCM Agreement and the GATT 1994 is compatible with the Appellate Body's interpretation of Article 14 as providing Members flexibility in the methodology used to calculate benefit. More importantly, China disregards the text of Article 14 – the term "product" does not even appear in Article 14 itself – and suggests that the panel elevate the context of other provisions of the SCM Agreement and the GATT 1994 over the text that directly relates to the calculation of benefit in an effort to create an obligation where none exists. This is inconsistent with the rules of treaty interpretation and the obligation in Articles 3.2 and 19.2 of the DSU to avoid adding to or diminishing the rights and obligations provided in the covered agreements.

300. Moreover, a proper analysis of the context of the SCM Agreement demonstrates that China's position is without support. The crux of China's argument is that, because the term "product" is used in various provisions of the SCM Agreement and Article VI:3 of the GATT 1994, "Commerce was obligated to conduct an *aggregate* analysis of *all* of the transactions involving the purchase of rubber inputs over the period"[468] of investigation and Commerce was further required to provide a credit in the aggregate benefit calculation any time a transaction conferred no benefit, or, as China terms it, a "negative benefit."[469] However, China's argument cannot be reconciled with the definition of a subsidy in Article 1 of the SCM Agreement.

301. Any time a government provides a financial contribution and a benefit is thereby conferred, a subsidy is "deemed to exist."[470] That is the "Definition of a Subsidy" in Article 1.1 of the SCM Agreement. Each time China provided a rubber input product to a producer of subject merchandise for less than adequate remuneration, a benefit was conferred, a subsidy was deemed to exist, and, because the subsidized imports were found to be causing injury,[471] the United States had the right to impose a countervailing duty equal to the amount of the benefit conferred. The fact that at other times China may have provided rubber input products to these firms for adequate remuneration, and therefore no subsidy existed in those instances, is irrelevant. Those non-subsidies could not eliminate or diminish the benefits conferred when China provided rubber input products for less than adequate remuneration.

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[466] *Japan – DRAMS (AB)*, para. 191.

[467] *EC – DRAMS (Panel)*, para. 7.213.

[468] China First Submission, para. 152 (emphasis in original).

[469] China First Submission, paras. 142-144, 149.

[470] SCM Agreement, Article 1.1.

[471] China has not challenged the finding of injury by the U.S. International Trade Commission in this dispute.

302. China ignores the troubling implications of its argument. As explained above, the basis China offers for the purported obligation to provide credit for "negative benefits" in the calculation of an aggregate benefit for the "product as a whole" is the use of the term "product" in various provisions of the SCM Agreement and the GATT 1994, not including, however, Article 14(d) of the SCM Agreement, or even Article 14 for that matter. Consequently, such an obligation, if it exists, could not be limited to subparagraph (d) of Article 14. It would necessarily apply to all of Article 14 and would require that credit be provided whenever an investigating authority found that a financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even different types of subsidies.

303. For example, an investigating authority might examine together in a single investigation both a simple transfer of money from the government to an investigated producer, such as a grant, and the provision by the government of a good, allegedly for less than adequate remuneration. Assuming the investigating authority determines that, in every transaction examined, the good was sold for adequate remuneration, *i.e.*, it was sold for more than the benchmark price, the amount of the benefit of the money transferred to the investigated producer via the grant should be reduced by the amount by which the price paid for the good exceeded the benchmark price when the investigating authority calculates the so-called "margin of subsidization for the product as a whole."

304. Nothing in the SCM Agreement requires such a result. The implication of China's argument is that, because an investigating authority found that one alleged subsidy did not exist, it should be required to offset or reduce the amount of a separate subsidy that *was* found to exist. Had the investigating authority not investigated the alleged input subsidy, then it would not have been required to provide a credit or offset against the benefit conferred by the grant, and the full value of the grant could have been countervailed. An additional concern is that, under China's logic, a respondent should be able to present evidence of any financial contribution for which it pays a "negative benefit" to the government and claim an offset against the benefit of a subsidy, regardless of whether Commerce is investigating that financial contribution or not.

305. Furthermore, the concern about an investigating authority being required to provide credit across subsidies for different types of input products is not hypothetical. China argues that this result was required in the *OTR Tires* CVD investigation. As China recognizes,"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."[472] That is, Commerce investigated the government provision of five distinct goods. In its analysis of the "actual benefit," though, China aggregates all five different input products together to show what it claims were "large negative benefits."[473] In doing so,

[472] China First Submission, para. 140 (emphasis added).

[473] China has drawn much attention to the number of comparisons in the *OTR Tires* CVD investigation in which Commerce determined that China sold rubber at a price higher than the benchmark price. China argues that

China hides the fact that, for one company, under China's own methodology, there was an "actual benefit" from the provision of a rubber product.[474] In China's analysis, this "actual benefit" was offset completely and thus hidden by the so-called "negative benefits" China argues Commerce should have found for other, separate input products.[475]

306. The Appellate Body has noted that the object and purpose of the SCM Agreement is to allow Members to fully offset countervailable subsidies through the application of countervailing duties. In this regard, the Appellate Body has warned that "[i]f the calculation of the benefit yields a result that is artificially low, or even zero . . . then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[476] The interpretation of Article 14 of the SCM Agreement proposed by China leads to exactly the result against which the Appellate Body admonishes. As demonstrated, it would result in a benefit calculation that is artificially low, or even zero, preventing the United States from fully offsetting the effect of subsidies found to exist. China's interpretation of Article 14 thus fails to read that article in light of the object and purpose of the SCM Agreement, and for that reason as well, China's interpretation must be rejected.

C. Commerce's Calculations of Subsidy Benefits When China Provided Rubber For Less Than Adequate Remuneration Were Consistent with Article 14 of the SCM Agreement

307. China's sole complaint about Commerce's benefit calculations in the *OTR Tires* CVD investigation is limited to Commerce's "failure" to provide a credit for those instances where the government provided rubber to the investigated firms for more than the benchmark price. As explained above, nothing in the SCM Agreement nor the GATT 1994 required Commerce to provide such credits. As described below, Commerce properly calculated benefits in the *OTR Tires* CVD investigation by determining those instances in which China provided rubber to the investigated producers for less than adequate remuneration. Thus, contrary to China's arguments, Commerce's determination was fully consistent with Article 14 of the SCM Agreement.

308. Commerce applied the following methodology to calculate the total benefits for the provision of rubber in the *OTR Tires* CVD investigation. The investigated tire producers

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these data demonstrate "the arbitrariness of Commerce's benefit calculation methodology," which led to what China terms "large negative benefits." (China First Submission, paras. 141-144.) There is nothing extraordinary about a government selling a good for adequate remuneration. However, the fact that China often sold rubber on terms comparable to other rubber sellers in China does not, in any manner, eliminate or diminish those instances in which China sold rubber at below market prices. In each instance in which China sold rubber for less than adequate remuneration, China conferred a benefit on the investigated firms and the SCM Agreement permits Members to fully offset the effects of such benefits.

[474] China First Submission, Exhibit CHI-58, last page.

[475] China First Submission, para. 144.

[476] *US – Softwood Lumber CVD Final (AB)*, para. 95.

reported their monthly purchases for each type of rubber.[477] Commerce determined a monthly benchmark price for each type of rubber based on monthly, market-based prices for a comparable good.[478] Commerce then compared the purchase price to the benchmark to determine if each type of rubber was provided for less than adequate remuneration. Whenever the price of the rubber was below the benchmark price, Commerce determined that the rubber had been provided for less than adequate remuneration. In those instances, the difference between the benchmark price and the purchase price was multiplied by the quantity of rubber purchased at the below-benchmark price to determine the benefit:

$$[\text{benchmark price - purchase price}] \text{ X } [\text{quantity purchased}]$$

In the final step of the calculation, Commerce summed the benefits received in each month of the period of investigation ("POI") to arrive at the total benefits received during the POI for each type of rubber.[479]

309. Commerce's benefit calculations were consistent with the guidelines established in Article 14 of the SCM Agreement because these calculations identified and measured those instances in which China provided rubber to the investigated firms for less than adequate remuneration. By identifying those instances in which an investigated company paid less than the benchmark price, Commerce identified when China "provide[d] goods to a recipient and, in turn, received insufficient payment or compensation for those goods."[480] By adding together all the benefits China provided to the tire producers during the POI, Commerce correctly determined the total benefits received during the POI.

D. China 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

310. China concludes the discussion of its argument that Commerce was required to provide credit in the benefit calculation for so-called "negative benefits" by asserting that the United

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[477] In some instances the respondents reported the monthly volume and value of rubber from each SOE as a single amount. In other instances respondents reported multiple amounts of volume and value of rubber from each SOE for a given month. Commerce made comparisons to the monthly benchmark on whatever basis the respondents reported their rubber purchases. China does not challenge Commerce's use of comparisons based on monthly data. China First Submission, para. 150.

[478] In some of the challenged CVD investigations, Commerce employed external benchmarks to determine the adequacy of remuneration. However, with respect to the provision of rubber for less than adequate remuneration, Commerce calculated benchmarks based on rubber import prices in China and non-governmental domestic Chinese rubber prices. *See OTR Tires CVD Final Decision Memorandum*, pp. 11-12.

[479] *See generally, OTR Tires CVD Final Decision Memorandum*, pp. 9-12; *Final Calculation Memorandum for Guizhou Tire Company Limited (GTC)* (July 7, 2008) (Exhibit CHI-56); *Final Calculation Memorandum for Tianjin United Tire & Rubber International*, Co., Ltd. (July 7, 2008) (Exhibit CHI-57).

[480] *US – Softwood Lumber CVD Final (AB)*, para. 84.

States acted inconsistently with Article VI:3 of the GATT 1994 and Articles 1 and 14(d) of the SCM Agreement.[481] In its "Request for Findings and Recommendations," China asks the Panel to find that the United States acted inconsistently with Articles 10, 14, 19.1, 19.4, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994.[482] China has not explained how the United States acted inconsistently with any of these provisions.

311. As explained above, China has failed to demonstrate that Article 14 of the SCM Agreement contains any obligation to provide credits in the benefit calculation for the so-called "negative benefits" of non-subsidies. Thus, China has failed to explain how the United States acted inconsistently with Article 14 as a result of Commerce not providing such credits in the benefit calculations in the *OTR Tires* CVD investigation.

312. With respect to Article 1 of the SCM Agreement, China does not request that the Panel find that the United States acted inconsistently with Article 1 in its "Request for Findings and Recommendations,"[483] despite its assertion that the United States did so in the conclusion of its discussion of this issue.[484] Thus, it is not clear whether China is making a claim pursuant to Article 1 or not. In any event, China offers no explanation of how the United States acted inconsistently with Article 1 in connection with Commerce's calculation of benefit.[485]

313. China likewise never offers any explanation of how the United States acted inconsistently with Articles 10, 19.1, and 32.1 of the SCM Agreement. China points to the use of the term "product" in Article 10 as support for its argument that an obligation exists under Article 14 to provide a credit in the benefit calculation for the so-called "negative benefits" of non-subsidies,[486] but China does not otherwise explain how the United States acted inconsistently with Article 10 itself.[487] As to Articles 19.1 and 32.1, China makes no reference whatsoever to these provisions in its discussion of this issue.[488] Hence, China has failed to substantiate any claim under these provisions.

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[481] China First Submission, para. 153.

[482] China First Submission, para. 468(c).

[483] China First Submission, para. 468(c).

[484] China First Submission, para. 153.

[485] China First Submission, paras. 139-153.

[486] China First Submission, para. 146 and n. 125. China also points to the use of the term "product" in Article VI:3 of the GATT 1994 and Articles 19.3 and 19.4 of the SCM Agreement. China requests that the Panel find that the United States acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, and these provisions are discussed below. However, China does not suggest either in its discussion of this issue nor in its "Request for Findings and Recommendations" that the United States acted inconsistently with Article 19.3 of the SCM Agreement.

[487] China First Submission, paras. 147-153.

[488] China First Submission, paras. 139-153.

314. Finally, with respect to China's request that the Panel find that the United States acted inconsistently with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement,[489] the United States again notes that China simply fails to provide any explanation in its First Submission as to how the United States acted inconsistently with these provisions. China's discussion of these provisions is limited to noting that their text includes the term "product." This is insufficient to substantiate any claim that the United States acted inconsistently with these provisions.

315. In addition, Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement both pertain to the *levying* of countervailing duties. Footnote 51 to Article 19.4 explains that "[a]s used in [the SCM] Agreement 'levy' shall mean the definitive or final legal assessment or collection of a duty or tax." Under the United States' retrospective CVD system, Commerce does not "levy" duties in the course of a CVD investigation, nor even as a consequence of the final determination of a CVD investigation. The investigation determination serves as the basis for a reasonable security (or a "cash deposit").[490] Duties are levied – for the first time, if at all – only after the conclusion of the first administrative review period.[491] As a result, Article VI:3 and Article 19.4 cannot impose an obligation with respect to the *OTR Tires* CVD investigation.

316. For all of the reasons given above, 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 credit in the benefit calculation for instances where China provided goods for adequate remuneration.

VI. COMMERCE PROPERLY MEASURED THE BENEFIT CONFERRED UPON PRODUCERS OF SUBJECT MERCHANDISE IN INSTANCES WHERE PRODUCTION INPUTS WERE PURCHASED FROM TRADING COMPANIES

317. China claims that Commerce failed to correctly calculate the benefit in those instances where production inputs were provided by a public body to trading companies and then purchased by producers of subject merchandise from such trading companies. Specifically, China claims that "Commerce undertook no examination whatsoever of the price paid by the trading companies for the inputs they purchased from SOEs in any of the three investigations. Commerce thus unlawfully presumed . . . that the purported financial contribution to the trading companies . . . conferred a benefit on the trading companies."[492] "In other words," China argues, "Commerce presumed the 'pass through' of a benefit that had not been found to exist."[493]

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[489] China First Submission, para. 468(c).

[490] 19 U.S.C. § 1671e(a)(3).

[491] 19 U.S.C. § 1675(a)(2)(C); *see generally* 19 C.F.R. § 351.212.

[492] China First Submission, para. 135 (footnote omitted).

[493] China First Submission, para. 136.

318. China's argument is without merit. In the *CWP*, *LWRP*, and *OTR Tires* CVD investigations, Commerce properly determined that a benefit was conferred upon producers of subject merchandise when production inputs – hot-rolled steel and natural and synthetic rubber – were provided for less than adequate remuneration by SOEs that, as explained above, Commerce properly determined are public bodies.

319. China characterizes Commerce's benefit analyses as "suffer[ing] from [a] . . . fundamental legal error."[494] Yet, China does not identify any provision of the SCM Agreement or GATT 1994 with which Commerce's benefit determinations are purportedly inconsistent.[495] China merely asserts that Commerce was required to determine the benefit conferred upon trading companies, engaged in buying and selling an input product, in addition to determining the benefit conferred upon producers of the merchandise that was the subject of Commerce's CVD investigations. China is incorrect.

320. To the extent that a trading company received a benefit from the financial contribution provided by an SOE, and some portion of the benefit of that financial contribution, in effect, passed through the trading company to a producer of subject merchandise, Commerce accounted for this and properly calculated the benefit conferred upon the producer of subject merchandise. To do so, Commerce compared the price the producer of subject merchandise paid for the input product with an appropriate benchmark price.

A. The SCM Agreement Does Not Require that the Recipient of a Financial Contribution Be the Same as the Recipient of a Benefit

321. The fact that the inputs were provided first to trading companies and then re-sold to producers of subject merchandise is of no moment and did not necessitate a separate determination of the benefit conferred to the trading companies. As the *Olive Oil* panel emphasized, a pass-through analysis is not required any time "there is *any* arms'-length transaction between unrelated companies in the chain of the production of an imported product subject to a countervail investigation. . . ."[496] Indeed, paraphrasing the findings of the Appellate Body in *US – Countervailing Measures*, the panel noted that, "under Article 1.1(b), a benefit might be received by different recipients, . . . the recipient of the benefit might be different from the recipient of the financial contribution, and . . . a subsidy can be bestowed directly or indirectly, and in respect of production, manufacture or export of a product."[497] "In other words, it is not necessary to identify the particular recipient or recipients of the benefit and the particular

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[494] China First Submission, para. 134.

[495] *See* China First Submission, paras. 134-138.

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

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

manner in which a subsidy is bestowed in order to determine that a benefit has been conferred, and that therefore a subsidy exists, within the meaning of Article 1.1(b)."[498]

322. As explained above,[499] in the investigations China challenges, Commerce determined, in accordance with SCM Article 1.1, that China made a financial contribution (*i.e.*, a provision of a good) to the trading companies that purchased input products from state-owned producers.[500] Commerce also found that a benefit was conferred upon producers of subject merchandise that purchased input products from the trading companies because the input products were sold for less than adequate remuneration within the meaning of Article 14(d) of the SCM Agreement.[501] Commerce explained that "[f]or these transactions, the GOC's financial contribution (provision of a good) is made to the trading company suppliers that purchase the [input product], while all or some portion of the benefit is conferred on the [subject merchandise] producers who purchase the [input product] from the trading company suppliers."[502] Thus, in these investigations, in some instances, the recipient of the financial contribution, the trading company, was different from the recipient of the benefit that Commerce countervailed, the producer of subject merchandise. This is contemplated by the SCM Agreement, as the *Olive Oil* panel explained.[503]

B. Commerce Properly Calculated the Benefit Conferred on Producers of Subject Merchandise from Inputs Provided Through Trading Companies

323. Contrary to China's claims, Commerce properly calculated the benefit conferred upon producers of subject merchandise in the *CWP*, *LWRP*, and *OTR Tires* investigations, including in instances involving trading companies. For any transaction that involved production inputs provided by an SOE to a trading company and then purchased by a producer of subject merchandise from the trading company, Commerce measured the benefit by comparing the price the producer of subject merchandise paid to the trading company for the production input with an appropriate benchmark price.[504] Consequently, any difference between the price the trading company paid to the SOE for the production input and the price the respondent producer paid to the trading company, *e.g.*, a mark-up added by the trading company, is reflected in Commerce's benefit calculations.

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[498] *Mexico – Olive Oil* (Panel), para. 7.152.

[499] *See* Section III.B *supra*.

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

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

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

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

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

324. Put another way, even if Commerce had first determined the difference between the benchmark and the price paid by the trading companies to the SOEs for the government-provided good, and then also determined the difference between the benchmark and the price paid by the respondent enterprises to the trading companies for the same good, the resulting determination of the amount of the benefit conferred upon the respondents would be the same. Regardless of whether the trading company sells the good for the same price or with a mark-up, Commerce's benefit calculation properly determines the amount of the benefit conferred on the last buyer, the producer of subject merchandise.

325. It simply was not necessary to measure any benefit that may have been received by the trading companies. The amount or portion of any benefit received by the trading companies is irrelevant for the purpose of determining the benefit conferred upon the subject merchandise producers. What matters is that Commerce properly identified a financial contribution and the amount of the benefit conferred upon the producers of subject merchandise. As noted, Commerce did so by comparing the price paid by producers of subject merchandise to the trading companies with an appropriate benchmark price. As a result of such comparisons, Commerce determined in the challenged investigations that producers of subject merchandise received a benefit when they purchased government-provided goods because the price paid for such goods was less than the benchmark price.[505]

326. In sum, Commerce's analysis identified only the amount of benefit that effectively "passed through" the trading companies and was conferred upon producers of subject merchandise. Commerce's determinations were thus consistent with the requirements of the SCM Agreement and do not raise the concerns at issue in the Appellate Body's admonition that ". . . Members must not impose duties to offset an amount of the input subsidy that has not passed through to the countervailed processed products."[506]

327. For the reasons given above, we respectfully request that the Panel reject China's claims related to Commerce's measurement of the benefit of input products provided through transactions involving trading companies.

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

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

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

328. China claims that Commerce's specificity determinations with respect to government policy lending in the *OTR Tires* CVD investigation and government provision of land-use rights in the *LWS* CVD investigation are inconsistent with Article 2 of the SCM Agreement. China's claims are without merit.

A. Commerce's Determination that the Policy Lending Program Was *De Jure* Specific to the OTR Tire Industry Was Consistent with Article 2 of the SCM Agreement

329. Commerce investigated policy lending subsidies in all four of the challenged CVD investigations. In the *OTR Tires*, *CWP* and *LWS* CVD investigations, Commerce found countervailable subsidies in the form of policy lending. In *CWP* and *LWS*, Commerce's determinations were based on facts available because China failed to cooperate to the best of its ability. In the *LWRP* CVD investigation, Commerce determined that the record did not demonstrate that the *LWRP* producers had used the policy lending program.

330. Before this Panel, China challenges only Commerce's specificity determination for policy lending with respect to the *OTR Tires* CVD investigation. Commerce found the policy lending in the *OTR Tires* CVD investigation specific because the loans were provided as part of government programs guiding financial institutions to lend to tire producers.

331. Commerce based this finding on the evidence of record in the *OTR Tires* CVD investigation, which contains central, provincial, and municipal-level government plans and policies that identify the tire industry for encouragement and support. These policies specifically provide that the provision of credit, including bank loans, should be part of this official government support. Furthermore, the evidence of record establishes that these policies are in fact taken into account by SOCBs in making their lending decisions, and that OTR tire producers received loans from the SOCBs.[507]

332. Finally, Commerce's determination was "clearly substantiated on the basis of positive evidence." Accordingly, and as discussed fully below, Commerce's specificity determination for the policy lending subsidy in the *OTR Tires* CVD investigation was consistent with Article 2 of the SCM Agreement.

1. A Subsidy Is *De Jure* Specific If It Is Explicitly Limited to Certain Enterprises by the Granting Authority or the Legislation Pursuant to Which the Granting Authority Operates

[507] *See OTR Tires CVD Final Decision Memorandum*, at 13-15, 98-100 (Exhibit CHI-4).

333. Article 1.2 of the SCM Agreement provides that a subsidy may be subject to countervailing measures only if it is "specific." Article 2 of the SCM Agreement sets forth the requirements for determining whether a subsidy is specific. Article 2.1 of the SCM Agreement provides as follows, in relevant part:

> In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) 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.

334. Article 2.4 of the SCM Agreement requires that a determination of specificity under the provisions of Article 2 must be "clearly substantiated on the basis of positive evidence." The Appellate Body has explained that the term "positive evidence" means evidence "of an affirmative, objective and verifiable character," which is "credible."[508]

335. Thus, where an investigating authority clearly substantiates, on the basis of positive evidence, that access to a subsidy is explicitly limited to certain enterprises by a granting authority, or the legislation pursuant to which the granting authority operates, then the determination of specificity made by that authority is consistent with the requirements of Article 2 of the SCM Agreement.

2. Commerce Clearly Substantiated That the Government of China's Laws, Plans, and Policies Explicitly Limit Access to Policy Lending to a Group of Industries That Includes the *OTR Tires* Industry

336. In the *OTR Tires* CVD investigation, Commerce determined that China provided subsidies in the form of policy lending to two companies, GTC and Starbright. In analyzing the specificity of these subsidies, Commerce considered a wide array of government laws, plans, and policies that guide banks to provide credit to support the tire industry in China. These policies were promulgated at the central, provincial, and municipal levels of government in China. Commerce also found that provincial and municipal plans are designed to implement central government policies and are intended to be consistent with these central plans.[509] Commerce

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[508] *US – Hot-Rolled Steel (AB)*, para. 192. 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 – DRAMS*. *EC – DRAMS*, para. 7.226, n. 191.

[509] *See OTR Tires CVD Final Decision Memorandum*, 13-14, 98 (Exhibit CHI-4); *see also OTR Tires CVD GOC NSA QR*, 13, 19, 21-22 (Oct. 29, 2007) (Exhibit US-84); *OTR Tires CVD Central Government Verification Report*, 13 (Apr. 24, 2008) (Exhibit US-80); *OTR Tires CVD Guizhou Province Verification Report*, 4-5 (Apr. 24,

found these policy lending subsidies *de jure* specific pursuant to Article 2.1(a) of the SCM Agreement because the government plans explicitly targeted a group of industries, which included the tire industry.

337. For example, the National Development and Reform Commission ("NDRC") created a catalogue that lists "the production of advanced belt tires, its supporting materials and equipment production" as one of several encouraged projects.[510] The implementing regulation for the 11th Five-Year Plan states that this catalogue is an "important basis for guiding investment directions and for the government to administer investment projects, to formulate and enforce policies on public finance, taxation, credit, land, import and export, etc."[511] The implementing regulations further direct all administrative departments of the government to support the identified industrial policy priorities: "[a]ll relevant administrative departments shall speed up the formulation and amendment of policies on public finance, taxation, credit, land, import and export, etc., effectively intensify the coordination and cooperation with industrial policies, and further improve and promote the policy system on industrial structure and adjustment."[512] Additionally, the 10th Five-Year Plan identified "meridian radial tires"[513] as a national security priority and states that "we should . . . reasonably direct the contribution of public funds . . . so as to . . . guarantee the realization of this target."[514]

2008) (Exhibit US-85).

[510] *OTR Tires CVD Final Decision Memorandum*, 13 (Exhibit CHI-4). NDRC, *Directory Catalogue on Readjustment of Industrial Structure (Version 2005)*, Decree No. 40 (Dec. 2, 2005) (*NDRC Catalogue Translation 1*). There are at least two translations of this document on the record of the *OTR Tires* CVD investigation. This translation was submitted in: *Petitioners' Response to Department of Commerce Questions on the Countervailing Duty Petition Filed on Certain Off the Road Tries from the People's Republic of China*, at Exhibit Supp. CVD-2 (Jun. 27, 2007) (Exhibit US-86). The same translation was also submitted in: *Additional Clarifying Information For Bridgestone's New Subsidy Allegations*, at Exhibit 10 (Sep. 19, 2007). For ease of reference, the United States refers to the translation submitted by China in Exhibit CHI-70 as "*NDRC Catalogue Translation 2*."

[511] Decision of the State Council on Promulgating the *Interim Provisions on Promoting Industrial Structure Adjustment*, at Article 12 (Dec. 2, 2005) ("*State Council Interim Provisions*"). China argues that it was unable to locate this document on the record. China First Submission, Exhibit CHI-69, at n. 2. China's confusion may be the result of small translation differences in the title of the document. For example, China refers to this document as the "*Temporary* Provision . . ." while the title submitted on the record is the "*Interim* Provision . . . ." This Chinese policy document was submitted on the record in *Bridgestone's New Subsidy Allegation*, at Exhibit 9 (Sep. 5, 2007) (Exhibit US-87); *see also OTR Tires CVD Final Decision Memorandum*, at 13 (Exhibit CHI-4).

[512] *Bridgestone New Subsidy Allegation*, at Exhibit 9 (September 5, 2007) (Exhibit US-87).

[513] OTR tires are a type of "meridian tires" (also known as "radial tires"). *See OTR Tires CVD Final Decision Memorandum*, at 99 (*citing GOC New Subsidy Allegations Response at Exhibit GOC-NEW-4-6* (Exhibit CHI-72)) (Exhibit CHI-4).

[514] *OTR Tires CVD Final Decision Memorandum*, at 13 (Exhibit CHI-4); SETC, *Promulgation of the Guidance of Recent Development in the Industrial Sector*, Circular No. 716 (Sep. 28, 2002) (Exhibit US-83). China states that it was unable to locate this document on the record. China First Submission, Exhibit CHI-69, at n. 3. Petitioners submitted this document in: *Petitioners' Response to Department of Commerce Questions on the Countervailing Duty Petition Filed on Certain Off the Road Tires from the People's Republic of China*, at Exhibit Supp. CVD-4 (Jun. 27, 2007).

338. Commerce found that provincial and municipal governments closely coordinated their own five-year plans with the priorities found in the central five-year plans. For example, government officials at the *OTR Tires* verification explained that the economic plans of the provincial and municipal governments were drafted based on the goals and objectives of the central government plans.[515] In this regard, Commerce found that the governments of the provinces in which GTC and Starbright were located maintained programs that conformed to the priorities of the central government policies, including directing lending to the tire industry.

339. Commerce found that the provincial government of Guizhou, the province in which GTC is located, not only identified the tire industry as a priority and directed lending to the tire industry, but also identified GTC specifically. For example, the Guizhou 11th Special Industrial Development Plan stated that "[u]nder the leadership of Guizhou Tyre, [the rubber industry shall] . . . vigorously develop radial tires . . . and give priority to the 5-million-unit semi-steel radial tire project of Guizhou Tyre."[516] In addition, the Guizhou 10th Five Year Plan singled out a small number of companies for production renovations, including GTC for technology renovations for tire manufacturing lines.[517] Finally, the Guizhou 9th Five Year Plan stated that "policy bank loans and loans from abroad should continue to be allocated according to the plan."[518]

340. In addition to the provincial government, Commerce found that the municipal government of Guiyang, the city in which GTC was located, had policies to guide lending to the tire industry. Similar to the provincial plan discussed above, the Guiyang 11th Five Year Plan identifies industries which should be developed, including the tire industry. In this regard, this plan states that the government "shall develop auto parts, tires and other auto-use rubber products aimed at both the domestic and world markets . . . [and] shall give priority to the 5-million-unit

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[515] *OTR Tires CVD Final Decision Memorandum*, at 13 (Exhibit CHI-4); *OTR Tires CVD Central Government Verification Report*, at 13 (Apr. 24, 2008) (Exhibit US-80); *see also OTR Tires CVD Guizhou Province Verification Report*, at 4 (Apr. 24, 2008) (government officials stated that the decision to include specific industries in provincial five-year plans is made in line with central government policies) (Exhibit US-85).

[516] *OTR Tires CVD Final Decision Memorandum*, at 112 (Exhibit CHI-4); *Bridgestone NSA Supplement*, Exhibit 4 (Oct. 1, 2007) (Exhibit CHI-77). China correctly notes that Commerce mistakenly cited to the Guizhou 11th Five-Year Plan in the *OTR Tires CVD Final Decision Memorandum*, rather than the correct citation to the Guizhou 11th *Special Industrial Plan*. *See* China First Submission, Exhibit CHI-69, at 7.

[517] *OTR Tires CVD Final Decision Memorandum*, at 99 (Exhibit CHI-4); *GOC NSA Response at Exhibit GOC-NEW-4-6* (Oct. 29, 2007) (Exhibit CHI-72).

[518] *OTR Tires CVD Final Decision Memorandum*, at 99 (Exhibit CHI-4); China correctly notes Commerce mistakenly cited to the Guizhou 10th Five-Year Plan in the *OTR Tires CVD Final Decision Memorandum*, rather than the correct citation to the 9th Five-Year Plan. *See* China First Submission, Exhibit CHI-69, at 4. This confusion was the result of significant errors made by China. First, China attached the incorrect Chinese language document to the English translations of these five-year plans. Specifically, with the exception of the first page of each Chinese language document, China attached the Chinese language version of the Guizhou 10th Five-Year Plan to the English translation of the Guizhou 9th Five-Year Plan and vice-versa. *See GOC NSA Response at Exhibits GOC-NEW-4-5 & 4-6* (Oct. 29, 2007) (Exhibit US-84). Additionally, China failed to provide Commerce with an English translation of the portion of the 9th Five-Year Plan discussing the allocation of loans. Commerce only became aware of this statement in the plan because a domestic producer provided Commerce with a partial translation of the Chinese language version which, as described above, was mislabeled the Guizhou 10th Five-Year Plan in the English translation. *See Bridgestone Pre-Preliminary Comments*, at 41 (Nov. 28, 2007). (Exhibit US-82).

radial tire project of Guizhou Tire Co., Ltd."[519] This plan also stated that it should be implemented by enhancing "the cooperation between banks and enterprises, and encourage the financial institutions to provide funds for the projects in conformity with economic policies."[520]

341. Starbright is located in Hebei Province and Commerce found that the Hebei provincial government guided lending to the tire industry through policies targeting the automobile parts industry.[521] Record evidence demonstrated that the Chinese government considered tire producers to be part of the automobile parts industry. As noted above, the Guiyang municipal plan discusses the GTC tire project within the context of identifying automobile parts as a key industry.[522]

342. Commerce next considered that there were multiple policy documents on the record demonstrating that the Hebei provincial government identified a group of industries which included the automobile parts industry as key industries to which lending should be directed. For example, the Hebei 11th Five-Year Plan for Technology lists "key projects" and includes automobile parts.[523] The guidelines for this plan direct banks to support key projects.[524] The plan also designates Xingtai City, where Starbright is located, as an automobile development base.[525] In addition, the Hebei 10th Five Year Plan states that multiple industries, including "auto parts," "shall be supported."[526] Moreover, the Hebei 9th Five Year Plan states that multiple industries, including "automobile and components" will be "developed greater and stronger."[527]

343. Thus, the evidence on the record of the *OTR Tires* CVD investigation, viewed in its entirety, clearly substantiated that China had a policy in place to guide lending to a group of industries including the tire industry.

3. China's Criticisms of Commerce's Specificity Determination for Policy Lending Are Unavailing

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[519] *OTR Tires CVD Final Decision Memorandum*, at 112 (Exhibit CHI-4); *Bridgetown NSA Supplement*, Ex. 1 (Oct. 1, 2007) (Exhibit CHI-78).

[520] *Bridgestone NSA Supplement*, Ex. 1 (Oct. 1, 2007) (Exhibit CHI-78).

[521] *OTR Tires CVD Final Decision Memorandum*, at 99-100 (Exhibit CHI-4).

[522] *OTR Tires CVD Final Decision Memorandum*, at n. 17 (Exhibit CHI-4); *Bridgestone NSA Supplement*, Ex. 1 (Oct. 1, 2007) (Exhibit CHI-78).

[523] *OTR Tires CVD Final Decision Memorandum*, at 99 (Exhibit CHI-4); *Bridgestone NSA Clarification*, Ex. 18 (Sep. 19, 2007) (Exhibit CHI-73).

[524] *OTR Tires CVD Final Decision Memorandum*, at 99 (Exhibit CHI-4); *Bridgestone NSA Clarification*, Ex. 17 (Sep. 19, 2007) (Exhibit CHI-74).

[525] *Bridgestone's NSA*, Exhibit 44 (Sep. 5, 2007) (Exhibit US-88).

[526] *OTR Tires CVD Final Decision Memorandum*, at 100 (Exhibit CHI-4); *GOC NSA Response, Ex. GOC-NEW-4-9* (Oct. 29, 2007) (Exhibit CHI-76).

[527] *OTR Tires CVD Final Decision Memorandum*, at 99 (Exhibit CHI-4); *GOC NSA Response at Ex. GOC-NEW-4-8* (Oct. 29, 2007) (Exhibit CHI-75).

344. China argues that Commerce's specificity determination was inconsistent with Article 2 of the SCM Agreement for three primary reasons. First, China argues that none of the measures relied upon by Commerce "defines a subsidy."[528] Second, China argues that none of the measures "explicitly limits" access to the subsidy to "certain enterprises."[529] Finally, China argues that none of the loans were "made pursuant to the measures" identified by Commerce.[530]

345. China's arguments are without merit and reflect a misunderstanding of Commerce's determination and the proper application of Article 2 of the SCM Agreement. First of all, the analytical framework that China asks the Panel to apply is not the framework established by the SCM Agreement. Article 2.1(a) is explicit:

> In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) 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.

The three points that China asks the Panel to examine are not the elements that Article 2.1(a) contains, and on that basis alone, China's argumentation should be rejected. In any case, each of China's three assertions is also individually flawed, as further described below.

(a) Article 2 of the SCM Agreement Does Not Require Commerce to Identify Legislation That Defines the Elements of a Subsidy

346. China argues that, for the purpose of making a *de jure* specificity determination, Article 2 of the SCM Agreement requires the identification of legislation that "define[s] the elements of the subsidy."[531] China's argument conflates the determination of specificity and benefit with the determination of financial contribution. Article 2 relates to the determination of whether a subsidy is specific, and does not relate to the "elements of a subsidy." The specificity determination necessarily follows the determination that a subsidy, "as defined in paragraph 1 of Article 1," exists.

347. Nothing in the text of Article 2.1(a) of the SCM Agreement requires Members to identify legislation that defines the elements of subsidy (*i.e.*, financial contribution and benefit). Instead, Article 2.1(a) defines a "specific subsidy" as a subsidy that the granting authority or legislation pursuant to which the granting authority operates explicitly limits to certain enterprises. The

[528] China First Submission, paras. 214-217.
[529] China First Submission, paras. 218-222.
[530] China First Submission, paras. 223-225.
[531] China First Submission, para. 217.

reference to "legislation" in Article 2.1(a) relates to "legislation pursuant to which the granting authority operates," which is not necessarily the same as the legislation that defines the elements of the subsidy. Article 2.1(a) simply requires an investigating authority to determine whether: (i) the granting authority explicitly limits access to a subsidy to "certain enterprises;" or (ii) the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to "certain enterprises."

348. Commerce's analysis of the specificity of policy lending in the *OTR Tires* CVD investigation followed the requirements of Article 2.1(a) of the SCM Agreement. Commerce focused on the legislation, or more precisely, the five-year plans and their implementing regulations.[532] As explained below, Commerce determined that these policy documents explicitly limited policy lending to a group of industries, including the tire industry, while prohibiting lending to other industries.[533] Commerce's determination was consistent with the requirements of Article 2.1 of the SCM Agreement.

(b) The Policy Documents Identified Clearly Substantiate That Policy Lending Was Explicitly Limited to Certain Enterprises

349. China asserts that the central, provincial and municipal policy documents do not substantiate that the policy lending subsidy was "explicitly limited" to the tire industry and argues that, on that basis alone, this Panel may rule Commerce's specificity determination "legally deficient on its face."[534]

350. China's argument misunderstands the basis for Commerce's specificity determination. As demonstrated by the NDRC Catalogue, the Chinese government planning documents on which Commerce relied did not target *only* the tire industry. The NDRC Catalogue identified projects in multiple industries, including the tire industry, to which lending would be directed.[535] Similarly, the provincial and municipal planning documents did not target solely the tire industry. For example, the Guiyang 11th Five-Year Plan lists GTC's radial tire project within the equipment manufacturing and auto parts industry. Also included within this plan is high-tech electronic communication products; the phosphorus, aluminum and coal industry; and the Chinese traditional medicine, tobacco, and food industry.[536]

351. Thus, the central, provincial and municipal policy documents each clearly substantiate that the various levels of government guided lending to a *group* of industries, which included the

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[532] *See, e.g.,* China First Submission, para. 218 (referring to the policy documents that Commerce identified as "legislation" within the meaning of Article 2.1(a) of the SCM Agreement).

[533] Article 2.1 of the SCM Agreement defines "certain enterprises" as including a group of industries.

[534] China First Submission, paras. 219-220; *see also* China First Submission, Exhibit CHI-69 (making similar arguments for the central, provincial, and municipal policy documents).

[535] *See NDRC Catalogue Translation 2* (listing projects as belonging to "encouraged industries" or "restricted industries" or "projects to be abolished") (Exhibit CHI-70).

[536] *Bridgestone NSA Supplement*, Exhibit 1 (Oct. 1, 2007) (Exhibit CHI-78).

OTR tire industry. Article 2.1 of the SCM Agreement defines "certain enterprises" to include a group of industries and permits a specificity determination based on a subsidy that is specific to a group of industries.

352. Additionally, China argues that the NDRC Catalogue cannot serve as a basis for a specificity determination because it lists 539 "encouraged projects" in "26 broad categories, spanning virtually the entire range of economic activity." The implication of China's claim is that the central planning documents targeted such a broad range of industries that there is no manner in which these policy documents can be understood as targeting specific industries. That is, China takes the position that the subsidies provided in these policy documents were generally available.[537]

353. While Commerce's specificity determination was based on the totality of the planning documents at all levels of government, not just the NDRC Catalogue, there can be no question that the national policy documents expressly encouraged lending for certain industries while *prohibiting* lending for other projects. Specifically, the NDRC Catalogue separates projects into three broad categories: "encouraged industries," "restricted industries," and "projects to be abolished."[538] From this, it is clear that the policy lending subsidy was not generally available. Specifically, Article 18 of the State Council Interim Provision states that:

> Investments are prohibited from being contributed to projects of the restricted category . . . No financial institution shall grant loans on such projects . . . .[539]

Additionally, Article 19 of the State Council Interim Provision states that:

> Investments are prohibited from being contributed to projects of the [abolished] category. All financial institutions shall stop various forms of credit granting supports to such projects, and take measures to recover the granted loans.[540]

354. It is important to note that the terms upon which the loans were provided from SOCBs to OTR tire producers are irrelevant to the specificity determination, and only pertinent in so far as they may establish that the loan conferred a benefit. China appears to conflate the two issues by arguing that SOCB loans to OTR tire producers could not have been specific because they were made at interest rates similar to those available to other borrowers.[541]

355. To the extent that the terms of the loans are considered at all relevant to a determination regarding whether SOCBs acted pursuant to industrial policies in lending to OTR tire producers,

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[537] China First Submission, paras. 226-229.

[538] *NDRC Catalogue Translation 2* (Exhibit CHI-70). The catalogue lists 539 encouraged projects in 26 categories, 190 restricted projects in 17 categories, and 399 abolished projects in 26 categories.

[539] Exhibit US-87.

[540] Exhibit US-87.

[541] China First Submission, paras. 171-173, 224.

it is important to look at the language of the policies themselves in assessing whether such loans reflect those policies. In particular, the policies themselves do not necessarily require banks to lend at preferential interest rates. Instead, the policies call upon the banks to make credit available to tire companies, and the policies instruct agencies to direct or allocate that credit to tire producers.

356. In short, the policies focus on stimulating the quantity of credit, or the availability of credit at all, rather than reducing the price of credit. The policies target certain industries for the direction of credit, and credit is expressly made unavailable to other industries.

(c) SOCBs Acted Pursuant to China's Laws, Plans, and Policies in Providing Policy Loans to the OTR Tires Industry

357. China asserts that "Commerce merely presumed that all of the loans that SOCBs extended to GTC were made pursuant to the legislation on which it relied for its finding of specificity."[542] China ignores the evidence on the record of the *OTR Tires* CVD investigation. The SOCBs acted pursuant to the policies summarized above in making their lending decisions. In two previous investigations – one on *CFS Paper from China* and another on *Lined Paper from China*, Commerce undertook a painstaking study of the operations of China's banking sector in order to determine the extent to which SOCBs followed government industrial policies in making their lending decisions. In the *OTR Tires* CVD investigation, Commerce relied upon these previous findings as well as additional evidence of record to determine that SOCBs do, in fact, act pursuant to industrial policies in making loans.

358. Examples of the positive evidence clearly substantiating that SOCBs lend in accordance with government industrial policies are listed below:

- China's Commercial Banking Law explicitly requires commercial banks to conduct their lending business under the guidance of the industrial policies of the State.[543]

- In 2006, the People's Bank of China reported that "[i]n active coordination with industrial policy," the Bank "enhanced dynamic assessment and monitoring of credit concentration and credit risks in key sectors, enterprises and areas, . . . [and] guided financial institutions to grant loans at a proper pace ... with a view to advancing the optimizing and upgrading of industrial structure and strategic adjustment of economic structure."[544]

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[542] China First Submission, para. 223.

[543] *See Council for Trade in Goods, Chairperson's Report, Transitional Review of China*, G/SCM/l21 (21 November 2007), at para. 5, submitted in *Bridgestone Pre-Prelim Comments*, Exhibit 1 (Nov. 28, 2007) (Exhibit US-95); *see also CFS CVD Final Decision Memorandum*, at 58-59 (Exhibit CHI-93).

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

- In 2007, officials from the People's Bank of China explained to Commerce that "it may be necessary for banks to heed industrial policies; banks may be taking on a greater risk if their customers use loans in a way that is inconsistent with industrial policies."[545] The Bank also explained that it holds seminars for officers of SOCBs where it expresses its views on industries in China and its "opinions on how credit should be guided."[546]

- Other bank officials interviewed by Commerce in 2007 confirmed that industrial policies are taken into account by SOCBs when making lending decisions.[547] For example, officials from the Bank of China explained that "industrial policy is one factor that the bank takes into account in assessing a company's total credit limit."[548] Similarly, the Bank of China's Global Offering in 2007 states that "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies."[549]

- In 2007, the Chairperson's report on the transitional review of China at the WTO noted that publicly available evidence and studies indicate "that state-owned bank lending practices continued to be heavily influenced by state industrial policies."[550]

- This finding was confirmed by independent financial experts interviewed by Commerce in 2007.[551] For example, one private financial expert explained that there are still levers of local government influence over the lending decisions of the bank branches, and this could be brought to bear on behalf of locally favored industries.[552]

359. As explained above, SOCBs in China do not lend consistent with commercial considerations and do not differentiate lending rates based on the credit risk presented by

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[545] *CFS GOC Verification Report* (Aug. 20, 2007), at 4, submitted in *OTR Tires CVD Petitioners' Pre-Prelim Comments*, Exhibit 5 (Nov. 29, 2007) (Exhibit US-89).

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

[547] *CFS GOC Verification Report* (Aug. 20, 2007), at 4, 11, 23, and 33, submitted in *OTR Tires CVD Petitioners' Pre-Prelim Comments*, Exhibit 5 (Nov. 29, 2007) (Exhibit US-89).

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

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

[550] *Council for Trade in Goods, Chairperson's Report, Transitional Review of China*, G/SCM/l21 (21 November 2007), at para. 5, submitted in *Bridgestone Pre-Prelim Comments*, Exhibit 1 (Nov. 28, 2007) (Exhibit US-81).

[551] *See CFS CVD Final Decision Memorandum*, at 56-57 (for a summary) (Exhibit CHI-93).

[552] *See CFS CVD Private Financial Experts Verification Report*, at 4 (Aug. 21, 2007), submitted in *OTR Tires CVD Petitioners' Pre-Prelim Comments*, Exhibit 6 (Nov. 29, 2007) (Exhibit US-92).

different borrowers. The primary means of differentiating among borrowers are not the rates at which loans are made, but whether or not credit will be available to a borrower at all and how much credit will be available. This is a natural result of the fact that most loans in China are already at rates near the government-set benchmark rate, and that the government floor on lending rates is not far below that benchmark.[553]

360. The record demonstrates that policies guiding banks to make credit available to particular industries, such as the tire industry, are effectuated through measures to ensure the quantity of credit available to these industries. This is apparent in the banks' own statements: the People's Bank of China "guided financial institutions to grant loans at a proper pace;"[554] the People's Bank of China briefs bank officers on "how credit should be guided;"[555] the Bank of China takes industrial policies into account "in assessing a company's total credit limit;"[556] and "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies."[557] The focus of the banks is thus consistent with the focus of the policies under which they operate: guiding credit to favored industries, rather than altering the rates at which credit is available to such industries.

361. For the reasons given above, positive evidence clearly substantiated Commerce's determination that the central, provincial, and municipal policy documents guided lending to specific industries, including the tire industry, while prohibiting lending to other industries. Accordingly, the Panel should find that Commerce's specificity determination with respect to policy lending in the *OTR Tires* CVD investigation was consistent with Article 2 of the SCM Agreement.

B. Commerce's Specificity Determination With Respect to the Provision of Land-Use Rights for Less Than Adequate Remuneration in the *LWS* CVD Investigation Was Consistent with Article 2 of the SCM Agreement

362. Commerce investigated land-use rights subsides in all four of the challenged CVD investigations. In the *CWP* CVD investigation, Commerce determined that China had not provided any such subsidies to the investigated producers. In the *LWRP* CVD investigation, Commerce determined that China provided subsidies to the investigated producers in the form of revenue forgone when China failed to collect the full contract price for land-use rights. In the *OTR Tires* CVD investigation, Commerce determined that China provided countervailable land-use rights subsidies pursuant to a policy to reform SOEs. Finally, in the *LWS* CVD investigation,

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[553] *CFS CVD Final Decision Memorandum*, at 68-70 (Exhibit CHI-93).

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

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

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

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

Commerce determined that China provided land-use rights subsidies to an investigated firm located in an industrial park.

363. Before this Panel, China only challenges Commerce's specificity determination for land-use rights in the *LWS* CVD investigation. Specifically, China argues that (1) the New Century Industrial Park does not meet the criteria for a "designated geographical region," (2) Commerce did not find that the alleged subsidy is only available to a subset of enterprises that obtained land-use rights within the industrial park, and (3) Commerce did not find that the alleged subsidy is limited to certain enterprises "within the designated geographical region" to the exclusion of companies that obtained land-use rights elsewhere in Huantai County.[558] China has failed to support these claims on a legal or factual basis, and the Panel should reject them.

1. Commerce's Specificity Determination for the Land-Use Rights Subsidy in the *LWS* CVD Investigation

364. In the *LWS* CVD investigation, Commerce determined that China's provision of land-use rights to one respondent, Zibo Aifudi Plastics Packaging Co., Ltd. ("Aifudi") was a countervailable subsidy. Commerce found this subsidy geographically specific because it was limited by a county to enterprises located in an industrial park within the county's jurisdiction. Commerce clearly substantiated its determination on the basis of positive evidence including submissions that Aifudi and the government made during the investigation and Commerce's verification findings.

365. As explained in Commerce's determination, Aifudi received industrial land-use rights from the Huantai County Municipal Government ("Huantai County").[559] This municipal government established the industrial park for the purpose of locating enterprises within its geographical area.[560] To locate enterprises within the industrial park, Huantai County provided the selected enterprises, including Aifudi, with industrial land-use rights.

366. Pursuant to Article 2.2 of the SCM Agreement, a subsidy is specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. As discussed above, Commerce determined that Huantai County created New Century Industry Park for the purpose of providing selected companies, including Aifudi, with land-use rights. Thus, Huantai County limited this land-use rights subsidy to enterprises located in a designated geographical region. Furthermore, Commerce confirmed that Huantai County provided land-use rights for the entire county as well as within the industrial park.[561] As a result, New Century Industry Park was a designated geographical region within the jurisdiction of

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[558] *See* China First Submission, paras. 279-301.

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

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

[561] *LWS CVD Final Decision Memorandum*, at 55 (Exhibit CHI-3); *LWS CVD Provincial and Local Government Verification Report*, at 8 (Mar. 4, 2008) (Exhibit US-79).

Huantai County. For these reasons, Commerce's geographic specificity determination was consistent with Article 2.2 of the SCM Agreement.

2. Contrary to China's Arguments, Commerce Correctly Determined that New Century Industry Park Was a "Designated Geographical Region"

367. China argues that Commerce acted inconsistently with Article 2.2 of the SCM Agreement in the *LWS* CVD investigation when it determined that New Century Industry Park was a designated geographical region. According to China, a designated geographical region must have its own economic and administrative identity, which China asserts the industrial park lacked.

368. China attempts to define the terms of Article 2.2 in an overly-restrictive manner, imposing significant new obligations by reading into that article terms and conditions that simply do not appear in the text. A proper interpretation of these terms demonstrates that New Century Industry Park constituted a designated geographical region within the meaning of Article 2.2 of the SCM Agreement. Moreover, even under China's restrictive interpretation, New Century Industry Park meets the definition of a designated geographical region.

369. The SCM Agreement does not define the terms "designated," "geographical," or "region." Consequently, interpretation of Article 2.2 of the SCM Agreement requires looking to the ordinary meaning of these terms. "Designate" is defined in relevant part as "point out, indicate, specify" or alternatively "call by a name or distinctive term; name, identify, describe, characterize."[562] "Geographical" is defined as "of, pertaining to, or of the nature of, geography"; and geography is defined in relevant part as "the subject matter of geography; (knowledge of) the features or arrangement of a region or a place, building, etc."[563] "Region" has multiple relevant definitions but the first such definition is "[a] large tract of land; a country; a definable portion of the earth's surface."[564]

370. Thus, the ordinary meaning of a designated geographical region is a "large tract of land" (region), "defined by the tract of land's feature or arrangement" (geographical), and "called by a name or described" (designated). The New Century Industry Park meets this definition. Commerce substantiated that Huantai County called by the name "New Century Industry Park" a large tract of land defined by that tract of land's arrangement in the county (*i.e.*, where it was

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[562] *New Shorter Oxford English Dictionary* (1993) (Exhibit US-95).

[563] *New Shorter Oxford English Dictionary* (1993) (Exhibit US-95).

[564] *New Shorter Oxford English Dictionary* (1993) (Exhibit US-95). Alternative relevant definitions include: "an area of more or less definite extent or character" or "a separate part of the world or universe" or "[a] place or condition with a certain character or subject to certain influences" or "an administrative division of a city or district" or "a space occupied by something."

physically located in the county).[565] Thus, New Century Industry Park is a "designated geographical region" within the meaning of Article 2.2 of the SCM Agreement.

371. While China presents more or less the same definition for "designated" and "geographical," China and the United States disagree as to the definition of "region" employed in Article 2.2 of the SCM Agreement. China argues that the ordinary meaning of "region" is "an economic or administrative subdivision."[566] As explained above, this is not the principal definition of "region," which instead is much broader and is not limited in the manner China suggests.

372. In support of its definition, China notes that Article 8.2(b) of the SCM Agreement provides that a subsidy to a disadvantaged region is non-actionable when, *inter alia*, the disadvantaged region is "a clearly designated contiguous geographical area with a definable economic and administrative identity." China argues that Article 8.2 and Article 2.2 of the SCM Agreement have a similar phrasing and purpose and, accordingly, the use of "definable economic and administrative identity" in Article 8.2 supports defining "designated geographical region" in Article 2.2 as "an area that has its own economic or administrative identity."[567] As an initial matter, the United States does not agree that individual provisions of the SCM Agreement have objects and purposes that are relevant to interpreting the text of the agreement. Instead, the text should be interpreted in light of the object and purpose of the entire agreement.[568] Furthermore, China's argument is illogical and, in fact, the text of Article 8.2 supports the U.S. definition of "region." If, as China argues, the drafters intended "region" in Article 2.2 of the SCM Agreement to mean "an administrative or economic subdivision," then in Article 8.2 the word "region" would have sufficed and the drafters would not have needed to add the additional limitation of "a definable economic and administrative identity" to a "disadvantaged region."

373. In any event, China does not explain what it means by "an economic or administrative subdivision." Certainly, New Century Industry Park was administratively distinct because there

[565] *See, e.g., LWS CVD Final Decision Memorandum*, at 14 (Exhibit CHI-3); *LWS CVD Provincial and Local Government Verification Report*, at 8 (March 4, 2008) (Exhibit US-79).

[566] In support of its argument, China posits that failing to limit "a designated geographical region" to "an economic or administrative subdivision" would result in every provision of land-use rights in China being viewed as geographically specific. China First Submission, para. 291. China's argument is incorrect because it ignores the requirement of Article 2.2 that the geographic region must be "designated," or "describe[d]," or "call[ed] by a name or distinctive term," which distinguishes it from any simple parcel of land. If the granting authority designates a geographical region (whether encompassing one or more parcels of land) and then grants access to a particular subsidy (whether land-use rights or other types of subsidies) to all enterprises within that region (whether one company or multiple companies), the subsidy would be specific to the relevant enterprises within the meaning of Article 2.2 of the SCM Agreement. Further, China's argument is contradicted by Commerce's determinations in the challenged investigations. Commerce examined land-use rights subsidies in three of the challenged investigations and only determined that the land-use rights subsidy in the *LWS* CVD investigation was geographically specific pursuant to Article 2.2 of the SCM Agreement.

[567] China First Submission, para. 288-289.

[568] *Vienna Convention*, Article 31(1).

is an administrative authority that oversees the park.[569] Additionally, firms located in the park pay administrative fees to cover basic infrastructure costs.[570] Similarly, the park was created to promote industrial activity in an undesirable part of the county and was thus, "economic."[571] For all these reasons, even under China's improperly narrow definition, New Century Industry Park was undoubtedly a "designated geographical region" within the meaning of Article 2.2 of the SCM Agreement.

3. Article 2.2 of the SCM Agreement Does Not Require a Finding That Only a Subset of Enterprises Obtained Land-Use Rights within the Industrial Park

374. China argues that Commerce's specificity determination for land-use rights in the *LWS* CVD investigation was inconsistent with Article 2.2 of the SCM Agreement because Commerce did not find that this subsidy was "'*limited to certain enterprises*' within the New Century Industry Park."[572] According to China, if a subsidy is available to all enterprises within a designated geographical region, it is not specific pursuant to Article 2.2 of the SCM Agreement. China misreads Article 2.2.

375. If, as China argues, the use of "certain enterprises" in Article 2.2 of the SCM Agreement means that finding specificity under that provision requires a finding that access to the subsidy was not available to all enterprises within the designated geographic region, then there is no reason for Article 2.2 to have been included in the SCM Agreement. Article 2.1(a) of the SCM Agreement provides that a subsidy "shall be specific" if access is "explicitly limit[ed]" to "certain enterprises." China would read Article 2.2 of the SCM Agreement to provide the same thing – that is, to require that a subsidy be explicitly limited to "certain enterprises" to be specific. In particular, China argues that the land-use rights subsidy must be limited to "certain enterprises" within New Century Industry Park, *i.e.*, a subset of enterprises within the park, to justify a specificity finding pursuant to Article 2.2.[573] Following this reasoning, the only difference between Articles 2.1(a) and 2.2 of the SCM Agreement is that, pursuant to the latter, the "certain enterprises" to which a subsidy is explicitly limited happen to be located within a designated geographical region within the jurisdiction of the granting authority. However, even if they were not located within a designated geographical region, the subsidy granted to them would nevertheless be specific pursuant to Article 2.1(a) by virtue of the explicit limitation. China's interpretation of Article 2.2 would render that provision redundant.[574] A fundamental

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[569] *LWS CVD Provincial and Local Government Verification Report*, at 10 (March 4, 2008) (Exhibit US-79).

[570] *LWS CVD Provincial and Local Government Verification Report*, at 12(March 4, 2008) (Exhibit US-79).

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

[572] China First Submission, para. 294 (emphasis added).

[573] China First Submission, para. 294.

[574] Put another way, China's suggested interpretation of Articles 2.1 and 2.2 of the SCM Agreement would allow a finding of specificity with respect to a group of enterprises within a province, for example, or a *subset* of all

tenet of treaty interpretation is that the 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."[575] Consequently, China's interpretation cannot be accepted.

376. Further, China's reading of Article 2.2 is incompatible with Article 8.2(b) of the SCM Agreement. That provision identifies as non-actionable "assistance to disadvantaged regions within the Territory of a Member given pursuant to a general framework of regional development *and non-specific (within the meaning of Article 2) within eligible regions* provided that" such assistance meets certain additional criteria.[576] Under China's reading of Article 2.2, if a subsidy provided to a particular region is non-specific within that region, then it is not specific pursuant to Article 2.2, and consequently it is non-actionable. If China's interpretation were correct, it would not have been necessary to require that assistance be non-specific within the region, because such assistance would already not be actionable under the SCM Agreement (by China's definition, it could not be found specific under Article 2.2). China's interpretation of Article 2.2 would render Article 8.2(b) a redundancy, and therefore is not permissible.

377. In this regard, it is also notable that Article 8.1(b) of the SCM Agreement refers to "subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below." This provision establishes that a subsidy could "meet all of the conditions provided for in [Article 8.2(b)]" – including the condition of being "non-specific (within the meaning of Article 2) within eligible regions" – and still be "specific within the meaning of Article 2." Article 8.1(b) of the SCM Agreement confirms that, contrary to China's understanding, the fact that a subsidy is available to all enterprises within a designated geographical region does not prevent a determination that such subsidy is "specific within the meaning of Article 2." Under China's reading of Article 2.2, Article 8.1(b) would make no sense. For this additional reason, therefore, the China's proposed interpretation of Article 2.2 must be rejected.

4. Article 2.2 of the SCM Agreement Does Not Require a Finding That No Enterprises Outside the Industrial Park Had Access to Similar Subsidies, Including Other Types of Land-Use Rights Subsidies

378. Lastly, China argues that Commerce acted inconsistently with Article 2.2 of the SCM Agreement by failing to find that the subsidy at issue was limited to "companies that obtained

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the enterprises within the New Century Industry Park, but *not* for the group of enterprises defined as all of those within the New Century Industry Park. Such a result is illogical and inconsistent with the text of Article 2.

[575] *Japan – Alcohol (AB)*, at 12.

[576] SCM Agreement, Article 8.2(b) (emphasis added) (footnote omitted). Pursuant to Article 31 of the SCM Agreement, Article 8 applied only for a period of five years following entry into force of the WTO Agreement.

land-use rights within the New Century Industrial Park, to the exclusion of companies that obtained land-use rights elsewhere in Huantai County."[577] China is mistaken.

379. In effect, China argues that Commerce was required to separately establish that both the financial contribution and benefit of the subsidy were geographically specific.[578] However, Article 2.2 references neither "financial contribution" nor "benefit." Instead, it references a "subsidy." Accordingly, the text does not require an investigating authority to break apart the subsidy into its component parts to determine whether the subsidy is geographically specific. This result is also supported by the structure of the SCM Agreement which requires an investigating authority first to determine whether a government has provided a financial contribution and benefit. It is only after both of these determinations that the SCM Agreement turns to the determination of whether the "subsidy" (not its component parts) is specific.

380. China argues that commercial leaseholders located outside the New Century Industry Park but within Huantai County pay lease rates to the County that are the same or lower than the rates paid by leaseholders within the Park. According to China, this means that access to the subsidy at issue is not limited to enterprises within the industrial park and thus is not specific under Article 2.2 of the SCM Agreement. China's argument must be rejected. As demonstrated in the record, the land-use rights subsidy at issue was used as an incentive to relocate producers to the New Century Industry Park and was tied to the level of investment within the park.[579] Therefore, the subsidy is unique and only available to enterprises investing within the park. The fact that Huantai County granted other types of land-use rights to other leaseholders for other purposes outside the industrial park is irrelevant to determining whether the particular subsidy at issue was only accessible to enterprises within the industrial park. In other words, enterprises that did not locate in the New Century Industry Park did not have access to the subsidy at issue, although they may have had access to other types of land-use rights subsidies outside the Park.

381. Under China's interpretation that the provision of similar types of financial contributions outside the designated geographic region precludes a finding of regional specificity, a loan guarantee program, for example, available to enterprises tied to locating within a designated geographical region would not be specific under Article 2.2 if the granting authority provided other loan guarantees tied to other conditions (or no conditions) elsewhere within its jurisdiction. Such an interpretation is inconsistent with the requirement, as evidenced by the reference to "a subsidy" in Articles 2.1 and 2.2, to conduct a specificity analysis for each subsidy at issue and not the subsidy's component parts, and such an interpretation would otherwise make it virtually impossible to find regional specificity.

382. Additionally, interpreting Article 2.2 of the SCM Agreement as requiring an investigating authority to find that the benefit was not available to any enterprise outside of the designated

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[577] China First Submission, para. 295.

[578] China First Submission, para. 297.

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

geographical region would be too restrictive and would enable circumvention of the subsidies disciplines. Under China's theory, if even one enterprise located outside the designated geographical region received a similar benefit (*i.e.*, paid a similar price for land-use rights), the subsidy would no longer be geographically specific. Thus, any government that provides a subsidy within a designated geographical region could easily avoid the subsidy disciplines simply by ensuring that at least one enterprise outside the geographical region received a similar benefit. Such an outcome is not required by the SCM Agreement, and interpreting Article 2.2 as requiring this outcome would be inconsistent with the Agreement's object and purpose to allow Members to fully offset injurious subsidies.

383. For the reasons given above, the United States respectfully requests that the Panel find that Commerce's specificity determination in the *LWS* CVD investigation was consistent with Article 2.2 of the SCM Agreement.

VIII. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH THE SCM AGREEMENT OR THE GATT 1994 IN THE CONCURRENT APPLICATION OF CVD AND AD MEASURES TO CERTAIN PRODUCTS FROM CHINA

384. In this dispute, China challenges the four AD measures and the four corresponding CVD measures on *CWP*, *LWRP*, *LWS*, and *OTR Tires* by arguing that imposing CVDs results in a "double remedy" when a Member is also imposing AD duties that have been calculated using normal value derived from a methodology based on surrogate, third-country values rather than actual Chinese prices or costs.[580] In fact, China advances the remarkable claim that, when applying trade remedies to China, a Member must *choose* between using the AD remedy and using the CVD remedy if it has found that China has not yet become a market economy for AD purposes and wants to calculate AD duties using a surrogate value methodology.

385. The requirement that a Member make a choice between the two remedies would effectively exempt Chinese products from being subject to both remedies, placing them in a more

[580] The United States recalls that, as set out in its preliminary ruling requests in Section II of this submission, the "measure" characterized by China as a "failure ... to provide legal authority for the US Department of Commerce to avoid the imposition of a double remedy" is not within the Panel's terms of reference and that, accordingly, it would be inappropriate for the Panel to make any findings in respect of this "measure." In any event, as the basis for China's "as such" claims on this "measure" appears to be identical to the basis that underlies China's "as applied" claims, the "as such" claims should be rejected for the same reasons.

The United States further notes that China also advances arguments under the heading "To the Extent That Commerce Has Legal Authority to Avoid the Imposition of Double Remedies in Parallel AD/CVD Investigations of NME Imports, But Only If Producers Present "Evidence" That "Subsidies Pass Through, Pro Rata, to U.S. Prices", U.S. Law Is Inconsistent with the Covered Agreements, Both As Such and As Applied." (China First Submission, heading to Section VI.F). Of course, China never identified such a "measure" either in its consultations request or its panel request. China appears to recognize that there is no such "measure" at issue in this dispute because it does not appear to ask for any findings and recommendations on this "measure." (*See* China First Submission, para. 468.). Nevertheless, the United States observes that this "measure" is not within the Panel's terms of reference and is therefore not an appropriate subject of analysis or findings and recommendation by the Panel.

favorable position than like products from all other WTO Members, at least until China has transformed into a market economy. This requirement is all the more striking because China's Accession Protocol, among the legal provisions overlooked by China, contemplates the concurrent application of both CVDs and AD duties based on a surrogate value methodology. China's Accession Protocol specifically provides for the use of such a methodology so that investigating authorities conducting *AD proceedings* would be able to overcome the difficulties in price comparability that stem from the nature of China's economy. China's Accession Protocol also specifically provides for China to be subject to *CVD proceedings* and recognizes that the nature of China's market may also in certain circumstances render prevailing terms and conditions in China unsuitable as benchmarks.

386. Given the remarkable nature of China's claim, it is perhaps not surprising that China offers little legal support for the claim in its First Submission. Instead, China spends considerable time describing its views on the logic and economic assumptions underlying the U.S. application of its trade remedy laws to China over the years, notwithstanding the irrelevance of this discussion to the issues raised in this dispute. In fact, China offers no discussion of any *WTO* legal provision for the first 24 pages of its 43-page section devoted to this double remedy issue.

387. Rather than follow China's approach, we begin our discussion below with the proper legal framework for examining China's claims in respect of the concurrent application of AD and CVD measures. Focusing on the WTO provisions that address – or, more precisely, do *not* address – this issue, we demonstrate that nowhere in the covered agreements is there support for China's remarkable claim. To the contrary, WTO rules expressly permit Members to take AD measures and to take CVD measures. Where Members intended to impose upon Members a choice between AD and CVD measures, as in situations of export subsidization, Members have done so *clearly*, consistent with the approach taken in predecessor agreements to the WTO Agreement. It cannot reasonably be disputed that no such *clear limitation* on this right of WTO Members exists in the WTO rules. This leads inexorably to one conclusion: that the United States did not act consistently with its WTO obligations by subjecting certain Chinese imports to CVDs concurrently with AD duties that were calculated not on the basis of a strict comparison with domestic costs and prices in China.

A. WTO Rules, Including China's Accession Protocol, Permit the Concurrent Application of CVD and AD Measures, Including AD Duties Not Calculated on the Basis of a Strict Comparison With Domestic Costs or Prices in China

388. WTO rules governing the imposition of AD and CVD measures contemplate two separate remedies to address the distinct harms of dumped imports and subsidized imports, respectively. Where the criteria for each remedy have been satisfied, a Member is permitted to impose duties to counteract each distinct harm up to a maximum level prescribed by the respective covered agreement. The sole limitation on the concurrent application of AD and CVD measures applies in certain circumstances of export subsidization. In light of this framework, where Members

have decided to include no further rules specifically limiting the concurrent application of these remedies, such a limitation cannot be implied from rules that address other aspects of AD and CVD proceedings.

1. The WTO Agreements Recognize That AD and CVD MeasuresAre Separate Remedies for Distinct Unfair Trade Practices

389. The WTO agreements and their predecessors have always recognized that the dumping and subsidization of imports, where they cause injury, are distinct unfair trade practices, to which Members are entitled to apply separate remedies.

390. As reflected in the text of the relevant legal provisions, AD and CVD regimes pursue different objectives. The AD rules generally compare prices at which a *company* sells products in the home market and in the export market to determine whether the price in the former exceeds the price in the latter. CVD rules, however, do not focus on *company* pricing decisions, but rather, on subsidies bestowed on products by *governments* or *public bodies*. Given this clear conceptual difference, it is not surprising that the multilateral trade rules have consistently treated AD and CVD measures separately.

391. Beginning with the signing of the GATT in 1947, separate rules have generally governed the AD and CVD proceedings conducted by GATT contracting parties and now WTO Members. Article VI:1 and VI:2 of the GATT 1994 permit the imposition of AD duties, up to the amount by which the normal value of the imported product exceeds its export price, in order to offset this difference in pricing. Nowhere in Article VI:1 or VI:2 is there any reference to subsidies or CVDs, still less any indication that they are relevant to the calculation of AD duties. Similarly, Article VI:3 of the GATT 1994 permits the imposition of CVDs, not in excess of the amount of the subsidy, in order to offset that subsidy. Nowhere in Article VI:3 is there any reference to dumping, nor any suggestion that the effect of the subsidies on costs or prices is relevant to the amount of CVDs that may be imposed.

392. The separate nature of the two remedies was carried over into the separate Tokyo Round AD Code and Subsidies Code, and subsequently into the Uruguay Round AD Agreement and SCM Agreement. Article 9.1 of the AD Agreement reiterates the discretion of the importing Member to impose an AD duty at any level up to the dumping margin:

> The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.

Article 19.2 of the SCM Agreement similarly provides for an importing Member to impose a CVD at any level up to the full amount of the subsidy:

> The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member.

393. Notwithstanding these provisions addressing the level of duties imposed to offset the particular harm–dumping or subsidization–neither Agreement speaks to the remedy, or level thereof, made available under the *other* Agreement. Nor does either Agreement speak to the level of remedies to be imposed in situations where there are parallel AD and CVD proceedings.[581]

394. The WTO agreements therefore continue to recognize that AD and CVD measures are separate remedies designed to address different kinds of harm, and that those remedies may be applied to the fullest extent of the dumping margin or subsidy, as relevant, regardless of the existence of parallel AD or CVD investigations.

2. The Sole Limitation on a Member's Concurrent Application of AD and CVD Measures is Found in Article VI:5 of the GATT 1994, Which Applies Only to Export Subsidization

395. GATT Contracting Parties further reinforced the separate nature of the remedies available from AD and CVD proceedings by providing for only one instance—set forth in Article VI:5 of the GATT 1994 —in which both remedies may not be applied to the full amount provided for in Article VI of the GATT 1994.

(a) GATT Article VI:5 does not permit imports to be subject to AD and CVD measures for the "same situation" of dumping and export subsidization, but this restriction does not apply to domestic subsidies

396. Article VI:5 of the GATT 1994 provides:

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

397. Article VI:5 makes clear, first, the understanding of Members that, as a general matter, AD and CVD measures could be applied concurrently to the same product. It is only because of

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[581] We discuss in Section VIII.B.2, below, the sole and limited provision addressing circumstances of AD and CVD remedies in parallel investigations.

this general understanding that the text in Article VI:5—addressing the specific circumstance of such concurrent application in the context of export subsidization—becomes necessary. Second, by its terms, Article VI:5 applies only to the circumstance in which a Member conducting concurrent AD and CVD proceedings on the same product finds "the same situation of dumping or export subsidization." Article VI:5 provides that the importing Member can impose either AD duties or CVDs, but not both, to address this same situation. In so providing, Article VI:5 appears to contemplate that, at least under some circumstances, an export subsidy may result in a lower price for an exported product than might otherwise be the case. Therefore, in such cases, Article VI:5 does not allow the importing Member to impose AD duties to address the portion of the dumping margin that is presumed to be attributable to a price differential that has been caused by an export subsidy and would be remedied by imposition of CVDs to offset the export subsidy.

398. The context of Article VI:5 confirms its limited application to export subsidization as distinct from other types of subsidization. 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*. (Footnote omitted) (Emphasis added).

399. In defining the term "countervailing duty," Article VI:3 states that CVDs offset subsidies granted in respect of the "manufacture, production or export" of a product. Similarly, Article VI:3 caps the amount of a CVD to the amount of the subsidy bestowed in respect of the "manufacture, production or export" of the product concerned. Thus, the language in Article VI:3 reveals that Members were aware that subsidies could be provided in respect of the manufacture, production, *or* export of a product, which confirms that the term "export subsidization" in Article VI:5 specifically refers to subsidies provided in respect of the exportation of a product and does not encompass subsidies provided in respect of the manufacture or production of a product.

400. We have shown that the Article VI:5 prohibition applies only to situations of export subsidies. Nothing about this expressly limited scope of Article VI:5 changes just because an investigating authority develops a specific methodology to address difficult circumstances of price comparability as in countries whose economies do not fully operate on market principles. *Ad* Note 2 to Article VI:1 provides:

> It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are

> fixed by the State, special difficulties may exist in determining price comparability for the purposes of [Article VI:1 of GATT 1994], and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

401. This *Ad* Note, added to the GATT in 1955,[582] recognizes that an investigating authority conducting an AD proceeding may need to look beyond the exporting country to find appropriate prices for comparison with prices in the importing country. Notably, the inclusion of this provision was not accompanied by a modification—to Article VI:5 or to any other provision in the GATT—that required the offsetting of the CVD against the AD duty, or vice versa, in cases of concurrent investigations on the same product. Therefore, the offsetting requirement in Article VI:5 applies exclusively to export subsidization, without regard to the AD methodology used by an investigating authority pursuing concurrent investigations.

402. As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members considered when it would be appropriate to constrain Members' resort to the concurrent application of AD and CVD remedies, and agreed that it would be appropriate only where imposing AD duties together with CVDs would compensate for "the same situation of dumping and export subsidization." Members clearly did not agree that any other circumstances warranted a restriction on the concurrent application of AD and CVD remedies. If they had, they would have provided so explicitly, as they did in the case of Article VI:5.

(b) Article 15 of the Tokyo Round Subsidies Code Confirms That the Only Limitation on Concurrent AD and CVD Remedies Is Found in Article VI:5 of the GATT 1994

403. We have demonstrated in the previous section that Article VI:5 provides the sole limitation on concurrent application of AD and CVD remedies. Article 15 of the Tokyo Round Subsidies Code provides further evidence that parties to the Code considered that no other provision in the GATT 1947 contained such a requirement. By extension, no other provision in the GATT 1994 contains such a requirement.

404. Article 15 of the Tokyo Round Subsidies Code is particularly relevant here because it shows that the precise issue now being raised by China – whether to require a Member to choose between the AD and CVD remedy where the methodology used to calculate the dumping margin does not use domestic prices or costs of the exporting party – is not new. Rather, it is an issue that has arisen in the past, and parties to the Code addressed it expressly.

405. Article 15, entitled "Special Situations," provided, in relevant part:

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[582] *See Guide to GATT Law and Practice* (1995), vol. 1, p. 228.

> 1. In cases of alleged injury caused by imports from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1, point 2) the importing signatory may base its procedures and measures either
>
> (a) on this Agreement, or, alternatively
>
> (b) on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

406. As discussed above, the note to Article VI of the GATT 1947 referenced in Article 15.1 of the Tokyo Round Subsidies Code described countries that "ha[d] a complete or substantially complete monopoly of its trade and where all domestic prices [were] fixed by the State." Under Article 15 of the Tokyo Round Subsidies Code, where imports from such a country were alleged to have been causing injury by virtue of both subsidized imports and dumped imports, concurrent imposition of AD and CVD measures was not permitted. The importing signatory was required to choose which remedy it would use to address injury caused by those imports.

407. Had such an "either-or" choice been required under other provisions of the GATT 1947 or the Tokyo Round Codes, Article 15 of the Subsidies Code would have been superfluous. Notably, Article 15 of the Tokyo Round Subsidies Code was dropped when the Uruguay Round agreements were negotiated. The texts of the WTO agreements contain no reference to the concurrent imposition of AD and CVD measures, other than in the circumstances of export subsidization expressly addressed by Article VI:5 of the GATT 1994. The existence of a provision in the Tokyo Round Subsidies Code specifically prohibiting the concurrent application of AD and CVD measures to certain countries, followed by the disappearance of that provision in the successor SCM Agreement, demonstrates that such a prohibition no longer exists and reinforces the presumption, created by the express limitation in Article VI:5 itself, that WTO Members never agreed on such a prohibition.

408. In *US – Underwear*, the Appellate Body reached a similar conclusion with respect to a provision that had appeared in a predecessor agreement but that was absent from the relevant WTO agreement. In that dispute, Costa Rica challenged the retroactive application by the United States of a temporary safeguard measure under the Agreement on Textiles and Clothing (ATC). The Appellate Body noted that the ATC contained no provision on retroactivity, unlike its predecessor, the Multifibre Arrangement (MFA), which contained a provision expressly permitting the backdating of the effective date of a restraint measure. From this, the Appellate Body reached the following conclusion:

> We believe the disappearance in the *ATC* of the earlier *MFA* express provision for backdating the operative effect of a restraint measure, strongly reinforces the presumption that such retroactive application is no longer permissable. This is the

> commonplace inference that is properly drawn from such disappearance. We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen.[583]

409. Through these developments, it is first evident that the issue of a potential overlapping remedy has been addressed head-on when deemed necessary. In particular, Members have not taken the view that the GATT 1994, the AD Agreement, the SCM Agreement or their predecessors already requires Members to choose between imposing AD or CVD measures when an importing Member uses a measurement methodology that is not based on domestic prices or costs of the exporting Member. Instead, where the requirement to make a choice was intended, an explicit provision was adopted for that purpose. Second, it is equally evident that, in the WTO agreements, Members decided that it was not appropriate to retain in the new agreements a restriction on the right to make full use of the AD and CVD remedies when the importing Member uses a measurement methodology that is not based on the domestic prices or costs of the Member under investigation.

3. Nothing in China's Accession Protocol Requires an Importing Member to Choose Between the Application of a CVD and an AD Duty Not Based on a Strict Comparison with Prices or Costs in China

410. As demonstrated above, none of the provisions of the covered agreements examined so far entitle China to the limitation it seeks on a Member's right to pursue AD and CVD remedies concurrently. We turn in this section to a consideration of China's Accession Protocol. China's Accession Protocol makes clear that Members, including China, contemplated the concurrent application of CVD and AD measures calculated on the basis of a surrogate value methodology without any limitation on the use of CVDs.

411. The provisions directly relevant to this issue are set forth in Part I, paragraph 15 of China's Accession Protocol. The chapeau to paragraph 15 makes clear that the rules contained therein were negotiated with both AD and CVD proceedings in mind.[584] The chapeau expressly references both types of proceedings in the same sentence, and cites to Article VI of the GATT 1994 as well as the Anti-Dumping Agreement and the SCM Agreement. The chapeau then explains that the pre-existing rules set forth in the GATT 1994, the Anti-Dumping Agreement and the SCM Agreement, "shall apply" in Members' AD and CVD proceedings involving

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[583] *US – Underwear (AB)*, pp. 14-15.

[584] The chapeau to paragraph 15 of China's Accession Protocol provides:

> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following . . ..

imports of Chinese origin "consistent with" the additional rules set forth in several subparagraphs below.

412. With regard to AD investigations, paragraph 15(a) provides as follows:

> In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

413. The additional rules applicable in CVD proceedings involving imports from China are set forth in paragraph 15(b), which provides as follows:

> In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then 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. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

414. Thus, in paragraph 15(a) of its Accession Protocol, China agreed that Members, when determining price comparability in AD proceedings involving imports from China, have the right to use special measurement methodologies that are not based on a strict comparison with domestic prices or costs in China. In other words, Members may calculate normal value without using domestic prices or costs in China. Paragraph 15(b) makes clear that Members also have the right to apply the WTO's CVD rules to imports from China. Having set out the right of

Members to apply AD duties on the basis of non-Chinese costs or prices, and the right of Members to apply CVDs, paragraph 15 imposes no limits on the concurrent application of both remedies.

415. Furthermore, paragraph 15(c) of the Protocol contemplates a Member making both remedies available to industries injured by imports from China:

> The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

By requiring the notification of *both*, this paragraph recognizes that one Member may maintain an AD methodology under paragraph 15(a) that is "not based on a strict comparison with domestic prices or costs in China " *and* a CVD methodology under paragraph 15(b) for using benchmarks outside China. The fact that a Member may maintain provisions for both AD and CVD investigations, and be required to notify them to the WTO, demonstrates that the drafters of the Protocol understood that such investigations could be conducted concurrently. Given this recognition, the absence of any provision in China's Accession Protocol limiting the concurrent application of AD and CVDs must be understood to mean that no such limitation exists.

416. Paragraph 15 of the Protocol therefore contemplates that Members might use the AD remedy, the CVD remedy, or both, including specifically the AD remedy based on an NME methodology and the CVD remedy based on benchmarks outside of China.

417. Our discussion has shown that GATT and WTO rules have generally placed no limitation on a Member's ability to impose AD duties and CVDs to the fullest extent permitted under the covered agreements. Where Contracting Parties or Members did want to restrict the right to make full use of both remedies, such a restriction has been unambiguous and explicit about the particular circumstances to which that restriction applies. This has included imposing on each Subsidies Code signatory the obligation, when addressing injurious imports from countries with a State monopoly of trade, to select whether it would pursue an AD "or, alternatively," a CVD remedy. This obligation was not included in either the SCM Agreement or China's Accession Protocol, both of which were negotiated over a period of time including when the Code was in force among several future Members. In these circumstances, the failure to explicitly restrict Members' resort to AD and CVD remedies concurrently in the current rules, including China's Accession Protocol, can mean only that Members retain such right.

B. The United States Did Not Act Inconsistently With the SCM Agreement or the GATT 1994

418. China contends that the U.S. imposition of a so-called double remedy is inconsistent with certain provisions of the SCM Agreement and with Article I:1 of the GATT 1994.[585] As we demonstrate below, China fails to establish an inconsistency with any of these provisions because it misunderstands the applicability of those provisions to the measures at issue in this dispute. Furthermore, China's failure to establish the existence of a double remedy "in all cases" where Commerce applies CVDs concurrently with AD duties calculated on the basis of an NME methodology necessarily means that the fundamental predicate upon which China's claims are based is incorrect.

1. Article 19.4 of the SCM Agreement

419. China argues that the imposition of concurrent CVDs and AD duties calculated under the NME methodology was inconsistent with Article 19.4 of the SCM Agreement because the AD duties are, in fact, really CVDs, so that when both sets of duties are taken together, they are in excess of the amount of subsidy found to exist.[586] Because China does not contest the fact that the CVDs, that is, the duties imposed pursuant to the four CVD investigations at issue in this dispute, do not exceed the amount of the subsidy found to exist in those investigations, China's claim should be rejected.[587]

420. Article 19.4 of the SCM Agreement provides:

> 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.

421. A "countervailing duty" is defined in the SCM Agreement as "a special duty levied *for the purpose of offsetting any subsidy* bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994" (emphasis added). Article VI:3 of the GATT 1994 provides, in relevant part: "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" (emphasis added).

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[585] China advances no claim under the AD Agreement.

[586] China First Submission, para. 375.

[587] Although China does contest various aspects of Commerce's subsidy findings, see Sections III-VI of this submission, the basis for China's claims of inconsistency with Article 19.4 and 19.3 in respect of the imposition of a so-called "double remedy" is separate from its concerns discussed in previous sections of this submission. China's argument here is *not* premised on a finding of inconsistency on the claims discussed above. Rather, China submits that, even where the U.S. CVDs have been calculated in accordance with the SCM Agreement, the inconsistency with Article 19.4 and 19.3 derive from its view that the United States "offset[s subsidies] through the manner in which it calculates anti-dumping duties under its NME methodology." (China First Submission, paras. 376 and 380.)

422. The AD duties calculated on the basis of Commerce's non-market methodology are levied to offset *dumping* of imported products that have caused injury. As a result, these duties do not fall within the definition of "countervailing duty" under the SCM Agreement and Article 19.4 does not apply. The fact that products from a transforming economy were the subjects of these investigations did not change the fundamental purpose of the duties subsequently imposed. The non-market economy methodology was used by Commerce, as expressly provided for in China's Accession Protocol, in order to overcome difficulties in price comparability in the calculation of the dumping margin given the nature of China's economy. This is confirmed by the chapeau to paragraph 15(a) of China's Accession Protocol, which makes clear that those rules address Members' actions "[i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement." That part of the *methodology* used to calculate normal value rejects home market prices and costs due to broad distortions in a non-market economy does not somehow transform the *AD duty* itself into a CVD. Therefore, notwithstanding China's attempts to cast it otherwise, the NME methodology used by Commerce is clearly a tool in furtherance of arriving at an *AD duty*. An AD duty, whether or not resulting from the application of a surrogate value methodology and a comparison of normal value with export price, is not subject to Article 19.4 of the SCM Agreement.

423. As can be seen, China does not dispute that the level of CVDs – properly understood – found by Commerce in each investigation before the Panel does not exceed the amount of the subsidy found to exist in that investigation. Consequently, consistent with Article 19.4 of the SCM Agreement, the United States has not levied CVDs on imports from China that exceed the amount of the subsidy "found to exist" in the respective investigations.

2. Article 19.3 of the SCM Agreement

424. China argues that the concurrent application of AD duties based on a surrogate value methodology and CVDs on products imported from China is inconsistent with Article 19.3 of the SCM Agreement. According to China, the AD duties and the CVDs, taken together, are in excess of the "appropriate amounts" of those duties.[588] China explains that the "appropriate amount" of CVDs can be "no greater than the amount needed to offset the subsidy," and that the amount of CVDs imposed by the United States was excessive because the subsidies in question were also offset by the AD duties imposed.[589] However, because China does not contest the fact that the CVDs – that is, the duties imposed pursuant to the four CVD investigations at issue in this dispute – do not exceed the amount of the subsidy bestowed upon each exporter,[590] China's claim has no merit.

425. Article 19.3 provides, in pertinent part:

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[588] China First Submission, para. 380.
[589] China First Submission, para. 383.
[590] See footnote 588 of this submission.

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall 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, 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.

426. Article 19.3 requires that a "countervailing duty" be levied "in the appropriate amounts in each case." As the rest of the first sentence of this provision makes clear, the subject of this sentence is how duties should be levied in a situation where multiple sources are found to have been subsidized and causing injury. Because each source may have been subsidized to varying degrees, and CVDs may be no greater than the amount of the subsidy found to exist,[591] the "appropriate amounts" that may be levied under Article 19.3 are those amounts calculated for each source in the CVD investigation.

427. Again, as in the case of Article 19.4, the basis for China's claim under Article 19.3 *of the SCM Agreement* appears to be that the *AD duties* imposed in the four AD investigations are actually CVDs in disguise, and that the sum of these duties exceeds the "appropriate amounts" in the CVD investigations. As discussed above, China's attempts to squeeze the AD duties at issue in this dispute into the definition of "countervailing duty" under the SCM Agreement are unavailing. In arguing otherwise, China essentially seeks to deny the United States its right to levy AD duties up to the margin of dumping under the AD Agreement and CVDs up to the amount of the subsidy under the SCM Agreement. The fact remains that China does not contest that the duties established by Commerce in the four CVD investigations were set at the rates calculated for each source in the course of those investigations. Therefore, the United States did not act inconsistently with Article 19.3 of the SCM Agreement.

3. Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994

428. China argues that, because the United States acted inconsistently with Article 19.4 and 19.3 of the SCM Agreement, it has also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994. China provides no other basis for its claims under Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994. We demonstrated above that China's claims under Article 19.4 and 19.3 fail. Accordingly, its consequential claims under Articles 10 and 32.1 of the SCM Agreement and Article VI of the GATT 1994 also fail.

4. Article I:1 of the GATT 1994

[591] Article 19.4 of the SCM Agreement.

429. As discussed above, according to China, the United States "inherently" imposes a so-called double remedy on Chinese products by virtue of the concurrent application of AD duties calculated on the basis of a surrogate value methodology and CVDs. China identifies two aspects of the dumping margin calculation performed by Commerce that, in China's view, reflect an effort by the United States to avoid the imposition of such a double remedy when applying AD and CVD measures simultaneously to products originating in market economies. In so doing, China argues, the United States accords to products from market economies an "advantage" that is not accorded China and therefore acts inconsistently with Article I:1 of the GATT 1994.

430. China's claim is without merit. China overlooks the fact that, in respect of the dumping margin calculation, Commerce applies the same rules to all imported products, regardless of country of origin. Moreover, a careful reading of China's arguments makes clear that the essence of China's complaint under Article I:1 of the GATT 1994 is that Commerce, when determining normal value, used a method that was not based on a strict comparison with costs and prices in China. Because this method is specifically contemplated under the applicable WTO rules, it is not precluded by Article I:1. In simple terms, the United States does not accord an "advantage" to products from market economy countries because, while the AD analysis for market and non-market economies might differ, both analyses are consistent with the relevant agreements.

431. We note at the outset that China appears to make claims under Article I:1 of the GATT 1994 in respect of two categories of measures: (1) "as applied" claims relating to the four AD and four CVD determinations at issue in this dispute, and (2) "as such" claim relating to the "measure" China refers to as a "failure . . . to provide . . . legal authority for the US Department of Commerce to avoid the imposition of a double remedy."[592] With regard to the "as applied" claims, China has failed to substantiate this claim because it has not identified "like products" to which the alleged "advantage" is applied.[593] If like products in other AD and CVD investigations have not been accorded the "advantage" claimed by China, then the fact that the Chinese products in the investigations at issue did not receive that "advantage" would not give rise to an as applied inconsistency with Article I:1.

432. With regard to the "as such" claim, we note that in Section II.A of this submission, the United States has requested two preliminary rulings because the alleged "measure" is not within the Panel's terms of reference and does not constitute a "measure" subject to dispute settlement. Nevertheless, the United States continues its discussion of China's claim under Article I:1 below because China's claims fail even aside from the pending preliminary ruling requests.

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[592] *See* China First Submission, para. 468(j) and (k).

[593] China states in its First Submission that, "[i]n any investigation of the same like products from a country that the United States designates as a market economy, Commerce would apply the policies and practices identified in Section VI.G.1 above to avoid the imposition of a double remedy." (Para. 427) What Commerce *would* do in respect of a like product is speculation on the part of China, nor does it explain how an advantage conferred on one product is not accorded the like product from another Member in the *application* of a measure.

(a) With Respect to the Aspects of the Dumping Margin Calculation Cited by China, the United States Applies the Same Rules to Products from Market Economies as it Does to Products from Economies That Are Not Operating on Market Principles

433. China refers to two aspects of Commerce's dumping margin calculation that allegedly discriminate against imports from China. The first is Commerce's refusal to deduct CVDs in determining export price. The second is Commerce's refusal to add subsidies to a producer's cost of production. China contends that Commerce refuses to make these adjustments in AD proceedings involving products from market economy countries, but that it makes these adjustments in proceedings involving imports from non-market economy countries.[594]

434. China's contention is simply incorrect. As to these two aspects of the calculation of the dumping margin, Commerce treats products from China no differently than it treats products from other Members.[595] Just as in an AD proceeding involving a product from a market economy, Commerce would not deduct CVDs in calculating the export price of a product from China, and did not do so in any of the four AD proceedings at issue in this dispute. China has presented no evidence suggesting otherwise.

435. Similarly, when determining cost of production in cases involving imports from market economy countries, Commerce has declined requests of interested parties to add to the cost of production the amount of subsidies actually received by the producer.[596] Again, Commerce did not add the amount of subsidies actually received to the cost of production of any Chinese producer in the four AD investigations at issue in this dispute. Nor does China contend that Commerce did so.[597]

436. Indeed, it appears that it is precisely because China recognized that it receives identical treatment with respect to requests for the deduction of CVDs from export price and requests for the addition of the full amount of subsidies to the cost of production, that China has avoided

[594] China First Submission, paras. 405-417.

[595] It is ironic that China's complaint in this regard serves to highlight that Commerce consistently has refrained from imposing a double remedy by refusing to make these adjustments, no matter the country of origin of the merchandise. *See U.S. Steel v. United States*, 15 F. Supp. 2d 892 (CIT 1998) (Exhibit US-90); *AK Steel v. United States*, 988 F. Supp. 594 (CIT 1997) (Exhibit US-91).

[596] *See* Tool Steel from the Federal Republic of Germany, 51 Fed. Reg. 10071, 10072 (Mar. 24, 1986) (Exhibit CHI-127).

[597] China does argue that, "[f]rom a standpoint of the potential double remedy, Commerce's NME methodology *has the same effect as* adding subsidies to a producer's cost of production in a market economy investigation." (China First Submission, para. 412 (emphasis added).) Of course, having *the same effect* as adding subsidies to a calculation is quite different from actually taking the amount of subsidies received by a producer and adding that amount to a cost of production. China, not surprisingly, emphasizes the former while correctly avoiding any suggestion that Commerce did the latter. In any event, the premise of China's argument is incorrect because, as explained in sub-section 5 below, Commerce's NME methodology does not have the same effect as adding subsidies to a producer's cost of production.

basing its MFN claim specifically on these two aspects of the dumping margin calculation. Instead, China was forced to formulate a more general label for the actions of Commerce with respect to these two aspects of the margin calculation – the so-called "Avoid[ance of] the Imposition of a Double Remedy"[598] – in order to attempt to bolster its argument under Article I:1 of the GATT 1994. Whatever label is used, however, it is clear that no advantage is given to products from Members with market economies that is not given to products from China in respect of these two aspects of the margin calculation.

437. China, not satisfied with this equal treatment, now seeks an advantage not available to any other Member, namely, a commitment by the United States not to avail itself of the two separate and distinct remedies of AD and CVD where the conditions to impose both remedies have been satisfied. Rather than upholding the most-favored nation obligation, accepting China's claim would place products of other Members—which do face both sets of remedies in those circumstances—in a disadvantageous position *vis-a-vis* Chinese products in the U.S. market. Put simply, what China is seeking is special treatment, not most-favored nation treatment.

(b) Article I:1 of the GATT 1994 Does Not Apply to Actions That Are Not Inconsistent With Article VI of the GATT 1994, the AD Agreement, or the SCM Agreement

438. In any event, we demonstrate below that China's claim is based on a misunderstanding of the relationship between, on the one hand, the WTO rules governing a Member's imposition of AD and CVDs and, on the other hand, a Member's MFN obligation. China's complaint glosses over the unsurprising fact that, because they originate in an economy with continuing significant levels of State interference in the operation of the domestic market, Chinese products pose methodological challenges to investigating authorities trying to determine costs and prices in connection with those products. The nature of China's economy thus requires investigating authorities to develop mechanisms that will allow them to make those necessary determinations, as recognized in China's Accession Protocol. Such methodological difficulties, by definition, do not exist in the context of market economies. Therefore, by attempting to draw comparisons with approaches followed for products from market economies, China compares "apples to oranges" and complains of a difference in treatment effectively mandated by a proper application of WTO rules on AD and CVD.

439. Article I:1 of the GATT 1994 provides:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in

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[598] China First Submission, heading to Section VI.G.1.

> connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

440. At the same time, a number of WTO rules explicitly recognize that, in the context of AD and CVD proceedings, a Member may—and in some circumstances must—accord certain treatment to products from one Member that may not be accorded to like products from another Member. For example:

- Article VI:2 and VI:3 of the GATT 1994[599]: provide for the imposition of AD and CVDs, as a result of which the duties imposed on a product from Member X may differ from those imposed on the like product from Member Y.

- Paragraph 2 of the *Ad* Note to Article VI:1 of the GATT 1994: recognizes that an investigating authority may not be able to rely on a "strict comparison with domestic prices" when determining a dumping margin for products from a Member with "a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State." In other words, for products from certain Members but not others, an investigating authority may employ a different methodology for identifying normal value even where prices exist in the exporting market.

[599] Article VI:2 and VI:3 of the GATT 1994 provide:

> 2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.
>
> 3. 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.

- Article 2.2 of the AD Agreement[600]: provides that an investigating authority may resort to constructed normal value, *inter alia*, because of a "particular market situation ... in the domestic market of the exporting country." As a result, in a particular investigation, dumping margins for exporters from Member X may be based on constructed normal value, whereas those for exporters from Member Y may be based on actual prices in the domestic market.

- Article 14(d) of the SCM Agreement: in the context of a CVD investigation, requires that the investigating authority determine, *inter alia*, the government's provision of goods at less than adequate remuneration "in relation to prevailing conditions for the good...in the country of provision." As discussed above,[601] this determination may be made by reference to a benchmark in a market *other than* the country of provision. This may result in the use of an in-country benchmark when assessing the benefit conferred by a financial contribution in Member X, but the use of an external benchmark when making the same assessment with respect to Member Y.

- Article 27.10 of the SCM Agreement: requires that CVD investigations on products from developing country Members be terminated if the subsidies or volumes of exports are below a given *de minimis* level.

- Paragraph 15(a)(ii) of China's Accession Protocol: recognizes that an investigating authority may determine a margin of dumping through a "methodology that is not based on a strict comparison with domestic prices or costs in China" if producers under investigation cannot establish that market conditions prevail in the respective industry. As a result, without regard to how the price comparison is conducted with respect to products from other Members, including through the use of actual prices in the domestic market, this provision contemplates an investigating authority's resort to prices and costs outside China when determining a margin of dumping for Chinese products.

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[600] Article 2.2 of the AD Agreement provides:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits. (footnote omitted).

[601] *See* Section IV, *supra*.

- Paragraph 15(b) of China's Accession Protocol: recognizes that an investigating authority may resort to benchmarks outside China where "there are special difficulties in the application" of the guidelines in Article 14(a)-(d) of the SCM Agreement. As in the case above of Article 14(d) of the SCM Agreement, this may result in the use of an external benchmark when assessing the benefit conferred by a financial contribution in China, but the use of an in-country benchmark when making the same assessment with respect to another Member.

441. Thus, various provisions of the WTO agreements provide for situations in AD and CVD proceedings where products from one Member may be treated differently from those of another Member, without contravening the obligation in Article I:1 of the GATT 1994. The proper application of each of those provisions could result in differential treatment that takes the form, for example, of the level of duties, the method of calculating normal value in AD investigations, or the method of determining the benefit in CVD investigations. Given the explicit authorization for such actions, it is clear that these actions, where they conform to the requirements of those other WTO provisions, are not inconsistent with Article I:1.[602]

442. Any other approach would effectively render every application of these and similar provisions of the Anti-Dumping Agreement, SCM Agreement and China's Accession Protocol an MFN violation and would be an interpretation of the WTO Agreement that is contrary to the principle of *effet utile*.[603] Therefore, where WTO AD and CVD rules specifically contemplate the possibility of treating like products from different Members differently, Article I:1 of the GATT 1994 does not prohibit the differential treatment resulting from a proper application of those rules.

(c) Article I:1 of the GATT 1994 Is Inapposite Because China's Accession Protocol Expressly Permits the Action About Which China Complains

443. In the light of this proper understanding of the relationship between Article I:1 and those WTO AD and CVD rules that specifically contemplate the possibility of treating like products from different Members differently, China's claim under Article I:1 cannot succeed. China's claim centers on the erroneous proposition that the methodology used by Commerce to calculate AD duties on products from China—namely, a methodology not based on a strict comparison with costs and prices in China—necessarily serves to capture subsidization *in addition to* dumping in the resulting dumping margin and therefore makes the concurrent application of

[602] As the GATT panel on *Swedish Anti-Dumping Duties* stated, "If the low-cost producer is actually resorting to dumping practices, he foregoes the protection embodied in the most-favored nation clause." Para. 8, L/328, adopted Feb. 26, 1955.

[603] *See Canada – Dairy (AB)*, para. 133 ("The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.").

CVDs a double remedy.[604] China further alleges that because Commerce's NME methodology is not used in cases involving products from market economies, Commerce is able to avoid such a double remedy against those products.[605]

444. As discussed above, paragraph 15(a) of China's Accession Protocol recognizes the right of Members to use "a methodology that is not based on a strict comparison with domestic prices or costs in China" when "determining price comparability under Article VI of the GATT 1994 and the AD Agreement." The explicit recognition of a Member's right to use such a methodology, with no corresponding prohibition on the application of CVDs, reflects the considered judgment of Members that no double remedy results whenever a Member applies that methodology in conjunction with CVDs. Furthermore, having pursued an approach to price comparability expressly contemplated by China's Accession Protocol – an approach that is necessarily inapplicable in respect of market economies – the United States did not act inconsistently with Article I:1 of the GATT 1994.

5. In Any Event, China Has Failed to Demonstrate the Theoretical Premise of Its Claims of WTO-Inconsistency, Namely, the Existence of a So-Called Double Remedy

445. We have demonstrated above that each of China's various claims under the SCM Agreement and the GATT 1994 fails based on the terms of the legal provisions that underlie those claims. However, each of these "as such" and "as applied" claims also rests on a common and faulty theoretical premise, that is, that a so-called double remedy *inheres* in the concurrent application of AD duties calculated using a methodology not based on a strict comparison of domestic costs and prices in China and CVDs.[606] China has failed even to demonstrate that this theoretical premise is valid. As a result, there is no theoretical basis for China's claims, even aside from the fact that there is no textual basis for China's claims in the covered agreements. China's claims of inconsistency, as such and as applied, with provisions of the SCM Agreement and the GATT 1994 must all be rejected.

446. China's argument as to the existence of a double remedy, as set out in its First Submission, while seemingly easy to comprehend, is simplistic in its analysis. We understand China's argument[607] to be the following:

[604] *See, e.g.*, China First Submission, paras. 329 ("By calculating an anti-dumping margin under its NME methodology and imposing a duty on this basis, Commerce necessarily offsets any subsidy bestowed upon the manufacture, production or export of the merchandise at issue.") and 330 ("By placing the producer in the position of having market-denominated costs of production, and then calculating an anti-dumping margin based on the difference between this market-determined cost of production and the producer's export price, Commerce necessarily captures any trade-distorting effects of alleged subsidies *in the anti-dumping margin*.") (original emphasis).

[605] *See, e.g.*, China First Submission, footnote 335 to para. 409

[606] *See, e.g.*, China First Submission, paras. 366 and 391.

[607] The argument that China advances before the Panel is different in emphasis from that advanced by the Government of China and several Chinese respondents before Commerce in the AD and CVD investigations at issue

(1) Commerce's surrogate value methodology to determine normal value in AD investigations involving Chinese imports fully remedies any and all subsidization in all cases without exception.[608] It is in this respect that "the rationale for using an NME methodology to determine normal value in an AD investigation *subsumes* the rationale for imposing countervailing duties on imported products."[609]

(2) It follows that the normal value calculated under this methodology "necessarily captures" the full amount of subsidies bestowed on the product subject to investigation.[610]

(3) Therefore, where AD duties based on such methodology are applied concurrently with CVDs, "the same alleged acts of subsidization in all cases" are fully remedied twice.[611]

447. To be clear, China does not contend that a supposed double remedy occurs only under certain defined circumstances, nor does China argue that some unspecified portion of a subsidy may be offset by virtue of a dumping margin that is not based on a strict comparison with costs and prices in China. China unambiguously asserts that the entire subsidy is *completely captured* within the calculation of normal value, and that this double remedy occurs in *every instance* that Commerce imposes a CVD concurrently with an AD duty calculated on the basis of Commerce's NME methodology or, for that matter, any other methodology adopted by any WTO Member that complies with *Ad* Note 2 to Article VI:1 of the GATT 1994 and/or paragraph 15(a) of China's Accession Protocol. As we discuss below, China has failed to establish this central predicate to its argument.

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as well as in a previous investigation on *Coated Free Sheet Paper*. The "double remedy" argument pressed before Commerce also sought to establish that countervailing domestic subsidies in China was not appropriate where surrogate values were used to calculate the dumping margin because those subsidies were already reflected in a dumping margin that was higher than it would be in the absence of subsidization. That argument, however, was expressly predicated on the assumption that the domestic subsidies provided to Chinese producers cause the recipients to lower all prices *pro rata*, including prices within China and prices for exports to the United States. This meant that the amount of the domestic subsidy should be understood to be effectively allocated across production so as to lower home market price and export price by the same amount on a per unit basis. The argument also assumed that normal value calculated through a surrogate value methodology does not reflect the price-reducing effect presumed to inhere in a Chinese domestic subsidy. According to this argument made during the investigations, when the lowered export prices were compared to a normal value based on surrogate values from a third country's market, a portion of any dumping margin was attributable solely to the domestic subsidies, as those subsidies had lowered export prices *pro rata* but had no effect on the surrogate values. It was in the context of examining this specific argument that Commerce questioned whether it could properly be assumed for all cases that "subsidies pass through, *pro rata*, to U.S. prices."

[608] *See, e.g.*, China First Submission, paras. 329 and 389.

[609] China First Submission, para. 323 (original emphasis). *See also id.*, at paras. 326, 373, and 397.

[610] China First Submission, paras. 330. *See also id.*, at para. 372.

[611] China First Submission, paras. 330 and 366. *See also id.*, at para. 326.

448. The premise of China's argument that a double remedy *inheres* in the concurrent application of CVDs and AD duties calculated using the non-market economy methodology is also erroneous as an economic matter. China asserts that every calculation of a dumping margin using the non-market economy methodology will be artificially inflated by the full amount of the subsidies that would concurrently be remedied by the application of CVDs. This is not correct.

449. Understanding China's theory of an inherent double remedy and the flaws in that theory requires an understanding of the two distinct comparisons that are made, pursuant to the distinct rules of the Anti-Dumping Agreement and the SCM Agreement, to determine the amount of the dumping margin on the one hand and the CVD on the other hand.

(a) China's "Double Remedy" Argument Rests on a Misunderstanding of the Non-Market Economy *Antidumping* Methodology and Overly Simplistic Economic Presumptions

450. Ordinarily, dumping is measured as the difference between export price and normal value, which is typically based on prices in the home market. Where such home market prices are unavailable, third country prices or the sum of cost of production, administrative, selling and general expenses and profit may be use to determine normal value. Under the NME methodology provided for in *Ad* Note 2 to Article VI:1 of the GATT 1994, normal value need not be based on a strict comparison with domestic prices and costs of the exporting country. In such cases, Commerce normally calculates normal value through a three-step process.

a. First, it determines the quantities of the factors of production (essentially, inputs) used to produce the product subject to investigation. In other words, Commerce determines the amount of raw materials, labor, energy and other inputs used to produce the merchandise.

b. Second, Commerce values these inputs in the surrogate, market economy country. For example, 3 kilowatt hours of electricity in China, valued at a price in India of 50 rupees per kilowatt hour, would yield an electricity cost of 150 rupees for the merchandise. It is important to note that the actual cost of electricity in China may be either higher or lower than the surrogate value used for electricity.

c. Third, Commerce adds amounts for factory overhead, selling, general and administrative ("SG&A") expenses, and profit, calculated on the basis of the ratios of these costs to the costs of the other inputs in the surrogate country.

451. China asserts that every calculation of a dumping margin using the non-market economy methodology will be artificially inflated by the full amount of the subsidies that would concurrently be remedied by the application of CVDs. China's theory of an inherent double remedy is therefore premised on the notion that the replacement of actual (subsidized) values of

factor inputs with surrogate values using the NME methodology results in an increase in the normal value by an amount that is equal to or greater than the amount of the subsidy. As a consequence, China claims that the dumping margin and the resulting AD duties will invariably remedy the subsidization in full. Underlying China's theory is the assumption that the normal values used pursuant to the NME methodology are completely insulated from any effect of the countervailed subsidy in every instance. To the extent that subsidization may have the effect of lowering normal values determined pursuant to the NME methodology, the dumping margin would likewise decline and the resulting AD duties imposed would not constitute a complete remedy for the subsidy.

452. In fact, subsidies may easily reduce the normal value determined pursuant to the NME methodology by reducing the *quantity* of factors consumed by the NME producer in manufacturing the product at issue. One 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, and energy. When the surrogate factor values are multiplied by these lower factor quantities, they result in lower normal values and, hence, lower dumping margins. In our example above, while the cost of electricity may still be 50 rupees per kilowatt hour, the kilowatt hours of electricity used to produce the product might decline from 3 hours to 2 hours, lowering the normal value by lowering the value of electricity used to produce the merchandise in question from 150 rupees to 100 rupees.[612]

453. Aside from the effect subsidies may have on factor quantities, China's argument that dumping duties imposed pursuant to the NME methodology are invariably a complete remedy for any subsidization also fails to account for the fact that the surrogate values are not entirely insulated from the effect of subsidies provided to industries in China. Suppliers of inputs to markets in market economy countries compete with Chinese suppliers of those same inputs. Similarly, profit and expense ratios used to obtain normal value under the NME methodology may be affected when derived from producers of the product at issue in market economy countries who compete with subsidized export-oriented industries with excess capacity in China. To the extent that surrogate values and ratios used pursuant to the NME methodology are reduced by the effects that subsidies in China may have outside of China, the normal values and dumping margins will be similarly reduced and the resulting AD duties imposed could not constitute a remedy for the subsidies.

[612] This reduction in the value of inputs has a secondary effect of also reducing normal value by reducing the amount of factory overhead, SG&A expenses, and profit as described in the third step of Commerce's NME methodology. These amounts are determined on the basis of ratios derived from market economy sources such that any reduction in factor usage by NME producers would result in the proportionate reductions in factory overhead, SG&A expenses, and profit. For example, overhead is calculated by Commerce in two steps in NME cases. First, Commerce uses information from the surrogate country to determine a ratio of overhead expenses to expenses for material, labor, and energy. This ratio is then applied to the totals for material, labor, and energy of the investigated NME producer. Thus, a reduction in the material, labor, or energy consumed by the NME producer will reduce the overhead expense of the producer and thereby reduce the normal value and the dumping margin. The same reduction would alter SG&A expenses and profit.

454. In cases where the producers of the merchandise in question in the NME country purchase inputs from market economy suppliers, Commerce frequently uses the actual prices paid for those inputs. Just as subsidies in China may have an impact on input prices outside of China, there can be little doubt that such subsidies have an impact on the price of competing inputs imported into China. The resulting normal values, dumping margins and AD duties imposed would be reduced to the extent that these input prices were reduced by reason of the effect of the subsidies.

(b) China's "Double Remedy" Argument Rests on a Misunderstanding of the *Countervailing Duty* Methodology and Overly Simplistic Economic Presumptions

455. Turning to the methodologies used to calculate CVDs, a subsidy may be measured in a variety of ways depending on the form of the subsidy. A grant of funds to a company from a government, for example, is readily measured by the amount of funds granted. Such a subsidy is fully countervailable even if the funds are not spent in ways that would reduce the cost of producing the merchandise at issue.

456. A fundamental premise underlying China's double remedy argument is that subsidies reduce costs *pro rata*. If subsidies do not invariably reduce costs *pro rata*, then there is no basis to argue that normal values determined using the NME methodology are invariably inflated by an amount that fully remedies the subsidy. There is considerable doubt, however, that most subsidies achieve anything close to *pro rata* reductions in cost. Subsidies often come with conditions attached that reduce the cost savings to the recipient below the nominal amount of the benefit received. For example, subsidy recipients may be required to retain redundant workers, maintain higher levels of production than would be optimum, remain in economically disadvantageous locations, reduce pollution, obtain supplies from favored sources, or otherwise adjust behavior to any number of policy objectives. Even without such strings attached, subsidies may be utilized in ways that only indirectly or minimally reduce costs.

457. With respect to other forms of subsidies, such as the provision of goods at less than adequate remuneration, measurement generally relies on a comparison of the actual (subsidized) cost of the good provided with a benchmark representing an unsubsidized provision of the good. In this regard, Article 14(d) of the SCM Agreement makes clear that the amount of such a subsidy is ordinarily measured "in relation to prevailing conditions for the good ... in the country of provision." In other words, the purpose of the CVD is not to account for the difference between the actual (subsidized) cost of the input to the company and what the input would cost the company if the input price were determined solely by market forces. Instead, the CVD is intended to countervail the extent to which the subsidized company benefitted as compared to unsubsidized companies in the same country.

458. Returning to the example of electricity used earlier, suppose the prevailing price of electricity in India, which in the example was 50 rupees per kilowatt hour, is lower than the

prevailing price of electricity in China. Thus, suppose the prevailing price in China is the equivalent of 100 rupees per kilowatt hour, but a particular company or industry in China is provided electricity at the equivalent of 80 rupees per kilowatt hour as a countervailable subsidy. Under these circumstances, the actual (subsidized) cost of 3 kilowatt hours of electricity used to produce the subject merchandise is the equivalent of 240 rupees, whereas the benchmark would be 300 rupees. The countervailable subsidy is, thus, 60 rupees. The surrogate value for electricity used to determine normal value in the dumping margin calculation, however, would be 150 rupees for 3 kilowatt hours at 50 rupees per kilowatt hour. This surrogate value used in determining normal value for the dumping margin is not inflated by 60 rupees, as China's double remedy theory proposes that it must be. Thus, the AD duties based on the normal value determined using the NME methodology would not constitute in any way a remedy for the subsidy found with respect to electricity.

(c) Failure of the Presumption That Non-Market Economy Dumping Margins Necessarily Capture the Full Amount of Domestic Subsidies is Fatal to China's "Double Remedy" Claim

459. In general, China's argument that the AD duties imposed based on the NME methodology necessarily subsumes any rationale for application of CVD depends on the normal value determined pursuant to the NME methodology being invariably as high or higher than the unsubsidized cost of producing the merchandise in China. Put otherwise, China's claim requires that the normal value determined pursuant to the NME methodology invariably is equivalent to the normal value that would be obtained by adding the amount of the subsidy to the actual (subsidized) cost. China's arguments attempt to obscure the possibility that these would differ by referring to both as "market determined." The above arguments belie this essential premise of China's claim. Contrary to the underlying premise of China's argument, subsidies do not necessarily reduce actual costs *pro rata*. And, contrary to China's assertions, NME dumping margins do not necessarily capture the full amount of any domestic subsidies bestowed upon the subject merchandise. Indeed, as shown above, subsidies may reduce dumping margins in a variety of ways. Where dumping margins do not reflect the full amount of subsidies that exist, China's claim that a Member can only resort to *either* a CVD or an AD duty based on an NME methodology would, under China's own argument, prevent that Member from receiving the full remedy to which it is entitled against both the dumping and subsidization.

C. Conclusion

460. We have demonstrated that China's claims in respect of a so-called "double remedy" are supported neither by law nor economic logic. Although GATT Contracting Parties and WTO Members have been explicit when limiting a Member's right to apply AD and CVD remedies concurrently, China fails to see the significance of the fact that no such limitation exists in the covered agreements that fits the circumstances of this dispute. Moreover, China, perhaps understandably, overlooks the deafening silence of its Protocol in this respect. The Protocol

explicitly recognizes that Members may calculate dumping margins not on the basis of costs or prices in China, and continues in the subsequent paragraph to discuss methodological difficulties in CVD proceedings, but gives no indication that these remedies are to be mutually exclusive.

461. In the absence of legal support for its story, China has sought refuge in the conceptual universe of "subsum[ing] . . . rationales" of CVD and AD methodologies that are not based on a strict comparison of domestic costs and prices in China. Again, China ignores the fact that WTO rules provide for these two remedies to address two distinct harms as measured by the respective rules governing AD and CVD calculations. Furthermore, any theoretical overlap in rationale that may be constructed by China cannot transform an AD duty – calculated in the course of an AD investigation in accordance with the AD Agreement – into a CVD – calculated in the course of a CVD investigation in accordance with the SCM Agreement. Yet this is precisely what China asks this Panel to do so that it can succeed on its claims under Articles 19.4 and 19.3 of the SCM Agreement.

462. Finally, because China's argument as to the existence of a so-called "double remedy" flows entirely from its view of "subsum[ing] . . . rationales," this argument rests on a showing that a complete "double remedy" occurs. Without such a showing, there is no basis for China's suggestion that a Member must choose between the CVD remedy, on the one hand, and the AD remedy not calculated on the basis of a strict comparison with domestic costs and prices in China, on the other hand. As discussed above, China falls far short of the making this showing and, for that reason alone, none of China's claims of inconsistency has any merit.

IX. THE UNITED STATES REMAINED AVAILABLE FOR CONSULTATIONS WITH THE GOVERNMENT OF CHINA BEFORE INITIATION AND THROUGHOUT EACH INVESTIGATION, AND AFFORDED INTERESTED PARTIES AMPLE TIME AND NUMEROUS OPPORTUNITIES TO SUBMIT RELEVANT INFORMATION IN THE INVESTIGATIONS

463. China claims that the United States acted inconsistently with certain procedural requirements of the SCM Agreement. As discussed at the outset of this submission,[613] the investigations at issue in this dispute were characterized by unparalleled efforts by Commerce to ensure the most thorough information-gathering, even at times pursuing information requests well beyond the point at which most reasonable investigating authorities would likely have resorted to facts available and adverse inferences. We discuss below more specific instances of Commerce's efforts to provide the Government of China and interested Chinese producers and exporters opportunities to clarify aspects of the investigations and to have ample time to respond to the agency's requests for information, consistent with the provisions of the SCM Agreement.

[613] *See* paras. 7-10 of this submission.

A. The United States Invited China to Consultations Prior to Initiating Each of the Challenged CVD Investigations, as Required by Article 13.1 of the SCM Agreement

464. China claims that the United States acted inconsistently with Article 13.1 of the SCM Agreement because, although the United States invited China for consultations before initiating each of the four CVD investigations at issue, the United States did not again formally invite China for consultations before examining, within the same investigation, information received about new subsidies that had not been identified in the application under Article 11. China premises its claim, however, on a fundamental misunderstanding of the term "investigation" for purposes of Article 13.1 of the SCM Agreement and, as a result, seeks to create an additional and entirely redundant procedural requirement not provided for under that Agreement.

465. Before examining the merits of China's legal interpretation, we note that a brief review of the relevant events in the four CVD investigations at issue demonstrates that China is seeking to impose a redundant requirement. Recognizing that information about subsidies not identified in the application may become available subsequent to the initiation of a CVD investigation on a given product, U.S. law permits interested parties within a certain time frame to submit such information, often referred to as "new subsidy allegations," to Commerce.[614] Commerce received new subsidy allegations in each of the four investigations, as did all interested parties. Because Commerce remained available for consultations in each of the four investigations, as required by Article 13.2 of the SCM Agreement, the Government of China had ample opportunity to avail itself of consultations subsequent to learning of the new subsidy allegations.

466. The record in each of the investigations, reflected in the table below, reveals that the Government of China did in fact continue consultations with Commerce on multiple occasions after initiation of the respective investigation. In fact, the Government of China met with Commerce shortly *after* the receipt of new subsidy allegations as well as after the decisions were made to include additional subsidies in the ongoing investigations. However, the only time the record reflects the Government of China discussing any new subsidies was to raise a question in one investigation about the timeliness, but not the substance, of the information submitted.[615] In light of the continuing availability of Commerce for consultations, including with respect to information on new subsidies, it appears that China's claim under Article 13.1 is ultimately about its disappointment in not having received a formal invitation to consult each time information was received about new subsidies.

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[614] 19 C.F.R. § 351.301(d)(4)(i)(A) (Exhibit CHI-130). U.S. law does not refer to Commerce's examination of new subsidies as "investigations," nor does Commerce issue a notice of initiation once it has decided to examine these new subsidies, as it would in the case of commencing a CVD investigation on a particular product.

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

	CWP	OTR	LWRP	LWS
Initiation of Investigation	July 5, 2007	August 7, 2007	July 24, 2007	July 25, 2007
New Subsidy Allegations	August 21, 2007	October 17, 2007 November 26, 2007	August 29, 2007	October 17, 2007
Additional Consultations with China	September 10, 2007 November 9, 2007 November 14, 2007 December 11, 2007	September 10, 2007 November 14, 2007	November 14, 2007 December 11, 2007	November 14, 2007 December 3, 2007
Department of Commerce Preliminary Decision to Include New Subsidies	April 9, 2008	May 2, 2008 May 28, 2008	April 21, 2008	April 22, 2008
Additional Consultations with China	May 13, 2008	March 11, 2008 May 13, 2008	May 13, 2008	January 10, 2008 May 13, 2008

467. The requirement for an investigating authority to invite an exporting Member for consultations is found in Article 13.1 of the SCM Agreement. That provision states:

> As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.[616]

The importing Member's obligation under Article 13.1 to invite the exporting Member for consultations is therefore triggered by the acceptance of an application under Article 11 of the SCM Agreement, and the obligation must be fulfilled before the initiation of an investigation.

468. As the table below demonstrates, and as China acknowledges,[617] Commerce invited China for consultations prior to initiating each of the four CVD investigations at issue:

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[616] SCM Article 13.1 (emphasis added).

[617] China First Submission, para. 431.

CVD Investigation	Application Accepted	U.S. Invitation to China for Consultations	Consultations Held	Initiation of Investigation
CWP[618]	June7, 2007	June 8, 2007	June 24, 2007	June 27, 2007
OTR Tires[619]	June 18, 2007	June 29, 2007	July 16, 2007	July 30, 2007
LWRP[620]	June 27, 2007	June 28, 2007	July 16, 2007	July 17, 2007
LWS[621]	June 28, 2007	June 29, 2007	July 16, 2007	July 25, 2007

469. China, however, claims that the United States acted inconsistently with Article 13.1 of the SCM Agreement, notwithstanding the invitation for consultations before the initiation of each of the four investigations. In China's view, the United States was required by Article 13.1 to invite China for consultations whenever information about additional subsidies on the same product, which were not identified in the application, was made available to Commerce after the initiation of an investigation on that product.[622] According to China, Commerce initiated a new "investigation" when, following the initiation of a CVD investigation on one of the four products

[618] *See Notice of Initiation of Countervailing Duty Investigation: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 72 Fed. Reg. 36668 (July 5, 2007) ("*CWP CVD Initiation Notice*") (Exhibit CHI-5); Letter from Susan Kuhbach, Office Director, to Mr. Zhao Baoqing, Minister Counselor, entitled, "Re: Countervailing Duty Petition on Circular Welded Carbon Quality Steel Pipe from the People's Republic of China," dated June 8, 2007 (Exhibit US-1); Letter from Sarah Ellerman, Senior Import Administration Officer, to The File, entitled, "Consultations with Officials from the Government of the People's Republic of China," dated June 24, 2007 (Exhibit US-5).

[619] *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 44122 (August 7, 2007) ("*Tires CVD Initiation Notice*") (Exhibit CHI-49); Letter from Thomas Gilgunn, Program Manager, to Mr. Dai Yunlou, Minister Counselor, entitled "Countervailing Duty Petition on Off The Road Tires from the People's Republic of China," dated June 29, 2007 (Exhibit US-29); Letter from Sarah Ellerman, Senior Import Administration Officer, to The File, entitled, "Consultations with Officials from the Government of the People's Republic of China," dated July 16, 2007 (Exhibit US-20).

[620] *See Notice of Initiation of Countervailing Duty Investigation: Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 72 Fed. Reg. 40281 (July 24, 2007) ("*LWRP CVD Initiation Notice*") (Exhibit CHI-18); Letter from Susan Kuhbach, Office Director, to Mr. Dai Yunlou, Minister Counselor, entitled "Re: Countervailing Duty Petition on Light-Walled Rectangular Pipe and Tube from the People's Republic of China," dated June 28, 2007 (Exhibit US-9); Letter from Sarah Ellerman, Senior Import Administration Officer, to The File, entitled, "Consultations with Officials from the Government of the People's Republic of China," dated July 16, 2007 (Exhibit US-13).

[621] *Laminated Woven Sacks from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 72 Fed. Reg. 40839 (July 25, 2007) ("*Sacks CVD Initiation Notice*") (Exhibit CHI-33); Letter from Thomas Gilgunn, Program Manager, to Mr. Dai Yunlou, Minister Counselor, entitled, "Countervailing Duty Petition on Laminated Woven Sacks from the People's Republic of China," dated June 29, 2007 (Exhibit US-19); Letter from Sarah Ellerman, Senior Import Administration Officer, to The File, entitled, "Consultations with Officials from the Government of the People's Republic of China," dated July 16, 2007 (Exhibit US-20).

[622] China First Submission, para. 436.

(*CWP*, *OTR Tires*, *LWRP*, and *LWS*), it determined that subsidies on the same product that were not identified in the application should be included in the relevant CVD investigation. China's interpretation, however, leads it to conclude erroneously that the United States conducted multiple "investigations" – each covering the same product – when it examined the information about additional subsidies.[623]

470. Although the term "investigation" is not defined in the SCM Agreement, the provisions of that Agreement make clear that the only "investigation" referred to in Article 13.1 is the investigation triggered generally by the filing of a duly substantiated application as provided for in Article 11, and not by the filing of information on newly-reported subsidies.[624] Article 11.1 provides that an investigation "shall be initiated upon a written application by or on behalf of the domestic industry." The written application that serves as the basis for the investigation to be initiated must contain, *in addition to* evidence on the "existence, amount and nature of the subsidy in question," a description of the allegedly subsidized product, information on the production of the like product, identification of known foreign producers and exporters, and evidence on the injury to the domestic industry caused by allegedly subsidized imports.[625] Such additional information would not be included as part of the allegations of new subsidies maintained on a product that is already the subject of investigation. Only where the investigating authority has concluded that the evidence in the application is sufficient, and that the application has been made by or on behalf of the domestic industry, may the investigating authority initiate an "investigation."[626] Therefore, an "investigation" under Article 13.1 is the examination by an investigating authority, with respect to an allegedly subsidized product, of issues identified by a particular "application" under Article 11.[627]

471. Furthermore, Article 13.1 states that an invitation for consultations must be extended to "Members the products of which may be subject to such investigation."[628] Article 12.9 similarly provides that interested parties include "an exporter or foreign producer or the importer of a *product subject to investigation*."[629] These provisions therefore reinforce the fact that the

[623] China First Submission, para. 433.

[624] The one exception to an application triggering an investigation is when a Member, pursuant to Article 11.6 of the SCM Agreement, initiates an investigation without having received a written application. None of the four CVD investigations at issue were initiated by Commerce under Article 11.6.

[625] Article 11.2 of the SCM Agreement.

[626] Article 11.3 and 11.4 of the SCM Agreement. Because an initiation is thus generally linked to a precedent application, and a new subsidy allegation, by definition, falls short of the requirements for an "application," China is in error when it asserts that the decision of Commerce whether to include new subsidies in an ongoing investigation"fall[s] squarely within" the term "initiated." (China First Submission, para. 438.)

[627] Given this proper understanding of the term "investigation" in Article 13.1, China's attempt to read the term "*any* investigation" in that provision as covering new subsidy allegations is unavailing. (China First Submission, para. 436 (original emphasis).)

[628] Article 13.1 of the SCM Agreement.

[629] Article 12.9 of the SCM Agreement (emphasis added). *See also* footnotes 46 and 50 of the SCM Agreement:

> [46] Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean

procedural focus for purposes of consultations is whether the investigation covers a *product* that is alleged to have been subsidized and imports of which are causing injury.

472. China's interpretation of Article 13.1 of the SCM Agreement also cannot be reconciled with Article 13.2. Article 13.2 provides:

> [T]hroughout the period of investigation, Members the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution.

Article 13.2 requires that, even after an investigation on an allegedly subsidized product has been initiated, the importing Member provide reasonable opportunity for consultations. In other words, where an investigation has been initiated on product X, and new subsidies on product X have been brought to the attention of the investigating authority, Article 13.2 *already requires* the importing Member to be available for reasonable opportunities to consult with the exporting Member, including with respect to newly-discovered subsidies on the same product should the exporting Member so choose. As discussed above, the record in each of the four CVD investigations at issue shows that the Government of China took advantage of such consultations with Commerce, even if it chose not to discuss the information provided with respect to new subsidy allegations during any of those consultations.[630] The opportunity provided by Article 13.2, therefore, further undermines China's reading of Article 13.1 to require the invitation of the exporting Member for consultations at the time an investigating authority learns of additional subsidies on a product that is already the subject of an investigation.

473. For these reasons, the United States requests that the Panel reject China's claims under Article 13.1 of the SCM Agreement.

B. The United States Provided the Government of China and Each Exporter and Foreign Producer At Least 30 Days to Reply to the Questionnaire, as Required by Article 12.1.1 of the SCM Agreement

474. 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 CVD investigations at issue. China does not contest the fact that Commerce provided all

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a product which is identical, i.e. alike in all respects to the *product under consideration*, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the *product under consideration*. (Emphasis added)

[50] ...the term "domestic interested parties" shall include consumers and industrial users of the *imported product subject to investigation*. (Emphasis added)

[630] *See* paragraph 466 of this submission.

interested parties at least thirty days to reply to the questionnaire issued at the outset of each of investigation. Rather, China's claim rests entirely on its assertion that the thirty-day requirement of Article 12.1.1 applies not only to that questionnaire, but also to subsequent requests for information made in the course of an investigation.

475. As we demonstrate below, China's reading of Article 12.1.1 is incorrect. The text of the Agreement, understood in its proper context, requires a thirty-day response time only for the questionnaire at the outset of an investigation. China's interpretation of Article 12.1.1 is not only inconsistent with the clear meaning of the text, but would result in severe restrictions on an investigating authority's ability to complete an investigation within the timeframes established by the SCM Agreement or would compel the perverse result that investigating authorities would refrain from seeking supplemental information, thereby providing less opportunity for respondents to clarify issues and facts vital to their positions.

476. Article 12.1.1 provides that "[e]xporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply." Although the term "questionnaire" is not defined in the SCM Agreement, a standard dictionary definition of the term "questionnaire" is "[a] formulated series of questions by which information is sought from a selected group, usu[ally] for statistical analysis."[631]

477. The context of Article 12.1.1 clarifies that not every request for information would constitute the "questionnaire" for which a minimum of thirty days must be provided for reply under Article 12.1.1. For example, paragraph 7 of Annex VI to the SCM Agreement, which governs procedures for on-the-spot investigations (or verifications), provides that prior to such investigations, an investigating authority should "advise the firms concerned of the general nature ... of any further information which needs to be provided." Notably, paragraph 7 does not use the term "questionnaire" to cover this request for information, notwithstanding the fact that such a request could well be presented in the form of a "series of questions." Furthermore, the information referred to in paragraph 7 "needs to be provided" at the time of the verification. In this light, if such a request for information were considered a "questionnaire" under Article 12.1.1, it would not be necessary for paragraph 7 to specify that it should be "standard practice" to make this request "prior to the visit." The thirty-day obligation in Article 12.1.1 would have required that the request be made at least thirty days in advance of the verification date and obviated the need for such specification.

478. Moreover, the context of Article 12.1.1 reveals that the term "questionnaire" for purposes of the SCM Agreement refers to a *particular* "series of questions" put forward by the investigating authority. Paragraph 6 of Annex VI to the SCM Agreement states: "Visits to explain *the questionnaire* should only be made at the request of an exporting firm." Paragraph 7 of the same Annex provides: "As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to *the*

[631] *The New Shorter Oxford Dictionary*, 1993. (Exhibit US-95)

questionnaire has been received." Paragraphs 6 and 7 of Annex VI do not refer to "a questionnaire" or "questionnaires" in the abstract, but instead, to "*the* questionnaire," indicating that Members contemplated the existence of one document in particular that would pose questions from the investigating authority and would be considered "the questionnaire" for purposes of the SCM Agreement.

479. Indeed, it is only logical that the questionnaire issued at the outset of an investigation is the single document contemplated by the term "the questionnaire" in paragraphs 6 and 7 of Annex VI. This questionnaire provides the first opportunity for the investigating authority to seek information on all of the issues raised by the application under Article 11, for which reason it is typically the most extensive request for information made in the course of a CVD investigation.[632] This questionnaire also tends to track the issues raised by the application,

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[632] This is reflected in the four CVD investigations at issue. In each of those investigations, the questionnaire issued at the outset of the investigation generally posed far more questions than any subsequent request for information sent by Commerce. For example:

•In CWP, the questionnaire at the outset of the investigation contained at least 93 questions for the Government of China and at least 85 questions for respondent Kingland, covering 28 alleged subsidy programs. The first supplemental requests for information for the Govt of China and Kingland contained 34 and 41 questions, respectively, covering 8 and 7 programs. Subsequent requests for additional information generally contained even fewer questions and covered fewer programs. (*See* Exhibit US-104: July 27, 2007 Initial CVD Questionnaire in Circular Welded Carbon Quality Steel Pipe from the People's Republic of China; October 9, 2007 First Supplemental Questionnaire to the GOC; October 4, 2007 First Supplemental Questionnaire to Kingland.)

•In LWRP, the questionnaires at the outset of the investigation contained 81 questions for the Government of China and 87 questions for ZZPC, covering 28 alleged subsidy programs. The first supplemental requests for information for the Government of China and ZZPC (including separate questions for ZZPC's four affiliated companies) contained 44 questions and 109 questions, respectively, covering 9 and 7 programs, respectively. Subsequent requests for additional information generally contained even fewer questions and covered fewer programs. (*See* Exhibit US-105: August 7, 2007 Letter from Office Director to Bureau of Fair Trade for Imports & Exports re: original questionnaire; October 24, 2007 Letter from Office Director to Bureau of Fair Trade for Imports & Exports re: supplemental questionnaire.)

•In LWS, the questionnaire at the outset of the investigation contained 66 questions for the Government of China and 63 questions for respondent Zibo Aifudi, covering 23 alleged subsidy programs. The first supplemental requests for information for the Government of China and Zibo Aifudi contained 42 and 34 questions, respectively, covering 13 and 4 programs, respectively. Subsequent requests for additional information generally contained even fewer questions and covered fewer programs. (*See* Exhibit US-106: August 3, 2007 Letter from Office Director to Embassy of China re: original questionnaire; October 23, 2007 Letter from Program Manager to Baker Hostetler re: China supplemental questionnaire; October 24, 2007 Letter from Program Manager to Garvey Schubert Barer re: Zibo Aifudi First Supplemental Questionnaire.)

•In OTR, the questionnaire at the outset of the investigation contained 76 questions for the Government of China and 81 questions for TUTRIC, covering 21 alleged subsidy programs. The first supplemental requests for information for the Government of China and TUTRIC contained 49 and 68 questions, respectively, covering 12 and 14 programs. Subsequent requests for additional information contained even fewer questions and programs. (*See* Exhibit US-107: August 17, 2007 Letter from Office Director to the

covering questions not only on all the subsidies identified in the application, but also on industry structure, identification of foreign producers and exporters, production data, export volumes, sales, and ownership and other affiliations among firms in the industry.[633] Given the breadth of information requested at this stage, when the investigating authority has no information other than the application, it is logical that the Agreement seeks to provide a minimum time period for interested Members and respondent firms to amass the information needed to be responsive to the investigating authority. The obligation in Article 12.1.1 to provide thirty days for reply therefore applies to the questionnaire issued at the outset of an investigation and not to every subsequent request for information by the investigating authority.

480. Indeed, if all requests for information in an investigation were subject to the thirty-day requirement under Article 12.1.1, as China argues, an investigating authority could well be unable to complete its investigation within the maximum one year (or, exceptionally, eighteen months) period set out in Article 11.11 of the SCM Agreement.[634] Meeting the timeframes in Article 11.11 becomes even more difficult where a respondent fails to answer questions posed by the investigating authority in the questionnaire at the outset of an investigation. Such failure may necessitate multiple additional requests for information in the investigating authority's attempt to collect all the information necessary to arrive at a reasoned determination.[635]

481. The table below indicates the numerous follow-up attempts by Commerce to get all the necessary information from each foreign interested party in order to complete its analysis in these investigations, highlighting the impossibility of meeting the deadlines in Article 11.11 under China's interpretation of Article 12.11:

Embassy of China re: original questionnaire; November 13, 2007 Letter from Program Manager to Hogan Hartson re: China supplemental questionnaire; November 9, 2007 Letter from Program Manager to Grunfeld Desiderio re: TUTRIC supplemental questionnaire.)

[633] In this respect, China is simply mistaken in asserting that "[n]ew subsidy allegations questionnaires are ... indistinguishable from the 'full initial questionnaire' issued after the investigation is initiated." China First Submission, footnote 364 to paragraph 452.

[634] Article 11.11 states, "Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation."

[635] For example, in the LWS investigation, Commerce asked China, in its August 3, 2007 original questionnaire and in its October 23, 2007 supplemental questionnaire, to provide the government's five-year plans for the textile industry. China did not provide the requested information in either its September 24, 2007 response to the original questionnaire or in its November 5, 2007 response to the October 23, 2007 supplemental questionnaire. (*See* Exhibit US-108: September 24, 2007 Letter from Baker Hostetler to Secretary of Commerce re: China questionnaire response, at 2-3; November 5, 2007 letter from Baker Hostetler to Secretary of Commerce re: China supplemental questionnaire response, at 12-13.)

Investigation	Total number of follow-up requests for additional information from all foreign interested parties following the questionnaire
CWP[636]	9
LWRP[637]	8
Sacks[638]	8
Tires[639]	18

If a thirty-day period had been required for each of the above requests for information, this would have required between 240 and 540 days in these investigations solely for the collection of most of the relevant factual information with respect to subsidization. Given the subsequent phases of the proceeding—including on-the-spot investigations, a preliminary determination, opportunities for interested parties to present arguments, oral hearing— Commerce would have been unlikely to meet the time frames established in Article 11.11 of the SCM Agreement. A thirty-day requirement would also have rendered it impracticable for Commerce to grant any extensions of time for replies, as encouraged by Article 12.1.1,[640] because such extensions would have cut further into the time available for the investigation, thereby making it even less likely that Commerce could have met the deadlines under the SCM Agreement.

482. The "questionnaires" in Article 12.1.1, as to which an investigating authority must provide thirty days to reply, therefore refers to the questionnaires that the investigating authority issues at the outset of an investigation to the interested Member and to foreign producers and exporters.

483. We note that the panel in *Egypt-Steel Rebar* arrived at the same conclusion with regard to the term "questionnaires" in Article 6.1.1 of the AD Agreement. Article 6.1.1 of the AD Agreement, like Article 12.1.1 of the SCM Agreement, requires that investigating authorities provide foreign interested parties with "at least 30 days for reply" to the "questionnaires." The panel in *Egypt-Steel Rebar* noted, *inter alia*, the use of "the questionnaire" in paragraphs 6 and 7 of Annex I to the AD Agreement, the relevant portions of which are worded identically to paragraphs 6 and 7 of Annex VI to the SCM Agreement. The panel concluded that the term "questionnaires" in Article 6.1.1 refers only to the questionnaires sent to interested parties at the

[636] See Exhibit US-96.

[637] See Exhibit US-98.

[638] See Exhibit US-100.

[639] See Exhibit US-102.

[640] Article 12.1.1 provides, in relevant part: "Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable."

outset of an investigation.[641] The panel further noted the practical difficulties generated by an interpretation of "questionnaires" in Article 6.1.1 that covered requests for information other than the questionnaire at the outset of an investigation:

> If any requests for information other than the initial questionnaire were to be considered 'questionnaires' in the sense of Article 6.1.1, a number of operational and logistical problems would arise in respect of other obligations under the AD Agreement. First, there is no basis in the AD Agreement on which to determine that some, but not all, information requests other than the initial questionnaire also would constitute "questionnaires." Thus, even if an investigating authority was not obligated to provide the minimum time-period in Article 6.1.1 in respect of every request for information, it would not be able to determine from the Agreement which of its requests were and were not subject to that time-period. On the other hand, if all requests for information in an investigation were 'questionnaires' in the sense of Article 6.1.1, this could make it impossible for an investigation to be completed within the maximum one year (or exceptionally, 18 months) allowed by the AD Agreement in Article 5.10. Moreover, a 30- or 37-day deadline for requests for information made in the context of an on-the-spot verification – i.e., the 'obtain[ing] of further details' explicitly referred to in Article 6.7 as one of the purposes of such verifications – obviously would be completely illogical as well as unworkable.[642]

484. Viewed against this proper understanding of Article 12.1.1 of the SCM Agreement, the United States fulfilled its obligation by providing at least thirty days for the Government of China and Chinese producers and exporters to reply to the questionnaire that Commerce issued at the outset of each of the four CVD investigations at issue. In fact, as the tables below reveal, Commerce granted several extensions of time such that only one respondent in those investigations submitted its reply to the questionnaire within the thirty-day period (taking into account the one week provided for in footnote 40 of the SCM Agreement[643]):

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[641] *Egypt - Steel Rebar (Panel)*, para. 7.276.

[642] *Egypt- Steel Rebar (Panel)*, para. 7.277.

[643] Footnote 40 of the SCM Agreement provides:

> As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

CWP

Interested Party	**Original Deadline for Reply**[644]	**Extensions Granted**[645]	**Total Days**
Government of China	39 days	13 days	52 days
Kingland Pipe	39 days	13 days	52 days
Shuangjie	39 days	13 days	52 days
Weifang East Pipe	39 days	13 days	52 days

LWRP

Interested Party	**Original Deadline for Reply**[646]	**Extensions Granted**[647]	**Total Days**
Government of China	38 days	None requested - but granted same extension as ZZPC	52 days
ZZPC	38 days	14 days	52 days
Qingdao	38 days	None requested - but granted same extension as ZZPC	No reply filed
Lets Win[648]	38 days	None requested	55 days

[644] *See* Exhibit US-110.
[645] *See* Exhibit US-110.
[646] *See* Exhibit US-110.
[647] *See* Exhibit US-110.
[648] Lets Win, a voluntary respondent, filed its notice of appearance on September 13, 2007, after the original questionnaire was issued on August 7, 2007. (*See* Exhibit US-109: September 13, 2007, Letter from Greenberg Traurig to Secretary of Commerce. Lets Win filed its response to the original questionnaire on October 1, 2007; October 1, 2007, Letter from Greenberg Traurig to Secretary of Commerce.)

LWS

Interested Party	Original Deadline for Reply[649]	Extensions Granted[650]	Total Days
Government of China	38 days	14 days	52 days
Aifudi	38 days	None requested	38 days
SSJ	38 days	21 days	59 days
Han Shing Chemical	38 days	None requested	No reply filed
Ningbo Yong Feng Packaging	38 days	None requested	No reply filed
Shangdong Qilu Plastic Fabric Group	38 days	None requested	No reply filed

OTR Tires

Interested Party	Original Deadline for Reply[651]	Extensions Granted[652]	Total Days
Government of China	38 days	21 days	59 days
Guizhou Tyre	38 days	21 days	59 days
Starbright	38 days	21 days	59 days
TUTRIC	38 days	21 days	59 days

485. China acknowledges that the United States satisfied its obligation with respect to the questionnaire issued at the beginning of each of the four CVD investigations.[653] China contends, however, that the term "questionnaires" also covers subsequent requests for information sent by Commerce, in particular, "supplemental questionnaires" and "new subsidy allegation

[649] *See* Exhibit US-110.
[650] *See* Exhibit US-110.
[651] *See* Exhibit US-110.
[652] *See* Exhibit US-110.
[653] China First Submission, para. 444.

questionnaires."[654] In support of its view, China points to the use of the plural term "questionnaires" in Article 12.1.1 and what it considers to be the "context" of that provision.

486. China's attempt to find support for its interpretation in the SCM Agreement is unavailing. First, although Article 12.1.1 uses the term "questionnaires" in the plural, that use is properly attributable to the corresponding reference to the recipients (Members, foreign producers, exporters) in the plural rather than to any intent of the Members to extend this thirty-day requirement to every request for information made by an investigating authority. It is true, as China posits, that Members could have used words like "receiving *the initial questionnaire*" instead of the plural "questionnaires",[655] but it is equally true that if Members had definitively intended China's interpretation, they could easily have so specified by saying instead, "*Any* exporter, foreign producer or interested Member receiving questionnaires." When seen in context of the explicit references to "*the* questionnaire" in Annex VI to the SCM Agreement,[656] the use of the plural in Article 12.1.1 does not carry the significance China ascribes to it.

487. Furthermore, the "context" cited by China offers little support for China's interpretation. The "context" relied on most heavily by China is the statement of the Appellate Body that Article 12 of the SCM Agreement "as a whole" provides for evidentiary rules and due process rights that apply "throughout" an investigation.[657] Of course, such a statement does not form part of the "context" of Article 12.1.1 under the customary rules of interpretation of public international law.[658] In any event, that statement speaks of Article 12 "as a whole" and does not address the particular text of Article 12.1.1. Moreover, China's reliance on this statement to substantiate its interpretation of Article 12.1.1 is misguided given the Appellate Body's recognition that Article 6.1.1, the provision in the AD Agreement establishing the same thirty-day time period as Article 12.1.1 of the SCM Agreement, "prescribes an absolute minimum of 30 days for the *initial response to a questionnaire*."[659]

488. China also finds support for its interpretation in the "ample opportunity" that an investigating authority must provide under Article 12.1 of the SCM Agreement for interested

[654] China First Submission, para. 445. Having argued in the beginning of this section of its brief that the term "questionnaires" in Article 12.1.1 imposes the thirty-day requirement on "all questionnaires, without qualification," China appears to have recognized, in a subsequent footnote, that this reading goes too far. (China First Submission, para. 447.) There, China suggests, in an attempt to distinguish *Egypt - Rebar*, that the term "questionnaire" might not include every request for information issued by an investigating authority, pointing in particular to requests to "obtain further details" under Article 6.7 of the AD Agreement and the "opportunity to provide further explanations" under paragraph 6 of Annex II to the AD Agreement. (China First Submission, footnote 363 to para. 451.) This attempt fails, however, because there is no support for China's view that these requests for information could not be made in the form of a "formulated series of questions." (See paragraph 475 of this submission.)

[655] China First Submission, para. 447.

[656] *See* paragraph 476 of this submission.

[657] China First Submission, para. 448 (quoting *Mexico – Rice (AB)*, para. 292). *See also* China First Submission, paras. 449 and 451.

[658] *See Vienna Convention on the Law of Treaties*, Article 31.2

[659] *US - Hot-Rolled Steel (AB)*, para. 73 (emphasis added).

parties to present evidence in an investigation.[660] China fails to acknowledge, however, that an investigating authority's issuance of requests for information, after receiving a response to the questionnaire, is one means by which the investigating authority "give[s] notice of the information" that it requires.[661] Such requests for information are also one of the principal mechanisms by which an investigating authority provides an "opportunity" for an interested party to submit evidence.[662] Making it more difficult for investigating authorities to make such requests for information would therefore deny interested parties some of the very "notice" and "opportunity" mandated by Article 12 of the SCM Agreement.

489. Also for this reason, China misunderstands the "balance"[663] achieved in Article 12 with a proper interpretation of Article 12.1.1. Rather than providing some sort of "unfettered discretion" to investigating authorities, such an interpretation ensures foreign interested parties a meaningful amount of time to reply to the typically most comprehensive questionnaire, issued at the outset of an investigation, while providing those parties with sufficient subsequent opportunities to be informed of additional information needed by the investigating authority. In being so informed, those parties are also better positioned to provide that information and present their views on issues relevant to the determination of the investigating authority.

490. The purely hypothetical "unfettered discretion" imagined by China, and the consequent potential for "inequitable result[s]," stands in stark contrast to the realities of the four CVD investigations at issue.[664] The record in each of those investigations reveals that Commerce afforded interested parties numerous opportunities to provide necessary information and present evidence they considered relevant to the particular investigation. As seen in the table below, Commerce granted at least in part every request for extension of time, and interested parties submitted their replies by the deadlines established:

[660] China First Submission, para. 449.
[661] SCM Agreement, Article 12.1.
[662] SCM Agreement, Article 12.1.
[663] China First Submission, para. 450.
[664] China First Submission, para. 450.

CWP

Request for Additional Information	Original Deadline for Reply[665]	Extensions Granted[666]	Total Days
1st Supp. questionnaire			
Government of China	7 days	7 days	14 days
Kingland	7 days	7 days	14 days
East Pipe	7 days	7 days	14 days
2nd Supp. questionnaire			
Government of China	6 days	7 days	13 days
Kingland	10 days	8 days	18 days
East Pipe	10 days	15 days	25 days
3rd Supp. questionnaire			
Government of China	9 days	19 days	28 days
Kingland	7 days	6 days	13 days
East Pipe	9 days	No extension requested	9 days
1st New Subsidy Allegation questionnaire			
Government of China	13 days	No extension requested	13 days
Kingland	13 days	No extension requested	13 days
East Pipe	13 days	No extension requested	13 days

665 *See* Exhibit US-96.

666 *See* Exhibit US-97.

2nd New Subsidy Allegation questionnaire			
Government of China	14 days	7 days	21 days
Kingland	14 days	No extension requested	14 days
East Pipe	14 days	7 days	21 days

LWRP

Request for Additional Information	**Original Deadline for Reply**[667]	**Extensions Granted**[668]	**Total Days**
New Subsidy Allegation questionnaire			
ZZPC	12 days	1 day	13 days
Lets Win	12 days	No extension requested	12 days
Government of China	12 days	No extension requested	12 days
1st Supp. questionnaire			
ZZPC	7 days	12 days	19 days
Lets Win	7 days	7 days	14 days
Government of China	7 days	7 days	14 days
2nd Supp. questionnaire			
ZZPC	7 days	11 days	18 days
Government of China	4 days	none requested	4 days
Lets Win	7 days	6 days	13 days

[667] *See* Exhibit US-98.

[668] *See* Exhibit US-99.

3rd Supp. questionnaire			
Government of China	16 days (7 days for certain questions only)	6 days	22 days
ZZPC	7 days	14 days	21 days

LWS

Request for Additional Information	Original Deadline for Reply[669]	Extensions Granted[670]	Total Days
1st Supp. questionnaire			
Government of China	9 days	3 days	12 days
SSJ	9 days	3 days	12 days
Aifudi	8 days	3 days	11 days
2nd Supp. questionnaire			
SSJ	7 days	3 days	10 days
New Subsidy Allegation questionnaire			
SSJ	7 days	No extension requested	7 days
Aifudi	7 days	No extension requested	7 days
Government of China	7 days	No extension requested	7 days
3rd Supp. questionnaire			
Aifudi	14 days	7 days	21 days
SSJ	14 days	no extension requested	21 days

[669] *See* Exhibit US-100.
[670] *See* Exhibit US-101.

Government of China	13 days	7 days	20 days
4th Supp. questionnaire			
SSJ	6 days	No extension requested	6 days

OTR Tires

Request for Additional Information	Original Deadline for Reply[671]	Extensions Granted[672]	Total Days
1st New Subsidy Allegation Questionnaire			
Government of China	14 days	10 days	24 days
Guizhou Tyre	14 days	10 days	24 days
Starbright	14 days	10 days	24 days
Tutric	14 days	10 days	24 days
1st Supp. questionnaire			
Starbright	14 days	4 days	18 days
Guizhou Tyre	14 days	4 days	18 days
Tutric	14 days	4 days	18 days
Government of China	10 days	4 days	14 days
2nd New Subsidy Allegation Questionnaire			
Guizhou Tyre	12 days	14 days	26 days
Government of China	12 days	14 days	26 days

[671] *See* Exhibit US-102.
[672] *See* Exhibit US-103.

2nd Supp. questionnaire			
Guizhou Tyre	14 days	14 days	28 days
Government of China	14 days	14 days	28 days
Starbright	14 days	14 days	28 days
Tutric	14 days	14 days	28 days
3rd Supp. questionnaire			
Government of China	14 days	7 days	21 days
Guizhou Tyre	14 days	7 days	21 days
Starbright	14 days	7 days	21 days
Tutric	14 days	7 days	21 days
4th Supp. questionnaire			
Government of China	12 days	2 days	14 days
Guizhou Tyre	8 days	No extension requested	8 days
Tutric	8 days	No extension requested	8 days
Starbright	8 days	No extension requested	8 days
5th Supp. questionnaire			
Starbright	10 days	5 days	15 days
Government of China	10 days	5 days	15 days

491. In the light of the above, the United States respectfully requests that the Panel reject China's claim under Article 12.1.1 of the SCM Agreement.

C. Application of Facts Available

492. China argues that, by failing to request certain necessary information from respondents in the *CWP* and *LWRP* CVD investigations and consequently relying on facts available, the United States acted inconsistently with Articles 12.1 and 12.7 of the SCM Agreement.[673]

493. The United States recalls that Commerce was not presented evidence that indicated the need for information about the amount of steel purchased through trading companies that came from SOEs until a very late stage of the investigations. Commerce recognized at that point that such information was necessary to determine the existence of a benefit conferred on producers of the product subject to investigation. Commerce relied on evidence from the records of the investigations in order to make these determinations.

494. It is in the light of these events that Commerce stated in its final determination in each investigation that it "did not ask the respondents to report the amount of [hot-rolled steel] purchased from trading company suppliers that was produced through SOEs."[674] In addition, in the final determination for *LWRP*, Commerce noted its intention to seek this information at the earliest opportunity, that is, during the assessment review.[675] Before any definitive rate of CVD is levied, respondents in the *CWP* and *LWRP* CVD investigations would be provided the opportunity to present evidence with respect to the amount of hot-rolled steel purchased from trading companies that was produced through SOEs.

X. CONCLUSION

495. For the foregoing reasons, the United States respectfully requests that the Panel grant the U.S. requests for a preliminary ruling and reject the remainder of China's claims.

[673] China First Submission, paras. 462 and 464.

[674] *CWP CVD Final Decision Memorandum*, at 10 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 9 (Exhibit CHI-2).

[675] *LWRP CVD Final Decision Memorandum*, at 9 (Exhibit CHI-2).

LIST OF U.S. EXHIBITS

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

US-	Title
1	*Consultation Invitation re: Countervailing Duty Petition on Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, dated June 8, 2007
2	*Entry of Appearance for the Government of China, Circular Welded Carbon Quality Steel Pipe from China*, dated July 27, 2007
3	*Memorandum to Susan Kuhbach, Director, AD/CVD Operations, Office 1: New Subsidy Allegation*, dated September 7, 2007
4	*Memorandum to David M. Spooner, Assistant Secretary for Import Administration re: Post-Preliminary Findings for the Provision of Land for Less than Adequate Remuneration and New Subsidy Allegations (CWP)*, dated April 9, 2008
5	*Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated June 24, 2007
6	*Certain Circular Welded Carbon-Quality Steel Pipe from China and Korea*, Investigation Nos. 701-TA-455 and 731-TA-1149-1150 (Final), 73 Fed. Reg. 31712 (June 3, 2008)
7	*Circular Welded Carbon-Quality Steel Pipe from China*, Investigation Nos. 701-TA-447 and 731-TA-1116 (Preliminary), 72 Fed. Reg. 43295 (August 3, 2007) (issued on July 31, 2007)
8	*CFS Paper, Georgetown Steel Memorandum* (March 29, 2007)
9	*Consultation Invitation re: Countervailing Duty Petition on Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, dated June 28, 2007
10	*Administrative Protective Order Application for the Bureau of Fair Trade for Imports & Exports of the Ministry of Commerce of the People's Republic of China, Light-Walled Rectangular Pipe and Tube from China*, dated August 27, 2007
11	*Memorandum to Susan Kuhbach, Director, AD/CVD Operations, Office 1: New Subsidy Allegation*, dated September 20, 2007
12	*Memorandum to David Spooner, Assistant Secretary for Import Administration re: Post-Preliminary Analysis for the Provision of Land for Less than Adequate Remuneration (LWRP)*, dated April 21, 2008
13	*Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated July 16, 2007
14	*Light-Walled Rectangular Pipe and Tube from China*, Investigation Nos. 701-TA-449 and 731-TA-1118 (Final), 73 Fed. Reg. 45244 (August 4, 2008)
15	*Light-Walled Rectangular Pipe and Tube from China, Korea, Mexico, and Turkey*, Investigation Nos. 701-TA-449 and 731-TA-1118-1121 (Preliminary), 72 Fed. Reg. 49310 (August 28, 2007) (issued on August 22, 2007)
16	*Notice of Appearance and Application for Administrative Protective Order on Behalf of the Ministry of Commerce, Laminated Woven Sacks from the People's Republic of China*, dated August 22, 2007

17	*Memorandum to Barbara E. Tillman, Office Director: New Subsidy Allegation*, dated November 2, 2007
18	*Memorandum to David Spooner, Assistant Secretary for Import Administration re: Post-Preliminary Analysis for the Provision of Land for Less than Adequate Remuneration*, dated April 22, 2008
19	*Consultation Invitation re: Countervailing Duty Petition on Laminated Woven Sacks from the People's Republic of China*, dated June 29, 2007
20	*Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated July 16, 2007
21	*Laminated Woven Sacks from China*, Investigation Nos. 701-TA-450 and 731-TA-1149-1122 (Final), 73 Fed. Reg. 45473 (August 5, 2008)
22	*Laminated Woven Sacks from China,* Investigation Nos. 701-TA-440 and 731-TA-1118-1122 (Preliminary), 72 Fed. Reg. 46246 (August 17, 2007) (issued on August 14, 2007)
23	*Amended Application for Administrative Protective Order on Behalf of the Government of China, New Pneumatic Off-the-Road Tires from the People's Republic of China*, dated November 30, 2007
24	*Application for Administrative Protective Order on Behalf of the Government of China, New Pneumatic Off-the-Road Tires from the People's Republic of China*, dated November 15, 2007
25	*OTR Tires CVD March 12, 2008 Memorandum to the File re: Ex-parte Meeting with Representatives of Government of China*
26	*Entry of Appearance on Behalf of the Government of the People's Republic of China, New Pneumatic Off-the-Road Tires from the People's Republic of China*, dated August 31, 2007
27	*Letter from Barbara E. Tillman, Director, Department of Commerce to GPX/Hebei Starbright Tire Co., Ltd. (OTR Tires)*, dated March 7, 2008
28	*Memorandum to File re: Verification of Hebei Starbright Tire Co., Ltd. (OTR Tires),* dated April 17, 2008
29	*Consultation Invitation re: Countervailing Duty Petition on Off the Road Tires from the People's Republic of China*, dated June 29, 2007
30	*Memorandum to the File, Countervailing Duty Investigation on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation Analysis for New Subsidy Allegations*, dated October 5, 2007
31	*Memorandum to the File, Countervailing Duty Investigation of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Initiation Analysis for New Subsidy Allegation*, dated November 14, 2007
32	*Letter from Thomas Gilgunn, Program Manager, Department of Commerce to GPX/Hebei Starbright Tire Co., Ltd. (OTR Tires) re: Rejection of Submission*, dated March 24, 2008
33	*Memorandum to David Spooner, Assistant Secretary for Import Administration re: Countervailing Duty Investigation of New Pneumatic Off-the-Road Tires from the People's Republic of China; Post-Preliminary Analysis of Non-Tradable Share Reform; Provision of Water to FIEs for Less than Adequate Remuneration; Grants to the Tire Industry for Electricity; and Various Provincial/Municipal Programs*, dated May 2, 2008
34	*Memorandum to the File: Consultations with Officials from the Government of the People's Republic of China*, dated July 16, 2007

35	*Letter from Thomas Gilgunn, Program Manager, Department of Commerce to GPX/Hebei Starbright Tire Co., Ltd. re: Opportunity to Supplement Record (OTR Tires)*, dated March 24, 2008
36	*Second Supplemental Questionnaire to Starbright from Commerce (OTR Tires)*, dated January 9, 2008
37	*Third Supplemental Questionnaire from Commerce to Starbright (OTR Tires)*, dated February 19, 2008
38	*Starbright's Comments on Department's Cancellation of Starbright Verification (OTR Tires)*, dated March 12, 2008
39	*March 11, 2008 Memorandum to the File re: Ex-parte Meeting with Representatives of Hebei Starbright Tire Co., Ltd.*
40	*Starbright's Second Supplemental Questionnaire Response: OTR Tires CVD investigation*, dated February 7, 2008
41	*Starbright's Fourth Supplemental Questionnaire Response, OTR Tires CVD Investigation*, dated February 28, 2008
42	*Starbright's Fifth Supplemental Questionnaire Response, OTR Tires CVD investigation,* dated April 9, 2008
43	*Certain Off-the-Road Tires from China*, Investigation Nos. 701-TA-448 and 731-TA-1117 (Final), 73 Fed. Reg. 51842 (Sept. 5, 2008)
44	*Certain Off-the-Road Tires from China*, Investigation Nos. 701-TA-448 and 731-TA-1117 (Preliminary), 72 Fed. Reg. 50699 (Sept. 4, 2007) (issued on August 27, 2007)
45	19 U.S.C. § 1677
46	Steven Barnett, *Banking Sector Developments*, in *China's Growth and Integration into the World Economy: Prospects and Challenges*, International Monetary Fund Occasional Paper No. 232, at 45 (2004)
47	*CFS CVD Private Financial Experts Verification Report*, dated August 21, 2007
48	Wendy Dobson and Anil K. Kashyap, *The Contradiction in China's Gradualist Banking Reforms* (2006) (*OTR Tires* CVD Record Pub. Doc. 290)
49	*Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16,766, 16,772 (Dep't of Commerce April 7, 2003) (preliminary determination)
50	*Certain Fresh Cut Flowers From the Netherlands*, 52 Fed. Reg. 3301 (Dep't of Commerce Feb. 3, 1987) (final determination)
51	IMF PRC: 2006 Article IV Consultation - IMF Country Report 06/394 International Monetary Fund, *People's Republic of China: 2006 Article IV Consultation - Staff Report* (October 2006) at 4 (*OTR Tires* CVD Record Pub. Doc. 1)
52	Richard Podpiera, IMF Working Paper, *Progress in China's Banking Sector Reform: Has Bank Behavior Changed?*, at 4 (March 2006) (*OTR Tires* CVD Record Pub. Doc. 1)
53	*Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 30946 (Dep't of Commerce July 13, 1992) (final determination)
54	*OECD Economic Surveys: China*, at 140 (2005) (*OTR Tires* CVD Record Pub. Doc. 1)
55	*China in the Global Economy: Governance in China* (OECD), at 382 (*OTR Tires* CVD Record Pub. Doc. 290)

56	*Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 1512, 1516 (Dep't of Commerce Jan. 10, 2006) (preliminary determination; unchanged in final)
57	*Trade Policy Review: Report by the Secretariat on the People's Republic of China (Revision)*, WT/TPR/S/161/Rev.1, at 20-21 (26 June 2006) (*OTR Tires* CVD Record Pub. Doc. 1)
58	*Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 37122 (Dep't of Commerce July 23, 2003) (final determination)
59	*DRAMS Final Decision Memorandum*
60	19 C.F.R. § 351.505
61	19 C.F.R. § 351.511
62	*Black's Law Dictionary*, 108 (6th ed. 1991)
63	*CWP China Supplemental Questionnaire Response*, dated December 18, 2007, at 34-35 and Exhibit S-40
64	*CWP CVD GOC National Verification Report* (March 5, 2008)
65	*CWP China Verification Report*, at Exh. A-2 (Mar. 5, 2008)
66	*CWP Petitioners' Pre-Preliminary Comments*, at Exh. 37 (Oct. 26, 2007)
67	*CWP Petitioner's Submission of Factual Information*, at Exh. 46 (Jan. 7, 2008)
68	*Memo to the File, "LWRP: China Import Statistics for Hot-rolled Steel,"* at Att. 1 (June 6, 2008)
69	*Antidumping Duty Investigation of Certain Lined Paper Products from the People's Republic of China, China's Status as a Non-Market Economy*, at 50-51 (Aug. 30, 2006)
70	*LWRP GOC National Verification Report* (March 5, 2008)
71	*Verification of the Questionnaire Responses Submitted by the Government of the People's Republic of China (GOC) – Central Government*, at 40 (Mar. 4, 2008)
72	*LWS GOC Response Regarding New Subsidy Allegation*, dated November 16, 2007
73	*Memorandum to File, Calculations for the Preliminary Determination: Guizhou Tire Company Limited*, at 3 (Dec. 7, 2007) (unchanged in final results)
74	*The Construction of the Benchmark Interest Rates in CVD Cases Regarding Government-Directed Loans*, Division of International Finance, Federal Reserve Board
75	*Memorandum to The File, from Shane Subler, entitled "Final Determination Calculation Memorandum for Zhejiang Kingland Pipeline and Technologies Co., Ltd.; Kingland Group Co., Ltd., Beijing Kingland Century Technologies Co.; Zhejiang Kingland Pipeline Industry Co., Ltd.; and Shanxi Kingland Pipeline Co., Ltd.,"* dated May 29, 2008
76	*Memorandum to The File, from Shane Subler, entitled "Final Determination Calculation Memorandum for Kunshan Lets Win Steel Machinery Co., Ltd.,"* dated June 13, 2008
77	*Memorandum to The File, from Damian Felton, entitled "Final Determination Calculation Memorandum for Zhangjiagang Zhongyuan Pipe-Making Co., Ltd.; Jiangsu Qiyuan Group Co., Ltd.; Jiangsu Zhongjia Steel Co., Ltd.; Zhangjiagang Zhongxin Steel Product Co., Ltd.; and Zhangjiagang Baoshuiqu Jiaqi International Business Co., Ltd.,"* dated June 13, 2008

78	*Memorandum to The File, from Nicholas Czajkowski, entitled "Final Calculation Memorandum for Guizhou Tire Company Limited (GTC),"* dated July 7, 2008
79	*LWS CVD Provincial and Local Government Verification Report*, at 8 (Mar. 4, 2008)
80	*OTR Tires CVD Central Government Verification Report*, 13 (Apr. 24, 2008)
81	*Council for Trade in Goods, Chairperson's Report, Transitional Review of China*, G/SCM/l21 (21 November 2007), at para. 5, submitted in *Bridgestone Pre-Prelim Comments*, Exhibit 1 (Nov. 28, 2007)
82	*Bridgestone Pre-Preliminary Comments*, at 41 (Nov. 28, 2007)
83	SETC, *Promulgation of the Guidance of Recent Development in the Industrial Sector*, Circular No. 716 (Sep. 28, 2002)
84	*GOC NSA Response at Exhibits GOC-NEW-4-5 & 4-6* (Oct. 29, 2007)
85	*OTR Tires CVD Guizhou Province Verification Report*, 4-5 (Apr. 24, 2008)
86	*Petitioners' Response to Department of Commerce Questions on the Countervailing Duty Petition Filed on Certain Off the Road Tries from the People's Republic of China*, at Exhibit Supp. CVD-2 (Jun. 27, 2007)
87	*Bridgestone's New Subsidy Allegation*, at Exhibit 9 (Sep. 5, 2007)
88	*OTR Tires CVD Bridgestone's New Subsidy Allegations*, Exhibit 44 (September 5, 2007)
89	*CFS GOC Verification Report* (Aug. 20, 2007), at 4, submitted in *OTR Tires CVD Petitioners' Pre-Prelim Comments*, Exhibit 5 (Nov. 29, 2007)
90	*U.S. Steel v. United States*, 15 F. Supp. 2d 892 (CIT 1998)
91	*AK Steel v. United States*, 988 F. Supp. 594 (CIT 1997)
92	*CFS CVD Private Financial Experts Verification Report*, at 4 (Aug. 21, 2007), submitted in *OTR Tires CVD Petitioners' Pre-Prelim Comments*, Exhibit 6 (Nov. 29, 2007)
93	*People's Bank of China 2006 Annual Report*, at 37, submitted in *OTR Tires GOC Questionnaire Response*, Exhibit GOC-3 (Oct. 15, 2007)
94	September 18, 2007 Memo to File from Susan Kuhbach, p. 2 (Government of China representative noting the timing of filing of new subsidy allegations in the *Tires* investigation)
95	*The New Shorter Oxford Dictionary*, excerpted (1993)
96	*CWP* CVD Investigation Original Deadlines for Replying to Requests for Additional Information
97	*CWP* CVD Investigation Extensions Granted for Replying to Requests for Additional Information
98	*LWRP* CVD Investigation Original Deadlines for Replying to Requests for Additional Information
99	*LWRP* CVD Investigation Extensions Granted for Replying to Requests for Additional Information
100	*LWS* CVD Investigation Original Deadlines for Replying to Requests for Additional Information
101	*LWS* CVD Investigation Extensions Granted for Replying to Requests for Additional Information
102	*OTR Tires* CVD Investigation Original Deadlines for Replying to Requests for Additional Information

103	*OTR Tires* CVD Investigation Extensions Granted for Replying to Requests for Additional Information
104	•July 27, 2007 *Initial CVD Questionnaire in Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*; •October 9, 2007 *First Supplemental Questionnaire to the GOC*; •October 4, 2007 *First Supplemental Questionnaire to Kingland*
105	•August 7, 2007 *Letter from Office Director to Bureau of Fair Trade for Imports & Exports re: original questionnaire*; •October 24, 2007 *Letter from Office Director to Bureau of Fair Trade for Imports & Exports re: supplemental questionnaire*
106	•August 3, 2007 *Letter from Office Director to Embassy of China re: original questionnaire*; •October 23, 2007 *Letter from Program Manager to Baker Hostetler re: China supplemental questionnaire*; •October 24, 2007 *Letter from Program Manager to Garvey Schubert Barer re: Zibo Aifudi First Supplemental Questionnaire*
107	•August 17, 2007 *Letter from Office Director to the Embassy of China re: original questionnaire*; •November 13, 2007 *Letter from Program Manager to Hogan Hartson re: China supplemental questionnaire*; •November 9, 2007 *Letter from Program Manager to Grunfeld Desiderio re: TUTRIC supplemental questionnaire*
108	•September 24, 2007 *Letter from Baker Hostetler to Secretary of Commerce re: China questionnaire response*, at 2-3; •November 5, 2007 *Letter from Baker Hostetler to Secretary of Commerce re: China supplemental questionnaire response*, at 12-13
109	•September 13, 2007, *Letter from Greenberg Traurig to Secretary of Commerce. Lets Win filed its response to the original questionnaire on October 1, 2007*; •October 1, 2007, *Letter from Greenberg Traurig to Secretary of Commerce*
110	*CWP, LWRP, LWS, OTR* - Documents Related to Original Deadlines for Reply & Extensions Granted