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

(WT/DS379)

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

December 18, 2009

** Public Version*
(Business Confidential Information has been redacted)

TABLE OF REPORTS CITED

Short Form	Full Citation
Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
China – Audiovisual Products	*China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R, circulated 12 August 2009
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
Mexico – HFCS (Article 21.5) (AB)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States: Recourse to Article 21.5 by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008
Mexico – Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice; Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – 1916 Act (AB)	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000
US – Countervailing Measures (Panel)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, adopted 8 January 2003, as modified by the Appellate Body Report, WT/DS212/AB/R

US – Countervailing Measures (AB)	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – OCTG from Argentina (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Shrimp (Article 21.5) (AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Softwood Lumber CVD Final (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Upland Cotton (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005

I. TERMS OF REFERENCE

A. U.S. REQUEST FOR PRELIMINARY RULINGS

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

1. In its response to this question, China claims to agree that "[w]hat takes place in ... consultations is not the concern of a panel,"[1] yet simultaneously discloses its own, self-serving characterization of what happened "during the consultations process."[2] The United States does not agree with China's characterization and implication, in footnote 3 and paragraph 2 of its answers, of what took place during consultations. Indeed, the United States considers these characterizations highly misleading. However, in the light of DSU Article 4.6, the United States is not in a position to disclose precisely what took place in order to explain why China is in error. The fact that China felt the need to resort to self-serving characterizations of what occurred during consultations is disappointing and only serves to accentuate the fact that, as the United States explained in its answers, China does not dispute that it failed to identify the so-called "absence of legal authority" in its consultations request.[3]

2. In any event, even China's own distorted characterization of what took place during consultations does not indicate that the "absence of legal authority" was in fact the subject of consultations. First, as the United States noted, the subject of consultations can be determined only by looking at the text of the consultations request. That text contains no reference to the alleged "absence of legal authority." Second, China's version, at most, indicates that China raised a question at some point in the consultation process about the legal basis for Commerce to make certain adjustments "to prevent double counting,"[4] not that China stated that there was an alleged measure consisting of a "lack of legal authority" on which China wished to consult in addition to those measures actually identified in the consultation request. The mere fact that a complaining Member may raise a question about the broader legal context in consulting on particular measures does not mean that the parties have expanded the consultations to include any additional alleged "measure."

3. Indeed, as a general matter, a complaining party cannot expand the scope of consultations simply by asking questions about additional matters. Otherwise the requirements of Article 4 of the DSU (including the requirement that consultation requests be in writing, identify the measures at issue, be notified to the DSB and the relevant Councils and Committees; and that the Member to whom the request is addressed reply within ten days) and the rights of potential third parties could be rendered ineffective. For example, China implicitly concedes that it did not

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[1] China Answers to Second Panel Questions, para. 1, *quoting US – Upland Cotton (AB)*, para. 287.

[2] China Answers to Second Panel Questions, footnote 3.

[3] *See* U.S. Answers to Second Panel Questions, para. 5.

[4] China Answers to Second Panel Questions, footnote 3.

fulfill any of these requirements, and that potential third parties received no notice, with respect to the alleged "measure."

4. Finally, the United States notes that for the first time China seems to take the position that its "absence of legal authority" claim somehow evolved from the consultation process.[5] Not only does the United States contest that characterization, it is also contradictory to what China has repeatedly stated in this dispute – that Commerce's alleged lack of legal authority was "*already evident* on the face of the measures that were the subject of consultations."[6] Based on these repeated statements, there appears to be no dispute between the parties that, at the time it filed its consultations request, China considered this "lack of authority" to exist as a separate "measure" that, according to China, was impairing its benefits under the covered agreements. China's decision not to include this "measure" in its consultations request must therefore be understood as a deliberate decision to limit the scope of the dispute to the "as applied" challenges against the AD and CVD determinations at issue. This limitation of the scope of the dispute is plainly reflected in the text of the consultations request.[7]

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

5. China asserts that the new "measure" it introduced in its panel request, the so-called "absence of legal authority," represented a "natural evolution" or "direct outgrowth" of the measures that were in fact the subject of consultations.[8] China recognizes that the Appellate Body explained in *Mexico – Rice* that it was discussing the term "legal basis" and that this refers to "claims."[9] Thus, the concept of "natural evolution" was referring to an evolution in the *claims* as a result of the consultation process.

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[5] China Answers to Second Panel Questions, para. 2.

[6] China's Response to U.S. Preliminary Ruling Request, para. 31.

[7] *See, e.g.,* U.S. First Written Submission, paras. 79-80.

[8] China Answers to Second Panel Questions, para. 6.

[9] *See Mexico – Rice (AB)*, para. 136 ("The Appellate Body has previously explained that the term 'legal basis', which appears in both Article 4.4 and Article 6.2, refers to the claims made by the complaining party."). The panel in *China – Audiovisual Products* also discussed only the *claims* that had changed between the consultations request and the panel request, not the *measures*. *See, e.g., China – Audiovisual Products*, paras. 7.130-7.131.

6. China claims that the Appellate Body report should be read to mean that the same approach should be taken with respect to *measures*. However, this is not accurate. Among other things, there is a difference in the language of Articles 4 and 6 of the DSU with respect to measures as opposed to claims. Article 4.4 requires that a request for consultations include an "identification of the measures at issue." Similarly, Article 6.2 requires that a panel request "identify the specific measures at issue." In both cases, the measure must be identified. However, Article 4.4 requires that consultations requests include only "an indication" of the legal basis for the complaint, whereas Article 6.2 requires a panel request to provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly." "An indication" of the legal basis does not require that all the claims be spelled out in the consultations request. Accordingly, a consultations request need not provide as full a description of the claims as a panel request – there is more room for differences between the consultations request and the panel request since the panel request is required to be more detailed. The same is not true with respect to measures since the measures have to be identified in both the consultations request and the panel request.

7. With respect to *measures*, the Appellate Body confirmed its view in *Mexico – Rice* that "Articles 4 and 6 of the DSU do not 'require a precise and exact identity' between the request for consultations and the panel request, provided that the 'essence' of the challenged measures had not changed."[10] The Appellate Body was not taking a "natural evolution" approach to measures. The question thus is whether the essence of the measure in the panel request is the same as the essence of the measure in the consultations request. Here, the essence of the alleged measure in the panel request is not the same as the essence of the "as applied" measures in the consultation request.[11]

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

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

and/or

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

Please cite any relevant jurisprudence.

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[10] *Mexico – Rice (AB)*, para. 137, *quoting Brazil – Aircraft (AB)*, para. 132.

[11] *See, e.g.*, U.S. First Written Submission, para. 85; U.S. Answers to First Panel Questions, para. 22.

8. The United States notes, as an initial matter, that it agrees with China that the scenarios set out in this question do not relate to the facts before this Panel, albeit for different reasons. The United States has noted that the written nature of the statutory provisions in these scenarios would render them easily defined and situated within the relevant legal system, and also would mean that there would likely have been no dispute as to the existence of those provisions.[12] The alleged "absence of legal authority," in contrast, has not yet been proven by China to exist.[13] These differences mean that the hypothetical scenarios posed by this question at most provide extremely limited assistance to analyzing the issues before the Panel.

9. China submits that the relevant differences between the facts of this dispute and those in the hypothetical scenarios are that the "absence of legal authority" was allegedly evident on the face of the AD and CVD determinations at issue and was in fact the subject of consultations. The United States has explained that neither of these differences is true. Although China may have believed that the determinations indicated a so-called "absence of legal authority," the United States has shown that Commerce in fact has not opined on the scope of its legal authority to make adjustments in cases of concurrent application.[14] The United States has also shown that the "absence of legal authority" was neither identified in the consultations request nor, even under China's characterization of what took place during consultations, consulted upon by the parties.[15]

10. China also errs in stating that it is "irrelevant" that the measure introduced in the panel request is the subject of an "as such" challenge not identified in the consultations request.[16] This claim of "irrelevance" flies in the face of the Appellate Body's recognition that "the implications of ['as such'] challenges are obviously more far-reaching than 'as applied' claims."[17]

11. China's failure to appreciate the significantly different nature of "as such" challenges leads it to incorrectly evaluate the first hypothetical scenario presented in this question. It appears that China confuses claims with measures and again looks to see if the claim of inconsistency remains in essence the same. China's approach is that as long as the claim remains the same (that doing X is inconsistent with provision Y of the covered agreements), it does not matter if the claim is directed at a particular application of a Member's law, multiple applications of that law, or even the law as such.[18] However, China's argument would prove too much. It would conflate particular measures (for example, particular determinations or actions) with the underlying but separate measures from which they were derived (including in theory a Member's

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[12] *See* U.S. Answers to First Panel Questions, para. 11.

[13] *See, e.g.*, U.S. Second Written Submission, paras. 221-222; U.S. Second Oral Statement, para. 83.

[14] *See, e.g.*, U.S. Second Written Submission, para. 222; U.S. Second Oral Statement, para. 84.

[15] *See* U.S. Answer to Second Panel Questions, Comment on Question 2.

[16] China Answers to Second Panel Questions, para. 8.

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

[18] *See* China Answers to Second Panel Questions, para. 10.

basic legal instruments such as a constitution), and in doing so would, among other things, erase the difference between "as such" and "as applied" claims. China's argument would also ignore the requirement to identify the *measure* at issue in a consultations request,[19] and would have important implications for potential third parties, who rely on the consultations request to determine whether they have a "substantial trade interest" in consultations requested under GATT Article XXII. Such parties will not be able to accurately evaluate their interest in a dispute where the complaining Member fails to identify "as such" challenges in a consultations request, and instead limits its claims to particular calculations.

B. OTHER ISSUES

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

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

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

12. In its response to Question 5, China suggests that the language in paragraph (d)(i) of its request for the establishment of the Panel "necessarily encompasses the use of a benchmark that is *not* based on prevailing terms and conditions in China."[20] In China's view, "[i]t was only through the use of these benchmarks that Commerce, in fact, rejected market conditions in China as the basis for identifying the relevant benchmark under Articles 14(b) and 14(d)."[21] Thus, China concludes that "paragraph d(i) of China's panel request provides a sufficient basis to challenge the benchmarks actually used by Commerce."[22]

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[19] Adopting China's reasoning would also have important implications for panel requests and the consequent scope of a panel's terms of reference. This would mean, for example, that a panel request that identified only an "as applied" challenge would nevertheless be sufficient to bring an "as such" claim within that panel's terms of reference because, in China's view, that would not change the "essence" of the matter.

[20] China Answers to Second Panel Questions, para. 12 (emphasis in original).

[21] China Answers to Second Panel Questions, para. 12.

[22] China Answers to Second Panel Questions, para. 12.

13. China is incorrect. Commerce's "rejection of prevailing terms and conditions in China" and its selection of "benchmarks actually used" are separate determinations. In each instance wherein Commerce relied upon an out-of-country benchmark, Commerce first addressed the question of whether it was possible to use an in-country benchmark, and only if it determined that it was necessary to use an out-of-country benchmark did Commerce then separately determine which external benchmark to use.[23]

14. Likewise, China also has discussed these issues separately throughout this dispute. For example, in its First Written Submission, after concluding that "Commerce's rejection of Chinese private prices as the appropriate benchmark in each of the CWP, LWRP and LWS investigations is therefore contrary to Article 14(d),"[24] China then states that it is "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 IV*."[25] Thus, in China's view, as articulated in its First Written Submission, the consistency with the covered agreements of Commerce's determination to "reject prevailing terms and conditions in China" and the benchmark "actually used" are distinct analytical questions.

15. In its Second Written Submission, China refers to "every aspect of Commerce's benefit determination with respect to land-use rights – its decision to reject private land-use in China, its selection of an out-of-country (Thailand benchmark) as a proxy for those prices, and its application of that benchmark in the benefit calculation...."[26] Here, again, China distinguishes between Commerce's decision to "reject private land-use in China" and its selection of an out-of-country benchmark. It is untenable for China to now suggest that the two issues are one and the same to avoid the consequence of its failure to identify in the request for the establishment of the Panel its concerns with the benchmarks Commerce "actually used."

16. China also asserts in its response to Question 5 that "China made perfectly clear in its first written submission that it was challenging the benchmarks that Commerce actually used for land-use rights and loans."[27] However, as the Appellate Body has explained:

> Article 6.2 of the DSU requires that the claims, but not the arguments, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the

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[23] *See, e.g., CWP CVD Final Decision Memorandum*, at 6-9 (loans), 64-66 (hot-rolled steel), (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 35-37 (hot-rolled steel) (Exhibit CHI-2); *LWS CVD Final Decision Memorandum*, at 11-14 (loans), 58-60 and 63-64 (land-use rights), 72-73 and 75-76 (BOPP) (Exhibit CHI-3); *OTR Tires CVD Final Decision Memorandum*, at Comment E.3 and Comment E.4 (loans) (Exhibit CHI-4).

[24] China First Written Submission, para. 129.

[25] China First Written Submission, para. 130.

[26] China Second Written Submission, para. 64.

[27] China Answers to Second Panel Questions, para. 14.

> complaint. If a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding.[28]

Whether China "made perfectly clear in its first written submission that it was challenging the benchmarks that Commerce actually used" is irrelevant to the question of whether a claim against the benchmarks "actually used" was included in China's request for the establishment of the Panel, and thus within the Panel's terms of reference.

17. Finally, China notes that "the United States requested a preliminary ruling from the Panel with respect to the additional measure set forth in China's panel request, claiming that it was not a 'specific measure at issue' within the meaning of Article 6.2 of the DSU and that it was outside the Panel's terms of reference, yet did not feel compelled to request a preliminary ruling with respect to paragraph d(i) of the panel request (or any other provision of the panel request, for that matter)."[29] It is irrelevant that the United States did not request a preliminary ruling that China's claims against the benchmarks actually used by Commerce are not properly before the Panel. As the Appellate Body has explained, in all cases:

> [P]anels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings." For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.[30]

Thus, it is necessary and proper for the Panel to determine whether China's claims in respect of the benchmarks actually used by Commerce for land-use rights and loans are within its terms of reference.

II. OFFSETS

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

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[28] *EC – Bananas III (AB)*, para. 143.

[29] China Answers to Second Panel Questions, para. 14.

[30] *Mexico – HFCS (Article 21.5) (AB)*, para. 36 (*quoting US – 1916 Act (AB)*, para. 54).

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

18. In its response to Question 6, China disagrees with Canada's view that, when examining the benefit of the provision of a good through one or more transactions, the factual circumstances of a given case will determine whether it is necessary to examine other transactions. China takes the position that Article 14(d) of the SCM Agreement imposes an obligation on authorities to perform the benefit calculation on an aggregate basis in *all* cases where multiple transactions are involved.[31]

19. China appears to continue to rest its argument mainly on the use of the term "good" in Article 14(d) of the SCM Agreement,[32] though China also recalls its discussion of the term "product" earlier in this dispute.[33] The United States has previously explained why the term "good" cannot credibly be understood as imposing the aggregation and credit obligations China seeks to create, while at the same time limiting those obligations exclusively to situations in which the government provides goods and services.[34] Likewise, the United States has already demonstrated why the term "product," which is not even found in Article 14, cannot establish the obligations China asks this Panel to create.[35] The terms of Article 14, read in context and in light of the object and purpose of the SCM Agreement, simply provide no support for China's position.

20. If China's argument were accepted, authorities would effectively be required, in all cases, to compare the average price paid in all transactions during the period of investigation against a single average benchmark for the same period. Nothing in the text of Article 14(d) of the SCM

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[31] China Answers to Second Panel Questions, para. 22.

[32] China Answers to Second Panel Questions, para. 18. China also asserts, without any support, that "Subsidies are identified, investigated, and measured on a program-specific basis in the first instance. Where the 'program' is the alleged provision of a 'good' for less than adequate remuneration, and there are multiple transactions during the period of investigation involving the purchase of that 'good', the investigating authority necessarily has to perform an aggregation in order to arrive at a single, period-wide subsidy benefit amount for that program." *Id.* The United States notes that nothing in Articles 1 or 14 of the SCM Agreement requires Members to analyze subsidies on a "program" basis and, indeed, the term "program" does not appear in either of these provisions. Instead, Article 1 of the SCM Agreement defines a subsidy as any instance where a government provides a financial contribution that confers a benefit.

[33] China Answers to Second Panel Questions, para. 24.

[34] U.S. Second Written Submission, paras. 125-133.

[35] U.S. First Written Submission, paras. 296-306.

Agreement supports China's view, and China's reading would have the perverse effect of prohibiting authorities from taking into account the market conditions that in fact prevailed at the time of each individual purchase when determining the adequacy of remuneration for the good in question.

21. The rigid and unreasonable requirement that China asks this Panel to create is inconsistent with the leeway and flexibility that panels and the Appellate Body have found to be inherent in Article 14 of the SCM Agreement. As the Appellate Body has noted, Article 14 contains guidelines that provide a framework for benefit calculations rather than a "precise detailed method of calculation" that authorities are obligated to implement.[36] Yet China seeks to have this Panel impose just such a precise and detailed methodology, which China insists must be followed in all cases regardless of the facts of record, based merely on China's reading of the word "good" in Article 14(d). Once again, China's position is untenable.

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

(b) (To China) Please explain the relationship of this argument that the USDOC did not perform an "apples-to-apples" comparison to:

(i) China's argument that Article 14(d) of the SCM Agreement requires, in all instances, that the benefit conferred by a subsidy in the form of the provision of a "good" must be calculated on an aggregated basis;

(ii) China's claim (paragraph 1(a)(vi) of the Request for Establishment of the Panel) that the "the US authorities' inclusion in a subsidy benefit calculation of only those transaction that produced a positive benefit, while excluding transactions that yielded no benefit [violated] Article IV:3 of the GATT 1994 and Articles 10, 14, 19.1, 19.4 and 32.1 of the SCM Agreement."

22. In its answer to Question 7, China fails to explain how its assertion that Commerce did not perform an "apples-to-apples" comparison is relevant to its claim that Commerce acted inconsistently with the covered agreements by not providing a credit for non-subsidized purchases in the rubber inputs benefit calculations. Rather than clarifying its claim, China's new "apples-to-apples" argument is a distraction, discussing facts and making contentions that are

[36] *US – Softwood Lumber CVD Final (AB)*, para. 92 (quoting the underlying panel report, at para. 7.49).

wholly irrelevant to its claim. In addition, China further confuses matters by once again shifting the legal basis for its credits/offsets claim.

23. China contends that its "apples-to-apples" argument does not constitute a new or distinct claim but, instead, was made "simply to identify yet another instance of how Commerce used aggregations when making its less than adequate remuneration determination for 'rubber' in the OTR Tires investigation."[37] China points out that Commerce aggregated the prices of investigated producers' privately-sourced rubber purchases in order to determine weighted-average monthly benchmark prices.[38] China, however, makes no connection between the "aggregation" in the weighted-average monthly benchmark calculation and China's complaint in this dispute. In actuality, no such connection exists. China claims that Commerce acted inconsistently with the U.S. obligations under the covered agreements by failing to provide a credit in the rubber subsidy benefit calculation for instances in which the government provided rubber inputs for adequate remuneration. The aggregation relevant to China's claim is Commerce's aggregation of the various subsidy benefits that China provided through the sale of rubber inputs for less than adequate remuneration. Thus, China's identification of instances of "aggregation" in the calculation of the benchmark used to measure the benefit serves only as a distraction and is in no manner helpful to this Panel.

24. Similarly, China draws the Panel's attention to the fact that, for certain inputs, Commerce used a benchmark from one month [[***]].[39] However, China once again establishes no discernable connection between this fact and China's claim that Commerce was obligated to provide a credit for non-subsidized purchases in the calculation of the subsidy benefits of government-provided rubber inputs. Furthermore, as the United States has explained, there was nothing inappropriate about Commerce's selection of benchmarks in the *OTR Tires* CVD investigation. Whenever possible, Commerce employed a benchmark based on the investigated producer's data from the *same month* as the purchase of the government-sourced input. When benchmark data from the same month was not available, Commerce employed the investigated producer's data from a proximate month.[40] However, in some circumstances, [[***]].[41] Commerce's selection of benchmark data in the *OTR Tires* CVD investigation was consistent with the obligations in the covered agreements, and, despite its attempt to distract the Panel's attention from the issues relevant to its credits claim, China has not challenged Commerce's selection of rubber benchmarks in the *OTR Tires* CVD investigation.

25. While China's answer states that it is not introducing a new claim against Commerce's use of benchmark data from a proximate month, China seeks to impugn this methodology by

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[37] China Answers to Second Panel Questions, para. 28.

[38] China Answers to Second Panel Questions, para. 29.

[39] China Answers to Second Panel Questions, paras. 37-38.

[40] U.S. Answers to Second Panel Questions, para. 27.

[41] *See* Exhibit US–157.

suggesting that the use of proximate data was biased in favor of finding a benefit.[42] As described above, Commerce used proximate data because no data on privately-sourced inputs was available in the same month as the purchases of the government-sourced input. Furthermore, such comparisons are outcome-neutral. A benchmark based on data from a proximate month may produce a benefit finding that is either higher or lower than that which would result if an exactly contemporaneous benchmark were available on the record, and there is nothing inherent in the methodology that makes one result more likely than the other.

26. Finally, China's answer to Question 7 introduces further confusion because China changes position, once again, regarding the legal basis of its credit claim. China now points to the so-called "basic reasonableness test," which China asserts was articulated by the panel in *EC – DRAMS*.[43] As an initial matter, the United States notes that there is no "basic reasonableness test" found in Article 14 of the SCM Agreement.

27. Moreover, the violation of the covered agreements found by the panel in *EC – DRAMS* is in no way analogous to Commerce's benefit determinations in the *OTR Tires* CVD investigation. In *EC – DRAMS*, the panel found that a loan, loan guarantee, or debt-for-equity swap cannot automatically be found to confer the same benefit as an outright grant.[44] The panel found that such an automatic benefit finding was inconsistent with Article 14 of the SCM Agreement. Commerce's refusal to provide a credit in the rubber benefit calculations did not automatically treat the various rubber input purchases as conferring a benefit. Instead, the only time Commerce found a subsidy benefit was when the government-sourced input was provided at a price below that which the investigated producer paid for the input from a private source. The methodology Commerce applied in the *OTR Tires* CVD investigation was entirely consistent with Article 14.

28. For all these reasons, neither China's "apples-to-apples" argument, nor its attempt to explain that argument, provides any support for China's claim that Commerce was required to provide a credit for non-subsidized purchases in the benefit calculations for government-provided rubber inputs in the *OTR Tires* CVD investigation.

IV. BENCHMARKS

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

(b) (To China) If the Panel were to find that the USDOC acted consistently with Article 14(d), does China nevertheless seek findings that the USDOC acted inconsistently with Section 15(b) of China's Protocol of Accession?

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[42] China Answers to Second Panel Questions, paras. 37-38.

[43] China Answers to Second Panel Questions, para. 34.

[44] *EC – DRAMS*, para. 7.212.

29. China and the United States agree that it is not necessary for the Panel to make any findings with respect to paragraph 15(b) of China's Protocol of Accession, though for different reasons. As the United States has explained, Commerce's benefit determinations were fully consistent with Article 14 of the SCM Agreement, and thus the additional commitments China made in relation to paragraph 15(b) need not be examined. In any event, China has not requested that the Panel make findings regarding paragraph 15(b), and confirmed in its answer to Question 10(b) that "there is no need for the Panel in this case to address China's claims under Article 15(b)."[45]

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

30. In its response to Question 11, China suggests that paragraph 15(b) of China's Protocol of Accession creates an "exception . . . to the otherwise mandatory obligation to apply the standards set forth in Article 14 of the SCM Agreement . . . if 'special difficulties' exist in the application of those standards." China further asserts that the use of external benchmarks in CVD cases involving goods from China would be "the rare exception," and that the paragraph "creates a strong bias in favour of using 'prevailing terms and conditions in China' for benchmarks, even in those situations where 'special difficulties' in their application have been found to exist." China's interpretation is not supported by the text of paragraph 15(b), read in the context of the Working Party Report.

31. First, China is incorrect that paragraph 15(b) creates an "exception" to Article 14 of the SCM Agreement. On the contrary, it expressly provides that "[i]n 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." Rather than being an exception, paragraph 15(b) sets forth additional terms and conditions to which China agreed as a condition for its accession to the WTO. Specifically, in addition to agreeing to be bound by the text of the SCM Agreement, which itself justifies the use of out-of-country benchmarks in certain circumstances, China also agreed to *additional* terms and conditions concerning the use of out-of-country benchmarks in CVD investigations. Paragraph 15(b) permits Members to use methodologies that take into account the possibility that appropriate internal benchmarks may not be available in China.

32. Additionally, the language of paragraph 15(b) does not support the contention that the "possibility that prevailing terms and conditions in China may not always be available as

[45] China Answers to Second Panel Questions, para. 41.

appropriate benchmarks" would arise only in "rare" circumstances. While the use of the terms "always," "possibility," and "may" in paragraph 15(b) recognize that internal benchmarks may be available in some instances and not in others, these words provide no support for the "strong bias" against external benchmarks that China seeks to create. As the United States has noted,[46] Paragraph 15(b) addresses a specific concern that certain Members had regarding their ability to find reliable benchmarks within China. These Members explained in paragraph 150 of the Working Party Report that out-of-country benchmarks are particularly important in the case of China because "China was continuing the process of transition towards a full market economy" and thus, "special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations." Therefore, paragraph 15(b) was included in the Protocol of Accession because the "special difficulties" associated with the transitional nature of China's economy may justify the use of out-of-country benchmarks. The text of paragraph 15(b), read in the context of the Working Party Report, supports the conclusion that the additional terms and conditions to which China agreed regarding external benchmarks were meant to be broadly available to Members, and not narrowly limited to isolated situations.

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

33. China objects to Commerce's discussion of the Dominant Firm theory because China alleges that it was not relied upon in the final determinations at issue in this dispute.[47] However, Commerce repeatedly explained in the determinations at issue in this dispute that it was relying upon the methodology set forth in the softwood lumber investigation.[48] The use of out-of-country benchmarks in the softwood lumber investigation relied upon the Dominant Firm theory. In the softwood lumber investigation, Commerce explained that:

> A large government presence in the market will tend to make much smaller private suppliers price-takers. While it is not unusual for small suppliers to be price-takers even in a market with no government involvement, the government-dominated market will distort the market as a whole if the government itself does not sell at market-determined prices. In such a situation, true market prices may not exist in the country, or it may be difficult to a find a market price that is independent of the distortions caused by the government's action. *See, e.g.,* Dr. Robert Stoner and Dr. Matthew Mercurio, "Economic Analysis of Price

[46] *See* U.S. First Written Submission, paras. 194-195; U.S. Answers to First Panel Questions, paras. 46, 51, 54-55; U.S. Second Written Submission, paras. 68, 70; U.S. Answers to Second Panel Questions, paras. 35-37.

[47] China Answers to Second Panel Questions, para. 43.

[48] *See, e.g., CWP CVD Final Decision Memorandum*, at 7 (Exhibit CHI-1); *LWRP CVD Final Decision Memorandum*, at 17, 36 (Exhibit CHI-2); *LWS CVD Final Decision Memorandum*, at 11-12, 72 (Exhibit CHI-3); and *OTR Tires CVD Final Determination*, at 7, 79 (Exhibit CHI-4).

> Distortions in a Dominant-Firm/Fringe Market" (January 4, 2002), Exhibit 4 of Letter from Dewey Ballantine to Department of Commerce (February 14, 2002).[49]

Therefore, the methodology Commerce relied upon in the investigations at issue in this dispute was, in part, from the Dominant Firm theory as set forth in the softwood lumber investigation.

34. China also argues that the Dominant Firm theory does not "align with the concern expressed by the Appellate Body in *US – Softwood Lumber IV*," because China believes that the Dominant Firm theory directs that prices will be higher and not lower, as the Appellate Body argued would occur when the government had a predominant role in the market.[50] On the contrary, as the United States explained, the Appellate Body's discussion of the predominant government role in *US – Softwood Lumber CVD Final* coincides directly with the Dominant Firm theory.[51] The flaw in China's reasoning lies in the fact that it misapplies the theory to the facts in the underlying investigations. The Dominant Firm theory does not direct that prices will necessarily be higher – only that fringe firms' prices will be influenced by the prices of the dominant firm(s).[52] Where, as in the case of China, the dominant firm(s) are owned by the government, prices may not be set to maximize profit.

35. China's final critique is that there is no evidence on the records of the investigations at issue in this dispute that there were dominant firms in the markets for which Commerce relied upon out-of-country benchmarks.[53] However, Commerce found that the government had a predominant role in each of these markets. Commerce determined, through available facts on the record, that 96.1 percent of the hot-rolled steel in China was manufactured by government-owned companies.[54] For BOPP, Commerce determined, through available facts on the record, that one government-owned company accounted for 90 percent of the petrochemical industry.[55] Additionally, Commerce concluded that the government owned all of the land in China,[56] and

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[49] *See Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 15545 (April 2, 2002), and accompanying Issues and Decision Memo., at "Provincial Stumpage Programs Determined to Confer Subsidies: Benefit" (Exhibit US-174).

[50] China Answers to Second Panel Questions, paras. 45 and 47.

[51] U.S. Answers to Second Panel Questions, paras. 39-40.

[52] U.S. Answers to Second Panel Questions, para. 38.

[53] China Answers to Second Panel Questions, paras. 49-52.

[54] *See CWP CVD Final Decision Memorandum*, at 11 (Exhibit CHI-1), and *LWRP CVD Final Decision Memorandum*, at 3-4 (Exhibit CHI-2).

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

[56] *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).

government-owned banks accounted for the vast majority of the lending in China.[57] China has not disputed these factual conclusions.

36. While ignoring the factual basis for Commerce's determinations, China asserts that the hot-rolled market in China was fragmented.[58] This, however, disregards Commerce's determination that government-owned producers *as a whole* accounted for 96.1 percent of the hot-rolled steel market in China.[59] China's argument presupposes that each firm operates as an independent firm, and ignores the common ownership by the government. Through this common ownership, the government retains a dominant position in these markets and, therefore, the dominant firm theory applies. Consistent with this understanding, the Appellate Body did not evaluate government-owned suppliers individually in *US – Softwood Lumber CVD Final*, but instead dealt with them as a whole, explaining that when the government's role is predominant "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."[60] Therefore, Commerce relied upon the Dominant Firm theory in the investigations at issue in this dispute.

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

37. China agrees with the United States that Commerce's reliance upon available facts on the record to determine the extent of government ownership of the domestic production of hot-rolled steel and BOPP is not relevant for the Panel's analysis of China's claims in this dispute.[61] China, however, takes this opportunity to allege again that Commerce relied upon "*per se* distortion findings."[62] As the United States has explained repeatedly, Commerce based each determination that the Chinese Government played a predominant role in a given market on the entirety of the record evidence and not merely a presumption.[63] China's objection to the reliance upon out-of-country benchmarks hinges upon its unsupported assertion that a price distortion analysis is required by the SCM Agreement.[64] However, the SCM Agreement does not require investigating authorities to make a price distortion finding in order to rely on out-of-country benchmarks.[65]

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[57] *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).

[58] China Answers to Second Panel Questions, paras. 50-52.

[59] *See CWP CVD Final Decision Memorandum*, at 11 (Exhibit CHI-1), and *LWRP CVD Final Decision Memorandum*, at 3-4 (Exhibit CHI-2).

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

[61] China Answers to Second Panel Questions, para. 54.

[62] *Id*.

[63] U.S. Second Written Submission, paras. 84-97 and 105-114.

[64] *See, e.g.,* China Answers to First Panel Questions, para. 126; and China Answers to Second Panel Questions, paras. 53 and 64.

[65] U.S. Second Written Submission, paras. 75-80.

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

38. In response to Question 16, China states that Commerce's determination in the *OTR Tires* CVD investigation is relevant to its claims concerning the *CWP*, *LWRP*, and *LWS* CVD investigations "only in that it confirms the uniformity of Commerce's *per se* 'majority government supplier' rule to evaluate the existence vel non of distortion."[66] While China is correct that the methodology applied in the *OTR Tires* CVD investigation was no different than that applied in the *CWP*, *LWRP*, and *LWS* CVD investigations, China incorrectly persists in its assertion that Commerce applied a "*per se* 'majority government supplier'" rule.

39. As the United States has explained, in each of the underlying investigations, when determining the appropriate benchmarks to use to measure the benefit, Commerce looked at all record evidence, including, where available, import penetration in the markets at issue.[67] While China continues to object to Commerce's methodology, alleging that it was "nothing more than Commerce's quantitative assessment of the role of [government-owned producers] in the market,"[68] China neither explains why a quantitative analysis is inconsistent with the SCM Agreement, nor articulates a qualitative analysis required by the SCM Agreement that Commerce should have performed instead.

40. Additionally, China argues that even if Commerce's methodology in *OTR Tires* "had a proper predicate," the "fact that a WTO Member may have complied with its WTO obligations in one investigation is no defence to a claim that it has violated those obligations in other investigations."[69] Of course, the United States agrees. Each challenged determination must be analyzed individually to assess its consistency with the covered agreements. However, China misses the point of the discussion of the rubber benchmark in *OTR Tires*. The United States has discussed the *OTR Tires* benchmark determination to highlight that Commerce applied the *same* methodology for determining whether it could use in-country benchmarks there and in the challenged investigations. The facts of record, however, led to a different conclusion in *OTR Tires* than in the other investigations. China has not argued that the facts in the challenged investigations were improperly assessed, but instead objects to Commerce's *"per se* 'majority government supplier' rule."[70] Commerce did not apply a *per se* majority government supplier rule, neither in the *OTR Tires* CVD investigation, nor in the *CWP*, *LWRP*, and *LWS* CVD

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[66] China Answers to Second Panel Questions, para. 59.

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

[68] China Answers to Second Panel Questions, para. 62.

[69] China Answers to Second Panel Questions, para. 63.

[70] China Answers to Second Panel Questions, para. 59.

investigations. In each investigation, the benchmark determinations were based on an assessment of all the evidence on the record.

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

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

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

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

41. China restates its view that Article 14(b) requires an investigating authority to take into account the "laws and regulations that are generally applicable to borrowers and lenders in that market."[71] However, Article 14(b) speaks only to the characteristics of the loan,[72] making no mention of the specific laws and regulations of the country of provision.

42. China argues that even if its laws and regulations prevent competition on rates, they should be determinative of the benchmark.[73] For example, China would require reliance on an in-country benchmark when the government is the *sole* provider of loans in the country.[74] This, however, directly contradicts the SCM Agreement, as explained by the Appellate Body in *US – Softwood Lumber CVD Final*. If out-of-country benchmarks are permissible when the government is the *predominant* provider of the good or loan, then they must also be permissible when the government is the *sole* provider.[75] China's position would require investigating authorities to rely solely upon in-country rates in China, even where there is a distorted market.

43. Moreover, China's position effectively eliminates the word "commercial" from the term "comparable commercial loan" in Article 14(b).[76] A benchmark loan rate that is a product of the financial contribution would not be a commercial loan, and requiring investigating authorities to use such a rate would mask the benefit of the financial contribution, contrary to the object and purpose of the SCM Agreement.[77]

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[71] China Answers to Second Panel Questions, para. 66.

[72] Such characteristics may include, for example, the loan's structure (*e.g.,* whether it has a fixed or variable interest rate) or the loan's maturity (*e.g.*, whether it is short-term or long-term).

[73] China Answers to Second Panel Questions, para. 68.

[74] *Id*.

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

[76] U.S. Answers to First Panel Questions, paras. 49-50.

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

25. *(To China) At paragraph 242 of your first written submission you argue that the US violated Article 14(b) because "GTC would not have paid an average annual LIBOR rate for its dollar-denominated loans," and that a "'comparable commercial loan' for this purpose would be a LIBOR-based dollar-denominated loan with the same maturity and the same interest rate terms." You then suggest that the USDOC should have used daily LIBOR rates, which are publicly available. Please explain what you mean by "the same interest rate terms," and what precise methodology you believe that the USDOC was required by Article 14(b) to apply to these loans. In this regard, please explain the terms of the loans at issue, and how specifically the USDOC should have applied daily or other LIBOR rates, instead of the annual averages it did apply.*

44. China failed to respond to this question. Not once in its three-and-a-half-page discussion did China explain how "USDOC was required by Article 14(b)" of the SCM Agreement to apply the methodology China proposes. Indeed, China has never articulated what in the text of Article 14(b) requires Members to use daily rates versus average rates. This is because there is no such requirement in Article 14(b).

45. China is simply proposing an alternate method for selecting a benchmark rate. However, this is not sufficient to establish that the methodology Commerce used was inconsistent with the SCM Agreement. In *US – Softwood Lumber CVD Final*, the Appellate Body explained that it would not "suggest alternative methods that would be available to investigating authorities" because determining the consistency of an alternative method with the SCM Agreement "will depend on how any such method is applied in a particular case."[78] That is, Commerce may apply a range of methods, and the question for this Panel is whether the method chosen in the challenged determination is consistent with Article 14(b).

46. China asserts that the benchmark must be on the same terms as the government-provided loan.[79] In other words, if the government-provided loan rate was set to LIBOR plus a spread, then the benchmark must also be a rate that reflects LIBOR plus a spread to be on the same terms.[80] However, just as there is no requirement in Article 14(b) to use daily rates versus annual average rates, there is similarly no requirement that an investigating authority select a benchmark loan rate that is calculated in the same way as the rate of the government-provided loan. For example, Commerce could have based the benchmark upon the average U.S. Treasury bill rate, which reflects short-term dollar lending. In that scenario, the graph provided in paragraph 71 of China's answers to the panel's second set of questions would not hold true. It might be that the average Treasury bill rate is below the LIBOR rate for the period and thus no benefit would be found. The goal of Article 14(b) is not to match the way in which the rate was set for the

[78] *US – Softwood Lumber CVD Final (AB)*, para. 106.
[79] China Answers to Second Panel Questions, para. 69.
[80] *Id.*, paras. 70-73.

government-provided loan, but instead to find a comparable commercial loan and *then* compare the interest rates on the loans to determine whether a benefit was conferred.

V. DOUBLE REMEDY

26. (To China) On the basis of Exhibit CHI-142, China submits that double remedies occurred in the specific cases at issue in this dispute, and provides amounts of alleged double remedies.

(a) Would China please explain, in words, the precise, complete analysis the Panel should apply to arrive at the conclusion that the exhibit shows that there was or would be a double remedy.

(b) What portions of the amounts in the table constitute the alleged double remedy?

47. China has failed to provide the Panel with the analysis that would demonstrate that, in the investigations at issue, the NME AD duty "offsets any benefit or advantage that the [NME] producer obtained from government subsidies"[81] and that, consequently, a double remedy is "inherent"[82] in the concurrent application of a CVD with an NME AD duty. As an initial matter, the United States observes that, in response to sub-part (b) of this question, China is unable to identify how the BOPP example and Exhibit CHI-142 reveal the amounts alleged to constitute the so-called double remedy. Rather than make such a showing, China states that it "does not consider that the existence of a double remedy directly corresponds to a 'portion[] of the amounts in the table.'"[83] In essence, China admits that it cannot quantify any purported double remedy, even with respect to the few self-serving examples it has taken from the record of the investigations. China's response therefore makes clear that, notwithstanding the reference to these examples, China's double remedy claims continue to rest on nothing more than legal and theoretical assumptions that are themselves unfounded and bear no relation to the investigations at issue.

48. With respect to China's attempt to respond to sub-part (a) of this question, the United States notes that China appears to rely primarily on two aspects of these examples that, in its view, substantiate its double remedy theory: (i) that Commerce did not use a Chinese exporter's actual costs when calculating its normal value;[84] and (ii) that the surrogate values relied on by

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[81] China Answers to Second Panel Questions, para. 80.

[82] China First Written Submission, para. 391. *See also* China Answers to First Panel Questions, paras. 209-212.

[83] China Answers to Second Panel Questions, para. 85.

[84] *See* China Answers to Second Panel Questions, para. 84.

Commerce were "subsidy-free" and consequently exceeded a respondent's actual costs.[85] Neither of these complaints provides the support needed for China's double remedy claims.

49. As concerns the first aspect, China complains in its response that "Commerce did not consider whether it would be appropriate, for example, to use Aifudi's *actual* cost for BOPP in the anti-dumping investigation to avoid double counting the alleged BOPP subsidy in the parallel countervailing duty investigation."[86] In so stating, China now effectively acknowledges that the objective of its double remedy claims is to require investigating authorities to use a respondent's actual costs when calculating dumping margins under an NME methodology. As the United States has explained, however, requiring an investigating authority to use an NME respondent's actual costs is fundamentally incompatible with the recognition that actual costs and prices in an NME will not produce meaningful normal values.[87] Therefore, the fact that an investigating authority uses costs and prices *other than* a respondent's actual costs and prices does not support China's assertion that a double remedy follows from such a calculation.

50. As concerns the second aspect noted above, China contends that surrogate values relied on by Commerce for its calculation of NME normal value are "market-determined," a term employed by China to indicate that surrogate values are free of subsidies.[88] China appears to suggest that, because surrogate values are thus "subsidy-free," and subsidies inexorably lower costs of production, those surrogate values will necessarily exceed the actual subsidized costs of a Chinese respondent,[89] as reflected in the tables presented by China.[90] This supposition about the necessary relationship between surrogate values and actual costs is erroneous for at least three reasons.

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[85] *See* China Answers to Second Panel Questions, para. 83 ("In the anti-dumping investigation, Commerce replaced this "subsidized" cost of [[***]] with what it considered a market-determined cost of $ 4.68.") and footnote 55 ("the U.S. NME methodology is indistinguishable from adding subsidies to the producer's costs in a market economy investigation."). In the same footnote, China makes reference to the article it submitted as CHI-138, which also assumes that the surrogate values used by Commere are necessarily "subsidy-free" and therefore always exceed actual costs ("using the surrogate *unsubsidized* costs in the AD calculation penalizes the company for the same subsidy").

[86] China Answers to Second Panel Questions, para. 84 (original emphasis).

[87] *See, e.g.*, U.S. Answers to Second Panel Questions, paras. 65 and 89.

[88] *See, e.g.,* China First Written Submission, paras. 371-373; China Answers to First Panel Questions, para. 209; China Second Written Submission, paras. 234-235.

[89] *See, e.g.,* China Answers to Second Panel Questions, para. 81 ("This is because the costs that Commerce used to determine constructed normal value did not reflect the subsidies that Commerce found the producer to have received."); *id.* at para. 88, *quoting favorably GPX* ("This is a critical point – the U.S. NME methodology, by its design, addresses any subsidization of the NME producer. It does so by comparing the producer's export price to a 'presumptively subsidy-free constructed normal value.'"); China Second Written Submission, para. 287 ("In the NME context, *by definition*, the normal value *does not reflect the cost reductions associated with the producer's receipt of subsidies*. The difference between that "unsubsidized" normal value and the producer's actual export price necessarily offsets the benefit of any subsidies that the producer may have received."); China First Written Submission, para. 392 ("By placing the producer in the position of having market-determined, unsubsidized costs of production, the NME methodology necessarily addresses any potential subsidization of that producer.").

[90] *See* China First Written Submission, para. 395; Exhibit CHI-142.

51. First, there is no basis to assume that the selection of a surrogate value from a market economy means that that particular surrogate value is "subsidy-free." Given that subsidies can and do occur in market economies, surrogate values are more likely to reflect any such subsidization rather than be devoid of the influence of subsidies. Furthermore, the United States has demonstrated why China's assumption is incorrect under U.S. law, noting in particular the very limited circumstances in which Commerce even considers subsidization in selecting surrogate values.[91] China therefore errs in equating a *market economy* surrogate value with a "*subsidy-free*" surrogate value.

52. Second, the United States has shown, on the basis of the records of the investigations at issue, that the surrogate values used by Commerce in calculating the NME normal value can in fact be *lower* than the actual costs of the Chinese respondents.[92] The United States provides additional evidence in this regard from the investigations at issue:

Natural Rubber Inputs For Guizhou Tyre In The OTR Tires Investigation (US$/Ton)

		October 2006	November 2006	December 2006	
AD Surrogate Value[93]		$ 1838.97	$ 1865.37	$ 1875.83	
CVD Benchmark[94]	[[	***	***	***	]]
Guizhou Tyre's Actual Cost[95]	[[	***	***	***	]]

Natural Rubber Inputs For TUTRIC In The OTR Tires Investigation (US$/Ton)

		August 2006	September 2006	November 2006	

[91] *See* U.S. Opening Statement at the Second Panel Meeting, para. 80; U.S. Second Written Submission, para. 189.

[92] *See* U.S. Answers to Second Panel Questions, paras. 66-67.

[93] *Memorandum to The File Regarding Off The Road Tires from China: Surrogate Values for the Final Determination* (July 7, 2008) (public document) (Exhibit US-167). Commerce used two HTS numbers for its natural rubber surrogate values. Data for those two HTS numbers were averaged to create this value.

[94] *Memorandum to The File Regarding Off The Road Tires from China: Final Calculation Memorandum for Guizhou Tire Company Limited*, Attachment 1 (July 7, 2008) (Exhibit CHI-56).

[95] *Id*.

AD Surrogate Value[96]		$ 1795	$ 1812	$ 1865	
CVD Benchmark[97]	[[	***	***	***	]]
TUTRIC's Actual Cost[98]	[[	***	***	***	]]

Low-Linear Density Polyethylene ("LLDPE") Inputs For Aifudi In The LWS Investigation (US$/KG)

		November 2006	December 2006	
AD Surrogate Value[99]		$ 1.41	$ 1.42	
CVD Benchmark[100]	[[	***	***	]]
Guizhou Tyre's Actual Cost[101]	[[	***	***	]]

These data from the investigations beg the question which of the above input prices, under China's theory, should be considered the "subsidy-free" price – the surrogate value or the CVD benchmark? It also further undermines China's implicit assumption that the NME methodology necessarily produces a "subsidy-free" surrogate value that is higher than a respondent's actual cost.

53. Finally, the history of the NME methodology in the covered agreements and their predecessors reflects the fact that there is nothing inherent in the application of that methodology that would, or was meant to, "capture"[102] subsidization and thereby necessarily produce higher surrogate values and higher dumping margins. The United States notes that it was an NME Contracting Party, Czechoslovakia, that proposed an amendment to the GATT 1947 to permit the

[96] *Memorandum to The File Regarding Off The Road Tires from China: Surrogate Values for the Final Determination* (July 7, 2009) (Exhibit US-167). Commerce used two HTS numbers for its natural rubber surrogate values. Data for those two HTS numbers were averaged to create this value.

[97] *Memorandum to The File Regarding Off The Road Tires from China: Final [CVD] Calculation Memorandum for Tianjin United Tire & Rubber International Co., Ltd. ("TUTRIC")*, Attachment 1 (July 7, 2008) (Exhibit CHI-57).

[98] *Id*.

[99] *Memorandum to The File Regarding Investigation of Laminated Woven Sacks from the People's Republic of China: Surrogate Values for the Final Determination*, at Exhibit 1 (June 16, 2008) (Exhibit CHI-47).

[100] *Memorandum to The File Regarding [the CVD] Investigation of Laminated Woven Sacks from the People's Republic of China: Final Calculation Memorandum*, at Attachment 6 (June 16, 2008). (Exhibit CHI-46).

[101] *Id*. Aifudi had [[***]].

[102] China First Written Submission, para. 330; China Second Written Submission, para. 235.

use of alternative dumping methodologies in respect of imports from NME countries.[103] That proposal, and the subsequent negotiating history regarding its adoption as the *Ad* Note 2 to Article VI:1 of the GATT 1947, make clear that the purpose of the *Ad* Note was not to address subsidization through an alternative dumping methodology.[104] An alternative anti-dumping methodology was required because comparisons based on meaningless internal prices could either fail to capture the full scope of dumping or, alternatively, create the appearance of dumping where none in fact existed. It is difficult to understand why the NME methodology would have originally been proposed by an NME Contracting Party if it were clear, as China appears to suggest, that the surrogate cost data involved in the application of such methodology will invariably lead to higher dumping margins than those that would be obtained based on NME actual cost data.

54. In the light of the above, and the U.S. response to Panel question 27, China has failed to demonstrate how the BOPP film example and Exhibit CHI-142 establish the existence of a double remedy in the investigations at issue.[105]

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

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

55. In its response to this sub-part, China states that, in *GPX*, the U.S. Court of International Trade ("USCIT") "expressly withheld judgment on whether Commerce has authority under U.S.

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[103] *See ARTICLE VI, Proposals by the Czechoslovak Delegation*, GATT Doc. No. W.9/86 (9 December 1954) (Exhibit US-175).

[104] *See ARTICLE VI, Proposals by the Czechoslovak Delegation*, GATT Doc. No. W.9/86 (9 December 1954) (Exhibit US-175); *Report of the Review Working Party III on Barriers to Trade Other than Restrictions or Tariffs*, GATT Doc. No. L/334 (1 March 1955), at para. 6 (Exhibit US-176). Indeed, subsidies are not mentioned even once in the relevant negotiating history. Instead, the focus was on finding appropriate price comparisons where the internal prices and costs of an NME were unreliable due to State price-fixing or State monopolization.

[105] The United States also notes its surprise at China's failure to make any reference in this discussion to Exhibit CHI-170, much less an explanation of the numerous assumptions underlying the data in those tables and of how that data reveals precisely where a double remedy could be identified by an investigating authority. The United States recognizes that this question did not specifically ask China to discuss Exhibit CHI-170. However, given the emphasis China placed on this Exhibit during the Panel meeting, and the fact that this was the first time in these proceedings China has attempted to articulate the connection between its theory and margin calculations (albeit not those from the investigations at issue), one would have expected a written explanation of such a complex exhibit, as the United States noted in its answers. *See* U.S. Answers to Second Panel Questions, para. 69. The lack of such an explanation can only lead one to conclude that China has recognized the significant shortcomings of Exhibit CHI-170, some which the United States identified in its answers, and decided accordingly to refrain from relying on that Exhibit to substantiate its theory.

law to avoid the imposition of double remedies in NME investigations."[106] In support of this characterization, China points to the court's statement in footnote 14 of its opinion that it was not deciding "whether 'any adjustments are permissible under the statute so that CVD remedies could be imposed.'"

56. Contrary to China's characterization, that statement does not reflect the court's decision to withhold judgment on the broader question of whether Commerce has authority at all under U.S. law to avoid the imposition of double remedies in NME investigations. As the fuller text of footnote 14 reveals, the court addressed in that footnote the possibility of adjustments only *under the U.S. AD statute*.[107] It is therefore with specific reference to the *authority under the AD statute* that the court expressly withheld judgment.

57. The United States explained in its answer to this question that *GPX* gives Commerce three options to prevent what the court perceived to be a potential double remedy: (1) refrain from applying CVDs to China; (2) treat China or GPX as a market economy entity; or (3) adjust either its AD or CVD methodology to address the problem.[108] The United States also explained that one would not expect the court to have set out these options for corrective action if it were apparent that Commerce lacked the legal authority to undertake such options. In this respect, the court in footnote 14 declined to rule only on whether a *part of the third option* – that is, the possibility of adjustments made in the course of calculating *AD margins* – would be permissible under U.S. law. The Court made no such disclaimer with respect to the other courses of action it made available to Commerce. Thus, China errs in suggesting that the *GPX* court "expressly withheld judgment" on whether Commerce had any authority to avoid the potential double remedy perceived by the court.

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[106] China Answers to Second Panel Questions, para. 86.

[107] Footnote 14 of *GPX* provides, in relevant part:

> The court does not decide here if any adjustments are permissible under the statute so that CVD remedies could be imposed. Both sides have suggested potential adjustments *to Commerce's AD methodology* in the NME context, including GPX's request for a constructed export price offset and Titan and Bridgestone's request for non-production energy to be included in overhead calculations. (See Pls.' AD Br. 4–14; Mem. of Titan in Supp. of Mot. for J. Upon the Administrative R. (Addressing "All Other" Antidumping Issues) ("Titan AD Br.") 19–24.) Many of *these adjustments*, however, seem logically inconsistent. When Commerce calculates surrogate values, the information used is not gathered in response to questions asked of mandatory respondents, but rather, Commerce relies on broad information from public documents, which is not broken down in a way that Commerce needs in order to make fine-tuned adjustments. (Emphasis added.)

[108] U.S. Answers to Second Panel Questions, para. 90. (This citation refers to the revised U.S. Answers filed on 11 December 2009.)

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

58. China notes that, in reaching its conclusion on the potential for a double remedy, the court in *GPX* asserts that "the NME statute was designed to remedy the inability to apply the CVD law to NME countries, so that subsidization of a foreign producer or exporter in an NME country was addressed through the NME AD methodology."[109] However, as the United States explained in its response to this question,[110] the court's statement is in error, as it cannot be reconciled with the U.S. statute or legislative history, or with the Court of Appeals' decision in *Georgetown Steel.*[111]

59. In addition, China overlooks the fact that *Georgetown Steel* was decided against a specific legal context that no longer applies. In its decision, the Court of Appeals discussed the NME provisions of U.S. law that had been re-enacted by the Trade Agreements Act of 1979[112] and noted the existence of the CVD provisions "in [that] same statute."[113] The court then explicitly recognized the constraint imposed by Article 15 of the Tokyo Round Subsidies Code, in particular the choice for "signatory countries to regulate imports from State-controlled economies based on a surrogate cost methodology under either antidumping or countervailing duty legislation."[114] When examining whether Commerce's decision not to apply the CVD law to economies such as the Soviet Union and East Germany was reasonable, the court therefore understood that such a decision would also facilitate U.S. compliance with Article 15 of the Subsidies Code in cases of concurrent NME AD and CVD investigations. This naturally reinforced the reasonableness of Commerce's decision not to apply the CVD law to such economies. However, in purporting to rely on characterizations made in *Georgetown Steel*, the *GPX* court failed to account for the relevance of Article 15 of the Tokyo Round Subsidies Code to the statements made in *Georgetown Steel*. In particular, the *GPX* court failed to account for the fact that Article 15 was dropped in the Uruguay Round agreements, thereby calling into question any interpretation premised on the context provided by that provision.

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

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[109] China Answers to Second Panel Questions, para. 88, *quoting GPX*, at 16 (underlining supplied by China).

[110] *See* U.S. Answers to Second Panel Questions, paras. 83-86, 94-95.

[111] Contrary to the *GPX* court's reading of *Georgetown Steel*, the Court of Appeals in *Georgetown Steel* did *not* state or even implicitly assume that NME AD duties were intended as a remedy for subsidization. What *Georgetown Steel* actually says is that the U.S. Congress enacted the NME methodology because "in State-controlled economy countries ... the supply and demand forces do not operate to produce prices, either in the home market or in third countries, which can be relied upon for comparison." Not surprisingly, this understanding, which has nothing to do with subsidization, is identical to that underlying the original proposal to provide for such an alternative dumping methodology. *See supra*, Comment on Answer to Second Panel Question 26.

[112] *Georgetown Steel Corp. v. United States*, 801 F. 2d 1308, 1316-1317 (Fed. Cir. 1986) (Exhibit CHI-90).

[113] *Id.*, at 1317.

[114] *Id.*, at 1316-1317.

60. China begins its response to this sub-part of the question by suggesting that statements made by the United States in its first written submission constitute a "concession"[115] that the U.S. NME methodology "offsets subsidization of the producer, at least to some degree."[116] That is incorrect.

61. When making the statements cited by China, the United States did not concede that the question of whether the NME methodology offsets subsidization is a question of "degree." Rather, the United States was simply addressing China's theoretical argument *on its own terms*. Throughout its submissions, China has advanced a theory under which the entire amount of subsidization of a given product is inherently captured by the calculation of a dumping margin using the NME methodology.[117] For example, China answered in the affirmative when asked directly by the Panel whether "China's position is that in all such cases, there is a double remedy for the full amount of any subsidy."[118] Under these circumstances, the initial demonstration by the United States that there was no such complete remedy was appropriate and sufficient to rebut the theory as articulated by China. In fact, given that China's theory continues to be premised on the NME normal value capturing the full amount of subsidies in every case of concurrent application, that demonstration remains dispositive. The arguments developed further by the United States in subsequent submissions, however, reinforce the demonstration of the lack of merit in China's double remedy claims.

62. China also submits that the *GPX* opinion is relevant for the Panel's analysis, placing great emphasis on the reference to municipal court decisions by other WTO panels. However, China fails to address the significant fact that, as the United States has explained, the *GPX* opinion is *not* a final decision under U.S. law and is subject to appeal, which Commerce intends to pursue.[119] *GPX* therefore cannot be said to reflect "the current state of the law."[120] In circumstances almost identical to those presented here,[121] the Appellate Body has cautioned

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[115] China Answers to Second Panel Questions, para. 92.

[116] China Answers to Second Panel Questions, para. 91.

[117] *See, e.g.,* China First Written Submission, paras. 374 ("Having made this determination and calculated anti-dumping duties on this basis, Commerce has necessarily addressed *any allocation of productive resources* within that economy that was not determined by market forces, including the provision of subsidized resources.") and 392 ("By placing the producer in the position of having market-determined, unsubsidized costs of production, the NME methodology necessarily addresses any potential subsidization of that producer.")

[118] China Answers to First Panel Questions, para. 209.

[119] U.S. Answers to Second Panel Questions, paras. 99-100.

[120] *US - Countervailing Measures on Certain EC Products (Panel)*, para. 7.150.

[121] Indeed, the situation before this Panel is even more compelling than that before the panel and Appellate Body in *US – Shrimp (Article 21.5)*. In this dispute, the USCIT has issued an opinion *remanding* the determination for reconsideration by Commerce, after which the revised determination will again be presented to the same lower court for review and possible protest by interested parties. Only after the CIT has then entered a final judgment will it be ripe for appeal. *See* U.S. Answers to Second Panel Questions, paras. 99-100. In *US – Shrimp (Article 21.5)*, the USCIT had already issued a final judgment and it had already been appealed to the Court of Appeals for the Federal Circuit.

against relying on the non-final opinion of a court for the determinative meaning of municipal law:

> There is no way of knowing or predicting when or how that particular legal proceeding will conclude in the United States. The *Turtle Island* case has been appealed and could conceivably go as far as the Supreme Court of the United States. It would have been an exercise in speculation on the part of the Panel to predict either when or how that case may be concluded, or to assume that injunctive relief ultimately would be granted and that the United States Court of Appeals or the Supreme Court of the United States eventually would compel the Department of State to modify the Revised Guidelines. The Panel was correct not to indulge in such speculation, which would have been contrary to the duty of the Panel, under Article 11 of the DSU, to make "an objective assessment of the matter … including an objective assessment of the facts of the case".[122]

63. The United States therefore maintains that the *GPX* opinion – because, *inter alia*, it is not a final decision and does not reflect an authoritative statement of U.S. law – is not instructive for the Panel's consideration of the issues in this dispute.

33. (To China) Please comment on para. 76 of the US oral statement at the second substantive meeting, in which the United States argues that if China's theory were accepted, then any anti-dumping duty pursuant to the NME methodology would fall within the definition of "countervailing duty" under footnote 36 of the SCM Agreement and Article VI:3 of GATT and therefore, could only be imposed pursuant to an investigation initiated and conducted in accordance with the SCM Agreement.

64. The crux of China's double remedy theory is that the NME methodology, by design, produces a normal value (and consequently, in China's view, a dumping margin) that inherently offsets any advantage from subsidization in respect of the same product.[123] The United States has highlighted several errors associated with this assertion.[124] Among those errors are the absurd consequences that follow from this assertion, including the fact that this assertion places an NME AD duty squarely within the scope of the definition of "countervailing duty" found in footnote 36 of the SCM Agreement and Article VI:3 of the GATT 1994.[125]

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[122] *US - Shrimp (Article 21.5) (AB)*, para. 95 (footnote omitted).

[123] *See, e.g.,* China Second Written Submission, para. 225; China Answers to First Panel Questions, paras. 209-211; China First Written Submission, para. 329.

[124] *See, e.g.,* U.S. Second Written Submission, paras. 180-207; U.S. Second Oral Statement, paras. 70-81.

[125] *See* U.S. Second Oral Statement, para. 77. Footnote 36 of the SCM Agreement provides:

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

65. Notwithstanding the Panel's invitation to explain how this might not be the case, China's response says nothing about the definition of "countervailing duty" and contains no citation to either footnote 36 of the SCM Agreement or Article VI:3 of the GATT 1994. In other words, China once again makes no attempt to speak to the precise terms of the covered agreements implicated by its argument, choosing instead to advance the erroneous assertion that "the United States has repeatedly recognized [that] different methods of calculating anti-dumping duties can have the effect of offsetting the benefit or advantage that a producer obtained from government subsidies."[126]

66. In support of this assertion, China cites four anti-dumping determinations by Commerce: *LEU from France*; *German Tool Steel*; *Certain Steel Products from the Netherlands*; and *Live Swine from Canada*.[127] The United States has already explained that China's analogy between this dispute and three of these determinations is inapposite, as these determinations were not based on subsidies being captured by normal value and involved the literal counting of CVDs twice – once in the actual levying of CVDs and once by either adding the CVDs to cost or subtracting CVDs from export price.[128] No matter how hard it tries, China cannot reasonably contend that such a straightforward duplication of CVDs occurs in the context of the investigations at issue. Were there such a straightforward duplication, China would not have had to resort to the construction of its theory of "overlapping rationales."

67. The fourth anti-dumping determination cited by China, *Live Swine from Canada*, similarly fails to support China's assertion. In that investigation, Commerce "include[d] the government contributions received by the respondents for the fiscal year from the ... program as an offset to respondents' reported G&A costs ."[129] Rather than being designed to "deduct subsidies from cost" to avoid offsetting any advantage from subsidization,[130] this approach reflects Commerce's long-standing practice of treating as an offset to cost, any income that is

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[126] China Answers to Second Panel Questions, para. 97.

[127] China Answers to Second Panel Questions, footnote 80.

[128] *See* U.S. Second Written Submission, footnote 350; U.S. Answers to First Panel Questions, paras. 158-160. The three determinations previously discussed by the United States are *LEU from France*, *German Tool Steel,* and *Certain Steel Products from the Netherlands*. In addition, with respect to *Certain Steel Products from the Netherlands*, the United States notes that China cites only a preliminary determination of the Department of Commerce. *See* Exhbit CHI-156. Commerce, however, did not have the opportunity to consider its methodology in the light of interested party comments because the AD and CVD applications were withdrawn and the AD and CVD investigations thereby terminated. *See Certain Steel Products From Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom: Termination of Countervailing Duty and Antidumping Investigations*, 47 Fed. Reg. 49058, 49059 (October 29, 1982) (Exhibit US-177). Commerce's preliminary position in *Certain Steel Products from the Netherlands*, therefore, cannot be considered a final opinion on the matter.

[129] *Live Swine from Canada*, I&D Memo for the Final Anti-dumping Determination, Comment 2 (March 4, 2005) (Exhibit CHI-158).

[130] *See* China Second Written Submission, para. 214; China Answers to Second Panel Questions, para. 246 and footnote 200.

received as a result of *producing* the subject merchandise, irrespective of source, and that is duly recorded in the respondents' books.[131] There are many examples of the application by Commerce of offsets to cost based upon revenue accruing from producing the subject merchandise. Perhaps the most common example is the application of offsets to manufacturing cost in the amount of the revenue earned by selling by-products that result from producing the subject merchandise.[132] Commerce routinely applies similar offsets to both G&A expenses[133] and financial expenses.[134]

68. That the application of offsets to cost in the amount of the revenue accruing from producing the subject merchandise is purely an aspect of the calculation of the dumping margin, rather than a tool to "deduct subsidies from cost" to avoid offsetting any advantage from subsidization, is further evidenced by the fact that Commerce applies such offsets independently of whether there is a parallel CVD investigation or, in event of such parallel investigation, even if this investigation does not result in the imposition of CVDs.[135] Indeed, *Live Swine from Canada* is itself an example of an investigation where Commerce applied the same offset to cost even where the final determination in the corresponding CVD investigation was negative.[136] Where there is no parallel CVD investigation, or where such investigation has not led to the imposition of CVDs, the application of offsets to cost in the amount of any revenue provided to the recipient by the government cannot possibly be targeted at avoiding double remedies.

69. China's mistaken focus on an alleged U.S. recognition that dumping calculations can offset subsidization therefore cannot excuse China's failure to explain, in response to a direct

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[131] Conversely, income accruing from *selling* the subject merchandise is treated as sales revenue.

[132] *See, e.g.*, *Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 31724, 31728, Comment 6 (June 10, 1998) (Exhibit US-178) ("Our general practice in cases involving agricultural goods has been to treat 'reject' products as by-products and to offset the total cost of production with revenues earned from the sale of any such 'reject' products. This approach has been upheld by the CIT in Asociacion Colombiana.").

[133] *See, e.g.*, *Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19388, Issues & Decision Memorandum, at p. 13, Comment 5 (April 13, 2004) (Exhibit US-179) ("We agree with SSI that the Department should continue to include the other revenue items as an offset to G&A expenses in the G&A expense ratio calculation. In calculating the G&A expense ratio, it is the Department's practice to include revenues and expenses that relate to the general operations of the company.").

[134] *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From Taiwan*, 65 Fed. Reg. 16877, Issues & Decision Memorandum, at p. 47, Comment 33 (March 30, 2000) (Exhibit US-180) ("In calculating cost of production and CV, it is the Department's practice to allow a respondent to offset (i.e., reduce) financial expenses with short-term interest income earned from the company's working capital.").

[135] *See, e.g.*, *Notice of Final Determination of Sales at Less than Fair Value: Furfuryl Alcohol from South Africa*, 60 FR 22550, 22556, Comment 16 (May 8, 1995) (Exhibit US-181) ("ISL claims its decentralization incentive payments were approved by and received from the South African government during fiscal year 1994. Since the revenue was recorded in its audited financial statements, ISL maintains that it appropriately included this amount in its submitted G&A rate calculation … [W]e included the grant revenue in ISL's G&A calculation.").

[136] *See Final Negative Countervailing Duty Determination: Live Swine from Canada*, 70 FR 12186 (March 11, 2005) (Exhibit US-182).

question from this Panel, how its double remedy theory relates to the definition of "countervailing duty" in the SCM Agreement and the GATT 1994.

VI. OTHER ISSUES

34. (To China) What are you asking the Panel to do in respect of the issue raised in paragraphs 134-137 of your first written submission?

70. In response to Question 34, China reiterates its claim 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 argues that Commerce's "rationale for concluding that the subject producers received a benefit was predicated on an assumption that some or all of the subsidy conferred in the transaction between the SOEs and the private trading companies 'passed through' to the subject producers when they purchased inputs from the trading companies."[137] China contends that, by failing to conduct a pass-through analysis pursuant to the framework articulated by the Appellate Body in *US – Softwood Lumber CVD Final*,[138] "Commerce unlawfully presumed that the purported financial contribution to the trading companies – the provision of HRS and rubber by SOEs – conferred a benefit."[139]

71. China is incorrect. Commerce was not required in these investigations to conduct any pass-through analysis, as that concept has been developed and understood by prior panels and the Appellate Body. In *Mexico – Olive Oil*, the panel reviewed "the basis in WTO law for the obligation to conduct a pass-through analysis in a countervailing duty investigation."[140] As that panel explained, two situations have been identified where a pass-through analysis is required:

> To summarize, the *US – Softwood Lumber IV* and *US – Canadian Pork* cases have established that a pass-through analysis is required in circumstances in which both of the following conditions are present: (1) a subsidy is provided in respect of a product that is an input into the processed, imported product that is the subject of the countervail investigation; and (2) the producer of the input product and the producer of the imported product subject to the countervail investigation are unrelated. ... There is also jurisprudence that in cases in which non-recurring subsidies were provided to state-owned enterprises that were later privatized at fair market values, the investigating authorities must conduct examinations to determine whether any of those past subsidies continued to exist following the privatization.[141]

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[137] China Answers to the Panel's Second Set of Questions, para. 100.
[138] China Answers to the Panel's Second Set of Questions, para. 101.
[139] China Answers to the Panel's Second Set of Questions, para. 102.
[140] *Mexico – Olive Oil*, para. 7.130.
[141] *Mexico – Olive Oil*, para. 7.142.

The investigations challenged by China did not involve either of the situations described by the *Olive Oil* panel.

72. With respect to the first situation identified by the *Olive Oil* panel, the *US – Softwood Lumber CVD Final* and *US – Canadian Pork* reports do not support China's view that a pass-through analysis was required in the challenged determinations.[142] In *US – Softwood Lumber CVD Final*, Commerce countervailed imports of softwood lumber based on subsidies provided to harvesters of raw logs, the input into the production of lumber. In *US – Canadian Pork*, the subsidy was provided to producers of live swine, while the countervailing duties were applied to imports of fresh, chilled, and frozen pork. In the challenged investigations, the situation is different. The subsidies were not provided *to* producers of input products; the subsidies were provided *by* those producers in the form of goods (input products) provided for less than adequate remuneration. The factual circumstances in the challenged investigations were unlike those in the *Softwood Lumber* and *Pork* dispute, and did not call for a pass-through analysis.

73. Additionally, the fact that the inputs were provided first to trading companies and then re-sold to producers of subject merchandise is not significant. 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."[143] 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."[144] The panel subsequently explained that "[i]n other words, it is not necessary to identify the particular recipient or recipients of the benefit and the particular manner in which a subsidy is bestowed in order to determine that a benefit has been conferred, and that therefore a subsidy exists, within the meaning of Article 1.1(b)."

74. 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 privately-owned trading companies that purchased input products from state-owned producers.[145] 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

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[142] With respect to the second situation identified by the *Olive Oil* panel, there has been no discussion whatsoever, either in this dispute or in the underlying investigations, of non-recurring subsidies provided to state-owned enterprises that were later privatized at fair market values. Thus, the second situation is not at issue in this dispute and need not be discussed.

[143] *Mexico – Olive Oil*, para. 7.143.

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

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

less than adequate remuneration within the meaning of SCM Article 14(d).[146] 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 of the benefit is conferred on the [subject merchandise] producers who purchase the [input product] from the trading company suppliers."[147]

75. 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 not an unusual situation. The mere fact of a difference between the recipient of a financial contribution and the recipient of a benefit does not necessitate a pass-through analysis.

76. In any event, contrary to China's claims, Commerce properly calculated the benefit conferred upon the 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. 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 markup added by the trading company, is reflected in Commerce's benefit calculations.

77. It was not necessary to measure the benefit that was 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.[148]

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

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

[148] *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 Nicholas Czajkowski, entitled "Final Calculation Memorandum for Guizhou Tire Company Limited (GTC)," at 3, dated July 7, 2008 (Exhibit US-78); Memorandum dated June 13, 2008, from Shane Subler, to The File, entitled "Final Determination Calculation

78. For these reasons, we respectfully request that the Panel reject China's claims related to trading companies and a so-called "pass through" analysis.

36. (To both parties) How, precisely, do you believe the word "questionnaire" should be defined for the purpose of Article 12.1.1? Do you believe that every "formal request for information" by an investigating authority constitutes a "questionnaire" for the purpose of Article 12.1.1? If not, on what basis would you distinguish "questionnaires" in this sense from other types of information requests? What is the relevance of Members' (including the parties') practices to the Panel's resolution of this claim?

79. In its response to this question, China again advances an interpretation of the term "questionnaire" in Article 12.1.1 of the SCM Agreement that ignores the context of the term and fails to recognize, as the SCM Agreement implicitly does, that the questionnaire issued at the outset of an investigation is fundamentally different from subsequent requests for information.[149]

80. China further insists that not *every* request for information falls within its understanding of the term "questionnaire." This truism does not alter the fact that the vast majority of the information sought by an investigating authority is obtained through questionnaires, that is, "formulated series of questions." As the United States demonstrated from the records of the investigations at issue, the constraints imposed by the time limits in Article 11.11 of the SCM Agreement are not academic or exaggerated; in each investigation, Commerce issued between 8 and 18 questionnaires subsequent to the questionnaire issued at the outset of each investigation.[150] Requiring 30 days for each subsequent questionnaire under such circumstances would only compel investigating authorities to resort to facts available more frequently rather than, for example, offering respondents multiple opportunities to provide the same information that respondents have failed to submit in responses to previous questionnaires.[151]

81. China also raises again the specter of the investigating authority with "no effective constraint on [its] ability to issue any number of questionnaires, of unlimited scope and with impossibly short deadlines over the course of an investigation,"[152] if the U.S. interpretation of Article 12.1.1 were accepted. The United States has explained why this dramatized concern has no basis, given, *inter alia*, the existence of other sub-paragraphs of Article 12 that ensure that

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Memorandum for Kunshan Lets Win Steel Machinery Co., Ltd.," at 2 (Exhibit US-76); Memorandum dated June 13, 2008 from Damian Felton, to The File, 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 (Exhibit US-77).

[149] *See* U.S. First Written Submission, paras. 477-480, 487-489; U.S. Second Written Submission, paras. 227-230.

[150] *See* U.S. First Written Submission, para. 481.

[151] For one such example from these investigations, see U.S. First Written Submission, footnote 635.

[152] China Answers to Second Panel Questions, para. 110.

respondents are provided rights in proceedings before investigating authorities.[153] In particular, the concerns that are raised by the specific situation contemplated by China do not compel China's broad reading of the term "questionnaire" in Article 12.1.1 because that situation is covered by the obligation in Article 12.1.

82. Finally, in responding to the Panel's question about the relevance of the parties' practices, China offers an irrelevant discussion of "subsequent practice" under Article 31(3)(b) of the Vienna Convention on the Law of Treaties. The United States has never suggested that "subsequent practice" should form part of the Panel's interpretative analysis when resolving this claim. Rather, the United States has noted only the specific practice of China when it comes to issuing questionnaires in CVD investigations. In this respect, notably missing from China's response is a discussion of why the Panel should accept the interpretation of Article 12.1.1 advanced by China when China itself has failed to follow that interpretation in its ongoing CVD investigations.

[153] *See* U.S. Second Written Submission, paras. 234-235.

LIST OF U.S. EXHIBITS

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

(WT/DS379)

US-	Title
174	*Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, Issues and Decision Memo., at "Provincial Stumpage Programs Determined to Confer Subsidies: Benefit"
175	*ARTICLE VI, Proposals by the Czechoslovak Delegation*, GATT Doc. No. W.9/86 (9 December 1954)
176	*Report of the Review Working Party III on Barriers to Trade Other than Restrictions or Tariffs*, GATT Doc. No. L/334 (1 March 1955)
177	*Certain Steel Products From Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom: Termination of Countervailing Duty and Antidumping Investigations*, 47 Fed. Reg. 49058 (October 29, 1982)
178	*Certain Fresh Cut Flowers From Colombia: Final Results of Antidumping Duty Administrative Review*, 63 Fed. Reg. 31724 (June 10, 1998)
179	*Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19388, Issues & Decision Memorandum (April 13, 2004)
180	*Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From Taiwan*, 65 Fed. Reg. 16877, Issues & Decision Memorandum (March 30, 2000)
181	*Notice of Final Determination of Sales at Less than Fair Value: Furfuryl Alcohol from South Africa*, 60 FR 22550 (May 8, 1995)
182	*Final Negative Countervailing Duty Determination: Live Swine from Canada*, 70 FR 12186 (March 11, 2005)