OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

UNITED STATES – DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA
WT/DS379

NOVEMBER 11, 2009

Mr. Chairman, members of the Panel:

On behalf of the United States delegation, I would like to thank you again for agreeing to serve on this Panel. The United States appreciates the significant time and effort that is involved in your work. As we have stated, we seek to assist you in completing your task by explaining the reasoning underlying the challenged determinations, and by articulating the proper interpretative analysis of the provisions of the covered agreements under consideration. In that vein, in our opening statement this morning, we intend to survey the landscape of the many issues in this dispute and hope to clarify for you where things stand.

1. An important theme that the United States has noted before, and that we reiterate here, is that this dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements. Thus, the proper focus of the Panel's attention is the text of the covered agreements and the rights and obligations established therein. Surprisingly, China has largely failed to articulate with any specificity how the U.S. actions it challenges are inconsistent with any express obligations contained in the covered agreements. While China has referenced multiple provisions of various agreements, China has not provided a proper interpretive analysis of those provisions. China's arguments do not provide a basis on which the Panel can sustain China's allegations that the United States has acted inconsistently with its WTO obligations.

2. Instead of addressing actual obligations in the agreements, China departs from the accepted rules of treaty interpretation and invents obligations found nowhere in the text of the covered agreements. Indeed, China has gone to great lengths to discuss anything *but* the specific obligations found in the text of the covered agreements. We will touch upon all of the issues in dispute this morning, but we would like to highlight just a handful of examples at the outset:

- With respect to financial contribution, rather than focus on a proper Vienna Convention analysis of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, China seeks to graft onto the provisions of the SCM Agreement rules found in the ILC Draft Articles on State Responsibility.

- With respect to the issue of credits for unsubsidized transactions, initially, rather than focus on the text of Article 14 of the SCM Agreement, which governs the benefit calculation, China attempted to invent an obligation based on panel and

Appellate Body reports interpreting unrelated provisions of separate covered agreements, the AD Agreement and the AD provisions of the GATT 1994. Then, incredibly, China changed the theory of its argument entirely, and now China suggests that the mere use of the term "good" in the singular form in Article 14(d) of the SCM Agreement establishes the obligation China asks this Panel to create.

- With respect to the concurrent application of AD and CVD measures, rather than focus on the specific obligations in Articles 19.3 and 19.4 of the SCM Agreement, China develops a theoretical, yet unsubstantiated, basis for its allegation of "double remedies" before ultimately trying to challenge an *anti-dumping* duty under the *SCM Agreement*. Additionally, rather than focus on specific rights and obligations, *inter alia*, in GATT Article I:1 and paragraph 15 of China's Protocol, China complains of imports from China being subjected to a dumping calculation methodology explicitly authorized under the covered agreements.

Consistently, throughout this dispute, China's arguments have failed to meaningfully address the specific rights and obligations as established by the covered agreements. As a result, the United States respectfully submits that the Panel is left with no option but to find that China's claims are without merit and must be rejected.

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

3. As the United States has explained throughout this proceeding, the "public body" determinations in the challenged CVD investigations were based on a proper interpretation of the SCM Agreement. In this regard, there are three points that the United States would like to emphasize this morning. First, China continues to urge the Panel to adopt an interpretation of the term "public body" that is not in accordance with the ordinary meaning of that term read in its context and in light of the object and purpose of the SCM Agreement. Second, China seeks to elevate the context of other covered agreements over the text of the SCM Agreement. And finally, China seeks to impose upon WTO Members certain rules taken from the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts. There is no basis in WTO law for interpreting the SCM Agreement as China proposes, and China's arguments must be rejected.

4. An analysis of the ordinary meaning of the term "any public body," in its context and in light of the object and purpose of the SCM Agreement, demonstrates that Commerce's financial contribution determinations were consistent with the SCM Agreement. The ordinary meaning of the term "public" includes the notion of belonging to the government or the nation. In addition, the term "public body" is modified by the term "any." Through the use of the term "any," the SCM Agreement indicates that there might be different *kinds* of public bodies. It is thus possible, as China suggests, that one public body might be an entity created by the government and empowered by the government to exercise governmental authority. Another public body,

however, might be a corporation in which the government holds a majority interest, and over which the government therefore has control. The SCM Agreement disciplines *both* of these kinds of public bodies, and potentially other variants as well.

5. China is incorrect that the SCM Agreement's collective reference to "a government or any public body" as "government" means the two separate terms "government" and "public body" must possess similar characteristics and should be functional equivalents.[1] To interpret the term "public body" to refer to entities that "possess characteristics similar to those that define a government," as China does,[2] would be to reduce the term "public body" to redundancy or inutility.[3]

6. The use of the term "government" in place of "a government or any public body" in the SCM Agreement is a shorthand drafting technique used for convenience. China erroneously finds significance in the use of this technique and attempts to impart a meaning that is simply not supported by the text. By China's logic, the use of the term "certain enterprises" as a shorthand for "an enterprise or industry or group of enterprises or industries" in Article 2 of the SCM Agreement would indicate that the term "enterprise" has the same meaning as the term "group of industries." That is a wholly untenable conclusion.

7. Contrary to China's repeated assertions, the interpretation of the term "public body" advanced by the United States does not fail to recognize the "relatedness" of the terms "government" and "public body."[4] The United States does not dispute that there is some relationship between a government and a public body, but the question in this dispute concerns the nature of that relationship. Properly understood, the nature of that relationship is one of ownership or control by the government over the public body. The relationship need not be, as China urges, the relationship between a government and its agencies.

8. When China further argues that Article 1.1(a)(1)(iv) of the SCM Agreement requires that an entity responsible for entrusting or directing a private body must itself be vested with government authority,[5] China ignores the meaning of the term "government" provided in the chapeau of Article 1.1(a)(1). Where the term "government" is used in the SCM Agreement, the reference is to "a government or any public body." This is plain from the text of Article 1.1(a)(1). Thus, Article 1.1(a)(1)(iv) does not relate strictly to "governmental authority." China

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

[2] China First Opening Statement, para. 22.

[3] *See US – Gasoline (AB)*, p. 23 (stating that treaty interpretation "must give meaning and effect to all the terms of a treaty").

[4] China Second Written Submission, paras. 15-16.

[5] *See* China Answers to First Panel Questions, paras. 86.

also wrongly conflates the standard under Article 1.1(a)(1)(iv) for determining whether a "private body" has been entrusted or directed with the question of whether an entity is a "public body." An entrustment or direction analysis involves an analysis of the *actions* of a government or public body and the *actions* of the private body or bodies at issue. A public body analysis, on the other hand, involves an analysis of the *nature* of the entity or entities at issue.

9. The term "public body" is properly understood as an entity owned or controlled by the government, but not necessarily authorized by the government to perform government functions. The *Korea – Commercial Vessels* panel adopted this approach, rejecting the argument China now makes with respect to the ILC Draft Articles. As that panel reasoned, "[i]n all cases, ... public body status can be determined on the basis of government (or other public body) control."[6] This Panel should follow a similar approach.

10. The *Korea – Commercial Vessels* panel also rejected the contextual argument China makes here, which is based upon the definition of "public entity" in the GATS Annex on Financial Services. That definition, which applies only for purposes of the Annex on Financial Services, is not relevant to an interpretation of "public body" in the SCM Agreement. An analysis of similar terms in other covered agreements cannot outweigh the ordinary meaning and immediate context of a term in the SCM Agreement.

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

12. Indeed, even in the French text of the Agreement on Agriculture, the term "organisme public" is not present. The English text reads: "the provision by governments or their agencies of direct subsidies." Similarly, the French text reads "octroi, par les pouvoirs publics ou leurs organismes, de subventions directes." The use of the term "their" or "leurs" in French links the "agencies" or "organismes" back to the government in the Agreement on Agriculture in a way that is unlike the text of the SCM Agreement.

13. In the SCM Agreement, the term "public body" is de-linked from the term "government" by the use of the words "or any." Regardless of the meaning ascribed to the terms of the Agreement on Agriculture, a "public body," for purposes of the SCM Agreement, is something other than a government agency.

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

14. Further, China's reliance upon the definitions of the French term "public" and the Spanish term "publico" does nothing to advance its arguments.[7] Those definitions are similar to the definitions of the English term "public," which the United States noted in paragraph 95 of its First Written Submission. The definitions of all of these terms contain the notion of relating to or pertaining to the government or nation. An entity that is owned or controlled by the government relates or pertains to the government or nation.

15. An interpretation of Article 1 of the SCM Agreement that treats the government-owned entity as a public body ensures that governments will not be able to hide behind their ownership interests to escape the disciplines of the SCM Agreement. Contrary to China's argument, such circumvention would not be prevented simply by the entrustment or direction provision of Article 1.1(a)(1)(iv). Entrustment or direction may be easily concealed, especially if the government has a majority ownership interest in the company, and thus has the ability to appoint the company's managers and directors. An interpretation of Article 1 of the SCM Agreement that recognizes a government-owned entity as a public body avoids these problems. Such a reading of Article 1, which defines "public body" both for the purpose of countervailing duty proceedings and WTO subsidy disciplines, is also consistent with the object and purpose of the SCM Agreement. As the Appellate Body has explained, the object and purpose of the SCM Agreement "includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies."

16. The Working Party Report accompanying China's accession protocol further confirms the correctness of the U.S. interpretation with respect to the entities at issue in this dispute. China cannot deny, as reflected in paragraph 172 of the Working Party Report, that its representative in no way disputed the understanding expressed by some Members that "when state owned enterprises (including banks) provided a financial contribution, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement." Whether or not China now concedes that it made a commitment in paragraph 172 of the Working Party Report that allows Members to treat China's state-owned enterprises and banks as government actors for purposes of Article 1.1(a) of the SCM Agreement, at the very least, China indicated its own recognition that its state-owned enterprises and state-owned commercial banks are "public bodies."

17. With respect to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, about which much has already been said in this dispute, China incorrectly argues that the ILC Draft Articles are relevant rules of international law that should be used to interpret the term "public body." The threshold question is whether the Draft Articles, and particularly the attribution guidelines in Chapter II of Part One of those articles, are relevant rules of international law applicable in the relations between the parties in this dispute, within the meaning of Article

[7] *See* China Second Written Submission, para. 9, note 13.

31(3)(c) of the Vienna Convention. They are *not* relevant and *not* applicable, and the Panel is *not* permitted to take them into account in interpreting the relevant SCM Agreement text.

18. As the United States has explained,[8] the purpose of the Draft Articles is to formulate "the basic rules of international law concerning the responsibility of States for their internationally wrongful acts."[9] The Draft Articles concern "the secondary rules" of state responsibility, and the "general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom."[10] Importantly, the "articles *do not* attempt to define the content of the international obligations, the breach of which gives rise to responsibility."[11] Put differently, the scope of the Draft Articles is limited to secondary rules of international law and explicitly excludes primary rules of international law. The Draft Articles say nothing about *whether* a breach occurred.

19. The question of whether goods or loans were provided by the "government or any public body" in China is not one of attribution of wrongful acts to China. That is, it is not a "secondary rule" question of attribution. The question relates to the substantive conditions for something to be a subsidy, which, even if it is, is not necessarily prohibited as a wrongful act, but may give the right to another WTO Member, in this case, the United States, to impose CVDs if certain additional conditions under the "primary rules" of the SCM Agreement are met. China is trying to graft secondary rules of general international law (limited to wrongful conduct) onto one of several conditions under primary rules of international law that do not even define wrongful conduct. This is contrary to the purpose of such secondary rules and contrary to the rules of interpretation of international agreements.

20. China also incorrectly suggests that the Appellate Body in *US – DRAMS* endorsed the use of the Draft Articles in interpreting Article 1 of the SCM Agreement. In *US – DRAMS*, the issue was whether the Korean government had entrusted or directed private bodies within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. The issue in this dispute is the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. The Appellate Body did not decide in *US – DRAMS* that government-owned entities cannot be "public bodies."

21. Additionally, Article 55 of the Draft Articles contains a *lex specialis* clause. The SCM Agreement is a "special rule of international law" that supersedes the Draft Articles. China incorrectly argues that the Draft Articles are parallel to, or "fully aligned" with, the SCM

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[8] U.S. First Written Submission, para. 115; U.S. Second Written Submission, paras. 48-51.

[9] *Draft Articles*, General Commentary, para. 1.

[10] *Id*.

[11] *Id.* (emphasis added).

Agreement.[12] That simply is not the case. Article 5 of the Draft Articles is not "fully aligned" with the "public body" language in Article 1.1 of the SCM Agreement, and Article 8 of the Draft Articles is not "fully aligned" with the "entrusts or directs" language in Article 1.1 of the SCM Agreement. Moreover, the detailed distinctions in those articles are not "applicable in the relations between the parties," as there is no consensus that the ILC provisions have attained the status of customary international law. The panel in *Korea – Commercial Vessels* declined to read the Draft Articles into an interpretation of the term "public body." This panel should do the same.

22. With respect to sales through trading companies, Commerce concluded that the public bodies made financial contributions to the trading companies, and these financial contributions conferred benefits to the respondent subject merchandise producers. This was a proper application of the SCM Agreement. No entrustment or direction analysis was required, and China has not substantiated its claim that Commerce's analysis was improper.

23. For all these reasons, the Panel should find that Commerce's "public body" determinations in the challenged CVD investigations were consistent with the SCM Agreement.

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

24. With respect to benchmarks, the United States has explained how Commerce's determinations were consistent with the SCM Agreement. Commerce's determinations to use benchmarks other than prices or interest rates available in China were based on findings that the predominant role of the Chinese government in various markets distorted prices and interest rates in China. Commerce made each benchmark determination on a case-by-case basis, based on the facts of each investigation. Commerce used Chinese prices whenever they were available and appropriate as market benchmarks. However, where the facts demonstrated that the government had a predominant role in a market and Chinese prices were unsuitable as commercial benchmarks, Commerce used market-derived prices from outside of China. Commerce's determinations were consistent with Article 14 of the SCM Agreement, as interpreted by the Appellate Body in *US – Softwood Lumber CVD Final*.

25. China, however, argues that a price distortion analysis is required before an investigating authority may rely on an out-of-country benchmark. Contrary to China's argument, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber CVD Final* requires a separate price distortion analysis before a Member may rely upon an out-of-country benchmark. The Appellate Body's analysis in *US – Softwood Lumber CVD Final* reflects the economic theory commonly referred to as the "Dominant Firm Model."[13] Consistent with this theory, the

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[12] China Answers to Panel Questions, paras. 73-74.

[13] U.S. Second Written Submission, para. 78.

Appellate Body noted that "[w]hen private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers *will align* their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices." The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.

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

27. Recall that available evidence showed that, in the hot-rolled steel market, China owned *96 percent* of the producers and that, in the BOPP market, China owned at least *90 percent* of the producers.[14] As a result, private suppliers accounted for a very small fraction of the sales in those markets. Despite complaining that Commerce applied a *per se* rule, China does not explain what other factors Commerce should have addressed in determining whether the government had a predominant role and which relevant record evidence was not assessed. Commerce correctly determined, based on record evidence, that China had a predominant role in the hot-rolled steel and BOPP markets, and Commerce justifiably used out-of country benchmarks to measure the benefit conferred by government-provided inputs.

28. In the markets for lending and land-use rights, in addition to the market distortion inherent in the fact that the government was the predominant supplier of loans and land, Commerce also found evidence of direct government intervention in those markets that would further impact prices, rendering those prices inappropriate for determining the amount of the benefit. China incorrectly argues that the Appellate Body found in *US – Softwood Lumber CVD Final* that "the possibility of rejecting private prices was deemed to exist only when the 'government's role in providing the financial contribution' was predominant." The Appellate Body did not address and, consequently, did not exclude the possibility that other types of government intervention would also distort the market and render prices unreliable.[15] Additionally, although it now argues otherwise, China has previously acknowledged in this

[14] U.S. Second Written Submission, para. 84.

[15] U.S. Second Written Submission, paras. 81-82.

dispute that direct government controls may be relevant in determining whether in-country prices can be used as benchmarks.[16]

29. With respect to lending, in the *CWP, OTR Tires*, and *LWS* CVD investigations, Commerce relied upon record evidence that indicated that not only did China have a predominant role as an owner of the majority of the banks in China, it also directly controlled interest rates through its regulation of the market. Commerce did not "sit in judgment upon [China's] monetary policies. . . ." Commerce's concern with China's direct control over interest rates was that it created distortion in the lending market. Commerce properly evaluated the extent to which China's invasive control over interest rates distorted the lending market, such that it was inappropriate to rely upon any in-country interest rates as benchmarks.[17]

30. For RMB-denominated loans, Commerce calculated the benchmark rate by analyzing the data using a regression analysis. The regression analysis Commerce used is based upon actual interest rates from countries with similar gross national incomes, which were available to borrowers. A regression analysis is essentially an average of interest rates that takes more factors into account than a simple average, and Article 14(b) of the SCM Agreement does not state a preference for the use of one interest rate rather than an average of interest rates. Commerce calculated comparison interest rates that were tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market." For dollar-denominated loans, Commerce used a yearly average LIBOR rate rather than a daily LIBOR rate to measure the benefit. Article 14(b) of the SCM Agreement contains no preference for a daily rate over a yearly average.

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

32. Because prices for land-use rights within China were inappropriate for use as benchmarks, Commerce compared the prices respondents paid for land-use rights to the sales of certain industrial land in Thailand. In arriving at this determination, Commerce evaluated several criteria to ensure that the comparison prices would "relate or refer to or be connected with"

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[16] U.S. Second Written Submission, para. 83.

[17] U.S. First Written Submission, paras. 235-243.

China's prevailing market conditions.[18] This was consistent with the requirements of Article 14(d) of the SCM Agreement.

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

33. China has failed to demonstrate that Commerce was required to provide a credit in the benefit calculations for instances in which China provided rubber inputs for adequate remuneration in the *OTR Tires* CVD investigation. That is, China has failed to show that Commerce was required to provide a credit in the subsidy calculation for non-subsidized transactions. Having shifted away from its earlier contextual argument based on the term "product" in various provisions of the SCM Agreement and the GATT 1994 *other than* Article 14 of the SCM Agreement, China now advances a new and different so-called "textual" basis for its invented credit/offset obligation. Now, China asks this Panel to find that the use of the term "good" in Article 14(d) of the SCM Agreement establishes several obligations on WTO Members and limits the application of those obligations to situations under Article 14(d).[19]

34. According to China, the mere use of the "singular term 'good'" in Article 14(d) establishes an obligation to aggregate the benefits of all transactions during the entire period of investigation involving the provision of a good. In addition, the use of the term "good" establishes an obligation to provide credit in such an aggregate benefit calculation for transactions in which the good was sold for more than the established benchmark. Finally, the term "good" limits this obligation to the unique situation of government-provided goods or services. Thus, there is no obligation to aggregate or provide credits when analyzing subsidies provided in the form of grants, loans, or loan guarantees. The obligation is limited to the provision of goods and services, and this is all accomplished by the use of the term "good" in Article 14(d). That is China's argument. It is simply not credible.

35. The correct, and far more plausible, reading of the text of Article 14(d) is that the term "good" is in the singular, and associated with the terms "in question," because, while a government may provide a variety of goods and services, to determine the adequacy of remuneration for a particular good provided by the government, Members must look at the "prevailing terms and conditions" for *that* good, and not some other good. Furthermore, the prevailing terms and conditions would be expected to vary over time; in many cases, they would be unique to each given transaction. In such cases, each transaction would have to be analyzed independently to determine whether any benefit is conferred as a result of that transaction, and consequently if a subsidy exists.[20]

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[18] U.S. Second Written Submission, paras. 116-119.

[19] *See*, *e.g.*, China Second Written Submission, paras. 142-144.

[20] U.S. Second Written Submission, para. 128.

36. The context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. Article 1 of the SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction by transaction basis. Recall that when we speak of a "transaction" here, we are not referring to an export sale from China to the United States. Rather, we are referring to any time a government or any public body sells a good or service for less than adequate remuneration, that is, when it provides a financial contribution and a benefit is thereby conferred. That transaction in itself – each transaction that meets those criteria – is a subsidy, and that subsidy is measurable, irrespective of any other subsidies or "non-subsidies" during the relevant period of investigation. When a Member analyzes multiple subsidies, there is no obligation to provide a credit in that analysis when an investigating authority determines that a granting authority did not provide a subsidy in some other instance or instances.

37. While China's Answers to First Panel Questions appear to abandon the concept of "product as a whole" in favor of an entirely new textual argument based on the term "good" in Article 14(d) of the SCM Agreement, China nevertheless continues to emphasize the flawed analogy it attempts to make to the Appellate Body's reports on zeroing. As the United States has explained, however, the Appellate Body's zeroing reports examine the calculation of margins of dumping under the AD Agreement and certain provisions of the GATT 1994 that relate solely to AD proceedings.[21] There are no provisions in the SCM Agreement, nor in the CVD provisions of the GATT 1994, that are analogous to the provisions relied upon by the Appellate Body in its zeroing reports, and there is certainly no analogous text in Article 14(d), which China now argues is the source of the obligation it proposes.

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

39. China conflates aggregation in a dumping calculation with aggregation in a CVD calculation, but the concepts are distinct. Aggregation in the CVD context occurs *after* the benefit has been measured and the existence of a subsidy or subsidies has been determined. Before Commerce sums the benefits found for each month in the period of investigation, Commerce has already determined whether or not a benefit exists. In summing the benefits, Commerce is determining "the amount of the subsidy found to exist" within the meaning of Article 19.4 of the SCM Agreement. The benefits of each separate subsidy – meaning each sale of a good found to have been made for less than adequate remuneration – are added together to determine the CVD rate, which is "the amount of the subsidy found to exist, calculated in terms

[21] U.S. Second Written Submission, paras. 134-136.

of subsidization per unit of the subsidized and exported product." Nowhere does Article 19.4 make reference to any obligation to credit government action that does not provide a benefit against government action that does provide a benefit.

40. In its Rebuttal Submission, China attempts to explain how the United States acted inconsistently with some of the other provisions to which China has made reference throughout this dispute.[22] Ultimately, however, China's claims under Article VI:3 of the GATT 1994, and Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement are all dependent on the Panel first finding that the United States acted inconsistently with Article 14(d) of the SCM Agreement. Because China has failed to establish any violation of Article 14(d), it is not necessary for the Panel to address China's other consequential claims under these other provisions.

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

41. Commerce's specificity determinations for the policy lending subsidy and land-use rights subsidy were clearly substantiated by positive evidence and otherwise in accordance with the covered agreements. China argues that Commerce was required to determine that the *benefits* of these subsidy programs, rather than the subsidy programs themselves, were specific.[23]

42. China's reading of Article 2 of the SCM Agreement is not supported by the text or the structure of the SCM Agreement, and must be rejected by this Panel. Neither Article 2.1(a) nor Article 2.2 requires an investigating authority to revisit the benefit determination to determine specificity.

43. Moreover, as the Panel noted in its Question 53, prior WTO panels have recognized the separate and independent nature of a specificity determination.[24] This is reflected in the structure of Article 1 of the SCM Agreement, which identifies three criteria for a countervailable subsidy: financial contribution, benefit, and specificity.

44. With respect to the *OTR Tires* CVD investigation, China complains that the legislation on which Commerce relied for its specificity determination does not "define[] the elements of the

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[22] China Second Written Submission, paras. 153-158.

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

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

subsidy."[25] But this is not required by the SCM Agreement. Instead, Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether legislation explicitly limits access to the subsidy to certain enterprises. Here, national, provincial, and municipal legislation and policy documents, viewed as a whole, explicitly limited access to the policy lending subsidy to a group of industries, including the tire industry.[26]

45. Contrary to China's argument,[27] the United States has not offered the Panel an *ex post* rationalization for Commerce's specificity determination for the policy lending subsidy. The U.S. rationale in this dispute and in the *OTR Tires CVD Final Determination* is that Chinese policies call upon banks to make the policy lending subsidy available to the producers and these policies instruct agencies to direct or allocate the policy lending subsidy to tire producers.[28]

46. Additionally, China argues that the legislation on which Commerce relied for specificity listed such a broad range of industries as encouraged that policy lending must have been generally available and not specific.[29] However, the policy documents on which Commerce relied were very specific, naming, for example, an investigated producer and its tire production facilities as a priority. Furthermore, lending was expressly prohibited to particular categories of industries. Thus, the policy lending subsidy was specific and not generally available. China's references to U.S. statements in the Large Civil Aircraft dispute ("the Boeing Dispute") and *US – Upland Cotton* are merely a distraction. China mischaracterizes the U.S. statements in those disputes and the U.S. position here.[30]

47. With respect to the *LWS* CVD investigation, China argues that Article 2.2 of the SCM Agreement requires that a regional subsidy be limited to a subset of enterprises or industries

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

[26] U.S. First Written Submission, paras. 337-343.

[27] *See* China First Opening Statement, para. 64; China Answers to First Panel Questions, para. 170.

[28] *See, e.g., OTR Tires Final Decision Memorandum*, 98-100.

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

[30] *See* U.S. Second Written Submission, paras. 159-165.

within a designated geographical region.[31] China's interpretation would require that, in order for a subsidy to be specific under Article 2.2, it would also have to be specific under Article 2.1, that is, it would have to be limited to certain enterprises. China's interpretation renders Article 2.2 redundant with Article 2.1, which is contrary to customary public international law rules of treaty interpretation.[32]

48. China argues that the land-use rights subsidy in the *LWS* CVD investigation was not regionally specific because enterprises both inside and outside the Park paid the same price for land-use rights.[33] China conflates the benefit and specificity analyses. The text of Article 2 makes no reference to a subsidy benefit and the structure of Article 1 demonstrates that a specificity determination is separate and independent from a benefit determination. In addition, China's theory that a benefit must also be specific to find a subsidy regionally specific must be rejected because it would allow a granting authority to circumvent the disciplines of Article 2.2 simply by ensuring that at least one enterprise outside the region receives a similar benefit. As the United States has explained, such a reading of Article 2.2 is both illogical and inconsistent with the object and purpose of the SCM Agreement.[34]

49. For all of these reasons, the Panel should find that the specificity determinations China has challenged were consistent with the SCM Agreement.

V. The United States Did Not Act Inconsistently With the SCM Agreement or the GATT 1994 in the Concurrent Application of CVD and AD Measures to Certain Products from China

50. The import of China's argument before this panel, although China denies it, is that Members may not apply CVDs and NME AD duties concurrently to the same merchandise, under any circumstances, because doing so automatically results in a so-called double remedy. The existence of the second and duplicate remedy, in turn, is based on the faulty premise that NME AD normal value offsets subsidization which has already been offset by CVDs. In addition to the apparent flaws in China's theory, China's double remedy claims remain entirely ungrounded, unsubstantiated, unquantified, and unsupported by the text of the covered agreements. China's failure to demonstrate the existence of a double remedy is outdone only by its failure to articulate the basis for a finding of inconsistency with the covered agreements.

A. The Remedy That China Seeks Is the Mutually Exclusive Application of AD Duties or CVDs to China on a Given Product

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[31] China First Written Submission, para. 294.

[32] U.S. Second Written Submission, paras. 167.

[33] China First Written Submission, para. 301.

[34] U.S. Second Written Submission, paras. 172-174.

51. It is indeed unfortunate to be at this stage of the panel proceedings and still be seeking clarification as to what exactly the complaining party is asking the Panel to do. This stems directly from China's failure to acknowledge the necessary consequence of its argumentation thus far, namely, that Members would be placed in the position of having to *choose* to either impose an AD duty calculated under the NME methodology, or to impose a CVD.

52. The United States has pointed out to the Panel, with ample citation to China's submissions, that China is in fact challenging the concurrent application of CVDs, on the one hand, with AD duties calculated using the NME methodology, on the other hand.[35] China asserts that this is a "caricature" of its argument, suggesting that a Member "is free to engage in the concurrent application of countervailing duties and anti-dumping duties determined in accordance with its NME methodology."[36]

53. However, it is the exercise of this "freedom," which China so generously acknowledges as belonging to WTO Members, that, under China's theory, necessarily results in the alleged double remedy. China makes various assertions in an attempt to reassure the Panel that it is not, in fact, advancing such a drastic position. For example, China says concurrent application is perfectly fine, *provided that* the investigating authority "tak[e] steps to ensure that the *remedy* represented by the use of an NME methodology does not offset the same subsidies that the importing Member offsets through the *remedy* of countervailing duties;"[37] or *provided that* the investigating authority "account[] for the fact that it thereby offsets the same subsidy twice."[38]

54. Of course, what China fails to mention when providing such statements is that, under China's theory, the only way to "account for the fact" that the subsidy is not offset twice is to *decline to impose* either the AD duty or the CVD. China states that CVDs and the NME methodology have an "obvious and fundamental overlap,"[39] and that "the imposition of a double remedy for the same alleged subsidy is *inherent* in the concurrent application of the NME

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[35] *See* U.S. Second Written Submission, para. 177. China maintains its position in its rebuttal submission that the alleged double remedy *inheres* in the concurrent application of AD and CVD measures, such that the only way to avoid such a double remedy would be to *choose* between the two remedies. *See, e.g.,* China Second Written Submission, paras. 219 (Having calculated an AD duty on the basis of market costs under the NME methodology, "the United States *necessarily offsets any benefit or advantage* that the producer obtained by receiving financial contributions from the government on terms more favorable than those available on the market.(emphasis added)).

[36] China Second Written Submission, para. 209.

[37] China Answer to Panel Question 68, para. 212 (original emphasis).

[38] China Second Written Submission, para. 209.

[39] China Second Written Submission, heading V.C.1, p. 87.

methodology and countervailing duties to the same category of imports."[40] It follows that, in China's view, avoiding the alleged WTO-inconsistent double remedy requires that a Member avoid applying duties calculated under an NME methodology concurrently with CVDs. Indeed, China is unable to identify any concrete circumstances, under China's theory, when the concurrent application of AD duties and CVDs would be permitted.

55. In this respect, the United States notes that China's reference to the GPX opinion is beside the point. While the GPX court did offer Commerce the choice to develop a mechanism to apply both CVD and NME AD measures, the court was able to do so only because it offered *no* rationale for its view that a double remedy could potentially arise. China, in contrast, has offered somewhat of a rationale - misguided though it might be - for how a double remedy might exist. And, under that rationale, *any* concurrent application of CVD and NME AD measures results in a double remedy. Therefore, in China's world, a Member "is *free to engage in the concurrent application* of countervailing duties and anti-dumping duties determined in accordance with its NME methodology,"[41] so long as it actually applies *only one or the other*.

B. China Has Failed to Establish a Violation of the SCM Agreement or the GATT 1994 in the Concurrent Application of CVD and AD Measures to Certain Products from China

1. Legal Framework Governing Members' Right to Concurrently Apply CVDs and AD Duties Calculated Under the NME Methodology

56. The essence of China's argument is a direct challenge to the right of Members to impose CVD and NME AD measures concurrently to imports from China. Once that point is recognized, the proper legal framework for considering China's claims becomes apparent. As the United States has explained,[42] the covered agreements fully reflect Members' consideration of this question. Having established two distinct regimes to address the separate practices of dumping and subsidization, GATT Contracting Parties identified *one instance* in which those practices and therefore regimes intersect – this is in the limited circumstance of export subsidization set out in GATT Article VI:5. When China joined the WTO, the covered agreements contained no other prohibition on the concurrent application of CVD and NME AD measures, nor did China's Accession Protocol.

57. Indeed, to the contrary, China's Protocol reflects the right of Members to apply the NME AD methodology as well as the right to apply CVDs, including the use of external benchmarks.[43] If there were conditions under which a Member were to be prohibited from applying one or the

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[40] China First Written Submission, para. 366 (original emphasis).

[41] China Second Written Submission, para. 209 (emphasis added).

[42] *See* U.S. First Written Submission, paras. 389-402.

[43] Part I, paragraph 15 of China's Protocol of Accession.

other, we would expect those conditions to have been laid out in China's Protocol. Indeed, given that no other WTO provision prevents the application of either remedy in the context of domestic subsidies, it was incumbent upon China to negotiate such a provision if it believed, as it says now, that a Member must in fact choose between these two remedies in respect of imports from China. China obviously did not do so.

58. Not only did China fail to negotiate such a provision in its Protocol, China explicitly recognized that certain WTO Members employed an NME methodology in dumping investigations involving imports from China. Given that during the period of its accession negotiations between 1986 and 2001, imports from China were the subject of no fewer than 30 anti-dumping investigations under the NME methodology in the United States,[44] we would expect to have seen in the Protocol or Working Party Report any concerns China might have had that the result of an NME calculation reflects not only price discrimination, but also subsidization. No such concerns are reflected there. Instead, paragraph 151(a) of China's Working Party Report contains language inserted at the request of China with a view to ensuring that Members that had not yet developed NME methodologies would do so along the lines of the NME methodologies already in existence. Indeed, that paragraph describes what was then, and is now, U.S. practice:

> With regard to importing WTO Members *other than those that had an established practice* of applying [an NME] methodology ... , they should make best efforts to ensure that their methodology for determining price comparability included provisions similar to those described above [relating to the selection of surrogate countries in Members with existing NME methodologies].[45] (Emphasis added)

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[44] *See* Exhibit US-152.

[45] Paragraph 151(a) of China's Working Party Report provides, in full:

> 151. The representative of China expressed concern with regard to past measures taken by certain WTO Members which had treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determinations. In response to these concerns, members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following:
>
> > (a) When determining price comparability in a particular case in a manner not based on a strict comparison with domestic prices or costs in China, the importing WTO Member should ensure that it had established and published in advance (1) the criteria that it used for determining whether market economy conditions prevailed in the industry or company

59. Finally, try as it might, China cannot avoid the significance of Article 15 of the Tokyo Round for this discussion. As the United States has observed,[46] Article 15 imposed upon signatories precisely the same choice China would now have the Panel read in to the SCM Agreement, namely, choosing between the CVD remedy and the AD remedy calculated under the NME methodology. During the Uruguay Round, however, Members decided *not* to carry this provision forward into the SCM Agreement. This is not a matter of speculation – the provision was there before, and it is not there now. This decision must be given meaning. As the Appellate Body observed in *US - Underwear*:

> We are not entitled to assume that that disappearance was merely accidental or an inadvertent oversight on the part of either harassed negotiators or inattentive draftsmen. That no official record may exist of discussions or statements of delegations on this particular point is, of course, no basis for making such an assumption...[A]ssuming, arguendo only, that the WTO Members had wanted to keep that practice, it is very difficult to understand why the treaty basis for such practice was not maintained but was instead wiped out.[47]

60. Once we have understood the proper legal framework for analyzing China's complaint, it becomes clear that this is not a question of the covered agreements being *silent* on the relevant issue. Our discussion of the relevant rules demonstrates that they are anything but "silent."[48]

61. It is for this reason that China's reliance on privatization and pass-thru disputes is particularly misplaced. China contends that those disputes were about situations that the SCM

> producing the like product and (2) the methodology that it used in determining price comparability. With regard to importing WTO Members other than those that had an established practice of applying a methodology that included, inter alia, guidelines that the investigating authorities should normally utilize, to the extent possible, and where necessary cooperation was received, the prices or costs in one or more market economy countries that were significant producers of comparable merchandise and that either were at a level of economic development comparable to that of China or were otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation, they should make best efforts to ensure that their methodology for determining price comparability included provisions similar to those described above.

[46] *See* U.S. First Written Submission, paras. 403-407.

[47] *US – Underwear (AB)*, p. 15 (original emphasis).

[48] China Second Written Submission, footnote 219.

Agreement did not "expressly address," as in this dispute,[49] and that panels and the Appellate Body nevertheless recognized the applicability of GATT and SCM provisions to those situations. China asks the Panel to do likewise here. In the light of our discussion of the rules, the United States submits that there is no basis to do so. The agreements are not silent, or, in other words, contain no gap that can be filled by reading an implicit prohibition on concurrent application into WTO provisions that address other specific issues.

2. Article 19.3 and 19.4 of the SCM Agreement

62. It is telling that, after extensive theoretical musings about the rationales of the NME methodology and CVDs, China settles on two provisions addressing only CVDs as the *precise legal basis* for an alleged WTO prohibition on concurrent application of CVD and NME AD measures; Article 19.3 and 19.4 of the SCM Agreement. In this respect, the United States notes, first, both provisions impose obligations in respect of the *levying* of CVDs. However, the CVDs in the investigations at issue were not levied at the time of panel establishment because no "definitive or final legal assessment or collection"[50] had been made. In any event, China has failed to advance any arguments establishing a violation of either provision.

63. China alleges a violation of Article 19.3 on the ground that it was not "appropriate" for Commerce to offset a subsidy through a CVD while simultaneously offsetting the same subsidy through the AD duty. In this respect, the United States observes that this claim is premised on the assertion that the AD duty calculated under the NME methodology offsets subsidization. As we will discuss shortly, this is simply not the case.

64. Furthermore, China fails to examine the specific text of that sentence of the provision to understand what is meant by "appropriate." Of course, Article 19.3 does not impose some open-ended requirement of "appropriateness" to be assessed subjectively according to the needs of the complaining party. Rather, as the United States has explained, the words surrounding the term "appropriate" make clear that appropriateness of the amounts of CVDs relates to the subsidization rate calculated for each "source[] found to be subsidized and causing injury."[51] China does not allege that the CVD amounts are not those that Commerce found for each "source." Therefore, China has not established any inconsistency with Article 19.3.

65. Similarly, China attempts to read out of Article 19.4 terms that cannot be ignored. As the United States has discussed, Article 19.4 requires a comparison between the CVD *levied* and the "amount of the subsidy *found to exist*." China has not contested that the duties calculated in the CVD investigations were done so in a manner inconsistent with the obligations in the SCM

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[49] China Answer to Panel Question 69, para. 225. *See also* China Second Written Submission, footnote 219.

[50] Footnote 51 of the SCM Agreement.

[51] Article 19.3 of the SCM Agreement.

Agreement relating to the requirements for such calculation. In the absence of an allegation of error under those obligations, the proper inquiry under Article 19.4 is simply whether the duty levied exceeds the amount of subsidy *actually* found by Commerce. The question under Article 19.4, in these circumstances, is *not* whether the "amount of the subsidy found to exist" was calculated in accordance with the SCM Agreements. That inquiry is undertaken under other provisions of the SCM Agreement. The fact that China could not squeeze its double remedy argument into the text of those other provisions is not a basis to expand Article 19.4 beyond its plain terms.

3. Article 12.1 and 12.8 of the SCM Agreement

66. In its second written submission, China advances two new claims, under Article 12.1 and 12.8 of the SCM Agreement. These claims have no merit for two reasons: (i) as with all of China's claims, those under Article 12.1 and 12.8 are premised on the existence of an inherent double remedy in the concurrent application of CVDs and NME AD duties, which, as we will discuss shortly, is incorrect; and (ii) even if a double remedy could be shown to exist, Commerce did not "require"[52] information to "evaluate the existence of a double remedy"[53] and such information did not form part of the "essential facts under consideration"[54] that the agency is required to disclose.

67. The United States would first like to correct an erroneous impression conveyed by China throughout these proceedings. At no point has Commerce ever agreed that a double remedy would likely arise from the concurrent application of CVDs and NME AD duties. It is equally certain that Commerce has never expressed the view – either in prior administrative proceedings or elsewhere – that a double remedy could arise on the basis of the overlapping rationales of AD and CVD remedies or because NME normal values are intended to counteract subsidies. China's emphasis on statements made by Commerce about the "possibility" of double remedy do not suggest otherwise.[55]

68. Commerce's statements concern arguments raised by interested parties before Commerce as part of comments the agency received before deciding to conduct CVD investigations on NMEs. Given these comments, and the conceptual and methodological complexity of the issues raised, Commerce declined to pre-judge the issue but signaled that it would keep an open mind to allow parties with a concrete interest in the issue to present their views supported by facts from the particular investigations. Such openness to examination of the issue, however, should not be confused with Commerce's views on the merits, namely, it saw no basis *ex ante* to believe that double remedies would be a problem, still less that there would automatically be a double remedy

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[52] Article 12.1 of the SCM Agreement.

[53] China Second Written Submission, para. 269.

[54] Article 12.8 of the SCM Agreement.

[55] E.g., China Second Written Submission, para. 276.

in every case. Providing a continuing opportunity for demonstration of an alleged double remedy is an appropriate position for an investigating authority, even where, as here, there is no basis for the claim and the investigating authority does not consider and has not found that such a double remedy exists.

69. Commerce, therefore, did not ask parties for information on how a double remedy might arise, because it did not envision such circumstances itself. Indeed, given that the arguments raised by the Government of China in the investigations based on export price effects, as well as the "overlapping rationale" argument advanced before this Panel, both represent significant departures from the premises underlying WTO AD and CVD rules, Commerce had no reason to make inquiries in the absence of evidence from the requesting parties. Therefore, it is not for Commerce to advise on the "'specific factual circumstances' under which it would consider a double remedy to arise,"[56] a condition it had no basis to believe existed. Rather, it is for interested parties who seek to fundamentally alter the application of CVDs and AD duties to explain, *with supporting evidence*, why their proposed course of action is appropriate. It cannot be disputed that neither Chinese respondents nor the Government of China did so in the investigations at issue.

C. China Has Failed to Establish That a Double Remedy Necessarily Results From the Concurrent Application of CVD and AD Measures to Certain Products from China

70. China's double remedy claims are predicated not on the facts of the underlying investigations, but rather, on the false and unsubstantiated premise that AD and CVD remedies have overlapping rationales and that the NME normal value necessarily offsets or corrects for subsidization. Because all of China's "double remedy" claims are premised on the existence of a "double remedy," China can succeed on its claims only if it demonstrates where that "double remedy" is found in Commerce's separate calculations of dumping margins and subsidy rates. However, China has failed to do so.

71. This failure is best demonstrated by taking a closer look at the assertions that, as best as we can tell from China's submissions, appear to underlie China's claim that a double remedy exists.

1. Normal Value is Not a Single "Remedy"

72. China advances its argument as to the existence of a double remedy solely by reference to the *normal value* obtained under the NME methodology and its alleged relationship to subsidization. Indeed, China goes so far as to state that the export price side of the dumping

[56] China Second Written Submission, para. 270.

margin calculation is "entirely irrelevant."[57] As a result, China unabashedly advances an allegation of double remedy without even considering the whole of one of the remedies at issue.

73. As the United States has observed,[58] the anti-dumping remedy consists of not only the normal value, but also the export price, and is the result of the comparison of the two. The examination of only one of these elements without the other does not inform the inquiry as to the existence of a double remedy. Indeed, at first blush, it is difficult to imagine how one half of the dumping equation is "entirely irrelevant" to a claim that the concurrent imposition of a dumping duty (that is calculated by subtracting *export price* from normal value) and a countervailing duty produces a double remedy and is therefore not permitted under WTO rules.

74. Upon closer review, however, it becomes clear that details such as half of the dumping equation need not be "relevant" where, as here, the complaining party does not base its double remedy allegation on any serious examination of the two remedies, that is, the actual dumping duties and CVDs imposed in the investigations at issue. Instead, China's unilateral declaration of the "irrelevance" of export prices to this inquiry simply appears consistent with China's failure throughout this proceeding to identify precisely where the alleged double remedy can be found in the underlying investigations.

2. NME Methodology is Not Designed to Offset Subsidization

75. China's position rests on the extraordinary proposition that an NME *anti-dumping* methodology, by its very nature, offsets *subsidization*.[59] This proposition is without merit. It reflects an understanding of the NME methodology that has no basis in, and is contradicted by, the text of the covered agreements.

a. The Covered Agreements Provide No Support for China's Proposition

76. First, as the United States has observed,[60] the covered agreements establish the anti-dumping and countervailing duty regimes as two different mechanisms to address two separate and distinct unfair trade practices. China has not cited any provision of the GATT 1994, Anti-Dumping Agreement or SCM Agreement that would support its proposition. Indeed, if the NME methodology does in fact counteract subsidization, leading directly to a so-called double remedy, one might have expected China to negotiate in its Protocol conditions on a Member's recourse to that methodology or, even better, an express prohibition on the concurrent application of AD and CVD measures, as it seeks to have the Panel insert now. China did neither.

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[57] China First Written Submission, paras. 363 and 392.

[58] *See* U.S. Second Written Submission, paras. 196-200.

[59] *See* China First Written Submission, para. 329.

[60] *See* U.S. First Written Submission, paras. 389-394.

77. Furthermore, accepting the view that the NME methodology is designed to offset subsidization would lead to incongruous results under the covered agreements. The United States recalls that footnote 36 to the SCM Agreement states that a 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." If China's theory was applied, that is, if the NME methodology offset subsidization, then any anti-dumping duty calculated pursuant to the NME methodology would fall squarely within this definition of "countervailing duty." Because such an anti-dumping duty would also be a countervailing duty, that anti-dumping duty, as required by Article 10 of the SCM Agreement, could "only be imposed pursuant to [an] investigation[] initiated and conducted in accordance with [the SCM Agreement]."[61] Therefore, an investigating authority could not impose an anti-dumping duty calculated pursuant to the NME methodology without first also conducting a CVD investigation. In the absence of such an investigation, an anti-dumping duty calculated pursuant to the NME methodology, under China's theory, would appear to be inconsistent with Article 10 of the SCM Agreement. Under China's theory, this would be the case whether or not a concurrent CVD case were ongoing. And of course, under China's argument, even after conducting the *two* investigations, that investigating authority could not *also* impose the duty resulting from the separate CVD investigation, but instead, would be permitted to impose only *one* of the duties calculated.

b. U.S. Law on the NME Methodology Provides No Support for China's Proposition

78. Just as China's view that the NME methodology counteracts subsidization cannot be reconciled with the text of the covered agreements, so too can it find no support in the text of the U.S. law governing the NME methodology. As explained in the U.S. rebuttal submission,[62] U.S. law identifies an exporting country as an "NME" based on an examination of multiple statutory factors, none of which references subsidization. Put simply, the existence, nature, or extensiveness of subsidization in the exporting country has *no bearing* on the designation of that country as an "NME." There is no basis to contend that subsidization is one of the "'distortions' in the market that the NME construct was designed to address"[63] when it is not even a factor examined when considering whether a country constitutes an NME.

79. The exclusive focus of the NME methodology on making a price comparison for the purpose of calculating the *dumping* margin is also reflected in U.S. legislative history, which notes that normal antidumping methodologies were "insufficient *to counteract dumping* in State-controlled economy countries where the supply and demand forces do not operate to produce

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[61] Article 10 of the SCM Agreement.

[62] *See* U.S. Second Written Submission, para. 187.

[63] China First Written Submission, para. 373.

prices … which can be relied upon for comparison purposes."[64] In its First Written Submission, China relies on one mention of subsidization in the NME context in the U.S. legislative history as support for its view that the NME methodology offsets subsidization.[65] However, this reliance is misplaced.

80. The United States has explained in its rebuttal submission that Commerce tends to avoid factor values in the limited circumstances where those values are based on import prices of inputs *and* the inputs are from countries that have been found in prior CVD investigations to be providing non-product-specific *export subsidies*.[66] This naturally leaves a whole swathe of potential subsidies unaccounted for in Commerce's application of the NME methodology. In respect of this broad range of potential subsidies, Commerce undertakes virtually no inquiry. Moreover, even where Commerce excludes factor values based on subsidized inputs, the factor values that are ultimately selected may well reflect subsidization themselves because Commerce does not and cannot ensure otherwise. Therefore, the prices used by Commerce when constructing normal value under the NME methodology cannot be concluded to be "unaffected by subsidies," as presumed by China's theory.[67]

81. This is not surprising, though, when one recognizes that the proper objective of the NME methodology is *not* to offset subsidization, but is to measure the margin of *dumping* in a context where normal value cannot be reliably measured using the exporting country's own costs and prices.[68] China's attempt to argue otherwise finds no basis in the covered agreements or in U.S. implementation of the NME methodology.

D. Commerce's Legal Authority

82. We now turn to China's erroneous reliance on a so-called "absence of legal authority." The Panel will recall, first, that the United States has identified multiple threshold flaws with China's challenge on the basis of this alleged "measure." These flaws are set out in the U.S. Request for Preliminary Rulings, which the United States reiterates this morning.

83. China again invites the United States to identify the legal authority that China claims does not exist. The United States respectfully declines that invitation. That invitation imposes upon the United States the burden of identifying, establishing the existence of, and articulating the content of, the alleged "measure" at issue. This burden, of course, belongs to China, not the United States, and as noted in the U.S. Second Written Submission, this burden has not been met

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[64] S.Rep. No. 93-1298, at 174 (1974) (emphasis added).
[65] *See* China First Written Submission, para. 371 and footnote 315.
[66] *See* U.S. First Written Submission, paras. 188-189.
[67] China Second Written Submission, para. 293 (emphasis removed).
[68] *See* U.S. First Written Submission, paras. 184-190.

here.[69]

84. In any event, as the United States has explained,[70] Commerce has not been presented with the concrete factual circumstances in which it was *required* to make a determination as to the scope of its legal authority. This follows directly from the failure of Chinese respondents and the Government of China to adduce any evidence relating to double remedy in the investigations at issue. The United States notes that China appears to misunderstand the U.S. position in this regard. Contrary to what China implies in paragraph 262 of its Second Written Submission, the United States does not contend that the question as to whether legal authority exists depends on specific factual circumstances. Rather the U.S. position is that it is Commerce's ability to *pronounce* on the scope of that authority which depends on the presence of concrete factual circumstances.

85. With respect to China's statement this morning about the relevance of the GPX opinion to the issue of Commerce's legal authority, the United States notes that China appears to misunderstand the implications under U.S. law of that decision. First, the United States recalls that the GPX court itself made clear that it was not deciding the question of Commerce's authority.[71] Like Commerce, the court expressed no view on this issue. Second, it is worth emphasizing that nothing in the court's order remanding the determination requires Commerce to accept or articulate a definitive position on its authority. As required by law, Commerce will make a remand determination consistent with the court's order, but will do so under protest and in the light of Commerce's intent to appeal this erroneous decision.

E. Opinion of the Court in GPX v. United States

86. Finally, the United States will focus for a few brief moments specifically on the GPX opinion raised by China in its oral statement. China has directed the Panel's attention to the recent opinion of the United States Court of International Trade ("USCIT") in *GPX Int'l Tire Corp v. United States*, finding that certain aspects of Commerce's AD and CVD measures on off-the-road tires from China were inconsistent with U.S. law. The GPX opinion should have no bearing on the Panel's consideration of this dispute for four reasons: (1) the GPX opinion is not instructive for this dispute because it is an opinion of a U.S. court interpreting U.S. law, whereas this dispute concerns the interpretation of the WTO agreements, including provisions from China's Accession Protocol that do not appear in U.S. law; (2) the GPX opinion is not the final judgment of the U.S. courts; (3) the GPX opinion is in error; and (4) even on its own terms, the decision does not support the position taken by China here – that, where a WTO Member is applying AD duties determined under a NME methodology to Chinese goods, it may not apply

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[69] U.S. Second Written Submission, para. 222.

[70] *See*, e.g., U.S. Second Written Submission, para 222; U.S. Answers to First Panel Questions, para. 63.

[71] *GPX Int'l Tire Corp v. United States*, Slip Op. 09-103 (Ct. Int'l Trade, Sept. 18, 2009).

any CVDs to those same imports.

87. The United States will say a few more words about the first point, namely that the difference in sources of law and in the substantive content of that law render the GPX opinion of no relevance for the task before the Panel. The United States would be pleased to provide a fuller explanation of this and the other three points just mentioned should the Panel consider the GPX opinion to be a useful subject for questions.

88. At the risk of stating the obvious, the United States notes that the issue before the USCIT – the permissibility of concurrent application of CVDs and NME AD duties – was decided solely *under U.S. law*. This Panel, in contrast, is looking at a comparable issue *under the WTO agreement*s. In addition to the different source of law, the *substance* of the U.S. law at issue in the GPX case is very different from the provisions of the WTO agreements under consideration. The USCIT opinion relates to a U.S. law that has not been modified in any relevant respect for decades and is based primarily on the 1986 U.S. court holding in the *Georgetown Steel* case.[72] This Panel is considering whether the concurrent application of NME AD and CVD measures is consistent with the WTO agreements, including China's Protocol, which entered into force on December 11, 2001 and specifically provides, in the case of China, that a Member has the right to apply the NME methodology and the right to apply CVDs. Moreover, as discussed earlier, the disappearance of Article 15 of the Tokyo Round Subsidies Code when the SCM Agreement entered into force further confirms Members' intention to place no prohibition on the concurrent application of CVDs and NME AD duties in the context of domestic subsidies.

VI. China Appears to Recognize That the 30-day Period in Article 12.1.1 of the SCM Agreement Does Not Apply to Requests for Information Following the Original Questionnaire

89. China alleges that the United States acted inconsistently with Article 12.1.1 of the SCM Agreement by not providing at least 30 days for respondents and the Government of China, as interested parties in the CVD investigations at issue, to respond to each request for information made by Commerce, not just the original questionnaire.[73] The United States has pointed out that the 30-day obligation in Article 12.1.1 applies only to the questionnaire issued at the outset of a CVD investigation.[74] The United States has further observed that this is a logical reading of Article 12.1.1 given the different nature of original questionnaires and subsequent requests for information, and the time constraints, imposed by WTO rules, under which investigating

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[72] Exhibit CHI-90.

[73] *See* China First Written Submission, paras. 444-457; China Second Written Submission, paras. 307-314.

[74] *See* U.S. First Written Submission, paras. 476-478; U.S. Second Written Submission, para. 227.

authorities must operate.[75]

90. It now appears that China, or at least China's investigating authority, agrees with this understanding of Article 12.1.1. In the context of an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, the Chinese Bureau of Fair Trade for Imports and Exports (BOFT), a part of MOFCOM, has issued one new subsidy allegation questionnaire and five supplemental questionnaires for the U.S. Government. For *none* of these six questionnaires did China provide an initial period of 30 days to respond.[76] Given this development, it appears that not only does BOFT agree with our reading of Article 12.1.1, but it has embraced it enthusiastically. We look forward to an explanation from China as to whether this reflects an evolution in China's thinking on Article 12.1.1 and whether, in China's view, it remains necessary for the Panel to make findings on this claim.

91. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

[75] *See* U.S. First Written Submission, paras. 479-480; U.S. Second Written Submission, paras. 229-233.

[76] *See* Exhibit US-153.

LIST OF U.S. EXHIBITS

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

US-	Title
152	ITC List of Existing AD Orders (Sept. 17, 2009)
153	▪ Letter transmitting BOFT New Subsidy Questionnaire in the GOES CVD investigation ▪ Letter transmitting BOFT First Supplemental Questionnaire in the GOES CVD investigation ▪ U.S. request for an extension of the deadline to respond to a portion of the BOFT Second Supplemental Questionnaire in the GOES CVD investigation ▪ Letter transmitting BOFT Third Supplemental Questionnaire in the GOES CVD investigation ▪ Letter transmitting BOFT Fourth Supplemental Questionnaire in the GOES CVD investigation ▪ Letter transmitting BOFT Fifth Supplemental Questionnaire in the GOES CVD investigation