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

(AB-2010-3 / DS379)

APPELLEE SUBMISSION OF THE UNITED STATES

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In the Introduction and Executive Summary of its appellant submission, China states that the issues on appeal in this dispute are "of systemic importance . . . to WTO Members at large."[1] The United States agrees.

2. This dispute squarely presents before the Appellate Body a number of questions of legal interpretation concerning provisions of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), in particular how the antidumping ("AD") and countervailing duty ("CVD") remedies, available to all Members under WTO rules, can be effectively applied to products from Members, such as China, with economies that, by their nature, pose methodological challenges to investigating authorities not present when examining dumped or subsidized imports from other Members.

3. China's economy does not yet operate fully on market principles. Prior to 1979, China's economy reflected the standard features of a centrally planned economy. Prices were set and resources allocated administratively through five-year plans. The state created, owned, and sustained economic enterprises without due regard to the cost of operating and maintaining them, or the demand for the goods and services they provided. Production and investment goals were often established for political, rather than economic and commercial reasons.

4. Since 1979, China has been engaged in a process of reform with the objective of establishing a socialist market economy. By the time of its request to join the WTO in 1995, China had taken significant steps to start reforming its centrally planned economy, including substantial price deregulation, the expansion of trading rights, the elimination of production quotas, substantial decentralization of state investment decision-making, the "corporatization" of SOEs, the privatization of many small and medium-sized SOEs, currency convertibility for trade purposes, and reduced restrictions on foreign investment.

5. The United States and other WTO Members recognized at the time of China's accession that these reforms were ongoing, and that more reforms would be needed for China's economy to operate fully on market principles. No one presumed that China's transformation was completed simply by virtue of China's entry into the WTO. Rather, such reform was a process, initiated before China sought accession to the WTO and likely to continue well after China's accession. Members therefore raised concerns during China's accession negotiations about the application of WTO rules, including trade remedies, in the context of the transitioning nature of China's economy.

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[1] Appellant Submission of the People's Republic of China (December 1, 2010) ("China Appellant Submission"), para. 3.

6. For example, the *Report of the Working Party on the Accession of China* ("Working Party Report") reflects WTO Members' concerns with the role of state-owned enterprises ("SOEs") and state-owned commercial banks ("SOCBs") in China:

> In light of the role that state-owned and state-invested enterprises played in China's economy, some members of the Working Party expressed concerns about the continuing governmental influence and guidance of the decisions and activities of such enterprises relating to the purchase and sale of goods and services.[2]

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

7. Members also generally expressed concern that:

> the special features of China's economy, in its present state of reform, still created the potential for a certain level of trade-distorting subsidization; this could have an impact not only on access to China's domestic market, but also on the performance of Chinese exports in the markets of other WTO Members, and should be subject to effective SCM Agreement disciplines.[3]

8. More specifically, Members were concerned that subsidies could be provided to, or from, SOEs and SOCBs. Members accordingly asked China to confirm that "when state-owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement."[4] China did not refuse this request for confirmation, instead stating that its "objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own profits and losses."[5]

9. In light of Members' concern that China's economy was still heavily dominated by the state, Members carefully considered and insisted upon numerous provisions that would permit effective remedies against unfairly traded imports from China. The commitments made in the areas of AD and CVD remedies reflected Members' recognition that prices and costs in China were not necessarily market-based. Therefore, for example, the normal AD methodologies used

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[2] *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49 (October 1, 2001) ("Working Party Report"), para. 44.

[3] Working Party Report, para. 171.

[4] *Id.*, at 172.

[5] *Id.*

to measure price discrimination, which rely on market prices and costs, could not be applied so as to arrive at accurate and reliable dumping margins. Special rules and flexibilities were needed. Thus, in its Accession Protocol, China agreed that:

> [i]n determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China . . . .[6]

10. A "methodology that is not based on a strict comparison with domestic prices or costs in China" is specifically permitted "if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product."[7] Thus, if market economy conditions do not prevail in the relevant industry, a Member conducting an AD investigation is expressly authorized to develop its own methodology to estimate "normal value" in the measurement of price discrimination. This is necessary given the otherwise impossible task of applying a remedy that first looks at the "home market price" to a situation in which there is no market-determined home market price.

11. Similarly, China's Accession Protocol expressly recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks" for measuring the benefit of subsidies.[8] This reflects the fact that the measurement of subsidies described in Article 14 of the SCM Agreement, in the context of a market economy, generally relies on the marketplace. Members understood that such reliance may not be appropriate in the case of China's market. The use of benchmarks from outside China's market may be necessary to ensure the full, meaningful, and practical applicability of traditional subsidy remedies to those situations in China in which a normal functioning market does not exist.

12. The same characteristics of China's economy reflected in the Working Party Report, and in specific commitments made in the Accession Protocol, also pose challenges for investigating authorities seeking information to perform the necessary calculations and analyses under the AD and CVD rules. In the context of the AD and CVD investigations at issue in this dispute, the U.S. Department of Commerce ("Commerce") faced these challenges head on.[9] Because of the nature of China's economy, Commerce calculated dumping margins, as provided for in China's

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[6] *Protocol on the Accession of the People's Republic of China*, WT/L/432 (November 23, 2001) ("China Accession Protocol"), para. 15(a).

[7] China Accession Protocol, para. 15(a)(i).

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

[9] As China indicates, the products that were the subjects of Commerce's investigations are: Circular Welded Carbon Quality Steel Pipe ("CWP"), Certain New Pneumatic Off-the-Road Tires ("OTR Tires"), Light Walled Rectangular Pipe and Tube ("LWR"), and Laminated Woven Sacks ("LWS"). *See* China Appellant Submission, note 2.

Accession Protocol, under a methodology that was not based on a strict comparison with domestic costs and prices, often referred to as a "non-market economy" (or "NME") methodology. In the CVD investigations, Commerce engaged in a careful examination of the relevant aspects of China's market to determine whether reliable benchmarks existed in order to evaluate the existence of a benefit. Where no such benchmarks existed, Commerce identified reliable benchmarks outside China in order to make a determination on subsidization.

13. Commerce properly determined, on the basis of the voluminous records in each of the investigations at issue, that the relevant Chinese product was being dumped and subsidized. China requested that a WTO dispute settlement panel be established to review Commerce's determinations and the Panel, for the most part, rejected China's claims.[10] With respect to the issues on appeal, the Panel found that:

> China did not establish that Commerce acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement in determining in the relevant investigations at issue that SOEs and SOCBs constituted "public bodies";[11]
>
> China did not establish that Commerce acted inconsistently with the obligations of the United States under Article 2.1(a) of the SCM Agreement by determining in the OTR investigation that lending by SOCBs to the OTR tire industry was *de jure* specific;[12]
>
> China did not establish that Commerce acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for HRS in the CWP and LWR investigations and for BOPP in the LWS investigation;[13]
>
> China did not establish that Commerce acted inconsistently with the obligations of the United States under Article 14(b) of the SCM Agreement by rejecting interest rates in China as benchmarks for calculating the benefit from RMB-denominated loans from SOCBs, in the CWP, LWS and OTR investigations, or that the benchmarks actually used in respect of the RMB-denominated loans were inconsistent with those obligations;[14] and

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[10] *See United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, Report of the Panel (July 23, 2010) ("Panel Report"), para. 17.1.

[11] *See* Panel Report, para. 17.1(a)(i).

[12] *See* Panel Report, para. 17.1(b)(i).

[13] *See* Panel Report, para. 17.1(c)(iv).

[14] *See* Panel Report, para. 17.1(c)(vii).

> China did not establish that the United States acted inconsistently with its obligations under Articles 10, 19.3, 19.4, and 32.1 of the SCM Agreement or under Article VI:3 of GATT 1994 by reason of Commerce's use of its NME methodology in the four anti-dumping investigations at issue and the imposition of anti-dumping duties on that basis concurrently with the imposition of countervailing duties on the same products in the four countervailing duty investigations at issue.[15]

14. On appeal, China alleges that the Panel made "certain errors of law and legal interpretation."[16] China suggests that, "[u]nless reversed by the Appellate Body, the Panel's errors of law and legal interpretation in respect of [the appealed] issues will gravely undermine the effectiveness of the disciplines that the SCM Agreement imposes on the use of subsidies and countervailing measures."[17] As we will demonstrate in this submission, China is mistaken, and the arguments China advances on appeal are without merit.

15. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") provides that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law." Article 31 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention") reflects such rules.[18] Article 31 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." A corollary of this customary rule of interpretation is that an interpretation that gives meaning and effect to all terms of the treaty is to be preferred.[19]

16. As it did before the Panel, China advances on appeal proposed interpretations of the covered agreements that cannot be reconciled with the customary rules of interpretation. China seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement. In short, having agreed to join the WTO and submit itself to the rules and obligations of the covered agreements, together with the terms and conditions of its Accession Protocol, China now seeks through dispute settlement to change the rules and obligations, and void the terms and conditions.

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[15] *See* Panel Report, para. 17.1(e)(ii).

[16] China Appellant Submission, para. 1.

[17] China Appellant Submission, para. 3.

[18] *US – Gasoline (AB)*, p. 17.

[19] *US – Gasoline (AB)*, p. 23.

17. The Panel correctly rejected China's proposed interpretations as overly formalistic, unsupported by the terms of the covered agreements in their context, and inconsistent with the object and purpose of the SCM Agreement. Contrary to China's assertion, it is China's proposed interpretations that, if accepted, would "gravely undermine the effectiveness of the disciplines that the SCM Agreement imposes on the use of subsidies and countervailing measures."[20] China's proposed interpretations would, for example:

- Restrict Members' ability to address injurious subsidies provided through companies that are majority-owned or controlled by a government, effectively shielding such subsidies from the disciplines of the SCM Agreement;

- Prevent a determination of *de jure* specificity except in the narrowest of circumstances, in which a law, in addition to explicitly limiting access to a subsidy, must also expressly identify the financial contribution and the benefit and explicitly limit access to both to certain enterprises;

- Effectively overturn the Appellate Body's finding in *US – Softwood Lumber IV* that evidence relating to the government's predominant role in the market is sufficient to reject in-country private prices as a benchmark under Article 14(d) of the SCM Agreement;

- Require investigating authorities to rely on interest rate benchmarks that are distorted by extensive and atypical government participation and intervention in the Chinese lending market, such that interest rates effectively are dictated by the government, which would result in a circular comparison yielding a benefit measurement that is artificially low or zero; and

- Prohibit Members from concurrently addressing both dumping and subsidization despite the absence from the covered agreements of any rules preventing concurrent application of the AD and CVD remedies.

18. For the reasons that the United States sets forth in this submission, China's proposed interpretations are not in accordance with the customary rules of treaty interpretation and they would undermine the object and purpose of the SCM Agreement. The findings and legal interpretations of the Panel, on the other hand, are based on well-reasoned and objective analyses of the law and the facts, and they are correct. Consequently, we respectfully request that the Appellate Body reject China's appeal and uphold the Panel's findings and legal interpretations.

19. This submission is organized as follows. **Section II** responds to China's arguments that the Panel erred in its interpretation and application of the term "public body" in Article 1.1 of the

[20] China Appellant Submission, para. 3.

SCM Agreement. The Panel correctly analyzed the ordinary meaning of the term "public body," in its context and in light of the object and purpose of the SCM Agreement, and found that this term refers to an entity controlled by a government.

20. China's arguments that the term "public body" is limited to an entity vested with government authority to exercise government functions are unavailing. China's criticism of the Panel's reference to usages of the term "public body" in the "municipal law" of various jurisdictions is misplaced and mischaracterizes the Panel's analysis; an ordinary meaning analysis is not limited to dictionary definitions.

21. China's contextual analysis is also flawed. Article 9.1 of the Agreement on Agriculture does not provide relevant contextual support for China's proposed interpretation. More relevant is the immediate context of the term "public body," including the use of the word "any" in Article 1.1(a)(1) of the SCM Agreement and the use of the term "private body" in Article 1.1(a)(1)(iv) of the SCM Agreement.

22. Furthermore, the Panel's interpretation strengthens and supports the object and purpose of the SCM Agreement, which is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[21]

23. The Panel also correctly found that the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts are not relevant rules of international law applicable in the relations between the parties that must be taken into account in interpreting the term "public body."

24. Ultimately, the Panel's interpretation of the term "public body" was well reasoned and consistent with other DSB recommendations and rulings, and the Panel did not err in finding that Commerce's determinations, that certain SOEs and SOCBs were public bodies, were not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

25. **Section III** responds to China's arguments that the Panel erred in its interpretation of Article 2 of the SCM Agreement. The Panel properly analyzed the text and context of Article 2.1(a) of the SCM Agreement, and the Panel's interpretation of Article 2.1(a) is consistent with the object and purpose of the SCM Agreement.

26. China offers a formalistic reading of the phrase "explicitly limits access to a subsidy," contending that, because the term "subsidy" is defined in Article 1.1 of the SCM Agreement as a financial contribution that confers a benefit, an investigating authority, in order to find a subsidy

[21] *US – Softwood Lumber IV (AB)*, para. 64.

de jure specific, must find that the law expressly identifies both the financial contribution and benefit and explicitly limits access to both of the elements of a subsidy to certain enterprises.

27. The Panel appropriately rejected this interpretation because the Panel could conceive of "many ways in which access to a subsidy could be *explicitly* limited, and [did not] see that both the financial contribution and the benefit necessarily would have to be set forth *explicitly* to effect such a limitation."[22] Having properly interpreted Article 2.1(a) of the SCM Agreement, the Panel then correctly found, based on the totality of the evidence before Commerce, that Commerce's determination in the OTR Tires CVD Investigation that the policy lending subsidy was *de jure* specific was not inconsistent with Article 2.1(a).

28. China asks the Appellate Body to ignore the totality of the evidence and focus on a single fact, which China mischaracterizes. It simply is not that case that the policy lending subsidy was available to 539 "industries." As the Panel found, the government policy documents listed "individual project types, described in very specific and narrowly-circumscribed terms," which gave the impression not "of broad availability but rather of singling out of very particular types of projects."[23] China ignores virtually all of the evidence that was before Commerce and criticizes the Panel for basing its conclusion on the totality of the evidence. China's argument is without merit. The Panel's conclusion was well reasoned, based on a comprehensive examination of the record evidence, and correct.

29. China's appeal of the Panel's interpretation of the term "subsidy" in Article 2.2 of the SCM Agreement is no different than its appeal of the Panel's interpretation of the same term in Article 2.1(a), and should be rejected, as it was by the Panel, for the same reasons.

30. In addition, despite prevailing on its claim under Article 2.2 of the SCM Agreement, China appeals what it describes as the Panel's "finding" that "the existence of a 'distinct' or 'unique' 'regime' for the provision of a subsidy is legally relevant to a determination of specificity" under Article 2.2."[24] As is evident from the Panel's report, the Panel made no "finding" in this regard.

31. **Section IV** responds to China's arguments that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement. The Panel did not err in interpreting Article 14(d) to permit the rejection of in-country private prices as a benchmark where the only evidence relied upon by the investigating authority is that the government is the predominant supplier of

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[22] Panel Report, para. 9.26 (emphasis added).

[23] Panel Report, para. 9.68.

[24] Notification of an Appeal by the People's Republic of China under Article 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the *Working Procedures for Appellate Review*, (December 1, 2010) ("China Notice of Appeal"), para. 6(b).

the good in question. The Panel correctly found that other evidence of distortion is not required. The Panel's interpretation is correct and consistent with the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV*.

32. China misreads the Appellate Body report in *US – Softwood Lumber IV* and challenges the Panel's findings based on economic and evidentiary arguments that are inapposite and without merit. China fails to recognize the inherent circularity of comparing the price of a government provided good to a benchmark price that is aligned with the government price because of the government's predominant role in the market; this would be akin to comparing the government price to itself.

33. The Panel correctly recognized this problem and properly found that Commerce's rejection of in-country private prices to determine the benefit in the CWP and LWR CVD investigations was not inconsistent with Article 14(d) of the SCM Agreement.

34. **Section V** responds to China's arguments that the Panel erred in concluding that Commerce's loan benchmark was not inconsistent with Article 14(b) of the SCM Agreement. The Panel correctly interpreted Article 14(b) as permitting the use of a proxy loan, including a loan denominated in a different currency, to measure the benefit of a financial contribution.

35. China contends that "comparing a loan denominated in one currency to a loan denominated in another currency will *necessarily* measure the factors that cause interest rates to be different in different countries and currencies."[25] That is, China simply denies the possibility that an investigating authority could make adjustments sufficient to render a benchmark loan denominated in a different currency "comparable" to the investigated loan. China's interpretation of the term "comparable" would effectively require that any benchmark loan used to determine whether an RMB loan provided by the government or any public body in China conferred a benefit "necessarily" must be identified from amongst loans within China.

36. As the Panel found, China proposes an "excessively formalistic interpretation" of Article 14(b), which "would effectively limit an investigating authority's ability to identify an appropriate benchmark, forcing it instead to fall back on a choice from among inappropriate benchmarks."[26] The Panel considered that "the logic of the Appellate Body's reasoning in *US – Softwood Lumber IV* in regard to Article 14(d) of the SCM Agreement [is] equally applicable to Article 14(b), and indeed to Article 14 in its entirety."[27]

37. China again fails to understand the circularity inherent in comparing the interest rate of a government-provided loan with a loan interest rate that effectively is dictated by the

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[25] China Appellant Submission, para. 381 (emphasis added).

[26] Panel Report, para. 10.121.

[27] Panel Report, para. 10.122.

government's predominant role and intervention in the lending market. Additionally, China erroneously conflates "benchmark interest rates" and "commercial" interest rates used as benchmarks to measure benefit under Article 14(b). China's argument is premised on the notion that all governments, in the ordinary course of implementing monetary policy, "effectively dictate" *benchmark* interest rates. Article 14(b), however, by its terms, is concerned with "commercial" loan interest rates and, as the Appellate Body has explained, loan interest rates determined by the "market."[28] All of China's legal and economic arguments that relate to "benchmark interest rates" are beside the point.

38. The Panel correctly found that Commerce's determination to reject RMB loans within China as a benchmark was not inconsistent with Article 14(b) of the SCM Agreement, and further correctly found that the loan benchmark used by Commerce to measure the benefit of the financial contribution was not inconsistent with Article 14(b). China's accusation that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter before it is based on misrepresentations and mischaracterizations of the Panel's report; it is entirely unsubstantiated and utterly without merit.

39. **Section VI** responds to China's arguments that the Panel erred in finding that the covered agreements do not prevent Members from concurrently applying to exports from China CVD measures and AD measures based on an NME methodology. The Panel correctly concluded that China failed to establish that Commerce's use of its NME methodology in the AD determinations at issue in this dispute, concurrently with its determination of subsidization and the imposition of CVDs on the same products in the CVD determinations at issue, was inconsistent with Articles 10, 19.3, 19.4, or 32.1 of the SCM Agreement or with Article VI:3 of the GATT 1994.

40. China's primary challenge on appeal is based on Article 19.4 of the SCM Agreement, which provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist." In China's view, if a subsidy has been "offset" through the manner in which the importing Member calculates ADs, the subsidy no longer "exists" because it can no longer be attributed to the imported products as a cause of injury to domestic producers. Contrary to China's mistaken interpretation, the Panel correctly found that the existence of subsidies for purposes of the SCM Agreement is governed by Articles 1 and 14 of the SCM Agreement, and has nothing whatsoever to do with the imposition of NME ADs on merchandise produced by subsidy recipients.

41. Similarly, the Panel properly found that China failed to demonstrate any inconsistency with Article 19.3 of the SCM Agreement. The Panel correctly found that CVDs are collected in the "appropriate" amounts within the meaning of Article 19.3 where the amount collected does not exceed the amount of subsidy found to exist. The Panel also properly rejected China's

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

challenges under Articles 10 and 32.1 of the SCM Agreement, which China conceded were derivative of its Article 19.3 and 19.4 claims.

42. The Panel properly considered two primary sources outside the SCM Agreement in its analysis – Article VI:5 of the GATT 1994 and Article 15 of the Tokyo Round Subsidies Code – and found that both supported its findings. China's Accession Protocol also provides contextual support for the Panel's findings

43. With respect to the object and purpose of the relevant agreements, China mistakenly asserts that an essential object and purpose of Part V of the SCM Agreement addressing CVDs is to ensure that CVDs do not remedy any subsidies that may have been remedied to any extent by NME ADs. To the contrary, the Panel correctly found that the WTO Agreement establishes separate remedies for what have always been considered to be distinct unfair trade practices. For all of these reasons, as explained more fully below, China's appeal with respect to the concurrent application of CVDs and NME ADs should be rejected.

II. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF THE TERM "PUBLIC BODY" IN ARTICLE 1.1 OF THE SCM AGREEMENT

44. China appeals the Panel's finding that Commerce's determinations in the challenged investigations, that certain SOEs and SOCBs are "public bodies," were not inconsistent with Article 1.1(a)(1) of the SCM Agreement.[29] China argues that the Panel erred in its interpretation and application of the term "public body" in Article 1.1(a)(1), and that the Panel acted inconsistently with Articles 3.2 and 11 of the DSU.[30] China is incorrect.

45. As the United States demonstrates below, the Panel correctly interpreted the term "public body" to refer to an entity controlled by a government[31] and appropriately rejected China's argument that the term "public body" must be understood as referring only to entities vested with government authority and performing governmental functions.[32] The Panel's interpretation resulted from a proper analysis of the ordinary meaning of the term "public body," read in its context and in light of the object and purpose of the SCM Agreement.

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[29] *See* Panel Report, para. 17.1(a)(i); *see also* China Notice of Appeal, para. 4.

[30] *See* China Notice of Appeal, para. 4.

[31] *See* Panel Report, para. 8.94.

[32] *See* Panel Report, paras. 8.59-8.60, 8.63, 8.73, 8.83.

46. As a result, the Panel concluded that Commerce did not act inconsistently with Article 1.1(a)(1) of the SCM Agreement by finding that certain SOEs and SOCBs are "public bodies."[33] The Panel explained that Commerce primarily relied upon majority government ownership to demonstrate control, and that there were no facts on the record indicating (and China did not argue) that government ownership did not equate to government control. Indeed, throughout this dispute, China has never claimed that it does not own or control the various entities Commerce found to be "public bodies." Government ownership or control is undisputed.

47. On appeal, as it did before the Panel, China argues that government control is not the correct standard for determining whether an entity is a "public body." Rather, in China's view, only an entity vested with government authority and performing governmental functions may be considered a "public body." However, China's interpretation is not based on a proper understanding of the ordinary meaning of the terms of Article 1.1(a)(1) of the SCM Agreement, in their context, and in light of the object and purpose of the SCM Agreement. China relies too heavily on an unrelated provision in the Agreement on Agriculture, which China incorrectly suggests provides relevant "context" for the interpretation of Article 1.1(a)(1) of the SCM Agreement, and on certain attribution rules in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts ("Draft Articles"), which China incorrectly argues are "relevant rules of international law applicable in the relations between the parties" that the Panel was required to "take[] into account."[34] China's flawed interpretative analysis has led China to an incorrect interpretation of the term "public body."

48. We note that the Panel in this dispute is now the third panel to interpret the term "public body" as meaning an entity controlled by the government.[35] The Panel's conclusion was reasoned, considered, and consistent with the customary rules of interpretation of international agreements. China's proposed interpretation, on the other hand, is aberrational and divorced from the text of the SCM Agreement. The Panel was right to reject it.

A. The Panel Did Not Err in Its Legal Interpretation of the Term "Public Body" in Article 1.1(a)(1) of the SCM Agreement

1. The Panel Correctly Analyzed the Ordinary Meaning of the Term "Public Body," in Its Context and in Light of the Object and Purpose of the SCM Agreement, and Found That This Term Refers to an Entity Controlled by a Government

[33] *See* Panel Report, paras. 8.138, 8.143.

[34] *See* Vienna Convention, Article 31.3(c).

[35] *See EC – Large Civil Aircraft (Panel)*, para. 7.1359; *Korea – Commercial Vessels*, paras. 7.50, 7.172, 7.353, and 7.356.

49. As noted above, the Panel concluded that a "public body," within the meaning of Article 1.1(a)(1) of the SCM Agreement, is any entity controlled by a government, and not necessarily, as China urges, an entity vested with government authority to perform governmental functions.[36] As we demonstrate below, this interpretation is consistent with the ordinary meaning of the term "public body," read in its context and in light of the object and purpose of the SCM Agreement.

a. The Ordinary Meaning of the Term "Public Body"

50. Article 1.1 of the SCM Agreement provides that "a subsidy shall be deemed to exist if":

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
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> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or service other than general infrastructure, or purchases goods;
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> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
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> * * *
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> (b) and a benefit is thereby conferred.[37]

51. The first question in any subsidy analysis is: was there a "financial contribution" by "a government or any public body within the territory of a Member"? Because the SCM Agreement does not define the term "public body," and Commerce did not determine that the "financial contribution" was provided by the "government," the Panel appropriately began its analysis by considering the meaning of the term "public body."

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[36] Panel Report, para. 8.94.

[37] SCM Agreement, Article 1.1.

i. The Panel's Analysis of the Term "Public Body" or "Organisme Public" or "Organismo Público"

52. At the outset, it must be noted that China is simply incorrect in its assertion that the Panel's analysis of the term "public body" was "*not* predicated" on an analysis of the ordinary meaning of that term.[38] China appears to ignore paragraphs 8.57 through 8.63 of the Panel Report, wherein the Panel discussed at length the ordinary meaning of the term "public body" (as well as "organisme public" and "organismo público").

53. China argued before the Panel that government ownership or control is not sufficient to find that an entity is a "public body" and that an entity may be considered a "'public body' for purposes of Article 1.1 *only* if two conditions are met: (1) the entity must be authorized by the law of the State to exercise functions of a governmental or public character, and (2) the acts in question must be performed in the exercise of such authority."[39]

54. The Panel therefore examined the ordinary meaning of the term "public body" or "organisme public" or "organismo público," in context and in light of the object and purpose of the SCM Agreement, to determine whether the meaning of that term is limited, in the manner argued by China, to entities vested with government authority to perform governmental functions, *i.e.*, government agencies. The Panel did not err in its finding that the meaning of the term "public body" is not limited in this manner.

55. The Panel referred to dictionary definitions that indicate that the ordinary meaning of the term "public" includes: "Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation."[40] The Panel further noted that the ordinary meaning of the term "body" "includes: 'a group of individuals regarded as an entity; a corporation'; and 'a number of individuals spoken of collectively, usually as united by some common tie, or as organized for some purpose; a collective whole or totality; a corporation; as, a legislative body, a clerical body.'"[41] Taken together, these definitions indicate that the ordinary meaning of the term "public body" includes corporations or entities belonging to the community or nation.

56. China submitted to the Panel various other definitions of the term "public," arguing that they support China's interpretation that a "public body" is an entity authorized by law to exercise functions of a governmental or public character, whose acts are performed in the exercise of such authority. The Panel properly concluded, however, that although the ordinary meaning of the

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[38] *See* China Appellant Submission, para. 36.

[39] China First Written Submission before the Panel, para. 40 (emphasis added). China makes the same argument on appeal. *See, e.g.*, China Appellant Submission, para. 30

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

[41] Panel Report, para. 8.59 (*quoting Free Dictionary online and Accurate and Reliable Dictionary online*).

term "public body" may also encompass entities authorized by law to perform functions of a governmental or public character, the meaning of that term is not limited to such entities.[42]

57. The Panel also examined the ordinary meaning of the relevant provisions in the French and Spanish versions of Article 1.1(a)(1) of the SCM Agreement and found no indication that the term "public body" in French or Spanish means only an entity vested with authority to perform governmental functions. The French term for "public body" is "organisme public," and the Spanish term is "organismo público." As the Panel explained, the meaning of the French term "public" includes "'d'État, qui est sous contrôle de l'État, qui appartient à l'État, qui dépend de l'État, géré par l'État.'"[43] The meaning of the Spanish term "público," meanwhile, includes "'perteneciente o relativo al Estado o a otra administración.'"[44] All of these definitions include the notion of belonging to, or being controlled by, the state or government, and not necessarily performance of governmental functions.

58. The various definitions summarized above indicate that the term "public body" has a broader meaning than that urged by China. This is not to say that the ordinary meaning does not also include entities authorized by law to perform functions of a governmental or public character and, in fact, performing acts in the exercise of such authority, but only that the ordinary meaning is not strictly limited to these types of entities. Rather, the ordinary meaning of the term "public body" indicates that this term refers to entities owned or controlled by a government.

ii. The Panel's Consideration of Other Usages of the Term "Public Body"

59. China argues that the Panel improperly relied upon "municipal law" to determine the meaning of the term "public body" and that this was inconsistent with Articles 3.2 and 11 of the DSU.[45] Indeed, China goes so far as to claim that the Panel's reference to "municipal law" was

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[42] Panel Report, para. 8.59.

[43] Panel Report, para. 8.61 (quoting *Centre National de Ressources Textuelles et Lexicales*). The English translation provided by the Panel is "Of the State, that is controlled by the State, that belongs to the State, that depends on the State, that is run by the State." The Panel provided further analysis as to why the French terms "public" and "organisme" referred to entities controlled by the State in paragraph 8.61 of its report.

[44] Panel Report, para. 8.61 (quoting *Real Academia Española Dictionary online*). The English translation provided by the Panel is "Belonging to or related to the State or other administration."

[45] *See* China Appellant Submission, paras. 103-132.

the "*sole* reason" the Panel did not agree with China's proposed interpretation of the term "public body" and "infected" key elements of the Panel's decision.[46] China is incorrect.

60. As an initial matter, China again mischaracterizes the Panel's assessment of the ordinary meaning of the term "public body." As described above, the Panel resorted to dictionary definitions of the words in the term "public body," and its French and Spanish counterparts, "organisme public" and "organismo público," respectively, in order to determine its ordinary meaning and found evidence that the meaning of the term "public body" includes entities owned or controlled by the government. Thus, the Panel's reference to "municipal law" was hardly the "sole" basis for any of the Panel's findings.

61. Additionally, it again is necessary to recall that China's argument before the Panel was, as it is here, that an entity is a "public body" *only* if it is vested with authority from the government to perform governmental functions, and if the acts in question are performed in the exercise of that authority.[47] The Panel therefore appropriately examined usages of the term "public body" to determine whether it is limited in the manner argued by China.

62. The dictionary definitions to which the Panel referred, as discussed above, indicate that the ordinary meaning of "public body" is not limited, as China suggests. However, the Appellate Body has cautioned that dictionary definitions alone are not always capable of resolving complex questions of interpretation.[48] Accordingly, the Panel considered some of the "varying definitions and practices" for "different jurisdictions" "as to what for purposes of their own domestic laws and systems are considered 'public bodies'."[49] This was an entirely appropriate way for the Panel to assess the ordinary meaning of the term "public body" and to determine whether that meaning, as revealed in usages of the term, is limited to entities vested with government authority to perform government functions, as China argues it is.

63. China incorrectly suggests that the Panel's consideration of "municipal law" was an extra step taken by the Panel, inconsistent with the Vienna Convention.[50] On the contrary, the Panel's consideration of the use of the term "public body" in the "municipal law" of various jurisdictions was merely a part of its examination of the ordinary meaning of that term, consistent with the

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[46] China Appellant Submission, paras. 103, 132 (emphasis in original).

[47] China First Written Submission before the Panel, para. 40; China Appellant Submission, para. 30.

[48] *See US – Gambling (AB)*, para. 164 (citing *US – Softwood Lumber IV (AB)*, para. 59; *Canada – Aircraft (AB)*, para. 153; and *EC – Asbestos (AB)*, para 92).

[49] Panel Report, para. 8.60. Of course, as detailed elsewhere in this submission, the Panel also considered the context of the term "public body" and the object and purpose of the SCM Agreement.

[50] *See* China Appellant Submission, para. 109.

requirement of the Vienna Convention, in order to determine whether the meaning is limited to the definition put forth by China. Along these lines, the Panel did not examine "municipal law" *per se*, but rather examined usages of the term "public body" or "organisme public" or "organismo público" in various domestic systems to determine whether that term is limited to entities vested with government authority and performing governmental functions, as China argues.

64. The Panel properly concluded that these usages indicate that the term "public body" is not limited as China has suggested. China argues that the Panel erred in its analysis because the usages referred to by the Panel "establish that such entities are *not* defined exclusively or even primarily by reference to government control."[51] China misses the point. The Panel's task was to determine whether the term "public body" is limited, as urged by China, to entities vested with authority from the government to perform governmental functions, and in fact performing such functions. The Panel found that the "municipal law" usages to which it referred indicate that the term is not so limited. The Panel noted that Scottish public bodies are actually "distinct from executive agencies" and include "nationalised industries"[52]; the term "organisme public" is synonymous with "organisme gouvernemental," which includes "State enterprises" such as those of a "commercial, financial or industrial nature..."[53]; and a usage of the term "organismo público" is not limited to "State agencies."[54] These various usages indicate that the ordinary meaning of the term "public body" can cover a wide array of entities.

65. Ultimately, the Panel's consideration of these various usages of the term "public body" or "organisme public" or "organismo público" simply confirmed for the Panel that, as indicated by the dictionary definitions to which it referred, the ordinary meaning of that term is not limited to entities vested with government authority to perform governmental functions. The Panel's analysis of the ordinary meaning of the term "public body," and its conclusion in this regard, was not in error.

b. The Context of the Term "Public Body"

66. The Panel also properly concluded that the context of the term "public body" indicates that this term refers to an entity controlled by a government. China criticizes the Panel's contextual analysis and offers its own. China's contextual arguments, however, all attempt to make the same flawed point – that a "public body" is no different from a government agency, because a "public body" must be an entity vested with government authority to perform governmental functions. This is made most apparent, as discussed below, by China's reliance on arguments concerning Article 9.1 of the Agreement on Agriculture as context for the

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[51] *See* China Appellant Submission, para. 117. *See also id.*, paras. 118-131.

[52] Panel Report, para. 8.60, note 161.

[53] Panel Report, para. 8.62.

[54] Panel Report, para. 8.62.

interpretation of Article 1.1(a)(1) of the SCM Agreement. Ultimately, China's argument boils down to a request to replace the language in the SCM Agreement, "a government or any public body within the territory of a Member," with the very different language in the Agreement on Agriculture, "governments or their agencies."

67. The Panel rightly rejected this request and conducted a proper analysis of the context of the term "public body." The Panel did not err in finding that the context of the term "public body" does not support an interpretation of that term that includes only entities vested with government authority to perform governmental functions. As discussed below, when properly read in context, the term "public body" must mean something different than the term "government agency" or an entity that performs governmental functions. As the Panel properly concluded, the context supports an interpretation of the term "public body" as referring to entities controlled by a government.

i. The Text of Article 1.1(a)(1) of the SCM Agreement

68. In Article 1.1(a)(1) of the SCM Agreement, the term "public body" is part of the disjunctive phrase "by a government or any public body within the territory of a Member. . . ." The SCM Agreement thus uses two different terms — "a government" or "any public body" — to identify the two types of entities that can directly provide a financial contribution. As a contextual matter, the use of the distinct terms "a government" and "any public body" together this way suggests that the terms have distinct and different meanings. Treaty interpretation should give meaning and effect to all terms of a treaty. As the Appellate Body has explained, "the internationally recognized interpretive principle of effectiveness should guide the interpretation of the *WTO Agreement*, and, under this principle, provisions of the WTO Agreement should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility."[55]

69. The term "government," as the Panel stated, means, among other things: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry."[56] In other words, "government" refers to the formal apparatus of a State — its ministries, agencies and other offices — that has the power and authority to govern.

70. China argues that a "public body" must be an entity authorized by law to exercise functions of a governmental or public character, whose acts are performed in the exercise of such authority. It is difficult to see how China's interpretation of the term "public body" differs in any significant way from the meaning of the term "government." Indeed, an entity that is legally

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

[56] *The New Shorter Oxford English Dictionary*, at 1123 (1993) (Exhibit US-95). *See also* Panel Report, para. 8.57.

authorized to perform governmental functions, and that in fact is doing so, is little more than an agent of the government, *i.e.*, a government agency. China's proposed interpretation would reduce the term "public body" in Article 1.1(a)(1) to a redundancy, given that the term "government" already includes government agencies.

71. This is made all the more clear by China's repeated reliance upon the Appellate Body's interpretation in *Canada – Dairy* of the phrase "governments or their agencies," which appears in Article 9.1 of the Agreement on Agriculture, as contextual support for China's interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. We discuss Article 9.1 of the Agreement on Agriculture in greater detail below.[57] For now, we simply note that the standard China proposes for determining whether an entity is a "public body" is the *exact same standard* articulated by the Appellate Body in *Canada – Dairy* for determining whether an entity is a "government agency": that is, "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character . . . ."[58] However, China never accounts for the fact that it is appropriate, in the context of Article 9.1 of the Agreement on Agriculture, to interpret the term "government agency" as somewhat redundant of the term "government" itself, because Article 9.1 of the Agreement on Agriculture *links* one term back to the other through the use of the phrase "governments or *their agencies*." There is no similar textual linkage in the phrase "a government or any public body within the territory of a Member" in Article 1.1(a)(1) of the SCM Agreement.

72. This is not to say that there is no relationship between a government and a public body. China misses the point when it complains that the meanings of the two terms must be related.[59] The real question is: what is the nature of this relationship? Properly understood, the relationship is one of ownership or control. China would have the relationship be one in which the government has authorized the public body to perform governmental acts. This, however, would mean not that the terms "government" and "public body" are related, but that they are identical.

73. Further, the term "public body" is preceded by the word "any."[60] As the Panel correctly found, "the word 'any' before 'public body' suggests a broader rather than narrower meaning of that term, *i.e.*, as referring to 'public bodies' of 'any' kind."[61] The Panel's correct interpretation of the term "public body" as referring to entities controlled by the government captures the idea that there might be different *types* of public bodies. Some might be more akin to government agencies (as China would have them be), while others might be corporations engaging in

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[57] *See infra*, Section II.A.1.b.iv.

[58] *Canada – Dairy (AB)*, para. 97. *See* China Appellant Submission, paras. 41-42.

[59] *See* China Appellant Submission, para. 48.

[60] *See* SCM Agreement, Article 1.1(a)(1).

[61] Panel Report, para. 8.65.

business activities. Yet, all are controlled by the government, and thus all are properly considered "public bodies."

74. Additionally, the use of the term "any" draws a further distinction between the terms "government" and "public body" and indicates that the term "public body" should not relate back to the term "government." The language in the SCM Agreement could have been written as "government or public body," or "government or its public bodies," or "government or another public body" or "government or similar public bodies." The SCM Agreement was not written in this way, and the language actually used must be given effect.

75. China also points out that Article 1.1(a)(1) of the SCM Agreement provides that both of the terms "government" and "any public body" shall be "referred to in this Agreement as 'government.'" China argues that the grouping of or reference to the two terms "a government" and "any public body" under the single term "government" means that a "public body" must possess the same essential characteristics as a "government" and perform governmental functions.[62] China greatly overstates the significance of the use of the shorthand term "government" for the phrase "a government or any public body within the territory of a Member."

76. The Panel correctly found that the grouping of the two distinct terms under the term "government" is simply a drafting technique, used so that the lengthy phrase "a government or any public body within the territory of a Member" need not be repeated throughout the SCM Agreement.[63] This drafting technique is similar to that used in Article 2.1 of the SCM Agreement, which refers to "an enterprise or industry or group of enterprises or industries" as "certain enterprises." Clearly, the terms "enterprise" and "industry" (and groups thereof) have different meanings, despite being referred to collectively as "certain enterprises." It could not be the case that an "enterprise" must have the same "essence" as an "industry." Rather, the use of the term "certain enterprises" in Article 2.1 of the SCM Agreement is a drafting technique used to obviate the need to repeat the lengthy phrase "an enterprise or industry or group of enterprises or industries" throughout the text.[64] Similarly, the use of the term "government" to refer to the phrase "a government or any public body within the territory of a Member" should not be read as making the distinct constituent terms of that phrase "equivalent" to one another.

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[62] *See, e.g.*, China Appellant Submission, paras. 39-45.

[63] Panel Report, para. 8.66.

[64] This type of drafting technique is used elsewhere in the WTO agreements as well. "Injury" is defined in the SCM Agreement and AD Agreement to mean not only "material injury" and "threat of material injury," but also "material retardation" of the establishment of a domestic injury. *See* SCM Agreement, Article 15, note 45; AD Agreement, Article 3, note 9. The term "financial services" is defined in the GATS Annex on Financial Services as including not only financial and banking services, but also "insurance and insurance-related services." *See* GATS Annex on Financial Services, para. 5(a).

77. On appeal, China asserts that an "enterprise" and an "industry" are functional equivalents in the sense that each constitutes an "economic entity" capable of receiving subsidies.[65] While this assertion appears correct, at a basic level, it is no different than saying that "a government" and "any public body" are functional equivalents in the sense that each is capable of providing financial contributions. This is not very instructive, and China's argument regarding the meaning of the terms "government" and "public body" goes well beyond this point, to the extreme of arguing that these entities must be defined in the same manner, as having the same "essence" and performing similar functions pursuant to vested governmental authority. This is like arguing that an "industry" must be defined as a business firm or company because the term "enterprise" generally refers to a business firm or company, and the term "industry" is grouped together with the term "enterprise" under the term "certain enterprises" for purposes of the SCM Agreement. This would not be a logical conclusion.

78. Even assuming *arguendo* that the grouping of the terms "a government" or "any public body" under the term "government" has some meaning besides as a useful drafting technique, China's contextual argument still lacks support. The more logical conclusion to draw from the SCM Agreement's reference to "a government" and "any public body" together as "government" is that, as the *Korea – Commercial Vessels* panel found, "[i]f an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the SCM Agreement."[66] That panel considered that such an "approach is consistent with the fact that Article 1.1(a)(1) provides that both governments and public bodies shall be referred to as 'government'."[67] Similarly, the Panel in this dispute viewed "the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of 'government' for purposes of the Agreement, as well as when 'private' actors may be said to be acting on behalf of 'government'."[68] Thus, to the extent that the phrase "(referred to in this Agreement as 'government')" is viewed as anything more than a useful drafting technique, it nevertheless offers no support to China's interpretation of the term "public body."

79. The Panel was right to reject China's contextual argument related to the text of Article 1.1(a)(1) of the SCM Agreement. In light of the use of both of the terms "government" and "public body" in that provision, those terms must have different and distinct meanings. Interpreting "public body" to mean entities vested with government authority — *i.e.*, government agencies — reduces the term "public body" to a redundancy. The collective reference to them as "government" does not lead to a different conclusion.

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[65] China Appellant Submission, para. 45.

[66] *Korea – Commercial Vessels*, para. 7.50 (footnote omitted).

[67] *Korea – Commercial Vessels*, para. 7.50, note 43.

[68] Panel Report, para. 8.90.

ii. The Term "Private Body" And the "Entrusts or Directs" Provision in Article 1.1(a)(1)(iv) of the SCM Agreement

80. The term "private body" in Article 1.1(a)(1)(iv) of the SCM Agreement is further context for interpreting the term "public body." The terms are, more or less, opposites. Indeed, the dictionary definition for the term "public" includes: "In general, and in most of the senses, the opposite of *private* adj."[69] "Private," on the other hand, is defined as follows: "Of a service, business, etc.: *provided or owned by an individual rather than the State or a public body*."[70] Logically, since the ordinary meaning of the term "public" is the opposite of "private," the meaning of the term "public" is "*provided or owned by the State or a public body rather than an individual*."

81. China argues that the entities at issue in this dispute — that is, entities owned by the government — presumptively are private bodies, unless they are exercising elements of government authority.[71] As the Panel recognized, this argument simply does not conform with the meaning of the term "private body." It turns the meaning of "private" entirely on its head. In addition to the definitions above, and as the Panel noted, everyday notions of the term "private" suggest that this term refers to something unrelated to the government.[72]

82. China argues that the Panel incorrectly relied upon the term "private enterprise" instead of "private body" when interpreting the latter term,[73] but China's objection is of no moment. As just noted, the definition of "private" includes: "Of a service, business, etc.: provided or owned by an individual rather than the State or a public body."[74] An "enterprise" is a "business," so the Panel's use of the term "enterprise" coincides with definition of "private" that is appropriate in the context in which that term is used in Article 1.1(a)(1)(iv). Moreover, the term "body," as described above, is defined to include "corporation" or other groups of people working toward "some common purpose,"[75] or, to put it another way, as an "enterprise." Accordingly, in the context of Article 1.1 of the SCM Agreement, which defines a "subsidy" — that is, an event that occurs in an arena where enterprises, firms, businesses, and corporations operate — it was not error for the Panel to look to the term "private enterprise."

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

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

[71] *See* Panel Report, para. 8.69 and note 172.

[72] Panel Report, para. 8.68.

[73] *See* China Appellant Submission, paras. 61-63.

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

[75] *See* Panel Report, para. 8.59.

83. China's complaint about the Panel's reference to the term "private enterprise" is a distraction from the real issue, that is, the contextual importance of the term "private body," which is the opposite of "public body." China ignores the fact that when referring to a service or business, the term "private" means "provided or owned by an individual rather than the State or a public body."[76] Thus, enterprises owned or controlled by the government cannot be considered "private bodies" without eviscerating the meaning of the word "private." No party suggests that such enterprises are the "government." Accordingly, they must be "public bodies." This is not to suggest that entities controlled by the government are "public bodies" simply by process of elimination. Rather, as discussed above, the ordinary meaning of the term "public body" in its context indicates the same. When interpreted in accordance with the customary rules of interpretation, the term "public body" must be understood as referring to entities controlled by the government, but not necessarily vested with authority to perform governmental functions.

84. China grasps at the language in Article 1.1(a)(1)(iv), noting that an element of entrustment or direction is that the function performed by the private body "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." China argues that this so-called "government function" requirement in Article 1.1(a)(1)(iv) proves that public bodies must be vested with governmental authority; otherwise, public bodies would not be able to entrust or direct a private body.[77]

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

[77] *See* China Appellant Submission, paras. 53-54. In a footnote, China also argues that the definition of "public entity" in paragraph 5(c)(i) of the GATS Annex on Financial Services is context for interpreting "public body" in the SCM Agreement. China's reliance upon the GATS Annex on Financial Services is misplaced. The definition of "public entity" applies only for purposes of the Annex on Financial Services, and there is no indication that the drafters of that Annex intended to create implications for interpreting other WTO Agreements. Just as importantly, to borrow from the definition of "public entity" in the GATS Annex on Financial Services to inform the meaning of the term "public body" in the SCM Agreement would be to introduce concepts of "benefit" into the interpretation of "public body." This is because the "public entity" definition in the Annex on Financial Services refers to whether an entity is acting commercially, and the question of whether an entity is acting consistent with commercial considerations is a "benefit" question under the SCM Agreement. *See* SCM Agreement, Article 14; *Canada – Aircraft (AB)*, para. 157. The Appellate Body has cautioned that it is a mistake to import notions of "benefit" into the definition of "financial contribution." *See Brazil – Aircraft (AB)*, para. 157. For this reason, the *Korea – Commercial Vessels* panel expressly rejected using the GATS Annex on Financial Services to inform the meaning of the term "public body" in the SCM Agreement. *See Korea – Commercial Vessels*, para. 7.47. Therefore, the Panel here also appropriately did not consider the GATS Annex on Financial Services to be relevant context for interpreting "public body." *See* Panel Report, para. 8.92.

85. Despite arguing elsewhere that the SCM Agreement's collective reference to the terms "government" and "public body" under the term "government" is of great significance and supportive of its interpretation, here China appears to ignore the fact that, for purposes of the SCM Agreement, the term "government" refers to the entire phrase "a government or any public body within the territory of a Member." When the term "government" in subparagraph (iv) of Article 1.1(a)(1) is read in light of the collective reference previously established in Article 1.1(a)(1), then that then subparagraph provides that there is a financial contribution when a government or any public body entrusts or directs a private body:

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

Thus, Article 1.1(a)(1)(iv), when read correctly, contains no language regarding strictly "governmental authority" that can be understood as supporting China's interpretation of the term "public body." The language in subparagraph (iv) simply refers to the types of functions identified in subparagraphs (i) through (iii) that otherwise normally would be carried out by, and vested in, governments or any public bodies.

86. Indeed, as the Appellate Body has explained, the language in subparagraph (iv) simply refers back to the functions described in subparagraphs (i) through (iii), to ensure that only actions covered in subparagraphs (i) through (iii), and not something "outside the scope" of those subparagraphs, are captured by instances of government (or, of course, public body) entrustment or direction of a private body.[78] There is nothing inherently governmental in nature about providing loans or equity within the meaning of subparagraph (i) or providing goods or services within the meaning of subparagraph (iii). Yet, clearly, a private body can be entrusted or directed to provide loans, equity, or goods and services, and there will be a financial contribution within the meaning of the SCM Agreement.

87. China also argues that because entrustment or direction entails giving responsibility to, or exercising authority over, a private body, then public bodies must have responsibility or authority in the first place.[79] However, the fact that a public body may have responsibility or authority for a specific task does not mean that it is vested with authority *from a government* to perform *governmental* actions. For example, a government-owned bank may be responsible for providing loans, and it might entrust this task to a private bank within the meaning of Article 1.1(a)(1)(iv), but this does not mean that the government-owned bank is necessarily vested with authority or responsibility from the *government* to perform *governmental* functions.

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[78] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 112.

[79] *See* China Appellant Submission, para. 57.

88. China alleges that, until recently, the investigating authorities in the United States, the EU, and Japan shared China's view that government-controlled entities are private bodies, unless exercising government authority. As evidence of this, China refers to the various *DRAMS* cases. While the United States cannot speak for the investigating authorities of the EU and Japan, or about the domestic laws under which they operate, we can say that Commerce explained in the CVD investigation of DRAMS why it did not consider all of the government-controlled entities in Korea during the relevant time frame to be "public bodies." As Commerce explained in that investigation, "temporary [government] ownership of the banks due to the financial crisis is not, by itself, indicative that these banks are [government] authorities."[80] Accordingly, Commerce examined other factors. As Commerce explained to the Panel, the DRAMS investigation was something of an anomaly, and in other cases, Commerce found ownership or control indicative of "public body" status, as it did in the CVD investigations at issue here.[81] The DRAMS CVD investigation is not in itself fully reflective of Commerce's analyses of the "public body" issue in all cases.

89. In sum, the term "private body," and the "entrusts or directs" provision of Article 1.1(a)(1)(iv) of the SCM Agreement, do not indicate that the only type of "public body" is an entity vested with authority from the government to perform governmental functions. To the contrary, a "public body," being the opposite of a "private body," is simply an entity that is controlled by a government.

iii. Subparagraphs (i)-(iii) of Article 1.1(a)(1)

90. The Panel also appropriately examined subparagraphs (i) through (iii) of Article 1.1(a)(1) as context for its interpretation of the term "public body." These subparagraphs identify, among other things, the provision of loans, loan guarantees, equity, and goods or services as types of financial contributions that can be provided by a government or any public body within the territory of a Member. The Panel properly concluded that to interpret the term "public body" in

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[80] *See Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16766, 16772 (Dep't of Commerce April 7, 2003) (preliminary determination) (Exhibit US-49). Government "authorities" is the term in United States law that includes "public entities" and thus "public bodies."

[81] *See* U.S. Responses to Panel's First Set of Questions, paras. 41-42. For example, in the following cases, Commerce considered ownership or control as establishing "public body" status: *Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 1512, 1516 (Dep't of Commerce Jan. 10, 2006) (preliminary determination; unchanged in final) (Exhibit US-56); *Polyethylene Terephthalate Film, Sheet, and Strip (PET Film) From India*, 67 Fed. Reg. 34905, at Comment 3 (Dep't of Commerce May 16, 2002) (final determination) and attached Issues and Decision Memorandum at Comment 3 (Exhibit US-114); *Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 Fed. Reg. 30636, 30642 (Dep't of Commerce June 8, 1999) (final determination) (Exhibit US-115).

the restrictive manner favored by China would be to deprive these subparagraphs in Article 1.1(a)(1) of much of their meaning.[82] This is because the provision of loans or loan guarantees or equity or goods or services is not inherently the function of governments or entities vested with authority to perform governmental functions, but rather of firms or businesses, including sometimes those owned or controlled by the government. As the Panel explained, "[t]o read the term 'any public body' as presumptively excluding government-owned or -controlled corporations or any other types of public entities engaging in these sorts of typical business functions (absent specific evidence in a particular case that they are vested with and exercising governmental authority), would appear largely to deprive these provisions of their common sense meaning and role."

91. China argues that the Panel's analysis is flawed because, in China's view, the provision of loans or goods or services "is not inherently governmental or inherently non-governmental."[83] However, in *Canada – Dairy*, on which China relies so heavily, the Appellate Body explained that "[t]he essence of 'government' is, therefore, that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority."[84] The Appellate Body further explained that a "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[85] Noticeably absent from this definition is any notion of the government being inherently involved with lending or selling or any other activity in the marketplace. Accordingly, the Panel properly concluded that those activities are more inherently activities of businesses or firms, and that if the term "public body" is limited to entities performing governmental functions, much of Article 1.1(a)(1) of the SCM Agreement will be deprived of meaning in many cases.

iv. Article 9.1 of the Agreement on Agriculture and the Appellate Body Report in *Canada – Dairy*

92. China urged the Panel below, and on appeal urges the Appellate Body, to look to Article 9.1 of the Agreement on Agriculture and the Appellate Body's interpretation of that provision in *Canada – Dairy* as decisive context for the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. China refers to the *Canada – Dairy* Appellate Body report numerous times in its appellant submission. In short, China proposes that the interpretation of the term "governments or their agencies" in Article 9.1 of the Agreement on Agriculture should govern the interpretation of the term "a government or any public body within the territory of a Member" in Article 1.1(a)(1) of the SCM Agreement. China refers to the use of the term

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[82] *See* Panel Report, para. 8.70.

[83] China Appellant Submission, para. 65.

[84] *Canada – Dairy (AB)*, para. 97.

[85] *Canada – Dairy (AB)*, para. 97.

"organismo público" in the Agreement on Agriculture and *Canada – Dairy* as support for its position. The Panel found that China's arguments in this regard did not give a "conclusive answer" as to how the SCM Agreement should be interpreted. The Panel was correct.

93. At the outset, we note that China's repeated reference to, and heavy reliance on, an Appellate Body interpretation of a provision of the Agreement on Agriculture reveals how divorced China's interpretation of the term "public body" is from the text of the SCM Agreement. Here, China is not arguing about the meaning of the terms of the SCM Agreement, but rather is importing terms and interpretations from the Agreement on Agriculture. China seizes on a single point – the use of the term "organismo público" in the Spanish versions of the Agreement on Agriculture and the Appellate Body report in *Canada – Dairy* – and asserts that this point alone should dictate the interpretation of the term "public body" in the SCM Agreement. We offer the following responses to China's single point.

94. First, the terms of Article 9.1 of the Agreement on Agriculture, in any language, are different from the terms of Article 1.1(a)(1) of the SCM Agreement. Article 9.1 of the Agreement on Agriculture refers to "governments or their agencies," "les pouvoirs publics ou leurs organismes," and "los gobiernos o por organismos públicos." Article 1.1(a)(1) of the SCM Agreement refers to "a government or any public body within the territory of a Member," "des pouvoirs publics ou de tout organisme public du ressort territorial d'un Membre," and "un gobierno o de cualquier organismo público en el territorio de un Miembro."

95. Second, as is clear from the language quoted in the previous paragraph, Article 9.1 of the Agreement on Agriculture creates a link between the term "governments" or "pouvoirs publics" and the term "agencies" or "organismes" through the use of the word "their" or "leurs." This link is noticeably absent from Article 1.1(a)(1) of the SCM Agreement. While it is true that the Spanish version of the Agreement on Agriculture appears not to have the same link as the English and French versions – and this slight point appears to constitute China's entire argument – the language of the Spanish version of Article 9.1 of the Agreement on Agriculture is nevertheless different than the language used in Article 1.1(a)(1) of the SCM Agreement, as reflected in the quotations above.

96. Third, at the risk of stating the obvious, the Appellate Body in *Canada – Dairy* was interpreting Article 9.1 of the Agreement on Agriculture, not Article 1.1(a)(1) of the SCM Agreement. This means that it was interpreting the specific term "their agencies" or "leurs organismes" or "organismos públicos" in the context of Article 9.1 of the Agreement on Agriculture and in light of the object and purpose of the Agreement on Agriculture. This led the Appellate Body to conclude that such an entity is "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, *that is,*

to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[86] There is no indication in the Appellate Body report that the Appellate Body's interpretation of this term should dictate the outcome of the interpretation of a different phrase, situated in a different context, in a different Agreement that has its own object and purpose. The Panel therefore correctly concluded that the Appellate Body report in *Canada – Dairy* did not provide a "conclusive" answer.[87]

97. Fourth, it is notable that China repeatedly omits the last phrase from its quotations of the Appellate Body report in *Canada – Dairy* (italicized in the preceding paragraph) – specifically, the phrase ". . . that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens." This phrase reflects the link that the Appellate Body drew between the definition of "their agencies" or "leurs organismes" or "organismos públicos" and the term "governments" or "pouvoirs publics" or "gobiernos." Earlier in its report, the Appellate Body had stated that "[t]he essence of 'government' is, therefore, that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority."[88] The Appellate Body's use of the same four verbs again later in the phrase omitted by China confirms that the Appellate Body was drawing a link between the terms "governments" and "agencies" (in the English version), which link is suggested by the presence of the terms "their" or "leurs," terms that are absent from the text of the SCM Agreement.

98. Additionally, the full quotation from the Appellate Body report in *Canada – Dairy* indicates just how restrictive China's proposed interpretation of the term "any public body" is. China asks the Appellate Body to find that a "public body" can only be an entity that performs governmental functions. This begs the question: what are these "governmental functions"? As the Appellate Body explained in *Canada – Dairy*, the functions of government are to regulate, control, supervise, or restrain private citizens. Consistent with Article 1.1 of the SCM Agreement, government-controlled entities can provide financial contributions, which may be subject to the disciplines of the SCM Agreement if other conditions are met, but the activities of such entities would fall far short of regulating, controlling, supervising, or restraining private citizens. China's interpretation excludes the possibility that these entities could be considered "public bodies."

99. To conclude, the context of the term "public body" supports an interpretation of that term that includes entities controlled by a government, but not necessarily exercising governmental functions. The term "public body" must mean something different than the term "government" or "government agency." The terms of Article 9.1 of the Agreement on Agriculture, as interpreted by the Appellate Body in *Canada – Dairy*, do not provide relevant context that

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[86] *Canada – Dairy (AB)*, para. 97 (emphasis added).

[87] Panel Report, para. 8.63.

[88] *Canada – Dairy (AB)*, para. 97.

requires a different result. The Panel committed no legal error in its analysis of the context of the term "public body."

c. The Object and Purpose of the SCM Agreement

100. Under the customary rules of interpretation, the terms of an international agreement also must be interpreted in light of the object and purpose of the agreement. Here, the object and purpose of the SCM Agreement support an interpretation of the term "public body" as meaning an entity controlled by the government, without the additional requirement that the entity must be vested with authority from the government to perform governmental functions.

101. The Appellate Body has said that the object and purpose of the SCM Agreement is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[89] Similarly, in *Brazil – Aircraft*, the panel found that "the object and purpose of the SCM Agreement is to impose multilateral disciplines on trade-distorting subsidization."[90]

102. The Appellate Body and panels have sought to ensure that the SCM Agreement is not interpreted rigidly or formalistically in a manner that would undermine its disciplines on trade-distorting subsidization. In *Canada – Autos*, the Appellate Body rejected an interpretation of Article 3.1(b) of the SCM Agreement that "would make circumvention of obligations by Members too easy."[91] In *Australia – Automotive Leather II*, the panel declined to restrict its analysis of export contingency exclusively to the legal instruments or administrative arrangements surrounding the subsidy, stating that "[s]uch a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a). . . ."[92] In *US – Softwood Lumber IV*, the Appellate Body explained that "the object and purpose of the *SCM Agreement* . . . includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies."[93] The Appellate Body emphasized in *US – Softwood Lumber IV* the right of WTO Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[94]

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[89] *US – Softwood Lumber IV (AB)*, para. 64.

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

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

[92] *Australia – Automotive Leather II*, para. 9.56.

[93] *US – Softwood Lumber IV (AB)*, para. 95 (*citing US – Carbon Steel (AB)*, paras. 73-74).

[94] *Id.*

103. Interpreting the term "public body" as referring to entities controlled by the government preserves the strength and effectiveness of the subsidy disciplines and inhibits circumvention by ensuring that governments cannot escape those disciplines by using entities under their control to accomplish tasks that would potentially be subject to those disciplines were the governments themselves to undertake them. China's proposed "governmental functions" test for determining whether an entity is a "public body," on the other hand, would be at odds with the object and purpose of the SCM Agreement. As the Appellate Body has found, inherent "governmental functions" are to regulate, control, supervise, or restrain private persons.[95] Government-controlled entities that do not engage in these typical "governmental functions" could nevertheless provide financial contributions that confer benefits to certain enterprises, but such subsidization would not be reachable under China's proposed interpretation of the term "public body."[96]

104. China suggests that the "entrusts or directs" provision in Article 1.1(a)(1)(iv) operates as the exclusive anti-circumvention provision in the SCM Agreement.[97] There is no support for China's position in the text of the SCM Agreement. Additionally, as the Panel found, requiring proof of government entrustment or direction of an entity it owns or controls would be akin to inquiring whether the government entrusted or directed itself.[98] Moreover, a government would be able to hide behind its ownership interest in an entity and engage in entrustment or direction behind closed doors. This would make proving entrustment or direction difficult or impossible. An interpretation of the term "public body" that includes government-owned or government-controlled entities avoids these problems.

105. China argues that the various *DRAMS* cases are proof that the entrustment or direction provision works, even when the entrusted or directed entities are government-owned.[99] China ignores facts that distinguish the *DRAMS* cases from the investigations at issue, principally that the government ownership in *DRAMS* was temporary and in place due to the Korean financial crisis.[100] In any event, the fact that investigating authorities were able make an entrustment or

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[95] *Canada – Dairy (AB)*, para. 97.

[96] In this respect, the *Korea – Commercial Vessels* panel noted that, because of the inclusion of the term "public body" in Article 1.1(a)(1), a "government practice" within the meaning of Article 1.1(a)(1)(i) "need not necessarily be purely 'governmental' in the narrow sense advocated by Korea [i.e., regulation or taxation]." *Korea – Commercial Vessels*, para. 7.28.

[97] *See* China Appellant Submission, paras. 81-84.

[98] Panel Report, para. 8.82.

[99] China Appellant Submission, paras. 83-84.

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

(continued...)

direction determination in one case does not demonstrate that it would not be possible for a government to hide evidence of entrustment or direction, or that entrustment or direction simply would not be necessary in other situations wherein the government owns or controls an entity.

106. China considers that the Panel's finding that majority government ownership is sufficient to establish that an entity is a "public body" when government ownership alone cannot establish entrustment or direction is an "obvious logical failing."[101] It is China's logic that is flawed. An entrustment or direction analysis is an analysis of the *actions* of the government or public body.[102] Ownership, of course, is not an action, but rather a state. Accordingly, it makes sense that government ownership alone is insufficient to establish the *actions* of entrustment or direction. An analysis of whether an entity is a public body, on the other hand, is an analysis of the *state*, or *nature*, of that entity.[103] Ownership is directly relevant to that *state* or *nature*.

107. Finally, an interpretation of the term "public body" that includes entities controlled by a government is not so broad that it undermines the object and purpose of the SCM Agreement. The Panel discussed this issue at length, explaining that a "public body" analysis is only the first step in a subsidy analysis.[104] As the Panel explained, a finding that an entity is a "public body" does not "condemn that entity, or otherwise . . . cast it in a negative light."[105] Nor does such a finding end the subsidy analysis. It only means that there is the potential for a financial contribution that confers a benefit.[106] These elements of a subsidy, as well as specificity, can then be examined. Therefore, finding entities controlled by the government to be "public bodies" does not extend the reach of the SCM Agreement in a manner that is inconsistent with its object and purpose. To the contrary, it simply ensures that certain entities are subject to the *potential* disciplines of the Agreement.

108. As we have demonstrated, and as the Panel correctly found, the ordinary meaning of the term "public body," in its context and in light of the object and purpose of the SCM Agreement, includes entities controlled by the government. The Panel did not err in finding that there was no additional requirement that such entities must be vested with authority from the government to perform governmental functions.

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[100] (...continued)
(Exhibit US-49).

[101] China Appellant Submission, para. 92.

[102] This is clear from the fact that the terms "entrusts" and "directs" are verbs.

[103] This is clear from the fact that the terms "public" and "body," as used in Article 1.1(a)(1) of the SCM Agreement, are an adjective and a noun, respectively.

[104] *See* Panel Report, paras. 8.78-8.81.

[105] Panel Report, para. 8.78.

[106] *See* Panel Report, paras. 8.80-8.81.

2. The Panel Correctly Found that the Draft Articles on Responsibility of States for Internationally Wrongful Acts Are Not Relevant Rules of International Law Applicable in the Relations Between the Parties That Must Be Taken into Account in Interpreting the Term "Public Body"

109. China argues that the Draft Articles are relevant rules of international law that must be taken into account in an interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. China is incorrect, and this is another instance in which China's argument relies exclusively upon terms and concepts outside of the SCM Agreement for an interpretation of a term within the SCM Agreement. Addressing China's arguments related to the Draft Articles, the Panel properly considered that the appropriate question was whether the Draft Articles "would override our analysis and conclusions based on the text of the SCM Agreement itself."[107] The Panel correctly answered this question in the negative.

110. Article 31 of the Vienna Convention is recognized as reflecting the customary rules of interpretation of international agreements. Article 31(3) of the Vienna Convention provides that:

> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

111. The Draft Articles are not a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." Not only do the Draft Articles make no reference to the SCM Agreement or its interpretation or the application of its provisions, the Draft Articles simply are not an "agreement" between the United States and China, or between any parties. In 2001, the United Nations General Assembly adopted a resolution on the Draft Articles, which indicated that the General Assembly:

> *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments

[107] Panel Report, para. 8.84.

> without prejudice to the question of their future adoption or other appropriate action . . . .[108]

The United Nations General Assembly has since adopted similar resolutions in 2004,[109] 2007,[110] and as recently as 6 December 2010.[111] That these resolutions are all "without prejudice to the question of [the Draft Articles'] future adoption" indicates that the Draft Articles have not been adopted and cannot be considered an "agreement between the parties."

112. For obvious reasons, the Draft Articles are not "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation," and China does not suggest that they are.

113. Rather, China takes the position that the Draft Articles are "relevant rules of international law applicable in the relations between the parties" within the meaning of the last provision of Article 31(3) of the Vienna Convention. As such, China argues that the provisions of the Draft Articles, and in particular Draft Articles 5 and 8, must be taken into account when interpreting Article 1.1(a)(1) of the SCM Agreement. Indeed, China does more than just argue that the Draft Articles are relevant rules that must be taken into account; China lifts the standards in the Draft Articles and reads them almost verbatim into the SCM Agreement. China's understanding of the status of the Draft Articles and their relevance to the interpretative question in this dispute is incorrect.

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[108] Resolution Adopted by the General Assembly, A/RES/56/83 (12 December 2001) (underlining added).

[109] *See* Resolution Adopted by the General Assembly, A/RES/59/35 (2 December 2004) (The resolution "*Commends once again* the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . ." (underlining added)).

[110] *See* Resolution Adopted by the General Assembly, A/RES/62/61 (6 December 2007) (The resolution "*Commends once again* the articles on responsibility of States for internationally wrongful acts, to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . ." (underlining added)).

[111] *See* "General Assembly, on Recommendation of Legal Committee, Adopts Texts on Measures to Eliminate Global Terrorism, Programme of International Legal Assistance; Also Adopts Texts on Rule of Law; Work of United Nations Commission on International Trade Law, International Law Commission," http://www.un.org/News/Press/docs//2010/ga11030.doc.htm (6 December 2010) ("Before the Assembly is a report on the responsibility of States for internationally wrongful acts (document A/65/463). It contains one resolution approved on 5 November, by which the Assembly would request Governments to consider the question of future adoption of the draft articles or other appropriate action and submit written comments on such future action to the Secretary-General." (emphasis added)).

114. With respect to the status of the Draft Articles, that is, whether the Draft Articles constitute "rules of international law applicable in the relations between the parties," the Panel noted that, in its view, "China significantly overstates the status that has been accorded to the Draft Articles where they have been referred to by panels and the Appellate Body."[112] As explained above, the Draft Articles have not been adopted and cannot be considered an agreement between the parties. In *US – Line Pipe*, the Appellate Body explained that "the International Law Commission's Draft Articles . . . do not constitute a binding legal instrument as such . . . ."[113]

115. While the Appellate Body has recognized that certain parts of the Draft Articles may be understood as setting out recognized principles of customary international law,[114] the United States notes that, given the level of detail and fine-line distinctions constructed in Articles 5-8 of the Draft Articles, it remains an open, and contested, question whether all of these details and distinctions have risen to the status of customary international law. Only if these articles were customary international law could they be said to be "applicable in the relations between the parties" and, as a result, possibly relevant in this dispute under Article 31(3)(c) of the Vienna Convention. That some parts of the Draft Articles might reflect customary international law does not mean that all of the details of the Draft Articles, including the ILC Commentaries, have attained this status.[115]

116. Assuming *arguendo* that the Draft Articles can be considered "rules of international law applicable in the relations between the parties," the Panel nevertheless correctly found that it was not required to take them into account because the Draft Articles are not "relevant" to the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

117. As the Panel recognized, the Draft Articles are clear that their purpose is *not* to define the primary rules establishing obligations under international law, but rather to define when a state

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[112] Panel Report, para. 8.87.

[113] *US – Line Pipe (AB)*, para. 259; *see also US – Gambling (Panel)*, para. 6.128.

[114] *See US – Line Pipe (AB)*, para. 259 (noting that Article 51 of the Draft Articles sets out a recognized principle of customary international law); *see also US – Gambling (Panel)*, para 6.128 (finding that Article 4 of the Draft Articles reflects customary principles of international law concerning attribution).

[115] In this regard, we would note that the first sentence of the General Commentary to the Draft Articles states that "[t]hese articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts." The reference, in particular, to "progressive development" suggests that the authors of the Draft Articles recognized themselves that the Draft Articles go beyond current public international law.

(as opposed to some other entity) is responsible for a breach of those primary rules.[116] In the context of countervailing duties under the SCM Agreement, the primary rule is contained in Article 10 of the SCM Agreement — namely, that Members shall ensure that imposition of a countervailing duty "is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement," including Article 1.1(a)(1). The question in this dispute has been whether the United States breached this primary obligation, and the Draft Articles have nothing to say about *whether* such a breach occurred.

118. In this respect, the commentaries to the Draft Articles are helpful. The commentaries state:

> It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States. In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc.[117]

The task of the Panel below was to determine whether the United States breached its obligation to impose countervailing duties only in accordance with the provisions of the SCM Agreement.[118] With respect to the "public body" issue, the Panel analyzed whether Commerce's findings were consistent with Article 1.1(a)(1) of the SCM Agreement, and China has asked the Appellate Body to review this finding. This is a question solely for the SCM Agreement and GATT 1994. The Draft Articles are not helpful in determining *whether* the United States breached its obligations; they would only be helpful in determining whether the United States was responsible for any alleged breach, for example, if there was some question about whether the action of Commerce is attributable to the United States.[119]

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[116] *See* Panel Report, para. 8.90. *See also Draft Articles, General Commentary*, para. 1 ("These articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility."). The commentaries also quote one of the architects of the Draft Articles as saying that the Draft Articles specify "the principles which govern the responsibility of States for internationally wrongful acts, *maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility*. . . ." *Id.*, para. 2 (emphasis added).

[117] *Draft Articles*, Commentary to Chapter III, para. 2 (footnote omitted).

[118] *See* SCM Agreement, Art. 10.

[119] *See, e.g.*, *US – Gambling (Panel)*, para. 6.127 (finding that "as an agency of the United States government with specific responsibilities and powers, actions taken by the USITC pursuant to those responsibilities and powers are attributable to the United States.").

119. Even if the issue in this dispute were whether China (as opposed to the United States) breached its obligations, the question of whether a "public body" provided goods or loans in China is not one of attribution of "wrongful" acts to China. The question simply relates to the substantive conditions for something potentially to be deemed a subsidy under the SCM Agreement. Even if a subsidy is deemed to exist, it may not be prohibited as such, but rather may give the right to another WTO Member, in this case, the United States, to impose CVDs if certain additional conditions under the "primary rules" of the SCM Agreement are met. As the Appellate Body stated in *US – FSC (Article 21.5 I)*:

> Article 1.1 of the *SCM Agreement* sets out a *definition* of a "subsidy" for the purposes of that Agreement. Although this definition is central to the applicability and operation of the remaining provisions of the Agreement, Article 1.1 itself does not impose any obligation on Members with respect to the subsidies it defines. It is the provisions of the *SCM Agreement* which follow Article 1, such as Articles 3 and 5, which impose obligations on Members with respect to subsidies falling within the definition set forth in Article 1.1. . . .
>
> In other words, Article 1.1 of the SCM Agreement does not prohibit a Member from foregoing revenue that is otherwise due under its rules of taxation, even if this also confers a benefit under Article 1.1(b) of the SCM Agreement. . . .[120]

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

> . . . the granting of a subsidy is not, in and of itself, prohibited under the SCM Agreement. Nor does granting a "subsidy", without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the SCM Agreement.[121]

In sum, China is trying to graft secondary rules of general international law (limited to responsibility for wrongful conduct) onto primary rules of international law that do not even define wrongful conduct.

120. China attempts to use the limited example of prohibited subsidies to show that the Panel erred in finding that the Draft Articles are not concerned with the substance of the underlying obligations, or the "primary rules" of international law.[122] The hypothetical scenario China posits, however, requires one to "assume" facts not present in this dispute.[123] The subsidies at issue in this dispute were domestic subsidies; not prohibited subsidies. Additionally, the

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

[121] *Canada – Aircraft (Article 21.5) (AB)*, para. 47.

[122] China Appellant Submission, paras. 174-176.

[123] China Appellant Submission, para. 175.

question before the Panel was whether goods and loans were provided by "public bodies" within the meaning Article 1.1(a)(1) of the SCM Agreement. The provision of a financial contribution is never, in and of itself, even actionable under the SCM Agreement, and certainly cannot be found, on its own, to constitute "wrongful conduct." The Panel properly based its findings on actual facts relevant to the question before it, and not on hypothetical facts or questions.

121. The Panel recognized that a determination that a government-controlled entity is a "public body" under the SCM Agreement, or that such public body has provided a financial contribution, is not a determination that the Member has engaged in "wrongful conduct." The Panel correctly observed that "to say that certain behaviour of an entity is covered by the SCM Agreement (*i.e.*, is a specific subsidy) in itself carries no negative connotation. Only in the particular, narrow instance of a prohibited subsidy does the existence of the subsidy give rise to such a connotation, and otherwise the existence of specific subsidies is a neutral event under the Agreement, actionable only where it causes, in particular instances, defined forms of adverse effects on another Member's interests."[124] The Panel did not err in declining to base its understanding of the relevance of the Draft Articles on the "narrow instance" of prohibited subsidies.

122. Assuming *arguendo* that providing a financial contribution is a wrongful act within the meaning of the Draft Articles and that the Draft Articles are not otherwise inapplicable, the Draft Articles contain a *lex specialis* clause and the SCM Agreement is a special rule of international law that governs when a financial contribution occurs and is attributable to a "State." Article 55 of the Draft Articles, entitled "Lex Specialis," provides that:

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

The commentaries to this article explain that "a particular treaty might impose obligations on a State but define the 'State' for that purpose in a way which produces different consequences than would otherwise flow from the rules of attribution in chapter II."[125]

123. The Panel explained that it viewed "the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of 'government' for purposes of the Agreement, as well as when 'private' actors

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[124] Panel Report, para. 8.78.

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

may be said to be acting on behalf of 'government'."[126] That is, the SCM Agreement effectively defines the "State" in a way that may produce different consequences from the Draft Articles. The standards in the Draft Articles thus have no relevance or application due to the inclusion of a special rule in Article 1.1(a)(1) of the SCM Agreement.

124. China argues that the Panel improperly assumed that, because the Draft Articles deal with the "same subject matter" as Article 1.1 of the SCM Agreement, then the *lex specialis* rule in the Draft Articles applies.[127] In China's view, there must be some "actual inconsistency" or "discernible intention" that one provision is to exclude the other in order to determine that the Draft Articles do not apply.[128]

125. However, to the extent that China argues that Article 5 of the Draft Articles establishes the standard for determining whether the provision of a financial contribution by a government-controlled entity is attributable to a Member, there plainly is an inconsistency between China's interpretation of the Draft Articles and the proper interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, as we have demonstrated above and as the Panel found. The interpretation of the Draft Articles urged by China is inconsistent with the ordinary meaning of the term "public body," which is not limited to entities vested with government authority and performing governmental functions; it is inconsistent with the meaning of the term "public body" in its context, specifically the juxtaposition of the terms "government," "public body," and "private body"; and it is inconsistent with the object and purpose of the SCM Agreement. Thus, there is an "actual inconsistency" between Article 5 of the Draft Articles and Article 1.1(a)(1) of the SCM Agreement.

126. The only other panel that has examined the question of the applicability of the Draft Articles to an interpretation of the term "public body" rejected China's understanding. In *Korea – Commercial Vessels*, Korea urged the panel to adopt the same two-part test, drawn from Article 5 of the Draft Articles, for which China argues here.[129] The panel in that dispute rejected Korea's proposed test and the element of engaging in official government functions as the standard for determining whether an entity is a "public body."[130] Significantly, the *Korea – Commercial Vessels* panel did not find that the Draft Articles are relevant rules of international law applicable in the relations between the parties that must be taken into account when interpreting the term "public body."[131]

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[126] Panel Report, para. 8.90.

[127] China Appellant Submission, para. 185.

[128] *See* China Appellant Submission, paras. 185, 187.

[129] *See Korea – Commercial Vessels*, para. 7.39.

[130] *See Korea – Commercial Vessels*, paras. 7.37, 7.39, 7.44-45, 7.48-49.

[131] Moreover, as the Panel noted, the panel in *EC – Commercial Vessels* stated that it

(continued...)

127. China argues that the Appellate Body endorsed the Draft Articles in *US – Countervailing Duty Investigation on DRAMS* and endorsed the proposition that the conduct of state-owned and state-controlled entities is not attributable to the state unless those entities are exercising elements of governmental authority within the meaning of Article 5 of the Draft Articles.[132] China misreads the *US – Countervailing Duty Investigation on DRAMS* Appellate Body report. The issue there was whether certain private bodies were entrusted or directed by the government within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, such that their provision of loans and equity was attributable to the government.[133] In a footnote, the Appellate Body noted the unremarkable proposition that the conduct of private parties normally is not attributable to the state and cited to the Draft Articles.[134]

128. The entirely different issue in this dispute, however, is whether Commerce properly found that certain entities are public bodies. The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* did *not* address the distinction between "public bodies" and "private bodies" in Article 1.1(a)(1) of the SCM Agreement. Moreover, the Appellate Body, in the footnote cited by China, did not state that the Draft Articles are "relevant rules of international law" and did not state that Articles 5 and 8 of the Draft Articles must be taken into account in interpreting Article 1.1 of the SCM Agreement. The Appellate Body certainly did not suggest that the provisions of the Draft Articles must be read wholesale into Article 1.1 of the SCM Agreement. Hence, the Panel concluded correctly that "the footnote says nothing whatsoever about the status of the Draft Articles *vis-a-vis* the WTO Agreement."[135]

129. With respect to the particular commentary to Article 8 of the Draft Articles referred to in the footnote in *US – Countervailing Duty Investigation on DRAMS (AB)*, the footnote appears to quote the commentary accurately, but that is all it does. The footnote does not imply a finding by the Appellate Body that, under Article 1.1(a)(1) of the SCM Agreement, because of the corporate separateness of the State from entities that it owns and controls, such entities cannot be "public bodies" unless exercising elements of governmental authority.

130. Indeed, comment 6 to Article 8 of the Draft Articles appears to rely entirely upon the corporate law principle of the separateness of owners from corporations or firms. This principle,

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[131] (...continued)
could see "no basis" for using concepts from the Draft Articles "to read into Article 23.1 [of the DSU] a limitation that is unsupported by an interpretation based on its text, context and object and purpose." *See* Panel Report, para. 8.90, note 192 (*quoting EC – Commercial Vessels*, para. 7.205).

[132] *See* China Appellant Submission, paras. 140, 191.

[133] *See, e.g.*, *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 88.

[134] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 112, note 179.

[135] Panel Report, para. 8.88.

however, is not always applicable in the context of the SCM Agreement. In *US – Countervailing Measures on Certain EC Products*, involving privatization, the Appellate Body was squarely faced with the argument that there is "a clear line separating a legal person (a firm) from its owners (shareholders)."[136] The Appellate Body rejected this argument, stating that "the legal distinction between firms and their owners that may be recognized in a domestic legal context is not necessarily relevant, and certainly not conclusive, for the purpose of determining whether a 'benefit' exists under the SCM Agreement, because a financial contribution bestowed on those investing in a firm may confer a benefit 'upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.'"[137]

131. Likewise, the legal distinction between firms and their owners is not necessarily relevant, and certainly not conclusive, in a "public body" analysis. Although *US – Countervailing Measures on Certain EC Products* concerned the measurement of the "benefit" in a specific factual scenario, it is significant that the Appellate Body was careful not to draw a bright line between a firm and its owners, in part because of a concern about the risk of circumvention of the disciplines of the SCM Agreement.[138] Accordingly, China's reliance on the footnote reference in *US – DRAMS (AB)* and the commentary to Article 8 of the Draft Articles is misplaced.

132. In another footnote in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body explained that Commerce, in the underlying CVD investigation, had considered certain entities that were owned by the Government of Korea to be private bodies.[139] The Appellate Body noted, without comment, that the panel in that dispute had considered that "the USDOC might have been entitled to treat these 100 per cent-owned firms as 'public bodies', but having refused to so classify them, the USDOC was required to establish entrustment or direction with respect to such creditors."[140] Similarly, the panel in *EC – Countervailing Measures on DRAM*

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[136] *US – Countervailing Measures on Certain EC Products (AB)*, para. 107.

[137] *US – Countervailing Measures on Certain EC Products (AB)*, para. 115.

[138] *US – Countervailing Measures on Certain EC Products (AB)*, para. 115. Indeed, comment 6 to Article 8 of the Draft Articles itself recognizes that sometimes the "corporate veil" must be pierced to prevent "evasion." The United States discusses the risk of circumvention presented by China's interpretation of the term "public body" elsewhere in this submission.

[139] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 131, note 225. Commerce did so because the Government of Korea ("GOK") had assumed ownership stakes in certain of these entities as a result of a financial crisis. Commerce stated that "temporary GOK ownership of the banks due to the financial crisis is not, by itself, indicative that these banks are government authorities." *See Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16766, 16772 (Dep't of Commerce April 7, 2003) (preliminary determination) (Exhibit US-49).

[140] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 131, note 225 (*citing*

(continued...)

Chips stated, "We do not wish to imply that it would not be possible or justified to treat a 100 per cent government owned entity as a public body, depending on the circumstances. Our task, however, is to review the determination actually made by the EC . . . ."[141] That panel explained that "[a] similar consideration applies to our analysis of Chohung Bank and the KEB in which the government of Korea held 80 per cent and 43 per cent of the shares, respectively, at the time of the investigation."[142] Thus, there simply is no indication that the Appellate Body or any prior panel has accepted or endorsed the proposition that the Draft Articles prevent government-owned or government-controlled entities from being considered public bodies unless they are performing governmental functions pursuant to government authority, as China argues.

133. In sum, the Panel correctly found that the Draft Articles are not relevant rules of international law that must be taken into account in an interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. China's heavy reliance on the Draft Articles – more than 25 percent of its argument (by page count) is dedicated to discussion of the Draft Articles – is misplaced, and is an indication of how disconnected China's proposed interpretation is from the actual text of the SCM Agreement.

3. The Panel's Interpretation of the Term "Public Body" Was Well Reasoned, Objective, and Consistent with Other WTO Panels

134. The Panel provided a thorough, objective, reasoned legal analysis of the meaning of Article 1.1(a)(1) of the SCM Agreement, and correctly interpreted the term "public body" as not limited to an entity vested with authority to perform governmental functions, but rather as including any entity that is controlled by the government. We have demonstrated above that the Panel's interpretation accords with the customary rules of interpretation of international agreements.

135. Other panels have reached the same conclusion with respect to the interpretation of the term "public body." Although the Appellate Body is not bound by the findings of these panels, their consistent approach indicates that a consensus has emerged among panels and WTO Members have "legitimate expectations"[143] as to the meaning of the term "public body." In *EC – Large Civil Aircraft*, the panel, addressing the status of a government-owned financial institution, explained that, "at the time of its 1992 investment in Aerospatiale, Credit Lyonnais was controlled by the French government and was a 'public body' for purposes of Article 1.1(a)(1) of

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[140] (...continued)
US – Countervailing Duty Investigation on DRAMS (Panel), paras. 7.8, note 29, and 7.62, note 80).

[141] *EC – Countervailing Measures on DRAM Chips*, para. 7.119, note 129.

[142] *EC – Countervailing Measures on DRAM Chips*, para. 7.119, note 129.

[143] *Japan – Alcoholic Beverages II (AB)*, p. 14.

the SCM Agreement."[144] Accordingly, the capital contribution made by Credit Lyonnais to Aerospatiale constituted a financial contribution by a public body.[145]

136. Most significantly, and as briefly mentioned above, the panel in *Korea – Commercial Vessels* concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)."[146] In reaching this conclusion, that panel rejected some of the very same arguments China advanced before the Panel and continues to advance on appeal.

137. China now argues that it has never endorsed Korea's positions in *Korea – Commercial Vessels*.[147] However, it is worth comparing their positions, because they are essentially identical. In *Korea – Commercial Vessels*, Korea argued that "an organization is a public body only when it acts in an official capacity, or is engaged in governmental functions."[148] Here, China argues that an entity is a public body if it "has been vested with authority to perform functions of a governmental character."[149]

138. In *Korea – Commercial Vessels*, Korea argued that "Article 5 of the Articles on State Responsibility provides for a two-step analysis that helps clarify whether an entity is a public body."[150] Here, China argues that "Article 5 naturally encompasses within its scope the type of entity characterized as a public body in Article 1.1 of the SCM Agreement. . . ."[151]

139. In *Korea – Commercial Vessels*, Korea argued that "an entity will not constitute a 'public body' if it engages in market (non-official) activities on commercial terms. . . ."[152] Here, China argues that its state-owned enterprises have "the same goal of operating profitably" as private companies and that its state-owned banks have "the same goal to generate profits that drives other commercial banks in China."[153]

140. Both the *Korea – Commercial Vessels* panel and the Panel in this dispute correctly rejected these arguments and instead applied a standard for determining whether an entity is a "public body" that is based upon government control.

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[144] *EC – Large Civil Aircraft*, para. 7.1359.

[145] *EC – Large Civil Aircraft*, para. 7.1359.

[146] *Korea – Commercial Vessels*, para. 7.50. *See also id.*, paras. 7.172, 7.353, and 7.356.

[147] *See* China Appellant Submission, para. 73.

[148] *Korea – Commercial Vessels*, para. 7.37.

[149] China Appellant Submission, para. 73. *See also, e.g.*, *id.*, paras. 30, 38, 133.

[150] *Korea – Commercial Vessels*, para. 7.39.

[151] China Appellant Submission, para. 144.

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

[153] China Appellant Submission, para. 13.

141. The implications of China's arguments in the present dispute are the same as Korea's in *Korea – Commercial Vessels* – that is, an entity could be determined to be a "public body" on one day, but maybe not on the next day, or the determination could even vary transaction by transaction.[154] This is because China insists that "public bodies" are defined in part by "the nature of the *functions* they perform."[155] China argues that an entity vested with authority to perform governmental functions "will be a public body *whenever it performs those functions*."[156] As we have explained elsewhere, the "public body" question is a question of the nature or identity of an entity, not of the actions or functions it performs, and one reason for this is to avoid the illogical conclusion that a single entity could change from being a public to a private body on a daily or even a transactional basis.

142. As the Panel found, "the question of the nature of the entity (*i.e.*, whether it is 'a government or any public body') is entirely separate from the behaviour of that entity in a given instance (*i.e.*, whether there is a financial contribution, whether a benefit is thereby conferred, and whether there is specificity)."[157] China's emphasis on the performance of certain "functions" as relevant to a "public body" analysis confuses separate legal elements in Article 1.1 of the SCM Agreement. Guided by the Appellate Body's statement as to the separate legal elements of "financial contribution" and "benefit" in *Brazil – Aircraft*,[158] the *Korea – Commercial Vessels* panel rejected an interpretation of Article 1.1 of the SCM Agreement that would confuse separate legal elements, and the Panel in the present dispute properly followed this line of reasoning.

143. Finally, as described above, the *Korea – Commercial Vessels* panel also declined Korea's invitation to import concepts from the Draft Articles into the interpretation of Article 1.1(a)(1) of the SCM Agreement. It similarly rejected the argument that paragraph 5(c)(i) of the GATS Annex on Financial Services is relevant context for interpreting the term "public body" in the SCM Agreement.[159] The panel considered that reliance on this provision in the GATS Annex on Financial Services, which turns on whether an entity operates on commercial terms, would introduce "considerations of benefit into the analysis of the private/public status of an entity."[160]

144. In sum, that different panels have arrived at the same conclusions and have interpreted the term "public body" as meaning an entity controlled by the government lends credence to the Panel's interpretation of that term. These consistent panel interpretations create "legitimate

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[154] *See Korea – Commercial Vessels*, para. 7.45.

[155] *See* China Appellant Submission, para. 38 (emphasis in original).

[156] China Appellant Submission, para. 73 (emphasis added).

[157] Panel Report, para. 8.72.

[158] *Brazil – Aircraft (AB)*, para. 157.

[159] *Korea – Commercial Vessels*, para. 7.47.

[160] *Korea – Commercial Vessels*, para. 7.47.

expectations" among WTO Members.[161] In contrast, China's proposed interpretation is aberrational and has no support in the SCM Agreement.

145. For all these reasons, the Appellate Body should affirm the Panel's legal interpretation that a "public body," within the meaning of Article 1.1(a)(1) of the SCM Agreement, is an entity controlled by the government.

B. The Panel Did Not Err in Its Assessment That Commerce Did Not Act Inconsistently With Article 1.1(a)(1) of the SCM Agreement in Finding Certain SOEs and SOCBs to Be Public Bodies

146. China does not contest, and did not contest before the Panel, that it owns or controls the SOEs and SOCBs at issue in this dispute. Rather, China has argued that such SOEs and SOCBs can be public bodies only if they are vested with authority to perform governmental functions. However, as demonstrated above, the Panel did not err in finding that a "public body" need not be an entity vested with authority to perform governmental functions, but rather is an entity controlled by the government. Based on its correct legal interpretation of the term "public body," the Panel found that Commerce's determinations in the CWP, LWR, OTR, and LWS CVD investigations that certain SOEs are "public bodies," and in the OTR CVD investigation that certain SOCBs are "public bodies," were not inconsistent with Article 1.1(a)(1) of the SCM Agreement.[162]

147. Before the Panel, there was some discussion as to whether majority-government ownership evinces government control.[163] The Panel considered this question and concluded that there was "no legal error, in analyzing whether an entity is a public body, in giving primacy to evidence of majority government-ownership."[164] The Panel noted that during the relevant investigations, the respondent subject merchandise producers and the Government of China did not provide evidence, and for the most part there was none on the record, beyond evidence of government ownership.[165] Rather, during the relevant investigations, the respondents generally argued that ownership or control was insufficient to establish "public body" status.[166] Similarly, before the Panel, China did not argue that, based on the record of the investigation, government

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[161] *Japan – Alcoholic Beverages II (AB)*, p. 14.

[162] *See* Panel Report, paras. 8.124-8.143.

[163] *See* Panel Report, para. 8.133.

[164] Panel Report, para. 8.136. *See generally, id.*, paras. 8.134-8.138.

[165] *See* Panel Report, paras. 8.128-8.131, 8.140-8.141. In the few instances in which there was such additional evidence, Commerce considered it, as the Panel so found. *See id.*, paras. 8.129-8.130, 8.132, 8.137, 8.140.

[166] *See* Panel Report, paras. 8.137, 8.140.

ownership did not equate to control.[167] Accordingly, the Panel concluded that Commerce properly relied upon evidence of government ownership or control to determine whether the entities at issue were "public bodies."

148. China does not challenge these aspects of the Panel's findings. China does not argue that government ownership did not equate to government control, that the records in the CVD investigations did not support Commerce's findings of ownership or control, or that the Panel erred in concluding that Commerce properly found the relevant entities to be owned or controlled by the government. As before the Panel, China argues only that government control (whether through ownership or otherwise) is insufficient to find an entity to be a "public body," and that rather the entity must be vested with government authority to perform governmental functions.

149. Thus, because China has not established that the Panel erred in finding that an entity is a "public body" if it is controlled by the government, irrespective of whether it is vested with government authority to perform governmental functions, the Appellate Body should affirm the Panel's findings that Commerce's determinations that certain SOEs and SOCBs are "public bodies" were not inconsistent with Article 1.1(a)(1) of the SCM Agreement.[168]

III. THE PANEL DID NOT ERR IN ITS INTERPRETATION OF ARTICLE 2 OF THE SCM AGREEMENT

A. The Panel Correctly Found that Commerce's Determination in the *OTR Tires* CVD Investigation that the Policy Lending Subsidy Was *De Jure* Specific Was Not Inconsistent with Article 2.1(a) of the SCM Agreement

150. China appeals the Panel's finding that Commerce's determination in the *OTR Tires* CVD investigation that the policy lending subsidy was specific was not inconsistent with Article 2.1(a) of the SCM Agreement.[169] China argues that the Panel incorrectly interpreted the requirement in Article 2.1(a) that, in order to determine that a subsidy is specific, an investigating authority must establish that the subsidy is explicitly limited to certain enterprises. As it did before the Panel, China urges that, under Article 2.1(a), a subsidy may be considered specific only if legislation separately identifies and limits access to each of the component parts of a subsidy, *i.e.*, both financial contribution and benefit. China "[c]onditionally" argues, in the event that the Appellate Body sustains the Panel's interpretation of Article 2.1(a), that the Panel's findings were legally insufficient to sustain Commerce's determination of *de jure* specificity, even under the Panel's interpretation of Article 2.1(a).[170] China also separately argues that the Panel incorrectly interpreted the term "certain enterprises" and suggests that this constitutes a "freestanding error

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[167] *See* Panel Report, paras. 8.137, 8.141.

[168] *See* Panel Report, paras. 8.138, 8.143, and 17.1(a)(1).

[169] *See* Panel Report, para. 17.1(b)(i); *see also* China Notice of Appeal, para. 5.

[170] China Appellant Submission, para. 236.

of legal interpretation."[171] China's arguments are without merit, and the Panel correctly rejected them.

151. As discussed below, the Government of China has promulgated policy documents at the national, provincial, and municipal levels that establish "encouraged" projects to which lending is provided and "restricted" and "eliminated" projects to which lending is prohibited. These policy documents demonstrate that access to the policy lending subsidy was explicitly limited to certain enterprises, including the OTR Tires industry. Indeed, some of these policy documents reference an investigated tire producer by name and state that its tire production facility is a government priority, while other policy documents expressly prohibit certain projects from accessing the policy lending subsidy.

152. After examining the totality of the evidence that Commerce considered, the Panel correctly concluded that the evidence on the record of the *OTR Tires* CVD investigation amply substantiated Commerce's determination that the policy lending subsidy was specific within the meaning of Article 2.1(a) of the SCM Agreement. As demonstrated below, the Panel's interpretation of Article 2.1(a) was correct and its analysis of the evidence was thorough. Consequently, the Panel's conclusions should not be reversed.

1. The Panel Correctly Interpreted Article 2.1(a) of the SCM Agreement

153. Article 1.2 of the SCM Agreement provides that a subsidy shall be "subject to the provisions" of Parts II, III, and V of the SCM Agreement – that is, a subsidy may be determined to be prohibited or actionable, or may be countervailed – only if the subsidy is "specific in accordance with the provisions of Article 2." Article 2.1 of the SCM Agreement sets forth several "principles" that apply in order to determine whether a subsidy is "specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises')," namely:

> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

[171] China Appellant Submission, paras. 244-256.

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

154. Article 2.1(a) of the SCM Agreement describes the requirements for finding that a subsidy is *de jure* specific, that is, access to the subsidy is "explicitly limited to certain enterprises." Article 2.1(c) describes the requirements for finding that a subsidy is *de facto* specific, that is, access to the subsidy, while not explicitly limited, is limited "in fact" to certain enterprises. Article 2.4 of the SCM Agreement provides that "[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence."

155. In the *OTR Tires* CVD investigation, Commerce determined that a policy lending subsidy existed and was *de jure* specific because access to the subsidy was explicitly limited to certain enterprises, including the OTR Tires industry. Commerce based its specificity determination on Chinese government policy documents that, when viewed in their totality, explicitly limited access to the policy lending subsidy.

156. Before the Panel, China argued that Commerce's specificity determination was inconsistent with Article 2.1(a) of the SCM Agreement because "Commerce did not clearly substantiate, on the basis of positive evidence, that the legislation that it relied upon defined the elements of the subsidy that it countervailed."[172] By "elements of a subsidy," China meant the component parts of a subsidy, *i.e.*, "financial contribution" and "benefit," as defined by Article 1 of the SCM Agreement.[173]

157. China makes the same argument on appeal. Specifically, China argues that Article 2.1(a) of the SCM Agreement requires an investigating authority conducting a *de jure* specificity analysis to determine that "the actual words of the legislation limit access to the particular financial contribution and its associated benefit" because "[i]t is the subsidy, not the financial

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[172] China First Written Submission before the Panel, para. 217.

[173] China First Written Submission before the Panel, para. 209.

contribution or benefit, that is the subject of the specificity inquiry."[174] As China correctly notes, "[t]he Panel disagreed with this interpretation . . . ."[175]

158. As demonstrated below, the Panel correctly interpreted Article 2.1(a) of the SCM Agreement consistently with the customary rules of interpretation. China's proposed interpretation, on the other hand, is formalistic, not supported by the text of Article 2.1(a), and would undermine the object and purposes of the SCM Agreement.

a. The Panel Properly Analyzed the Text and Context of Article 2.1(a) of the SCM Agreement

159. China complains that "the Panel's conclusion concerning 'the text' of Article 2.1(a) was not based on any analysis of the text itself."[176] Additionally, China criticizes the Panel's alleged "functional interpretation,"[177] asserting that the Panel "completely ignored the ordinary meaning of the term 'subsidy,'"[178] and arguing that the Panel's interpretation failed to "give effect to the requirement of an 'explicit' limitation."[179] China's arguments are without merit.

160. As an initial matter, China mischaracterizes the Panel's report and ignores the Panel's analysis of the text of Article 2.1(a) of the SCM Agreement. Contrary to China's unfounded assertion, the Panel conducted a proper textual analysis of Article 2.1(a). Indeed, the Panel "start[ed] by considering the text of Article 2.1 of the SCM Agreement"[180] and noted, in particular, that:

> [i]n the provision at issue, Article 2.1(a) of the SCM Agreement, *the text requires*, and the parties do not dispute, that the limitation in question must be explicit. Where the parties disagree is with respect to how that explicit limitation must be structured for a measure to fall within the scope of Article 2.1(a) of the SCM Agreement.[181]

161. After considering China's argument that "the granting authority, or the legislation setting forth the measure in question, must identify or specify the elements of a subsidy, *i.e.*, financial

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[174] China Appellant Submission, para. 212.

[175] China Appellant Submission, para. 213.

[176] China Appellant Submission, para. 214.

[177] *See*, *e.g.*, China Appellant Submission, paras. 213-217.

[178] China Appellant Submission, para. 214.

[179] China Appellant Submission, para. 216.

[180] Panel Report, para. 9.20.

[181] Panel Report, para. 9.23.

contribution *and* benefit" – which the Panel understood to be based on the words "explicitly" and "subsidy" in Article 2.1(a)[182] – the Panel concluded that:

> [A] reading of Article 2.1(a) of the SCM Agreement that would require explicit limitation of both the financial contribution and the benefit, such as China advocates, *is not supported by the text of that provision*. In our view, it would limit *de jure* specificity to a single, narrow set of circumstances, in which a single piece of legislation (or perhaps more than one formally interrelated pieces of legislation) or some action by the granting authority, would explicitly set forth, in the form of a formal programme, the financial contribution and benefit elements (including the form they would take and how they would operate) and would then specify the particular eligible beneficiaries (and possibly also would state explicitly that only those beneficiaries were eligible). *We cannot agree with such a reading*, which in our view would exclude many situations in which access to a given subsidy was explicitly limited, by virtue of a limitation of access to either the financial contribution or the benefit.[183]

As the foregoing description of the Panel's textual analysis indicates, China's assertion that the Panel's "conclusion concerning 'the text' of Article 2.1(a) was not based on any analysis of the text itself" lacks any basis in reality.[184]

162. China criticizes the Panel's "functional" interpretation of Article 2.1(a).[185] China argues that:

> [I]t is axiomatic that the process of treaty interpretation must begin with the actual words of the treaty. Whatever role a "functional" analysis might have in the process of treaty interpretation (and the Panel did not make this clear), in no event can such an approach supplant the text of the agreement itself. There is only one way "to look at this issue", and that is by applying the rule of treaty interpretation established under Article 31 of the Vienna Convention. That rule begins with the text of the provision to be interpreted. The Panel failed to undertake this essential first step in the process of treaty interpretation.

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[182] Panel Report, para. 9.24.

[183] Panel Report, para. 9.28 (emphasis added).

[184] China Appellant Submission, para. 214.

[185] *See* China Appellant Submission, paras. 213-217.

163. China mischaracterizes the Panel's analysis. As explained above, the Panel did analyze the text of the SCM Agreement. It did so from a "functional standpoint."[186] That is, the Panel's functional approach was a method for analyzing the text. The Panel explained that:

> The first issue raised by [China's] claim is whether, to explicitly limit access to a subsidy, a granting authority or a legislation must specify all of the elements of a subsidy, i.e., financial contribution and benefit. As noted, for China, this is first and foremost a textual question following from the definition of "subsidy" in Article 1 of the SCM Agreement, i.e., that the use of the word "subsidy" in Article 2.1(a) requires that both the financial contribution and the benefit be explicitly identified by the granting authority or the law. Another way to look at this issue, however, is from a functional standpoint. That is, functionally, could a granting authority or a legislation explicitly limit access to a "subsidy" without identifying both the financial contribution and the benefit flowing therefrom? Or put another way, would the only way for a granting authority or a legislation to explicitly limit access to a subsidy be to explicitly identify both the financial contribution and the benefit, and explicitly limit access to both?[187]

The Panel answered these questions by noting that "there are many ways in which access to a subsidy could be explicitly limited, and we do not see that both the financial contribution and the benefit necessarily would have to be set forth explicitly to effect such a limitation."[188] Through its consideration of these questions, that is, through the application of a functional approach, the Panel analyzed whether the phrase "explicitly limits access to a subsidy" must have the meaning China asked the Panel to ascribe to it.

164. China notes that the Panel distinguished its approach from China's and suggests that the contrast drawn by the Panel "is telling," and indicates that China's interpretation was "textual" while the Panel's was not.[189] China misunderstands the basis for the Panel's distinction. The Panel was not distinguishing its approach from *all* textual approaches; rather, it was distinguishing its own textual approach from *China's* textual approach.

165. The Panel explained that, for China, the interpretation of Article 2.1(a) is "first and foremost a textual question *following from the definition of 'subsidy' in Article 1 of the SCM Agreement*, i.e., that *the use of the word 'subsidy' in Article 2.1(a) requires that both the financial contribution and the benefit be explicitly identified* by the granting authority or the

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[186] Panel Report, para. 9.25.

[187] Panel Report, para. 9.25.

[188] Panel Report, para. 9.26.

[189] China Appellant Submission, para. 217.

law."[190] Thus, China's proposed "textual" analysis would, in effect, short circuit any consideration of the meaning of text of Article 2.1(a), obviating the need to interpret any of the words in that provision other than "subsidy." Rightly skeptical of such a dubious analytical approach, the Panel decided to look at the text "from a functional standpoint" in order to assess the meaning of Article 2.1(a), in particular the phrase "explicitly limits access to a subsidy," and determine whether China's proposed interpretation is correct.

166. As noted above, the Panel found that China's proposed interpretation is not correct. The Panel properly concluded that "a reading of Article 2.1(a) of the SCM Agreement that would require explicit limitation of both the financial contribution and the benefit, such as China advocates, is not supported by the text of that provision."[191]

167. China complains that the Panel "completely ignored the ordinary meaning of the term 'subsidy.'"[192] This is simply untrue. As indicated above, the Panel recognized that, for China, the interpretation of Article 2.1(a) is "first and foremost a textual question following from *the definition of 'subsidy' in Article 1 of the SCM Agreement* . . . ."[193] In analyzing the meaning of Article 2.1(a), the Panel considered whether "a granting authority or a legislation [could] explicitly limit access to a 'subsidy' without identifying both the financial contribution and the benefit flowing therefrom? Or put another way, would the only way for a granting authority or a legislation to explicitly limit access to a subsidy be to explicitly identify both the financial contribution and the benefit, and explicitly limit access to both?"[194] It is evident from this discussion that the Panel was aware of the definition of the term "subsidy" and considered whether that term, by virtue of its definition in Article 1, is determinative of the interpretation of Article 2.1(a). The Panel did not "ignore" the meaning of the term "subsidy"; it just disagreed with China's view of the significance of its meaning for the purpose of interpreting Article 2.1(a).

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[190] Panel Report, para. 9.25 (emphasis added).

[191] Panel Report, para. 9.28. We note that nothing in the text of Article 2.1(a) of the SCM Agreement requires Members to identify legislation that defines the component parts of a subsidy (*i.e.*, financial contribution and benefit). Instead, Article 2.1(a) provides that a subsidy shall be "specific" if "the granting authority, or the legislation pursuant to which the granting authority operates," explicitly limits access to a subsidy to certain enterprises. The term "legislation" in Article 2.1(a) appears only in connection with the phrase "the legislation pursuant to which the granting authority operates." There is no indication in the text of Article 2.1(a) that the legislation pursuant to which the granting authority operates must be the same as legislation that may define the component parts of a subsidy.

[192] China Appellant Submission, para. 214.

[193] Panel Report, para. 9.25 (emphasis added).

[194] Panel Report, para. 9.25.

168. China also argues that the Panel's "functional" interpretation of Article 2.1(a) "fail[ed] to give effect to the requirement of an 'explicit' limitation"[195] in that provision. According to China, the Panel:

> appeared to envision that a limitation of access either to a financial contribution or a benefit could "function" as a limitation on access to the subsidy at issue, and in this respect fulfil the express requirement of Article 2.1(a). But a "functional" limitation is not an "explicit" limitation. It is, at most, a limitation that is "merely implied or suggested" by the operation of the legislation, rather than one that is evident from the actual words of the legislation.[196]

China seeks to create a tension between the Panel's reasoning and the text of Article 2.1(a) of the SCM Agreement that simply does not exist. The panel never found that an "implied or suggested" limitation was sufficient for purposes of a *de jure* specificity determination. Instead, the Panel recognized that there are many ways in which access to a subsidy could be explicitly limited, including, for example, an explicit limitation on access to a financial contribution, which would necessarily also explicitly limit access to the subsidy.[197]

169. It also simply is not the case that the Panel "did not examine the ordinary meaning" of the term "explicitly," as China suggests.[198] While the Panel did not refer in its report to any dictionary definition of the term "explicitly," this does not demonstrate that the Panel did not examine that term's ordinary meaning in connection with its interpretation of Article 2.1(a). As the Appellate Body has explained, "[i]n order to identify the ordinary meaning, a Panel *may* start with the dictionary definitions of the terms to be interpreted. But *dictionaries, alone, are not necessarily capable of resolving complex questions of interpretation*, as they typically aim to catalogue all meanings of words – be those meanings common or rare, universal or specialized."[199] Reference to a dictionary is not required in all cases in order to identify a term's ordinary meaning. The ordinary meaning of some terms may be obvious, such that it would not be necessary to look those terms up in a dictionary, and doing so, in any event, would not necessarily be illuminating, as the Appellate Body explained. In any event, Article 31 of the Vienna Convention does not oblige a treaty interpreter to consult a dictionary, and the absence of any indication in the Panel report that the Panel did so does not, in itself, constitute legal error.

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[195] China Appellant Submission, para. 216.

[196] China Appellant Submission, para. 216.

[197] Panel Report, para. 9.26.

[198] China Appellant Submission, para. 216.

[199] *See US – Gambling (AB)*, para. 164 (emphasis added) (citing *US – Softwood Lumber IV (AB)*, para. 59; *Canada – Aircraft (AB)*, para. 153; and *EC – Asbestos (AB)*, para 92).

170. Furthermore, the focus of China's arguments before the Panel was not on the definition of the single term "explicitly." Indeed, China asserted in its answer to Panel Question 64 that there was no disagreement among the parties that an "explicit" limitation was one which was based on the "actual words of the law."[200] In this regard, it is uncontested that Commerce correctly reported the "actual words" of the policy documents on which it relied for its specificity determination. For example, as discussed in more detail *infra*, China has not challenged that the "actual words" of the SETC Circular No. 716, *Promulgation of the Guidance of Recent Developments in the Industrial Sector* ("SETC Circular 716"), identified meridian radial tires as a priority and stated that "we should . . . reasonably direct the contribution of public funds . . . so as to . . . guarantee the realization of the target under planning."[201] Nor does China challenge that the "actual words" of the Guizhou 9th Five-Year Plan stated that "policy bank loans and loans from abroad should continue to be allocated according to the plan."[202]

171. They key question raised by China's challenge, then, was not the definition of the word "explicitly" or whether the policy documents contained explicit limitations but, instead, whether the phrase "explicitly limits access to a subsidy" in Article 2.1(a) of the SCM Agreement requires legislation or the granting authority to limit access to both the financial contribution and benefit. Accordingly, the Panel had no need to examine the dictionary definition of the single term "explicitly," but rather it examined that term's ordinary meaning in connection with its interpretation of Article 2.1(a). Because the Panel could conceive of "many ways in which access to a subsidy could be *explicitly* limited, and [did not] see that both the financial contribution and the benefit necessarily would have to be set forth *explicitly* to effect such a limitation," the Panel rejected China's proposed interpretation of Article 2.1(a).[203]

172. Finally, analyzing the context of Article 2.1(a), the Panel observed that "a wide variety of possible forms of subsidization falls within the definition in Article 1 of the SCM Agreement, and we see nothing in Article 2 that would narrow down those forms, in a scenario of either *de jure* or *de facto* specificity."[204] The Panel noted that "Article 1.2 of the SCM Agreement treats the concepts of subsidy and specificity as separate" and, indeed, "financial contribution, benefit and specificity are three independent and cumulative elements, all of which must be present for a measure to be covered by the SCM Agreement."[205] The Panel recalled *Brazil – Aircraft*, in which the Appellate Body found that financial contribution and benefit are "independent

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[200] China Responses to Panel's First Set of Questions, para. 201 (July 28, 2009).

[201] *See* Panel Report, paras. 9.74-9.76; *OTR Tires CVD Final Decision Memorandum*, 13.

[202] *OTR Tires CVD Final Decision Memorandum*, 99; *see also* Panel Report, note 370 (clarifying that due to China's error this statement was originally attributed to the 10th Five-Year Plan).

[203] Panel Report, para. 9.26 (emphasis added).

[204] Panel Report, para. 9.29 (emphasis added).

[205] Panel Report, para. 9.29.

concepts, both of which must be present for a measure to be a subsidy in the sense of the SCM Agreement."[206] The Panel also signaled its agreement "with the approach taken by the panels in *EC – Countervailing Measures on DRAM Chips*, *US – Countervailing Duty Investigation on DRAMS*, and *Korea – Commercial Vessels*, all of which analyzed the question of specificity separately from financial contribution and benefit."[207]

173. Thus, it is clear from the Panel's discussion in its report that, Contrary to China's arguments on appeal, the Panel properly examined the text and context of Article 2.1(a) of the SCM Agreement in connection with its interpretative analysis, and the Panel arrived at the correct interpretation of that provision.

b. The Panel's Interpretation of Article 2.1(a) Is Consistent with the Object and Purpose of the SCM Agreement

174. The Panel observed that "the general role in the SCM Agreement of the specificity requirement, which is related to the overall object and purpose of the SCM Agreement to discipline trade-distorting subsidies," is to "establish that the subsidies deemed under the Agreement to be potentially trade distortive are those that are targeted in some way to particular beneficiaries, rather than being broadly available throughout the economy of a Member."[208] The Panel considered that it "must guard against both an overly-broad reading of the specificity requirement which would sweep within the coverage of the SCM Agreement non-specific subsidies, and an overly-rigid or restrictive reading which would subvert the purpose of the specificity requirement, and thus undermine the effectiveness of the SCM Agreement."[209]

175. The Panel's interpretation of Article 2.1(a), *i.e.*, that it does not require explicit limitation of both the financial contribution and the benefit, is consistent with the Appellate Body's recognition that the object and purpose of the SCM Agreement is to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[210]

176. China's proposed interpretation, on the other hand, would undermine the object and purpose of the SCM Agreement. As the Panel explained,

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[206] Panel Report, para. 9.29 (*citing Brazil – Aircraft (AB)*, para. 157).

[207] Panel Report, para. 9.29.

[208] Panel Report, para. 9.21.

[209] Panel Report, para. 9.22.

[210] *US – Softwood Lumber IV (AB)*, para. 64.

> While ultimately all three elements (financial contribution, benefit and specificity) must be present for a given measure to be covered by the SCM Agreement, *a formalistic reading of the specificity provisions* as implying a particular conjunction of these elements, or a particular order of analysis, *might have the effect of omitting from coverage measures which viewed in their entirety have all three necessary elements to be covered by the SCM Agreement*.[211]

The Panel was concerned that:

> to require that a given legislation or granting authority lay out all elements of a specific subsidy, explicitly limiting access to both the financial contribution and the benefit, would have the effect of treating as non-*de jure* specific a wide variety of subsidies to which access was explicitly limited. This would mean that the only basis on which specificity could be found for such subsidies would be on a *de facto* basis, a fact-intensive, case-by-case inquiry that would be both illogical and entirely superfluous under the described scenarios where an explicit limitation of access to a subsidy existed.[212]

Additionally, the Panel worried that, "where the details as to the actual distribution of the subsidy could not be obtained, the subsidy would be left outside the scope of the SCM Agreement in spite of its undeniably being explicitly limited to particular beneficiaries."[213]

177. The Panel rightly concluded that China's proposed interpretation "would open considerable scope for circumvention of the SCM Agreement, based on a distinction in form but not substance."[214] On the other hand, the Panel reasoned that its own correct interpretation did not have the "potential" to "improperly bring within the scope of the SCM Agreement measures that in fact are not specific subsidies" because:

> [i]n whatever order the analysis is conducted, and regardless of whether access is explicitly limited in respect of the financial contribution or the benefit or both, the three elements of financial contribution, benefit and explicit limitation of access would be present, and the measure thus would be a *de jure* specific subsidy and hence covered by the SCM Agreement.[215]

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[211] Panel Report, para. 9.30 (emphasis added).

[212] Panel Report, para. 9.30.

[213] Panel Report, para. 9.30.

[214] Panel Report, para. 9.30.

[215] Panel Report, para. 9.31.

178. On appeal, China argues that the Panel's interpretation of Article 2.1(a) was "inconsistent with the object and purpose of Article 2 within the SCM Agreement."[216] We would note that the relevant object and purpose under Article 31 of the Vienna Convention is that of the treaty itself. The word "its" in the phrase "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" refers to the word "treaty."[217] China's discussion of the purported object and purpose of a particular provision of the SCM Agreement is not germane to a proper interpretative analysis under the customary rules of treaty interpretation. Unlike the Panel, China does not address the object and purpose of the SCM Agreement itself.

179. China also asserts that the Panel's concern about circumvention was "misguided."[218] In China's view:

> Subsidies that are not *de jure* specific under Article 2.1(a) can still be *de facto* specific under Article 2.1(c). Together, these two provisions (along with the *per se* specificity of prohibited subsidies established by Article 2.3) provide a basis for a finding of specificity in respect of all subsidies that are potentially countervailable under Part V of the SCM Agreement. There is no room in Article 2 for "circumvention" of subsidy disciplines.[219]

China simply denies that any problem exists without seriously addressing the concern raised by the Panel.

180. As described above, the Panel considered that China's narrow, "formalistic" interpretation "would have the effect of treating as non-*de jure* specific *a wide variety of subsidies* to which access was explicitly limited"[220] and, "where the details as to the actual distribution of the subsidy could not be obtained, the subsidy would be left outside the scope of the SCM Agreement in spite of its undeniably being explicitly limited to particular beneficiaries."[221]

181. China contends that the Panel's reasoning "operates on the premise that the term 'subsidy' in Article 2.1(a) refers, as the Panel believed, to 'either the financial contribution or the benefit' – precisely the proposition that the Panel was trying to establish by recourse to this

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[216] China Appellant Submission, para. 222 (subheading (1)).

[217] Vienna Convention, Article 31.

[218] China Appellant Submission, para. 226 (subheading (2)).

[219] China Appellant Submission, para. 227.

[220] Panel Report, para. 9.30 (emphasis added).

[221] Panel Report, para. 9.30.

argument."[222] Contrary to China's assertion, this is not a "logical fallacy."[223] Rather, it is a straightforward application of the customary rules of interpretation. Having preliminarily established that the ordinary meaning of the terms in Article 2.1(a), read in the context of Article 1, suggested a particular interpretation, the Panel analyzed whether this interpretation is consistent with the object and purpose of the SCM Agreement. At the same time, the Panel articulated its view that China's proposed interpretation, in addition to being unsupported by the text or context of Article 2.1(a), was also inconsistent with the object and purpose of the SCM Agreement.

182. In sum, the Panel's analysis and interpretation of Article 2.1(a) of the SCM Agreement was entirely proper, and China's appeal of it is without merit.

2. The Panel Correctly Applied Its Interpretation of Article 2.1(a) of the SCM Agreement

183. China "[c]onditionally" appeals "the Panel's finding that the economic planning documents relied upon by Commerce explicitly limited access to the relevant financial contribution (loans by SOCBs) and therefore 'functionally' limited access to the relevant subsidy (loans by SOCBs that conferred a benefit)."[224] Because the United States firmly believes that the Appellate Body should sustain the Panel's interpretation of Article 2.1(a) of the SCM Agreement, for the reasons we have given above, we consider that the condition for this appeal is fulfilled, and thus we now respond to China's arguments in support of its conditional appeal.

184. China argues that the Panel's findings "were legally insufficient to sustain Commerce's determination of *de jure* specificity" under the Panel's interpretation of Article 2.1(a) of the SCM Agreement.[225] In China's view, "under the Panel's own interpretation, the measures relied upon by Commerce would need to contain an explicit limitation of access to the relevant *financial contribution*"[226] but China asserts that "[t]here was no limitation of access ('explicit' or otherwise) to loans by SOCBs to companies in the encouraged industries, and the Panel did not identify one."[227] China argues that, consequently, "the Panel's findings were legally insufficient to sustain Commerce's determination of specificity" under the Panel's interpretation of Article 2.1(a).[228] China's arguments are without merit.

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[222] China Appellant Submission, para. 228.

[223] China Appellant Submission, para. 229.

[224] China Appellant Submission, para. 236.

[225] China Appellant Submission, para. 236.

[226] China Appellant Submission, para. 237.

[227] China Appellant Submission, para. 242.

[228] China Appellant Submission, para. 243.

a. China Mischaracterizes the Relevance of the "Permitted" Category of Projects in the Implementing Regulation

185. In support of its appeal, China, for the first time, ascribes great significance to the existence of a fourth category of "permitted" projects identified in the implementing regulation ("Implementing Regulation") for the 11th Five-Year Plan of the Government of China ("GOC 11th Five-Year Plan").[229] According to China, it is "undisputed" that SOCBs, in addition to providing loans to projects in the "encouraged" category, also provided loans to projects in the "permitted" category.[230] As a result, China argues that the Panel "failed to identify an explicit limitation of access to loans by SOCBs to the encouraged industries," and so the Panel's conclusion that Commerce's specificity determination was consistent with Article 2.1(a) of the SCM Agreement should be reversed.[231] China's argument is misleading and incorrect.

186. China asserts that "[i]t is undisputed that SOCBs also provided loans to the *permitted* category of industries . . . ."[232] However, China fails to identify any evidence in the record before the Panel to support its contention that SOCBs provided loans to the permitted category. Instead, in footnote 249 of China's appellant submission, which follows this statement, China incorrectly cites to paragraph 9.59 (fourth bullet) of the Panel report. The fourth bullet of paragraph 9.59 of the Panel report reads as follows, in its entirety:

> Non-listed projects: Article 13 of the Regulation states that projects not belonging to the encouraged category, the restricted category or the eliminated category, but conforming to the relevant laws, regulations and policies of the state, belong to the "permitted" category, and are not listed in the catalogue.

187. Nothing in the fourth bullet of paragraph 9.59 of the Panel report indicates that SOCBs provided loans to projects in the "permitted" category. It is simply a summary of Article 13 of the Implementing Regulations, which establishes that projects in the "permitted" category are not listed in the GOC Catalogue.[233] Importantly, Article 12 of the Implementing Regulations establishes that "[t]he 'Catalogue for the Guidance of Industrial Structure Adjustment' is the

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[229] China Appellant Submission, paras. 240-243. *See also* Implementing Regulation, Article 13 (explaining that the companion catalogue to the GOC 11th Five-Year plan ("the GOC Catalogue") is composed of the three categories: encouraged, restricted, and eliminated, and indicating that the permitted category includes industries which conform to relevant laws, regulations, and policies of the state but are outside the scope of the catalogue) (Exhibit US-87, p. 11).

[230] China Appellant Submission, para. 241.

[231] China Appellant Submission, paras. 243.

[232] China Appellant Submission, para. 241.

[233] *See* Implementing Regulation, Article 13 (Exhibit US-87, p. 11).

important basis for guiding investment directions, and for the governments to administer investment projects, to formulate and enforce policies on public finance, taxation, credit, land, import and export, etc."[234] Taken together, these provisions make clear that "permitted" projects, due to their exclusion from the GOC Catalogue, are also excluded from government lending pursuant to the policy lending subsidy.

188. We also note that neither Commerce nor the Panel found that the Chinese policy documents *do not* prohibit lending to the projects in the "permitted" category. This question was not raised by China before the Panel or by responding parties before Commerce. Moreover, there was no evidence before Commerce or the Panel that any SOCBs provided loans to projects in the "permitted" category. The policy documents on the record of the *OTR Tires* CVD investigation are, at most, silent with respect to lending to the permitted category and, as noted above, perhaps suggest that, because "permitted" projects are excluded from the GOC Catalogue, they are excluded from government lending, including through SOCBs. Accordingly, there is no factual basis for China's assumption that SOCBS provided loans to projects in the "permitted" category.

189. Additionally, as the Panel recognized, the existence of the "permitted" category, rather than supporting China's argument that the policy lending subsidy was not specific, further demonstrates that this subsidy was not generally available within the Chinese economy:

> While there is no information on the record as to the absolute or relative magnitude of [the "permitted"] category, or of the three listed categories, the existence of a "permitted" category by definition narrows the maximum possible scope of the "encouraged" category (as well as of the "restricted" and "eliminated" categories) relative to the economy as a whole.
>
> In this respect, we do not see that the documents of record demonstrate that the list of projects in the "encouraged" category spans "virtually the entire range of economic activity in China", as suggested by China. We thus do not consider that these documents would compel a reasonable and objective investigating authority to conclude that any subsidies granted on the basis of that category were non-specific. To the contrary, we consider that a reasonable and objective investigating authority could conclude that any subsidies granted on the basis of the "encouraged" category were to a sufficiently discrete segment of the economy as to be limited to "certain enterprises".[235]

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[234] Implementing Regulation, Article 12 (Exhibit US-87, p. 11).

[235] Panel Report, paras. 9.70-9.71.

The United States agrees with the Panel's observation. The existence of the "permitted" category supports the conclusion that the "encouraged" category is not so broad as to encompass the full range of the Chinese economy.[236]

b. China Ignores the Totality of the Evidence Before Commerce

190. China's conditional appeal of the Panel's finding that the economic planning documents relied upon by Commerce explicitly limited access to the policy lending subsidy is based entirely on one provision of one document on the record before the Panel: Article 13 of the Implementing Regulations. As explained above, the existence of the "permitted" category of projects, as established in Article 13 of the Implementing Regulations, does not support a finding that the Panel's conclusion was legally insufficient to sustain Commerce's specificity determination. More fundamentally, though, China's approach is flawed because it relies on a single policy document and ignores the totality of the evidence before Commerce and the Panel, which included a number of central, provincial and municipal government planning documents. For this reason, China's argument is without merit.

191. In its report, the Panel articulated the standard of review it applied to analyze Commerce's specificity determination for policy lending in the *OTR Tires* CVD investigation. First, the Panel explained the general standard when reviewing an investigating authority's factual findings. The Panel stated:

> we examine whether the USDOC provided a "reasoned and adequate" explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported its determination of *de jure* specificity.
>
> * * *
>
> In conducting this analysis, we are conscious of the need to avoid a *de novo* review of the evidence, but we are equally mindful of the Appellate Body's admonition that it is the duty of a panel reviewing an investigating authority's determination to conduct a "critical and searching" examination, based on the

[236] Furthermore, even assuming *arguendo* that this permitted category was relevant to determining whether the policy lending subsidy was specific, China is incorrect to assume that the permitted category along with the encouraged category is too broad a group to constitute "certain enterprises." This argument ignores the fact that there were a large number of listings in the GOC Catalogue to which lending was prohibited. In fact, the listings to which lending was prohibited were much more numerous than the number of listings that were in the encouraged category. Thus, policy lending is prohibited to a significant portion of the Chinese economy suggesting that the policy lending subsidy is not generally available within the Chinese economy.

> information contained in the record and the explanations given by the authority in its published report.[237]

The Panel then explained how that standard would be applied with respect to the specificity determination under review. The Panel was mindful that Commerce based its specificity determination for policy lending on various policy documents from various levels of Chinese government (*i.e.,* policy documents from the central, provincial, and municipal governments). The Panel stated:

> In this case, we consider that the most appropriate way to approach our consideration of the various planning documents referred to in the USDOC's specificity determination is to examine them both on their own terms and in the light of the USDOC's actual determination, with a view to seeing whether they constitute positive evidence on the basis of which a reasonable and objective administering authority could have found that these documents describe a "sufficiently discrete segment of the economy" (in the words of the *US – Upland Cotton* panel) as to support a finding of *de jure* specificity in respect of any subsidies provided thereunder to that segment of the economy.[238]

192. China's reliance on a single document in support of its argument indicates that China misunderstands the correct standard of review to apply in this dispute. As the Panel noted, by its own terms, Commerce's specificity determination was based on the "totality" of the evidence.[239] The Panel correctly noted that the Appellate Body has found that, under such circumstances, the standard of review requires a panel to consider the evidence on the same basis – in its totality:

> [W]e recall the Appellate Body's ruling that a panel reviewing a determination on a particular issue that is based on the "totality" of the evidence relevant to that issue must conduct its review on the same basis. In particular, the Appellate Body held that if an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination, rather than

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[237] Panel Report, paras. 9.44 and 9.50 (*citing to US – Softwood Lumber VI (Article 21.5) (AB)*, para. 93).

[238] Panel Report, para. 9.51.

[239] *See, e.g.,* Panel Report, para. 9.52; *OTR Tires Final Decision Memorandum*, 98 (stating that Commerce's specificity determination was based on "the totality of the information on this record").

> assessing whether each piece on its own would be sufficient to support that determination.[240]

193. In *Japan – DRAMs*, for example, the panel found that the investigating authority did not have a proper evidentiary basis for finding that certain private creditors were "entrusted or directed" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.[241] The Appellate Body reversed this finding, explaining that the investigating authority had relied on the "totality of the evidence" and, as a result, the panel was incorrect to consider only certain aspects of the record evidence.[242] The Appellate Body stated that, by limiting its examination of the evidence, the panel "failed to properly apply the required standard of review."[243]

194. Contrary to China's argument, the correct question is not whether any one document, viewed in isolation, supports Commerce's specificity determination. Instead, "the totality of the evidence" before Commerce must be evaluated to determine whether Commerce's specificity determination was "clearly substantiated on the basis of positive evidence."[244]

195. After examining the totality of the evidence before Commerce, the Panel correctly found that the policy documents established that Commerce's specificity determination was consistent with Article 2.1(a) of the SCM Agreement. For the reasons given above, China's conditional appeal should be rejected.

3. The Panel Correctly Interpreted the Term "Certain Enterprises"

196. China also argues on appeal that the Panel erroneously interpreted the term "certain enterprises."[245] China indicates that this appeal is "separate and apart" from its appeal of the Panel's interpretation of Article 2.1(a) of the SCM Agreement and its conditional appeal of the Panel's application of its interpretation, to which we respond above.[246] China asserts that this is "a freestanding error of legal interpretation that negates the Panel's findings and conclusions," even under the Panel's interpretation of Article 2.1(a).[247] For the reasons given below, China's arguments are without merit.

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[240] Panel Report, para. 9.52.

[241] *See Japan – DRAMs (Korea) (Panel)*, para. 7.253-254.

[242] *See Japan – DRAMs (Korea) (AB)*, paras. 132-134.

[243] *Japan – DRAMs (Korea) (AB)*, para. 134.

[244] SCM Agreement, Article 2.4.

[245] China Appellant Submission, paras. 244-256.

[246] China Appellant Submission, para. 244.

[247] China Appellant Submission, para. 244.

a. The Panel Properly Interpreted the Term "Certain Enterprises" And Correctly Applied that Interpretation to the Totality of the Evidence Before Commerce

197. After analyzing the text of Article 2.1 of the SCM Agreement in order to ascertain the meaning of the term "certain enterprises," and taking into account the panel report in *US – Upland Cotton*, the Panel explained that "the dividing line between a subsidy to which access is limited enough to be specific, as opposed to broadly enough available throughout an economy to be non-specific, is not precisely defined in the SCM Agreement and can only be determined on a case-by-case basis."[248] The Panel therefore determined that it would be appropriate to consider this question in its analysis of the details of Commerce's determination of *de jure* specificity in respect of lending by SOCBs to the OTR Tire industry.

198. In its report, the Panel "examine[d] in some detail the documents cited by the USDOC in the light of its determination, with a view to seeing whether those documents support the inferences, and the ultimate conclusion, drawn from them by the USDOC."[249] The Panel explained that, at the central government level, Commerce:

> noted in particular that: (i) the [GOC] 11th Five-Year Plan . . . provided for increasing the development of important spare parts for the automobile industry; (ii) the GOC Catalogue identified the "production of advanced belt tires" as an "an encouraged national project"; (iii) the "Implementing Regulation" identified the GOC Catalogue as the "'important basis for funding investments directions, etc.'"; and (iv) the "SETC Circular 716" under the 10th Five-Year Plan identified the production of "meridian tyres" as a national priority and required that the contribution of public funds be reasonably directed in order to guarantee the realization of the target under the plan.[250]

199. The Panel analyzed the GOC 11th Five-Year Plan (2006-2010) and noted that "in its own words, the stated purpose of the GOC 11th Five-Year Plan is 'to clarify the national strategic intention, define the key emphasis in the government work and guide the behaviour of market subject.'"[251] After reviewing the contents of the document, the Panel found that it "supports the USDOC's conclusion that this document identified automobile spare parts as a target for development."[252]

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[248] Panel Report, para. 9.42.

[249] Panel Report, para. 9.53 (citations omitted).

[250] Panel Report, para. 9.53 (citations omitted).

[251] Panel Report, para. 9.55.

[252] Panel Report, para. 9.55.

200. The Panel considered "The Implementing Regulation of the 11th Five-Year Plan" and determined that:

> the Implementing Regulation in its own words confirms the finding of the USDOC that the function of the GOC Catalogue which it cross-references is to form the basis for investment direction by the various levels of government. It also appears from the mandatory wording of the Regulation, and its references to penalties for violating the restrictions on financing, investment, and business transactions relating to the categories, that the categories, and thus the GOC Catalogue elaborating the details thereof, are mandatory. We further note that the Regulation explicitly provides that a principal function of the GOC Catalogue is the allocation of loan financing by financial institutions – the categories are defined in large part in terms of whether funds are required to be provided, prohibited from being provided, and/or subject to recovery. In other words, the Regulation indicates that the function of the GOC Catalogue is to provide the details on how the investment priorities in the central government plan are to be implemented by the lower levels of government.[253]

The Panel thus found Commerce's "characterization of the Implementing Regulation to be reasonable and supported by the record evidence."[254]

201. The Panel examined the GOC Catalogue (11th Five-Year Plan) and explained that:

> [T]he central government's five-year plan indicates certain priority industries and activities for investment, and . . . its Implementing Regulation both defines the encouraged, restricted and prohibited categories, and indicates that the GOC Catalogue contains the list of the particular projects that fall within each of these categories. Thus, the GOC Catalogue – in particular its encouraged category – identifies the universe of types of projects singled out as a matter of national policy for encouragement and investment.[255]

Thus, the Panel expressed its view that "this document is the central document in the USDOC's specificity determination."[256] The Panel reasoned that its "conclusion as to the *de jure* specificity finding must necessarily hinge on whether the encouraged projects, taken as a whole, could

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[253] Panel Report, para. 9.60.

[254] Panel Report, para. 9.60.

[255] Panel Report, para. 9.61.

[256] Panel Report, para. 9.61.

reasonably be viewed as a sufficiently discrete segment of the economy as to constitute, collectively, 'certain enterprises'."[257]

202. The Panel noted that "China's main argument about the GOC Catalogue is that, even if this document referred to all elements of a subsidy, its coverage is too broad to give rise to a finding of specificity."[258] The Panel further noted that China argued that "the sectors or categories under which the encouraged projects are grouped do cover a wide swath of economic activity."[259] In the Panel's view, however:

> [A]s a factual matter what is either "encouraged", "restricted", or "to be abolished" within a given sector pursuant to the GOC Catalogue is clearly not the entirety of that sector. Indeed, there is considerable overlap in the sectors identified in the three respective categories: twelve sectors appear in all three lists; and an additional five sectors appear in two of the lists. Purely as a matter of logic, it would be impossible for a given sector, in its entirety, to be simultaneously "encouraged", "restricted", and/or "to be abolished". Thus, to note that the sectors under which the encouraged projects are grouped cover a broad spectrum of economic activity adds little to our analysis of the USDOC's *de jure* specificity determination.[260]

203. The Panel considered "more relevant the characterization by the *US – Upland Cotton* panel that non-specific subsidies are broadly available throughout an economy, in contrast to specific subsidies to which access is limited to a 'sufficiently discrete segment' of an economy as to constitute 'certain enterprises'."[261] In light of this standard, the Panel concluded that:

> [W]e do not see that the documents of record demonstrate that the list of projects in the "encouraged" category spans "virtually the entire range of economic activity in China", as suggested by China. We thus do not consider that these documents would compel a reasonable and objective investigating authority to conclude that any subsidies granted on the basis of that category were non-specific. To the contrary, we consider that a reasonable and objective investigating authority could conclude that any subsidies granted on the basis of the "encouraged" category were to a sufficiently discrete segment of the economy as to be limited to "certain enterprises".

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[257] Panel Report, para. 9.61.

[258] Panel Report, para. 9.65.

[259] Panel Report, para. 9.66.

[260] Panel Report, para. 9.66 (citations omitted).

[261] Panel Report, para. 9.67.

> For these reasons, we consider reasonable the USDOC's reliance, in reaching its *de jure* specificity determination in respect of SOCB lending to the OTR industry, on the reference in the GOC Catalogue to "'advanced belt tires […]'" as an "'encouraged'" project.[262]

204. The Panel also examined the 10th Five-Year Plan of the Government of China and SETC Circular 716. The Panel recognized that before Commerce China argued that "the central planning documents are non-binding general policy orientations."[263] Nevertheless, the Panel found that:

> Given the detailed and precise descriptions, in respect of tire industry investments to be "encouraged" or "supported", . . . and the fact that these encouraged investment projects are specifically addressed to all of the sub-central government entities, which are enjoined to "abide by and implement" the Circular, we consider that their own wording seems to support the USDOC's finding that the SETC Circular 716 conveyed policy directions, *inter alia*, concerning investment in the OTR tires industry, to those other levels of government.[264]

205. The Panel also considered Commerce's "analysis and conclusions in respect of the sub-central planning documents, with a view to assessing whether they contain evidence, as the USDOC found, that the sub-central governments established and carried out their own planning

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[262] Panel Report, para. 9.71-72.

[263] Panel Report, para. 9.79.

[264] Panel Report, para. 9.79.

by implementing the central government plans."[265] With respect to GTC, a respondent tire producer in the *OTR Tires* CVD investigation, the Panel expressed its view that:

> Given the explicit references to GTC's tire project in the provincial and municipal planning documents cited by the USDOC, and the similarity of the priorities for the tire industry in these documents to the description in the GOC Catalogue of the "encouraged" tire project, and the references to the provision of credit financing to the projects targeted for development, and given the indications in the central-level documents that the lower-level governments are to establish their own plans based on the central plans, we consider that it was reasonable for the USDOC to have concluded, in respect of GTC, that these provincial and

[265] Panel Report, para. 9.80. While it is clear that the Panel considered the provincial and municipal policy documents in upholding Commerce's policy lending specificity determination, it is unclear how much weight the Panel accorded these documents. In this regard, the Panel stated that:

> given [Commerce]'s determination that the programme is a central level programme, we must analyze its specificity determination at the same level. If we were to find that the specificity determination was not supported by the central government-level planning documents, such that the programme was non-specific, then provincial and/or municipal-level evidence of specific instances of implementation of the central-level programme (even if they referred explicitly to particular industries and/or enterprises) could not override the programme's non-specificity.

Panel Report, para. 9.49. While these sentences may be interpreted as suggesting that the provincial and municipal policy documents are less probative than the central government policy documents, the Panel recognized that Commerce based its specificity determination on the totality of the evidence, including the central, provincial, and municipal policy documents. Further, it would be incorrect as a matter of logic to suggest that, if the central government policy documents are insufficient to support a specificity determination, then the provincial and municipal documents could not provide the necessary support. The central government policy documents on the record of a CVD investigation could establish that a granting authority maintains legislation which establishes a subsidy program but only suggests, and does not clearly establish, that access to the subsidy is limited. Further, as in China, the provincial and municipal governments could implement the central government plans in their own policy documents. Under such circumstances, provincial and municipal policy documents could flesh out the subsidy program and provide the necessary evidence clearly substantiating that access to the subsidy program is explicitly limited to certain enterprises within the meaning of Article 2.1(a) of the SCM Agreement.

> municipal plans implemented the central plans for development of the OTR tires industry, including in respect of the provision of credit financing.[266]

Similarly, with respect to Starbright, another Chinese tire producer, the Panel reasoned that:

> Given the explicit references in the Hebei planning documents to the rubber industry and the automobile parts industry, as well as to the provision of credit financing in support of projects in these industries, we consider that it was reasonable for the USDOC to have concluded that these documents implemented the central-level plan in respect of the OTR tires industry, which included the provision of financing to that industry.[267]

206. After conducting the thoroughgoing analysis of the evidentiary record described above, the Panel concluded that:

> [A] reasonable and objective investigating authority could have determined, on the basis of the evidence on the record, that the Government of China, at the central level, explicitly identified "certain enterprises" in the sense of Article 2.1(a) of the SCM Agreement for encouragement and development (including the tire industry), and instructed the sub-central governments to implement this policy. We also conclude that a reasonable and objective investigating authority could have determined that pursuant to these same planning documents, SOCBs (among other financial institutions) were instructed to provide financing to the "encouraged" projects. Thus, we find no legal error in the USDOC's determination on the basis of these documents that government authorities at all levels of government in China (central, provincial and municipal) effectuated policies to ensure the provision of loans to the OTR tire industry.[268]

207. The Panel then considered Commerce's determination that the SOCBs acted pursuant to the government policies set forth in the planning documents when they provided loans to tire producers and found that a reasonable and objective investigating authority could conclude on the basis of the record evidence that they did.[269]

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[266] Panel Report, para. 9.89.

[267] Panel Report, para. 9.94.

[268] Panel Report, para. 9.95.

[269] Panel Report, paras. 9.96-105. For example, as the Panel noted, part of the record in the *OTR Tires* CVD investigation included a determination and supporting evidence from a previous investigation – *CFS Paper from China* – in which Commerce undertook an in-depth study of the operation of China's banking sector and determined that SOCBs followed government industrial policies in making their lending decisions. *See, e.g.,* Panel Report, paras., (continued...)

208. On the basis of the analysis and consideration of the evidence described above, the Panel ultimately concluded that China had "failed to establish that the USDOC's finding in the OTR investigation, that lending by SOCBs to the OTR tire industry (in particular to GTC and Starbright) was *de jure* specific, was inconsistent with the obligations of the United States under Article 2.1(a) of the SCM Agreement."[270]

209. We have extensively summarized above the Panel's analysis of the totality of evidence before Commerce in order to convey the comprehensiveness of the Panel's analysis. As explained below, on appeal, China attempts to reduce the Panel's analysis to an individual sentence and paint it as undermined by a single fact. Contrary to China's criticism, and in contrast to China's argument, the Panel's analysis was thorough, well-reasoned, and correct.

b. China's Argument on Appeal Is Without Merit

210. On appeal, China argues that the Panel's interpretation and application of the term "certain enterprises" to the relevant facts was "plainly in error."[271] On the contrary, it is China's arguments that are erroneous.

211. China begins its analysis of the meaning of the term "certain enterprises" by referring to the panel report in *US – Upland Cotton* and noting that "[t]he object and purpose of Article 2 within the SCM Agreement is to filter out those subsidies that 'are broadly available and widely used throughout an economy and are therefore not subject to the Agreement's subsidy

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[269] (...continued)
9.101 and 9.103. Additionally, as noted above, the national, provincial, and municipal policy documents all make reference to the banks relying on various government policies in making lending decisions. For example, the Implementing Regulation states that the GOC Catalogue serves as an important basis for the central, provincial, and municipal governments to direct funding and investment; SETC Circular No. 716 states that the government should direct the contribution of public funds as to guarantee the realization of the targets under the planning documents; the Guizhou Provincial Government 9th Five-Year Plan states that policy bank loans and loans from abroad should be allocated according to the plan; the Guiyang Municipal Government 11th Five-Year Plan states that the plan should be implemented by enhancing cooperation between banks and enterprises and financial institutions are encouraged to provide funds for projects in conformity with economic policies; and the guidelines for the Hebei Provincial Government 11th Five-Year Plan for Technology directs banks to support key projects. In this regard, the Panel noted that China had been unable to point to evidence to contradict Commerce's determination that SOCBs acted pursuant to industrial policies in providing credit. Panel Report, para. 9.104. Before the Appellate Body, China also fails to point to any such contradictory evidence.

[270] Panel Report, para. 9.107.

[271] China Appellant Submission, para. 250.

disciplines'."[272] As we noted earlier, the relevant object and purpose under Article 31 of the Vienna Convention is that of the treaty itself. China's discussion of the purported object and purpose of a particular provision of the SCM Agreement is not germane to a proper interpretative analysis under the customary rules of treaty interpretation.

212. China then selectively quotes from the panel reports in *US – Upland Cotton* and *EC – Large Civil Aircraft*, and even from a U.S. appellate submission in *US – Large Civil Aircraft (Second Complaint)*. In particular, China notes that "the panel in *US – Upland Cotton* interpreted the term 'certain enterprises' to refer to a 'limited group of producers of certain products'" and China suggests that the panel "considered that a subsidy is provided to 'certain enterprises' if the recipients of the subsidy constitute no more than a 'discrete segment' of the economy of the Member granting the subsidy."[273] China also quotes from the panel report in *EC – Large Civil Aircraft*, which "recently found that subsidies available to a 'wide array of economic sectors' are not subsidies provided to 'certain enterprises'."[274]

213. While China appears to accurately quote these prior panel reports, its doing so does little to illuminate the meaning of the term "certain enterprises." The Panel, too, took into consideration the panel report in *US – Upland Cotton* and agreed with that panel that "the dividing line between a subsidy to which access is limited enough to be specific, as opposed to broadly enough available throughout an economy to be non-specific, is not precisely defined in the SCM Agreement and can only be determined on a case-by-case basis."[275] Consequently, the Panel embarked on the extensive analysis of the evidentiary record described above in order to ascertain whether the subsidy in question was limited to "certain enterprises," and the Panel ultimately concluded that it was.

214. China attempts to reduce the Panel's extensive analysis to a single sentence, noting twice that the Panel "recognized that any determination of *de jure* specificity in respect of the alleged 'policy lending' subsidy 'must necessarily hinge on whether the encouraged projects, taken as a whole, could reasonably be viewed as a sufficiently discrete segment of the economy as to constitute, collectively, "certain enterprises".'"[276] China argues, based on a single fact, that the Panel's conclusion that the subsidy was limited to "certain enterprises" was in error because, in China's view, "[i]t is impossible to characterize 539 industries spanning 26 different economic sectors as a 'discrete segment' of the Chinese economy."[277] China's argument cannot be accepted.

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[272] China Appellant Submission, para. 248.

[273] China Appellant Submission, para. 248.

[274] China Appellant Submission, para. 248.

[275] Panel Report, para. 9.41.

[276] China Appellant Submission, paras. 249, 251.

[277] China Appellant Submission, para. 255.

215. First, China's assertion that the GOC Catalogue identifies 539 encouraged "industries" is simply inaccurate.[278] The Panel found that the GOC Catalogue listed:

> individual project types, described in very specific and narrowly-circumscribed terms. To us, the impression given by the narrowness of the projects described within each of the listed sectors (in spite of the breadth of those sectors as a whole, individually and collectively), is not one of broad availability but rather of singling out of very particular types of projects.[279]

216. China argues that "the 539 encouraged industries are not 'described in very specific and narrowly-circumscribed terms.'"[280] In China's view, "[e]ach one of these categories, by itself, represents a broad segment of economic activity,"[281] and the projects that are "encouraged" target a number of economic sectors and thus "encompass a vast swath of the entire Chinese economy."[282]

217. Here, China appears to be challenging the Panel's factual finding in respect of the contents of the GOC Catalogue, and in particular the contents of the items listed in the "encouraged" category. This is not an appropriate matter for appellate review. Under Article 17.6 of the DSU, review by the Appellate Body is "limited to issues of law covered in the panel report and legal interpretations developed by the panel."[283] China indicates that it "considers that the Panel's examination of the GOC Catalogue, as well as the other economic planning documents on which Commerce relied for its finding of specificity, involved the application of a treaty term ('certain enterprises') to the facts of the OTR investigation."[284] In China's view, "[t]his is an issue of law."[285] While it may be the case that the Panel's ultimate finding that the

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[278] China Appellant Submission, para. 244; *see also* China First Written Submission before the Panel, note 186 (where China refers to the 539 listings in the GOC Catalogue as "539 encouraged national projects" and *not* "539 industries").

[279] Panel Report, para. 9.68.

[280] China Appellant Submission, para. 250.

[281] China Appellant Submission, para. 250.

[282] China Appellant Submission, para. 246.

[283] DSU, Article 17.6.

[284] China Appellant Submission, para. 251, note 264.

[285] China Appellant Submission, para. 251, note 264. While China asserts that this aspect of its appeal raises an "issue of law," China argues in the alternative that the Panel's assessment of the facts was not objective, as required by Article 11 of the DSU. As an initial matter, we note that the Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO

(continued...)

economic planning documents supported Commerce's specificity determination is an issue of law concerning the legal interpretation of the term "certain enterprises," the Panel's intermediate finding that the GOC Catalogue lists "very particular types of projects" rather than "industries" is a finding of fact. Thus, the premise of China's argument on appeal – a challenge to the Panel's finding of fact – is flawed, and is not the proper subject of a WTO appeal.

218. China also suggests that the Panel "appears to have been influenced in its conclusion by the existence of the 'restricted' and 'eliminated' categories of industries described in the GOC Catalogue."[286] Lending was prohibited to projects in both the restricted and eliminated categories.[287] China criticizes the Panel's reference to these other categories, arguing that "[t]he content and description of the 'restricted' and 'eliminated' categories was not relevant to whether the encouraged category of industries – the alleged recipients of 'policy lending' – collectively constituted 'certain enterprises'."[288]

219. China narrowly focuses its argument on one fact, which is actually not a "fact" at all, *i.e.*, that the "encouraged" category purportedly included 539 "industries." The Panel, on the other hand, examined all of the evidence on the record, including evidence of the "restricted" and "eliminated" categories. The Panel's examination of the totality of the evidence, in this regard, as we explained above, was motivated by its proper recognition that "a panel reviewing a determination on a particular issue that is based on the 'totality' of the evidence relevant to that issue must conduct its review on the same basis."[289]

220. Furthermore, the Panel noted that there are an even larger number of "restricted" and "eliminated" listings – 589 – within the GOC Catalogue for which lending is prohibited.[290] In this regard, the Panel explained:

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[285] (...continued)
dispute settlement process itself." *EC – Poultry (AB)*, para. 133. China's argument, in the alternative, in a footnote, that the Panel acted inconsistently with Article 11 of the DSU does not appropriately reflect the seriousness of the allegation China is making. In any event, China's argument is without merit. In contrast to China's narrow focus on pieces of evidence, which it mischaracterizes, the Panel objectively considered the *totality* of the evidence before Commerce and correctly concluded that the policy lending subsidy was *de jure* specific within the meaning of Article 2.1(a) of the SCM Agreement.

[286] China Appellant Submission, para. 251.

[287] *See, e.g.,* Articles 18 & 19 of the Implementing Regulation (which states that lending is prohibited to projects in the restricted and eliminated categories) (Exhibit US-87, p. 12-13).

[288] China Appellant Submission, para. 251.

[289] Panel Report, para. 9.52.

[290] Panel Report, para. 9.63.

> To us, the impression given by the narrowness of the projects described within each of the listed sectors [in the GOC Catalogue] (in spite of the breadth of those sectors as a whole, individually and collectively), is not one of broad availability but rather of singling out of very particular types of projects. Furthermore, as the Implementing Regulation makes clear, the express purpose of both the "restricted" and "eliminated"/"to be abolished" categories is to impose limitations on investment, provision of credit, etc., in respect of the projects in those categories.[291]

221. China ignores the vast majority of the evidence that was before Commerce and criticizes the Panel for basing its conclusion on the totality of the evidence. China's argument is without merit. The Panel's conclusion was well reasoned, based on a comprehensive examination of the record evidence, and correct.

222. China also argues that interpreting "certain enterprises" to cover the range of economic sectors included within the "encouraged" category found in the GOC Catalogue would be inconsistent with the panel's interpretation of "certain enterprises" in *EC – Large Civil Aircraft*.[292] In particular, China points to the panel's determination that access to European Investment Bank ("EIB") loans provided pursuant to *Eligibility Guidelines* were not limited to certain enterprises.[293]

223. China's reliance on the panel report in *EC – Large Civil Aircraft* ignores key distinctions between the facts in this dispute and the facts in *EC – Large Civil Aircraft*. For example, there was no indication in *EC – Large Civil Aircraft* that the *Eligibility Guidelines* listed a large number of projects for which lending was prohibited. To the contrary, the panel found that EIB loans were "available for essentially all projects that contribute to one or more of its broad policy objectives."[294] Further, there was no indication in *EC – Large Civil Aircraft,* as there is here, that various levels of the government actually named particular investigated producers and their facilities for the investigated merchandise as a priority for which lending should be encouraged.[295] Finally, we would note that the panel report in *EC – Large Civil Aircraft* has not yet been adopted by the DSB.

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[291] Panel Report, para. 9.68.

[292] *See* China Appellant Submission, paras. 252-253.

[293] *See* China Appellant Submission, para. 253.

[294] *EC – Large Civil Aircraft (Panel),* para. 7.928.

[295] *See, e.g., EC – Large Civil Aircraft (Panel)*, para. 7.930 ("there is no evidence before us to suggest that the loans at issue were granted because of any intention to provide that type of assistance only to Airbus").

224. China also points to the purported position taken by the United States in other disputes on the issue of what constitutes "certain enterprises."[296] China argues that these positions are inconsistent with the position of the United States in this dispute. China's reference to these disputes is a distraction. The issue here is whether the Panel, based on the evidence before it in this dispute, properly determined that Commerce's specificity determination was consistent with Article 2.1(a) of the SCM Agreement. Furthermore, China mischaracterizes the U.S. positions in the other disputes it discusses and ignores key distinctions between the facts in those disputes and the facts here.

225. For example, China asserts that in *US – Large Civil Aircraft (Second Complaint)*, the United States argued that a program that targeted the defense and aerospace industry was not sufficiently discrete to support a finding that access to it was limited to a group of enterprises or industries within the meaning of Article 2 of the SCM Agreement.[297] China mischaracterizes the U.S. position.

226. There were a number of subsidy programs alleged in *US – Large Civil Aircraft (Second Complaint)*. The statement made by the United States on which China relies pertained to Independent Research and Development ("IR&D") and Bid Proposal ("B&P") Reimbursements. The United States was explaining why these reimbursements were neither *de jure* nor *de facto* specific under Article 2 of the SCM Agreement.

227. In explaining why the reimbursement programs were not *de jure* specific, the United States explained that the regulations pursuant to which the reimbursements were made placed no limitations on the industries or enterprises that could claim reimbursements.[298] That is, the reimbursement programs were not restricted to the defense and aerospace industries. Instead, the only requirements for the reimbursements were that the company have a cost-based contract with a U.S. government agency, that the company had, in fact, incurred expenses for research and development or bid and proposal activities that were not required in the performance of any other contract, and that they were allocable, reasonable, and not otherwise unallowable.[299]

228. Furthermore, the reimbursement programs in *US – Large Civil Aircraft (Second Complaint)* are factually distinct from the policy lending program in important respects. For example, with respect to the IR&D program, the United States explained that "research and

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[296] *See* China Appellant Submission, para. 254.

[297] China Appellant Submission, para. 254.

[298] *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) ("US – Large Civil Aircraft (Second Complaint) (Panel)")*, U.S. First Written Submission, para 304 (available at: http://www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/disputes-sorted-compl).

[299] *US – Large Civil Aircraft (Second Complaint) (Panel)*, U.S. First Written Submission, para 304.

development are simply activities in which any company in any industry may engage."[300] In contrast, China's policy lending subsidy targeted specific projects. Moreover, in *US – Large Civil Aircraft (Second Complaint)*, the reimbursement programs did not specifically name Boeing,[301] unlike the provincial and municipal planning documents in the *OTR Tires* CVD investigation, which specifically named an investigated tire producer and its production facilities.

229. Finally, China argues that the United States asserted in the *US – Upland Cotton* dispute that subsidies provided to the entire agricultural industry are not limited to a group of enterprises or industries. China is incorrect. The panel in *US – Upland Cotton* explained that the United States had argued that the alleged subsidies in question were "available to the whole the United States agriculture *sector* and the United States contends that the this is too broad and diverse to constitute a single enterprises or industry or group of enterprises or industries."[302]

230. Once again, China ignores key aspects of the economic policy documents on the record of the *OTR Tires* CVD investigation and before the Panel that distinguish the facts in this dispute from those in *US – Upland Cotton*. There is no evidence that the policy lending subsidy is available to an entire sector of the Chinese economy. Instead, the policy documents are much more specific, naming specific projects and even an investigated tire producer and its production facilities.

231. As demonstrated above, the Panel engaged in a comprehensive analysis of the evidence that Commerce had considered in making its specificity determination, and concluded, in light of the totality of that evidence, that Commerce's specificity determination was not inconsistent with Article 2.1(a) of the SCM Agreement. China's argument that the Panel's interpretation and application of the term "certain enterprises" constituted legal error, on the other hand, ignores virtually all of the evidence on the record and depends entirely on a factual premise that was expressly rejected by the Panel. Consequently, China's argument is without merit, and we respectfully request that the Appellate Body reject China's appeal.

B. The Panel Correctly Interpreted Article 2.2 of the SCM Agreement

232. Before the Panel, China challenged Commerce's determination in the *LWS* CVD investigation that the provision of land-use rights to certain producers located in an industrial park within Huantai County was regionally specific within the meaning of Article 2.2 of the SCM Agreement. The Panel found that Commerce's specificity determination was *inconsistent*

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[300] *US – Large Civil Aircraft (Second Complaint) (Panel)*, U.S. First Written Submission, para 306.

[301] *US – Large Civil Aircraft (Second Complaint) (Panel)*, U.S. First Written Submission, para 306.

[302] *US – Upland Cotton (Panel),* para. 7.1126 (emphasis added) (citations omitted).

with Article 2 of the SCM Agreement.[303] The United States has not appealed this finding. China, however, does appeal the Panel's interpretation of Article 2.2 of the SCM Agreement.

233. China raises two issues on appeal. First, China argues that the Panel "erred in interpreting the term 'subsidy' in Article 2.2 of the SCM Agreement to refer to either a financial contribution or a benefit, and in finding that Article 2.2 permits an investigating authority to make a finding of regional specificity based solely 'on the element of the financial contribution'."[304] Second, China argues that the Panel "erred in its interpretation of Article 2.2 of the SCM Agreement in finding that the existence of a 'distinct' or 'unique' 'regime' for the provision of a subsidy is legally relevant to a determination of specificity under this provision."[305] For the reasons given below, China's arguments are without merit.

1. The Panel Correctly Interpreted the Term "Subsidy" in Article 2.2 of the SCM Agreement

234. China's appeal of the Panel's interpretation of the term "subsidy" in Article 2.2 of the SCM Agreement is no different than its appeal of the Panel's interpretation of the same term in Article 2.1(a), discussed above. As the Panel explained:

> We recall our finding, *supra*, that it is not necessary for a granting authority or the relevant legislation to identify all elements of a specific subsidy for a valid finding of *de jure* specificity. We thus find no legal error in the USDOC having based its determination of regional specificity on the element of the financial contribution, *i.e.*, on the provision of land-use rights by Huantai County.[306]

235. China argues that "[a]s the facts of the LWS investigation amply demonstrate, analyzing specificity at the level of the financial contribution can lead to a finding of regional specificity in respect of a subsidy that is not 'limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority'."[307] This argument is belied, however, by the Panel's conclusion, even after analyzing specificity at the level of the financial contribution, that Commerce's specificity determination was not consistent with the requirements of Article 2.2. China's concern is unfounded.

236. China advances no other argument in support of its appeal, simply noting that "[a]s with its erroneous interpretation of Article 2.1(a), the Panel's interpretation of Article 2.2 ignores the

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[303] Panel Report, para. 17.1(b)(ii).

[304] China Notice of Appeal, para. 6(a).

[305] China Notice of Appeal, para. 6(b).

[306] Panel Report, para. 9.155.

[307] China Appellant Submission, para. 264.

express definition of the term "subsidy" and would undermine the object and purpose of filtering out subsidies that are available throughout the jurisdiction of the granting authority and therefore not countervailable."[308] In response, we refer back to our arguments concerning the definition of the term "subsidy" and the Panel's assessment of its relevance to the proper interpretation of the provisions of Article 2, which we presented above in section III.A.1.a of this submission. For the reasons we have already given, the mere use of the term "subsidy" in Article 2.2 does not signify that an investigating authority must determine that both the financial contribution and benefit are regionally specific in order for the subsidy to be regionally specific within the meaning of Article 2.2.[309] The Panel's legal analysis of Article 2.2 of the SCM Agreement is, in this regard, correct and should not be reversed.

2. The Panel Made No "Finding" that the Existence of a "Distinct" or "Unique" "Regime" for the Provision of a Subsidy Is Legally Relevant to a Determination of Specificity

237. China also appeals what it describes as the Panel's "finding" that "the existence of a 'distinct' or 'unique' 'regime' for the provision of a subsidy is legally relevant to a determination of specificity" under Article 2.2 of the SCM Agreement.[310]

238. In the first place, it does not appear that the Panel made any such "finding" and the statements to which China points are not "legal interpretations developed by the panel."[311] Pursuant to Article 17.6 of the DSU, Appellate Body review is "limited to issues of law covered in the panel report and legal interpretations developed by the panel." Additionally, Article 17.3 of the DSU provides that "[t]he Appellate Body may uphold, modify or reverse the legal findings and conclusions of the Panel." Taken together, these provisions make clear that it is the legal findings and conclusions of a panel and issues of law, and legal interpretation developed by a

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[308] China Appellant Submission, para. 264.

[309] China also notes that the Panel referred to *de jure* specificity in the context of Article 2.2 of the SCM Agreement and China suggests that this was incorrect because regional specificity determinations pertain to subsidies that are regionally specific "in fact." China Appellant Submission, note 276. Given its brevity, China's argument is somewhat unclear. We note, however, that the Panel's reference to "*de jure* specificity" appears to be limited to its description of its own prior finding, which concerned *de jure* specificity. Additionally, we would note that Article 2.2 does not limit a regional specificity determination to a *de jure* or *de facto* analysis. To the contrary, neither of the terms related to those concepts, "explicitly" in Article 2.1(a) and "in fact" in Article 2.1(c), appears in this provision. Accordingly, a regional specificity determination could, consistent with Article 2.2, be based on either a *de jure* or a *de facto* specificity analysis.

[310] China Notice of Appeal, para. 6(b).

[311] DSU, Article 17.6.

panel in support of its findings and conclusions, that are the proper subject of an appeal. China's appeal would thus not appear to be properly before the Appellate Body.

239. That the Panel statements China identifies do not constitute a finding is evident from China's Appellant Submission and the passages of the Panel Report to which China refers. For example, China complains that the Panel "stated that Commerce had failed to identify any evidence 'that the provision of land-use rights in the Industrial Park constituted a distinct regime for the provision of that financial contribution, compared with the provision of financial contributions in the form of land-use rights outside the Park.'"[312] Actually, the Panel noted that it saw "no basis under the USDOC's analytical approach, and the United States points to no record evidence, to establish that the provision of land-use rights in the Industrial Park constituted a distinct regime for the provision of that financial contribution, compared with the provision of financial contributions in the form of land-use rights outside the Park."[313] This was simply a passing statement about an analytical approach Commerce did not use and evidence to which the United States did not point during the dispute.

240. China also suggests that the "Panel made several other statements *to the effect that it would have reached a different conclusion* if the United States had been able to demonstrate that the provision of land-use rights in the New Century Industrial Park 'constituted a land-use regime that was clearly distinguishable from the general provision of land-use rights by the county government.'"[314] On its face, this statement indicates that the Panel did not actually make a finding, only that China believes it "would have" made one. In addition, China mischaracterizes the Panel's statement. The Panel simply noted that "had the USDOC made further inquiries into these or similar issues, and depending on the outcome of those inquiries, our conclusions as to the WTO-consistency of the USDOC's regional specificity finding in respect of the provision of land-use rights to Aifudi *might* have been different."[315] This is an unremarkable proposition: had the facts been different, the Panel's conclusion *might* have been different. Additionally, once again, this statement does not reflect a legal interpretation or a finding made by the Panel.

241. China's presentation of its argument in its appellant submission suggests that China itself recognizes that the Panel did not make any finding in respect of this issue. China argues only that "[t]hese statements by the Panel *appear to suggest* that the Panel *would have found* the alleged land-use rights subsidy to be regionally specific," and "[t]he Panel's reasoning *appears to endorse* an argument by the United States . . . ."[316] China further suggests that "[t]he Panel's *apparent endorsement* of this interpretation has important implications for the compliance

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[312] China Appellant Submission, para. 265.

[313] Panel Report, para. 9.159.

[314] China Appellant Submission, para. 265 (emphasis added).

[315] Panel Report, para. 9.163 (emphasis added).

[316] China Appellant Submission, para. 266 (emphasis added).

obligations of the United States in this proceeding, as well as for the operation of Article 2 of the SCM Agreement generally."[317] What the Panel "appear[ed] to suggest," arguments it "appear[ed] to endorse," and a finding it "would have" made does not amount to a "finding" that the Panel actually did make that could be the subject of a WTO appeal.

242. In addition, the Panel sought to clarify that it was not making a finding in the statements China identifies:

> *Nor*, when we say that the United States has pointed to no record evidence that the Industrial Park constituted a unique land-use regime, as might have been indicated by special rules or distinctive pricing or other elements that distinguished the provision of land in the Park from the provision of land outside the Park, *do we mean to imply any factual findings of our own* that the Industrial Park was or was not such a regime, or that the terms and conditions for land-use inside the Park were or were not indistinguishable from those outside.

The Panel expressly stated that it was not making a factual finding, and there is no indication in the Panel statements China identifies that the Panel made a legal finding either.

243. As noted above, China suggests that the Panel's statements raise concerns about the "implications for the compliance obligations of the United States in this proceeding, as well as for the operation of Article 2 of the SCM Agreement generally."[318] China's concerns are unfounded. The Panel found that Commerce "acted inconsistently with the obligations of the United States under Article 2 of the SCM Agreement by determining that the government provision of land-use rights, in the LWS investigation, was regionally-specific"[319] and "recommend[ed] that the United States bring its measures into conformity with its obligations under" the SCM Agreement.[320] The Panel did not, in the conclusion of its report, suggest ways in which the United States could implement its recommendations, as is contemplated under Article 19.1 of the DSU, and there is no indication in the statements China identifies that they are intended to be or actually constitute such a suggestion. Thus, the Panel statements about which China expresses concern have no implications, whatsoever, for the compliance obligations of the United States in this proceeding.

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[317] China Appellant Submission, para. 267 (emphasis added).

[318] China Appellant Submission, para. 267 (emphasis added).

[319] Panel Report, para. 17.1(b)(2).

[320] Panel Report, para. 17.3.

244. Neither do the Panel's statements have any implications "for the operation of Article 2 of the SCM Agreement generally."[321] As explained above, the Panel statements identified by China do not constitute a finding or legal interpretation made by the Panel. Furthermore, we would note that, per Article IX.2 of the WTO Agreement, the Ministerial Conference and the General Council have the exclusive authority to adopt interpretations of the covered agreements, including the SCM Agreement, and panels, the Appellate Body, and the DSB are prohibited by Articles 3.2 and 19.2 of the DSU from adding to or diminishing the rights and obligations of the Members provided in the covered agreements.

245. In any event, the crux of China's appeal with respect to the Panel's discussion of the land-use rights subsidy appears to be China's contention that this discussion suggests that:

> the Panel would have found the alleged land-use rights subsidy to be regionally specific if it had been provided as part of "distinct regime", even if the identical subsidy was available elsewhere in Huantai County.[322]

The United States would note that the Panel never discussed what it would find in the event that "the identical subsidy were available elsewhere in Huantai County." Consequently, China's concern that the Panel statements it identifies will have "important implications" for the operation of Article 2 of the SCM Agreement is unfounded.

246. For the reasons given above, the United States respectfully requests that the Appellate Body reject China's arguments and uphold the Panel's findings and legal interpretations of Article 2 of the SCM Agreement.

IV. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 14(D) OF THE SCM AGREEMENT

247. China appeals the Panel's finding that Commerce's determination to reject in-country prices in China as benchmarks for hot-rolled steel ("HRS") in the CWP and LWR investigations was not inconsistent with Article 14(d) of the SCM Agreement.[323] As we demonstrate below, China's arguments are without merit.

248. At the outset, the United States notes its agreement with China that China's claim, before the Panel and on appeal, presents "a straightforward question of legal interpretation."[324] The pertinent facts are not disputed. As the Panel noted, in the CWP and LWR CVD investigations, Commerce determined, in reliance on available facts and adverse inferences, that 96.1 percent of

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[321] China Appellant Submission, para. 267.

[322] China Appellant Submission, para. 267.

[323] Panel Report, para. 17.1(c)(vi); *see also* China Notice of Appeal, para. 7.

[324] China Appellant Submission, para. 272.

Chinese HRS production was from SOEs.[325] Commerce also examined import data, which showed that the volume of imports of HRS amounted to only three percent of total Chinese HRS production.[326] Commerce concluded that "the import quantities are small relative to Chinese domestic production of HRS."[327] China did not challenge before the Panel, and does not challenge on appeal, Commerce's determinations to rely on facts available and adverse inferences to establish the percentage of government ownership of HRS producers,[328] or Commerce's assessment of the volume of imports. Hence, these facts are undisputed.

249. In its final determinations in these investigations, Commerce determined that, because of the Government of China's "overwhelming" involvement in the HRS market, private prices of HRS in China were not an appropriate basis of comparison for determining whether a benefit was conferred as a result of the government provision of HRS.[329] Commerce reasoned that, because the government accounted for more than 96 percent of HRS production, "the use of private producer prices in China would be akin to comparing the benchmark to itself, (*i.e.*, such a benchmark would reflect the distortions of the government presence)."[330] Therefore, Commerce did not use prices in China as benchmarks, but rather used as a benchmark world market prices from Steel Benchmarker, which provides a global index of the prices available in the Atlantic and Pacific Basin.[331]

250. The Panel considered that the "central legal question" before it was "whether record evidence that the government was the predominant supplier of a good can be sufficient, on its own, to establish market distortion such that rejection of in-country private prices as benchmarks would be permissible under Article 14(d) of the SCM Agreement."[332] The United States agrees

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[325] *See* Panel Report, para. 10.49; *see also CWP CVD Final Decision Memorandum*, at 11 (Exhibit CHI-1) *and LWR CVD Final Decision Memorandum*, at 4 (Exhibit CHI-2).

[326] *See LWR China Verification Report*, at Exh. A-2 (Mar. 5, 2008) (Exhibit US-70); *CWP China Verification Report*, at Exh. A-2 (Mar. 5, 2008) (Exhibit US-65); *CWP Petitioners' Pre-Preliminary Comments*, at Exh. 37 (Oct. 26, 2007) (Exhibit US-66); *and Memo to the File,* "*LWRP: China Import Statistics for Hot-rolled Steel*," at Att. 1 (June 6, 2008) (Exhibit US-68).

[327] *LWR CVD Final Decision Memorandum*, at Comment 7, at 36 (Exhibit CHI-2); *see also CWP CVD Final Decision Memorandum*, at note 212 (Exhibit CHI-1); *see also* Panel Report, para. 10.54.

[328] *See* Panel Report, para. 10.49, note 511.

[329] *See* Panel Report, para. 10.49.

[330] *CWP CVD Final Decision Memorandum*, at 64 (Exhibit CHI-1); and *LWR CVD Final Decision Memorandum*, at 36 (Exhibit CHI-2).

[331] *CWP CVD Final Decision Memorandum*, at 64 (Exhibit CHI-1); and *LWR CVD Final Decision Memorandum*, at 36 (Exhibit CHI-2).

[332] Panel Report, para. 10.38.

with China that "[t]his was the correct formulation of the issue. . . ."[333] However, plainly, the United States and China do not agree on the answer to this legal question.

251. The United States considers that the Panel correctly answered this question in the affirmative, and that the Panel's interpretation of Article 14(d) was consistent with the customary rules of interpretation and in line with the Appellate Body's own interpretation of this provision, as elaborated in the Appellate Body report in *US – Softwood Lumber IV*.

252. China argues on appeal that the Panel erred as a matter of both law and economics, and that the Panel's interpretation of Article 14(d) of the SCM Agreement departed from the Appellate Body's interpretation in *US – Softwood Lumber IV*. However, for the reasons given below, China's arguments fail because they are based on a misreading of the Appellate Body report in *US – Softwood Lumber IV*, a misapplication of inapposite economic theories, and a mistaken notion of the significance of factors other than government market share, which Commerce considered but determined were not relevant to its selection of an appropriate benchmark.

253. The central flaw of China's arguments, as we will elaborate below, is China's failure to appreciate the problem that is being addressed when an investigating authority determines that it is necessary to reject as a benchmark private prices in the country of provision because of the government's predominant role in the market. China appears to believe that the problem identified by the Panel, and by the Appellate Body in *Softwood Lumber IV*, is that government predominance in the market will cause private market prices to be "artificially low." Consequently, China argues that evidence of government predominance in the market is legally insufficient to support a finding of "distortion," *i.e.*, that private market prices align with the government price and are "artificially low," and that, in any event, government predominance, as a matter of economics, is unlikely to cause private market prices to be "artificially low."

254. China misunderstands the problem. The problem with government predominance in the market, as the Panel found, and as the Appellate Body found in *US – Softwood Lumber IV*, is that private prices "will align" with the government price such that a comparison of the government price to a benchmark price from the private market in the country of provision would be circular, that is, it would be tantamount to comparing the government price to itself.[334] It is the circularity inherent in such a comparison that results in a *benefit* calculation – determined by means of such a comparison – that is "artificially low." The "distortion" in the private market prices is the alignment with the government price, and such alignment results from government predominance in the market.

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[333] China Appellant Submission, para. 272.

[334] *See* Panel Report, paras. 10.42-44; *see also US – Softwood Lumber IV (AB)*, para. 101.

255. The question of whether the government price is "artificially low" is the very question being addressed by the benefit analysis, *i.e.*, the comparison of the government price to a price from the commercial market. In order determine whether the government price is "artificially low," the investigating authority must first identify a commercial benchmark, free from the influence of the government's own pricing strategy, with which to compare the government price.

256. China's basic misunderstanding permeates and undermines all of China's arguments. Because of this fundamental flaw, and other errors that will be discussed below, all of China's arguments are without merit.

A. The Panel Did Not Err in Interpreting Article 14(d) of the SCM Agreement to Permit the Rejection of In-Country Private Prices as a Benchmark Where the Only Evidence Relied Upon by the Investigating Authority Is that the Government Is the Predominant Supplier of the Good in Question

257. China argues that the Panel "erred in interpreting Article 14(d) to permit the rejection of in-country private prices as a benchmark where the only evidence relied upon by the investigating authority is that the government is a predominant supplier of the good in question."[335] China's argument is without merit.

258. The Panel properly concluded that, under Article 14(d) of the SCM Agreement, evidence that the government is the predominant supplier of a good in a country is sufficient to justify rejection of in-country private prices as benchmarks for determining the benefit from the government provision of that good. In other words, there is no requirement in Article 14(d) to establish price distortion, in addition to the predominance of the government in the market, before resorting to out-of-country benchmarks.

259. In the discussion that follows, we will demonstrate that the Panel's interpretation of Article 14(d) was proper and consistent with a correct understanding of the Appellate Body's interpretation of that provision, as elaborated in the Appellate Body report in *US – Softwood Lumber IV*. We will also show why China's legal, economic, and evidentiary arguments to the contrary are flawed, primarily due to China's basic misunderstanding of the circular nature of a comparison of the government price to an in-country private market benchmark price in a situation where the government is the predominant supplier of the good in question in the country of provision.

1. The Panel Correctly Interpreted Article 14(d) of the SCM Agreement and the Panel's Interpretation is Consistent with the Appellate Body's Interpretation in *US – Softwood Lumber IV*

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[335] China Notice of Appeal, para. 7(a).

260. In relevant part, Article 14(d) of the SCM Agreement provides:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
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> * * *
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> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

261. The chapeau of Article 14 refers to "any method" used by an investigating authority, and describes the subparagraphs of Article 14 as "guidelines." The Appellate Body has explained that "[t]he reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[336] Moreover, the Appellate Body has emphasized that the provisions in the subparagraphs of Article 14, including Article 14(d), are "guidelines," and has stated that "the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'."[337]

262. These guidelines in Article 14 are to be used in calculating the "benefit" conferred pursuant to Article 1.1 of the SCM Agreement. By now, it is well-established that the term "benefit" as used in the SCM Agreement refers to an advantage or something that "makes the recipient 'better off' than it would otherwise have been, absent that [financial] contribution."[338] To determine whether a financial contribution makes a recipient "better off" than it would have been without it, it is necessary to look to the market. Thus, the Appellate Body has explained that "the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on

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[336] *US – Softwood Lumber IV (AB)*, para. 91.

[337] *US – Softwood Lumber IV (AB)*, para. 92.

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

terms more favourable than those available to the recipient in the market."[339] In other words, a proper comparison to the market is central to a benefit analysis.

263. Analyzing the text of Article 14(d), which provides that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase . . .," the Appellate Body explained that:

> Although Article 14(d) does not dictate that private prices are to be used as the *exclusive* benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration. [Thus,] . . . the starting-point, when determining adequacy of remuneration, is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision. This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods. <u>However, this may not always be the case</u>.[340]

Because it may not always be the case that private prices in the market of provision will generally represent an appropriate measure of the "adequacy of remuneration" for the provision of goods, the Appellate Body has recognized that "investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d) . . ." under certain circumstances.[341]

264. In *US – Softwood Lumber IV*, the panel identified two examples, and the Appellate Body identified a third situation, wherein it would be permissible under Article 14(d) to use a benchmark other than private prices in the country of provision. The panel there "acknowledged that 'it will in certain situations not be possible to use in-country prices' as a benchmark . . .," for example "(i) where the government is the only supplier of the particular goods in the country; and, (ii) where the government administratively controls all of the prices for those goods in the country."[342] The Appellate Body did not disagree with the Panel in this regard. The Appellate Body went further than the Panel, however, and concluded that "investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first

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

[340] *US – Softwood Lumber IV (AB)*, para. 90 (underlining added).

[341] *US – Softwood Lumber IV (AB)*, para. 90; *see also, e.g.*, *Softwood Lumber IV (AB)*, paras. 96, 101, 103.

[342] *US – Softwood Lumber IV (AB)*, para. 98 (*citing US – Softwood Lumber IV (Panel)*, para. 7.57).

established that private prices in that country are distorted because of the government's predominant role in providing those goods."[343]

265. The Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV* is at the heart of China's appeal. China reads the Appellate Body report as establishing a rule that, in order to reject in-country private prices as benchmarks, an investigating authority must not only find that the government plays a predominant role in the market, but also must make an entirely separate finding that private prices are distorted – such that they are "artificially low" – by virtue of the government's predominant role.[344] The Panel, however, did not read the Appellate Body report in *US – Softwood Lumber IV* the same way as China, nor did it interpret Article 14(d) as requiring a separate finding of market distortion. The Panel did not err, as demonstrated below.

266. In the underlying CVD investigation in *US – Softwood Lumber IV*, Commerce had found that private Canadian stumpage prices were not usable as benchmarks because the government was the predominant owner of forest land and provider of stumpage. The panel in that dispute found that Commerce's rejection of in-country private prices was inconsistent with Article 14(d) of the SCM Agreement because, according to the panel, Article 14(d) required that private prices from the market "in the country of provision" (in that case, Canada) be used as the benchmark.[345]

267. The United States appealed and the Appellate Body reversed the panel's finding. The Appellate Body reasoned that the panel's extreme approach frustrated the purpose of Article 14, which concerns the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient," because there may be situations in which it would be impossible to determine whether a recipient is "better off" than it would have been absent the financial contribution.[346] "This *is because the government's role in providing the financial contribution is so predominant that it effectively determines the price* at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 *would become circular*."[347] In other words, the *government predominance itself* is the cause of the price distortion; "because of" the government's predominance, other prices effectively are determined by the government price, *i.e.*, private market prices align with the government price, and the comparison becomes "circular."

268. This circularity is the heart of the problem; in such situations, attempting to calculate a benefit could result in an "artificially low" benefit because the government price is being

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[343] *US – Softwood Lumber IV (AB)*, para. 90.

[344] *See* China Appellant Submission, paras. 295-305.

[345] *See US – Softwood Lumber IV (AB)*, para. 86 (*quoting US – Softwood Lumber IV (Panel)*, para. 7.50).

[346] *US – Softwood Lumber IV (AB)*, para. 93 (*citing Canada – Aircraft (AB)*, para 157).

[347] *US – Softwood Lumber IV (AB)*, para. 93 (emphasis added).

compared to itself, and, unsurprisingly, such a comparison would show no or little difference between the prices compared. As a result, the Appellate Body considered that there are limited circumstances when it would be possible to use as benchmarks prices other than private prices in the country of provision. In particular, as noted above, such circumstances include situations in which the government is the sole or predominant supplier of the good in question.[348]

269. Contrary to China's misguided reading of the Appellate Body report in *US – Softwood Lumber IV*, the Appellate Body did not interpret Article 14(d) of the SCM Agreement as requiring an investigating authority to make a separate finding that private prices are distorted, in addition to finding that the government is the predominant supplier in the market. Rather, the Appellate Body repeatedly referred to the government's predominant role as a supplier of the good in question,[349] indicating that, as the Panel below agreed, this is the "central fact" in determining whether the small portion of private prices in the market are usable as benchmarks.[350]

270. The panel in *US – Softwood Lumber IV* made a distinction between situations in which the government is the sole supplier of the good in question or administratively controls all prices for the good, on the one hand, and situations in which the government is the predominant supplier of the good, on the other hand.[351] According to that panel, government predominance is insufficient to reject in-country private prices; but the panel was quick to note: "Certainly, in our view, in a situation where, for example, the government is the *only* supplier of the good in the country, or where the government administratively controls all of the prices for the good in the country, there would be *no* price other than the price charged by the government and thus no basis for the comparison foreseen in Article 14(d) of the SCM Agreement."[352] In those situations, the panel considered that the "only remaining possibility" would be the use of a benchmark other than in-country prices.[353] Those were not the facts before the panel, however, and the panel did not agree with the United States that the rejection of in-country prices is also

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[348] *See US – Softwood Lumber IV (AB)*, paras. 100-102. Another situation would be if the government administratively sets the prices. There may be other situations, not contemplated or addressed in *US – Softwood Lumber IV (AB)*, in which government actions result in an inability to use in-country prices as benchmarks. *See US – Softwood Lumber IV (AB)*, para. 99 (clarifying that the Appellate Body was only addressing situations in which there is government predominance as provider of a good). The issue in this dispute, however, concerns the government action of producing or supplying the good in question.

[349] *See, e.g., US – Softwood Lumber IV (AB)*, paras. 93-102.

[350] *See* Panel Report, para. 10.45.

[351] *See US – Softwood Lumber IV (Panel)*, para. 7.57.

[352] *US – Softwood Lumber IV (Panel)*, para. 7.57.

[353] *US – Softwood Lumber IV (Panel)*, para. 7.57.

permissible under Article 14(d) when the government is the predominant, as opposed to the sole, supplier of the good in question.

271. The Appellate Body *rejected* the distinction drawn by the panel between the government as the sole supplier and the government as the predominant supplier. The Appellate Body stated that, "[i]n terms of market distortion and effect on prices, there may be little difference between situations where the government is the sole provider of certain goods and situations where the government has a predominant role in the market as a provider of those goods."[354] In other words, it is the government's role in these two situations that effectively determines in-country prices and therefore justifies the use of out-of-country benchmarks. When the government is the sole supplier of a good, or when it administratively sets prices, it is undeniable that in-country (*i.e.*, government) prices cannot be used as benchmarks because the analysis would be entirely circular.

272. The fact that the Appellate Body found little distinction between this situation and a situation in which the government is the predominant supplier of goods is significant. The Appellate Body recognized that, in either situation, use of in-country prices would be circular. As the Appellate Body explained, "[w]henever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices."[355]

273. The Appellate Body's recognition, that in both instances – government as predominant supplier and government as sole supplier – the government effectively determines the price in the market such that any in-country comparison would be circular, led it to reverse the panel's finding. The Appellate Body concluded that "an investigating authority may use a benchmark other than private prices of the good in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."[356] This statement by the Appellate Body does not set forth a two-step requirement for rejecting in-country prices, as China argues. Rather, it simply explains that such rejection is permissible under Article 14(d) when the government's role in the market is predominant and *therefore causes distortion of prices*.

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[354] *US – Softwood Lumber IV (AB)*, para. 100.

[355] *US – Softwood Lumber IV (AB)*, para. 100; *see also* para. 101 ("When 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.").

[356] *US – Softwood Lumber IV (AB)*, para. 103.

274. Such was the Panel's understanding here. The Panel explained that, when the government is the predominant supplier of a good, "the analytical justification for the possibility to reject private in-country prices in that situation is identical for the other two cases of government involvement that were identified in *US – Softwood Lumber IV*, and indeed applies *a fortiori* to both, *i.e.*, where the government administratively controls all of the prices for the good in the country; and where the government is the sole supplier of the good in the country."[357] In all of these situations, there is no in-country price to which to compare the price of the government-provided good because comparing the government price with an in-country price aligned with it would be circular and would yield a benefit calculation that is artificially low.

275. China argues that the Panel misunderstood the Appellate Body report in *US – Softwood Lumber IV* and, as a result, erred in its interpretation of Article 14(d) of the SCM Agreement.[358] China's argument, however, is premised on a mischaracterization of the Panel's report. China asserts that "[t]he *only* reasoning that the Panel offered in support of its interpretation of Article 14(d) was its contention that there is a legally significant difference between the government acting as a 'significant' supplier of a good and the government acting as a 'predominant' supplier of a good."[359] This is patently untrue.

276. As just discussed, and as reflected in the Panel's report, the Panel emphasized the legally significant *identity* between the government acting as "sole" supplier of a good and the government acting as "predominant" supplier of a good, rather than the *difference* between the government acting as a "significant" versus the "predominant" supplier of a good. Indeed, the Panel's consideration of the Appellate Body's use of the terms "predominant" and "significant" is limited to just one paragraph, in which the Panel notes its disagreement with China's view that the Appellate Body used the two terms interchangeably. China significantly overstates the relevance of the Panel's brief discussion of this issue to its interpretation of Article 14(d) of the SCM Agreement.

277. This is likely because this issue is of some importance for China's argument. China equates the terms "significant" and "predominant," which is necessary to support China's reading of a passage of the Appellate Body report in *US – Softwood Lumber IV* as establishing that the fact that the government is a "predominant" supplier of goods does not, in itself, establish that all prices for the good are distorted.[360] China misreads the Appellate Body's statement. The Appellate Body explained:

> We emphasize once again that the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of

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[357] Panel Report, para. 10.42.

[358] *See* China Appellant Submission, paras. 295-305.

[359] China Appellant Submission, para. 296 (emphasis in original).

[360] *See* China Appellant Submission, paras. 298-299.

> provision is very limited. We agree with the United States that "[t]he fact that the government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted". Thus, an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision. The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation.[361]

278. As noted above, the Panel briefly addressed China's contention that "the Appellate Body used the terms 'predominant' and 'significant' interchangeably."[362] The Panel explained:

> In our view, these are distinct concepts and we read the Appellate Body's report as treating them as such. In particular, "a significant" supplier, in our view, refers to something smaller than "the predominant" supplier. Furthermore, to us it is clear that being the largest or even the only domestic supplier in the country in question is not at all the same as being "the predominant" supplier of the good in question in the country. In particular, the concept of "predominance" is in relation to the domestic market as a whole for the good in question, including imports. Obviously, the larger the share of imports, the lower the possibility to find that a government is "the predominant" supplier of the good in the country in question.[363]

The United States agrees with the Panel's understanding of the passage from the Appellate Body report in *US – Softwood Lumber IV*. It is evident from the Appellate Body's use of two distinct terms that it intended to express two distinct concepts.

279. In addition, we note that the Appellate Body quoted and agreed with the U.S. statement from the U.S. appellant submission in *US – Softwood Lumber IV* that "'[t]he fact that the government is a significant supplier of goods does not, in itself, establish that all prices for the goods are distorted'."[364] In that submission, the United States referred to three scenarios: (1) a scenario in which a government is a "significant" supplier of the good in question, which does not, in itself, establish that all prices are distorted;[365] (2) a scenario in which the government is the "dominant supplier" of a good in question and therefore the government's actions are

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[361] *US – Softwood Lumber IV (AB)*, para. 102.

[362] Panel Report, para. 10.46.

[363] Panel Report, para. 10.46.

[364] *US – Softwood Lumber IV (AB)*, para. 102, note 126.

[365] U.S. Appellant Submission, *US – Softwood Lumber IV (AB)*, para. 28.

"determinative" of conditions in the private market;[366] and (3) a scenario in which the government "formally controls" prices in the private sector because it is the sole supplier or administrative price-setter, which the panel in that dispute acknowledged could justify the use of out-of-country benchmarks even though this scenario is virtually indistinguishable from the second scenario.[367] The United States, in effect, distinguished between the first scenario, on the one hand, and the second and third scenarios, on the other hand, as part of its larger argument that in reality there is no distinction between the second and third scenarios (and that the panel in that dispute was illogical for finding one).

280. China argues that "[t]he Panel's reading of *US – Softwood Lumber IV* implausibly assumes that the Appellate Body intended to formulate a distinction of considerable legal significance using nothing other than a subtle difference in phraseology within the confines of a single paragraph, and without any further elaboration in an Appellate Body report that devoted 17 pages to this topic."[368] China simply overstates the emphasis that the Appellate Body and the Panel placed on the distinction between the government as a "significant" supplier and the government as a "predominant" supplier. Far more relevant than this contrast is the close identity that the Appellate Body and the Panel found between the government as the "sole" supplier and the government as the "predominant" supplier. As the Panel explained, "the analytical justification for the possibility to reject private in-country prices" in both of these situations is "identical."[369]

281. China argues that its reading of *US – Softwood Lumber IV* is supported by the Appellate Body's finding that it was unable to "complete the analysis" in that dispute.[370] China misreads the implications of the Appellate Body's finding that it was unable to complete the analysis. The Appellate Body explained that the panel "made no findings of fact relating to the alleged distortive effect on prices of the provincial governments' participation in the market for standing timber." China asserts that, in light of the purported existence of four "undisputed facts":

> [h]ad the Appellate Body considered "predominance", on its own, to be a sufficient basis on which to reject private market prices under Article 14(d), it could have completed the analysis based on the undisputed facts establishing the "predominant participation" of the provincial governments in the timber markets. Instead, the Appellate Body concluded that there were insufficient undisputed facts "relating to the alleged distortive effects on prices of the provincial governments' participation in the market for standing timber," and noted, in

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[366] U.S. Appellant Submission, *US – Softwood Lumber IV (AB)*, paras. 28-29.

[367] U.S. Appellant Submission, *US – Softwood Lumber IV (AB)*, para. 29.

[368] China Appellant Submission, para. 298.

[369] Panel Report, para. 10.42.

[370] *See* China Appellant Submission, paras. 301-303.

> particular, the disputed character of the "evidence relied upon by USDOC to conclude that private prices for stumpage in Canada were distorted."

China suggests that "[t]hese findings are entirely inconsistent with the Panel's suggestion that the Appellate Body considered 'predominance', by itself, to be determinative of whether private market prices were distorted." China is incorrect.

282. The Panel found that the government's predominant role as a supplier of the good in question was the "central fact" in determining whether the small portion of private prices in the market are usable as benchmarks.[371] The Panel, however, noted that "this is of course not to the exclusion of *other evidence that may be relevant* to the question of whether the government's predominance as a supplier would lead to a circular price comparison *in a particular investigation*."[372] The Panel agreed with the Appellate Body that "the decision to reject in-country prices as the benchmark due to the role of the government in the market for the good in question can only be made on a case-by-case basis, in accordance with the relevant evidence in the particular investigation, rather than in the abstract."[373]

283. In *US – Softwood Lumber IV*, the Appellate Body considered that, in light of disputed facts and evidence on the panel record *in addition to* the evidence of government predominance, and in the absence of additional factual findings by the panel there concerning the weight to be ascribed to that additional evidence and its potential impact on the factual determination that the market was distorted, it was not possible for it to determine whether Commerce was justified, under Article 14(d), in using a benchmark other than private prices in Canada.[374] This is not an indication that the evidence of the government's predominant role would have been insufficient to justify using a benchmark other than a private price in the country of provision, only that other disputed facts on the panel record may have influenced the determination whether the use of such a benchmark was justified.

284. Additionally, the Appellate Body noted that there were insufficient factual findings by the panel and undisputed facts in the panel record to enable it to examine whether the benchmark actually used by Commerce "related or referred to, or was connected with, prevailing market conditions in Canada, as required by Article 14(d), so as to adequately reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale."[375] Thus, even if the Appellate Body had completed the analysis with respect to the decision to reject in-country prices as a benchmark, the Appellate Body would not have been able to complete the legal

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[371] *See* Panel Report, para. 10.45.

[372] Panel Report, para. 10.45 (emphasis added).

[373] Panel Report, para. 10.47.

[374] *US – Softwood Lumber IV (AB)*, para. 115.

[375] *US – Softwood Lumber IV (AB)*, para. 118.

analysis of Canada's claim that the actual benchmark Commerce used was inconsistent with Article 14(d) of the SCM Agreement. Partially completing the analysis would not have assisted the parties in resolving the dispute.

285. China also argues that, in the CWP and LWR investigations, Commerce itself did not make a distinction between the government as a "predominant" supplier and the government as a "significant" supplier.[376] However, it is undisputed here that the Chinese government was the predominant supplier of HRS during the relevant periods of investigation in the CWP and LWR investigations, because of the fact that SOEs accounted for 96.1 percent of HRS production in China.[377] In other words, record evidence clearly demonstrated government predominance. Thus, Commerce explained that the government's involvement in the HRS market was "overwhelming" and cited to its Softwood Lumber determination explaining its practice when the market is "'so dominated by the presence of the government. . . .'"[378] If China is suggesting that the term "so dominated" is not synonymous with the term "predominant," its position simply is untenable. Further, the fact that Commerce later used the word "significant" is immaterial. A "predominant" market position inherently is "significant," although the converse may not always be true. Given the fact that the government clearly was the predominant supplier of HRS, a fact which is undisputed,[379] it follows that Commerce's determinations were thus based on a finding of predominance.

286. In sum, the Panel did not err in finding that Article 14(d) of the SCM Agreement does not require evidence in addition to the government's predominant role as supplier in order to justify an investigating authority's decision to reject in-country private prices as benchmarks. The Appellate Body report in *US – Softwood Lumber IV* is likewise clear that an investigating authority is justified in concluding that a government's predominant role is sufficient to distort the market.

2. China's Economic and Evidentiary Arguments Are Inapposite and Without Merit

287. As discussed above, the Appellate Body in *US – Softwood Lumber IV* recognized that when the government is the predominant supplier of a good, a comparison using in-country prices as benchmarks would be circular, just as it would be if the government were the sole

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[376] *See* China Appellant Submission, para. 304.

[377] *See* Panel Report, para. 10.49 and note 511 (noting that China does not challenge the 96.1 percent position of SOEs in the Chinese HRS market).

[378] *See CWP CVD Final Decision Memorandum*, at 64 (Exhibit CHI-1); *LWR CVD Final Decision Memorandum*, at 36 (Exhibit CHI-2).

[379] *See* Panel Report, para. 10.49, note 511 (noting that China did not challenge Commerce's determination based upon the available facts, which resulted in the finding that the government accounted for 96.1 percent of HRS production in China).

supplier or administrative price-setter. China nevertheless urges a return to what it calls the "interpretative foundations" of *US – Softwood Lumber IV* and then submits a lengthy economic analysis, followed by several evidentiary items, that it submits must be taken into account before an investigating authority may rely upon out-of-country benchmarks due to the government's predominant market role.[380]

288. There is a fundamental flaw in China's argument. China assumes, without warrant, that the foundation of Commerce's determinations, the Panel's finding, and the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV*, is that a government's predominant role as supplier of a good will result in "artificially low" prices for that good in the country, from both government and private suppliers. On the contrary, the foundation of those decisions is that a government's predominant role as supplier of a good means that private market prices will align with the government price such that it is not possible *in the first place* to use in-country prices to measure whether the government price is low (*i.e.*, for less than adequate remuneration). In other words, the reason an investigating authority may utilize benchmarks other than in-country prices is because comparing the government price to an in-country price aligned with it would be circular.

289. China argues that "the mere fact that prices are 'aligned' in any given market provides no indication of whether those prices are suppressed or 'artificially low'" and therefore provides no justification for rejecting those prices as benchmarks.[381] China argues that only if prices are "artificially low" may they be rejected as benchmarks, and goes to great lengths to try to establish that the fact that the government is the predominant supplier of a good does not prove that prices in the country are artificially low.[382]

290. The Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV*, however, was *not* based upon whether prices would be "suppressed" or "artificially low" or "artificially high" when the government is the predominant supplier of a good. It was based upon the conclusion that mandating the use of in-country prices as benchmarks when the government is the predominant supplier of a good would be a *circular exercise*, which would result in a *calculation of the benefit that is artificially low*. The Appellate Body explained that "[t]he resulting comparison of prices carried out under the Panel's approach to interpreting Article 14(d) would indicate *a 'benefit' that is artificially low*, or even zero, such that the full extent of the subsidy would not be captured, as the Panel itself acknowledged."[383] The concern is not

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[380] *See* China Appellant Submission, paras. 308-347.

[381] *See* China Appellant Submission, para. 310.

[382] *See* China Appellant Submission, paras. 312-320.

[383] *US – Softwood Lumber IV (AB)*, para. 100 (emphasis added). The Appellate Body used the term "artificially low" another time, in paragraph 95, in the same manner. It stated: "If the calculation of the benefit yields a result that is artificially low, or even zero, as could be the

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necessarily artificially low *prices* (which could only be determined by reference to a commercial benchmark), but the possibility of an artificially low *benefit*, due to the *circular comparison* resulting from comparing the government price to in-country prices that are "effectively determined" by the government price itself.[384]

291. China's incorrect reading of *US – Softwood Lumber IV* permeates the rest of its analysis. Thus, China *assumes* that the only reason an investigating authority may disregard in-country prices as benchmarks is if those prices are artificially low. Operating under this assumption, China appears to believe that it has eviscerated the Panel's reasoning with its theoretical argument that a "dominant firm" would have no incentive to keep prices artificially low and therefore the remaining private suppliers would not set their prices artificially low.[385] What China fails to understand is that there is no way to for an investigating authority to determine whether prices are artificially low or not without comparing the prices to some benchmark. Whether something is "low" is a relative concept, which can only be measured by reference to something else, *i.e.*, a benchmark.

292. Thus, contrary to China's assumption, the reason an investigating authority may disregard in-country prices as benchmarks under the interpretation of Article 14(d) elaborated by the Appellate Body in *US – Softwood Lumber IV* is that *there is no way of knowing whether those prices are too low in the first place*. They are "aligned" with the government price, which is the

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[383] (...continued)
case under the Panel's approach, then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement." *Id.*, para. 95.

[384] The Appellate Body in *US – Softwood Lumber IV* did refer to price "suppression" through government predominance on three occasions (*see* paras. 94, 111, and 114), each time referring to statements of the panel below. The Appellate Body itself did not base its reversal of the panel on the fact that government predominance *necessarily* results in price suppression, but only on the circular comparison that would result when private prices are effectively determined by government prices. *See id.*, para. 101 ("When 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.").

[385] *See* China Appellant Submission, paras. 315-320. We note that the United States referenced the "dominant firm" theory during the Panel proceedings in an effort to explain that "smaller, non-dominant firms, are 'price-takers' in that they set a price equal to that of the dominant firm because they are so small relative to the market demand." U.S. Second Written Submission before the Panel, para. 78. The Panel merely indicated in footnotes that the United States had made reference to this theory, but it does not otherwise appear that the Panel relied on it. *See* Panel Report, notes 491 and 600.

very thing that those private prices otherwise would be used to assess.[386] Any comparison between a government price and a price aligned with it will be circular and will yield zero (or close to zero) benefit. This problem of the "circular comparison" is the underpinning of the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV* and is what led the Appellate Body to refer to the possibility of an "artificially low" *benefit*.

293. This is what China appears not to understand. Before even getting to the question of whether the government prices are artificially low, it is necessary to find something to which to compare the financial contribution. Thus, in the context of the investigations at issue here, before even getting to the question of whether HRS prices in China are artificially low, it is necessary to find something to which to compare those prices. In light of the predominant position of the Government of China in the Chinese HRS market, comparing government prices to any other prices in China would be circular.

294. China's economic arguments therefore are fundamentally flawed. Likewise, China's arguments that there was record evidence before Commerce relevant to the "proper distortion inquiry" are mistaken.[387] The evidence described by China purports to show that private HRS suppliers could not have been selling at "suppressed" or "below-market" or "below-cost" prices and, therefore, those prices should have been used as benchmarks.[388] However, this evidence is irrelevant because it is not necessary to show separate evidence of market distortion – much less evidence that in-country private prices are below-market or below-cost – when the government is a predominant supplier and therefore prices are inherently aligned or distorted. Analyzing this evidence, which is evidence of conditions in China, involves the very type of circular analysis criticized by the Appellate Body in *US – Softwood Lumber IV*. Commerce and the Panel properly found that this evidence "did not mitigate the fact that the government accounted for 96.1 per cent of Chinese HRS production."[389]

295. As we have explained, the Panel properly understood that the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV* was based on the "effectively circular price comparison" that would result if in-country prices must be used as benchmarks when the government is a predominant supplier of a good.[390] The determination that an in-country price comparison would be circular comes before any analysis of whether or not the government price itself is low or not. Moreover, the Panel did not err in concluding that nothing in Article 14(d),

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[386] *US – Softwood Lumber IV (AB)*, para. 100.

[387] China Appellant Submission, para. 322. *See also id.*, paras. 324-344.

[388] China uses these three quoted terms, or variants of them, repeatedly. *See, e.g.*, China Appellant Submission, paras. 325, 326, 330, 335, 338, 339, and 342.

[389] Panel Report, para. 10.53. *See also CWP CVD Final Decision Memorandum*, at 65 (Exhibit CHI-1); *LWR CVD Final Decision Memorandum*, at 36 (Exhibit CHI-2).

[390] Panel Report, para. 10.44.

or in the Appellate Body's report in *US – Softwood Lumber IV*, "would prohibit, *a priori*, a finding of market distortion, and a decision to depart from in-country private prices, where the only relevant evidence was that the government is the predominant supplier of the good."[391] Indeed, such predominance justifies a decision to depart from in-country prices because, when the government is the predominant supplier, it "effectively determines"[392] the prices of private suppliers. The Panel's legal interpretation of Article 14(d) of the SCM Agreement thus was not erroneous.

B. The Panel Properly Found That Commerce's Rejection of In-Country Private Prices to Determine the Benefit in the CWP and LWR CVD Investigations Was Not Inconsistent With Article 14(d) of the SCM Agreement

296. Because the Panel did not err in its analysis of the legal issue — that government predominance in the market effectively determines the remaining private prices and makes the comparison circular such that in-country prices cannot be used as benchmarks — it also properly found that Commerce's determinations in the CWP and LWR CVD investigations were not inconsistent with the SCM Agreement.

297. China suggests that the Panel failed to discharge its duties pursuant to Article 11 of the DSU.[393] However, it will be recalled that China's principal argument before the Panel was that Commerce impermissibly relied upon a "*per se*" rule of government predominance to justify its use of out-of-country benchmarks. The Panel found that, contrary to China's argument, nothing in the Appellate Body report in *US – Softwood Lumber IV* "would prohibit, *a priori*, a finding of market distortion, and a decision to depart from in-country private prices, where the only relevant evidence was that the government is the predominant supplier of the good."[394] China's argument assumed, incorrectly, that government predominance alone was insufficient to justify a finding of market distortion and the use as benchmarks of prices other than in-country prices.

298. The Panel appropriately considered whether Commerce examined all the evidence and arguments on the record, in keeping with the Appellate Body's instruction that a decision to disregard in-country prices as benchmarks must be made on a case-by-case basis.[395] China suggests that the Panel reviewed Commerce's determinations using a rationale or explanation

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[391] Panel Report, para. 10.45.

[392] *US – Softwood Lumber IV (AB)*, para. 93.

[393] *See* China Appellant Submission, para. 357.

[394] Panel Report, para. 10.45.

[395] *See* Panel Report, paras. 10.48-10.61; *US – Softwood Lumber IV (AB)*, para. 102.

other than that provided by Commerce.[396] China is incorrect. As the Panel's report reflects, the Panel summarized the evidence that Commerce had noted was before it, and explained why Commerce properly found much of the evidence was irrelevant, because it did not negate the fact that any comparison to in-country prices would be circular due to the government's predominant position.[397] The Panel examined Commerce's own rationale for its determination.

299. Significantly, the Panel discussed Commerce's analysis of the role of imports into the Chinese market in all four CVD investigations.[398] China ignores this. In both the CWP and LWR investigations, Commerce noted that the volume of imports of HRS amounted to only three percent of total Chinese HRS production.[399] Therefore, Commerce concluded that "the import quantities are small relative to Chinese domestic production of HRS," and that "imports are insufficient to serve as reliable benchmarks."[400] This was contrasted with the situation in the *OTR Tires* CVD investigation, where, despite the government's share of domestic production of rubber, Commerce relied upon import prices and other in-country prices as benchmarks.[401] It did so because of "the large penetration of imports of natural rubber and synthetic rubber in the PRC rubber markets and the lack of other evidence on the record to show that SOEs or government agencies through other methods had control of, or otherwise distorted, these markets during the POI."[402]

300. Thus, the Panel did not err in its assessment of Commerce's determinations. Consistent with the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV*, Commerce conducted a "case-by-case" analysis to determine whether there was government predominance in the relevant markets such that private prices were "effectively determined" by the government prices and therefore any comparison with an in-country price would be circular. This is what the Panel found.

301. Again, China's argument is predicated on its mistaken belief that there must be additional evidence of price distortion – and that this evidence must show that prices are artificially low – before government predominance in a market for a good can justify the use of something other than in-country prices as benchmarks. The United States has explained above why China is

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[396] *See* China Appellant Submission, para. 356-357.

[397] *See* Panel Report, paras. 10.51-55.

[398] *See* Panel Report, paras. 10.54, 10.57-10.59.

[399] *See LWRP China Verification Report*, at Exh. A-2 (Mar. 5, 2008) (Exhibit US-70); *CWP China Verification Report*, at Exh. A-2 (Mar. 5, 2008) (Exhibit US-65); *CWP Petitioners' Pre-Preliminary Comments*, at Exh. 37 (Oct. 26, 2007) (Exhibit US-66); *and Memo to the File, "LWRP: China Import Statistics for Hot-rolled Steel,"* at Att. 1 (June 6, 2008) (Exhibit US-68).

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

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

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

incorrect as a matter of law, and why the Panel did not err in its interpretation of Article 14(d) of the SCM Agreement. As a result, the Panel did not err in its finding that Commerce acted consistently with the SCM Agreement.

302. For all these reasons, the Appellate Body should find that the Panel did not err in determining that Commerce did not act inconsistently with the SCM Agreement in its decision not to use in-country prices as benchmarks in determining the benefit from the government provision of HRS to respondents in the CWP and LWR CVD final determinations.

V. THE PANEL DID NOT ERR IN CONCLUDING THAT COMMERCE'S LOAN BENCHMARK WAS NOT INCONSISTENT WITH ARTICLE 14(B) OF THE SCM AGREEMENT

303. China appeals "the Panel's interpretation and application of Article 14(b) of the SCM Agreement as it relates to the USDOC's selection of loan benchmarks in the OTR, LWS, and CWP investigations."[403] The Panel correctly found that "China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(b) of the SCM Agreement by rejecting interest rates in China as benchmarks for calculating the benefit from RMB-denominated loans from SOCBs, in the CWP, LWS and OTR investigations, or that the benchmarks actually used in respect of the RMB-denominated loans were inconsistent with those obligations."[404]

304. On appeal, China advances three principal contentions. First, China argues that "[t]he Panel erred in its interpretation and application of Article 14(b) in finding that observed interest rates for loans denominated in a particular currency can be rejected as a 'distorted' benchmark, and in finding that the USDOC had a legal basis to reject observed RMB interest rates as a loan benchmark."[405] Second, China argues that "[t]he Panel erred in finding that the benchmark used by the USDOC was 'a comparable commercial loan which the firm could actually obtain on the market' within the meaning of Article 14(b)."[406] Third, China argues that "[t]he Panel acted inconsistently with Article 11 of the DSU by failing to assess the conformity of the benchmark used by the USDOC with the legal requirements of Article 14(b). To the extent that the Panel's findings and conclusions in respect of the USDOC loan benchmark were based on its assessment of the facts, that assessment was not objective as required by Article 11 of the DSU."[407] China's arguments are without merit.

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[403] China Notice of Appeal, para. 8.

[404] Panel Report, para. 17.1(c)(vii).

[405] China Notice of Appeal, para. 8(c).

[406] China Notice of Appeal, para. 8(a).

[407] China Notice of Appeal, para. 8(b).

305. As will be demonstrated, China proposes an "excessively formalistic interpretation" of Article 14(b), which "would effectively limit an investigating authority's ability to identify an appropriate benchmark, forcing it instead to fall back on a choice from among inappropriate benchmarks."[408] Additionally, China's arguments are premised on China's erroneous conflation of "benchmark interest rates" and "commercial" interest rates used as benchmarks to measure benefit under Article 14(b). China's confusion in this regard undermines its legal and economic arguments. Finally, China's allegation that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the matter before it is based on misrepresentations and mischaracterizations of the Panel's report; it is entirely unsubstantiated and utterly without merit.

306. For the reasons given herein, the United States respectfully requests that the Appellate Body reject all of China's appeals related to Article 14(b) of the SCM Agreement.

A. The Panel Correctly Interpreted Article 14(b) of the SCM Agreement as Permitting the Use of a Proxy Loan, Including a Loan Denominated in a Different Currency, to Measure the Benefit of a Financial Contribution

307. The Panel began its assessment by noting that, in its view, "[t]he central question of legal interpretation raised by [China's] claim is whether, and if so under what circumstances, Article 14(b) of the SCM Agreement permits the rejection of in-country interest rates as benchmarks for government-provided loans."[409] China criticizes the Panel's formulation of the legal issue before it, correctly noting that "[u]nlike Article 14(d), which refers to 'prevailing market conditions … in the country of provision', Article 14(b) does not have an express notion of territoriality. The paradigm of 'in the country' versus 'out of the country' does not arise under Article 14(b)."[410]

308. While China is right that Article 14(b) of the SCM Agreement contains no geographical limitation with respect to the benchmark selected to measure the benefit of the financial contribution, China argued before the Panel that "RMB loans can only be obtained in China, and that to be 'comparable' in the words of Article 14(b), a benchmark loan must be denominated in the same currency as the one under investigation."[411] Implicit in China's argument is that, because the currency of the benchmark loan must be the same as the currency of the financial contribution, and RMB loans may only be obtained in China, then, with respect to RMB loans provided by the government or a public body in China, there *is* a geographical limitation on the benchmark that may be used to measure the benefit of the financial contribution. That is, in China's view, a benchmark for an RMB loan must necessarily be identified within China. In light of China's argument, the Panel's analysis properly "focuse[d] on the general question of

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[408] Panel Report, para. 10.121.

[409] Panel Report, para. 10.105.

[410] China Appellant Submission, para. 398.

[411] Panel Report, para. 10.105.

whether, and if so when, rejection of in-country interest rates is permissible" under Article 14(b).[412]

309. On appeal, China suggests that "the precise issue before the Panel was whether Commerce had a legal basis under Article 14(b) to reject . . . observed RMB interest rates as a benchmark in favour of its multi-currency regression model."[413] This appears to be a correct formulation of the issue, and this is, in fact, the issue the Panel considered below.

310. The Panel examined the text of Article 14(b) of the SCM Agreement and noted, at the outset, that:

> [T]he chapeau of Article 14 indicates that the provisions set forth in sub-paragraphs (a)-(d) of this provision are "guidelines", and that while investigating authorities must respect these guidelines in calculating the benefits from the particular kinds of financial contributions identified in the respective sub-paragraphs, they have flexibility as to the precise methodology that they use, so as to be able to take into account the particular facts of a given investigation.[414]

This observation is consistent with prior Appellate Body reports that have analyzed the meaning of Article 14. The Appellate Body has explained that "[t]he reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient."[415] Moreover, the Appellate Body has emphasized the importance of the word "guidelines":

> [T]he term 'guidelines' suggests that Article 14 provides the 'framework within which this calculation is to be performed', although the 'precise detailed method of calculation is not determined' . . . . [T]hese terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, we find merit in the United States' submission that the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'.[416]

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[412] Panel Report, para. 10.105.

[413] China Appellant Submission, para. 400.

[414] Panel Report, para. 10.107.

[415] *US – Softwood Lumber IV (AB)*, para. 91.

[416] *US – Softwood Lumber IV (AB)*, para. 92.

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

> The chapeau of Article 14 provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit. Paragraphs (a)-(d) of Article 14 contain general guidelines for the calculation of benefit that allow for the method provided for in the national legislation or regulations to be adapted to different factual situations.[417]

312. While Article 14 sets forth guidelines for the calculation of benefit, neither Article 14 nor any other provision of the SCM Agreement defines the term "benefit." Article 31(1) of the *Vienna Convention* provides that a treaty shall be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ordinary meaning of "benefit" is something that is "to advantage of, or profit to, recipient."[418] The panel in *Canada – Aircraft* explained that "to determine whether a financial contribution (in the sense of Article 1.1(a)(1)) confers a 'benefit', *i.e.*, an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution."[419] However, to determine the position that the recipient would have been in "but for the financial contribution," it is necessary to select a commercial benchmark for comparison.[420]

313. As the Appellate Body explained in *Canada – Aircraft*:

> We . . . believe that the word "benefit", as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient *"better off" than it would otherwise have been, absent that contribution*. In our view, *the marketplace provides an appropriate basis for comparison* in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.[421]

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

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

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

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

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

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

314. Article 14(b) of the SCM Agreement sets forth the guideline for determining whether a loan by a government has conferred a benefit. Article 14(b) provides that:

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

315. Analyzing this text, the Panel explained that Article 14(b):

> provides that the relevant comparison for determining whether a government loan confers a benefit is with "a comparable commercial loan that the firm could actually obtain in the market". In our view, the key concept in this phrase is the word "commercial". In particular, the basic task in calculating a benefit from a government loan is to determine whether, when an investigated entity borrows from the government, the terms are better-than-commercial, *i.e.*, better than a commercial lender would charge for the same loan.[422]

The Panel thus concluded that, "pursuant to Article 14(b) of the SCM Agreement, the comparator to be used to determine the existence and amount of any benefit from a government loan must be, first and foremost, 'commercial'."[423]

316. The Panel also observed that "Article 14(b) indicates that the benchmark loan must be 'comparable'."[424] The Panel described its understanding of the meaning of the word "comparable" as follows:

> Article 14(b) indicates that not any 'commercial' loan can be used as a benchmark, but instead the particular benchmark loan selected must be 'comparable' to the investigated government loan. We view the term

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[422] Panel Report, para. 10.108.

[423] Panel Report, para. 10.111.

[424] Panel Report, para. 10.112.

> 'comparable' to mean, in general terms, that the benchmark loan should have been established around the same time, should have the same structure as (fixed or floating interests rates) and similar maturity to the government loan, should be about the same size, and should be denominated in the same currency, as these are the fundamental elements used to describe loans, and thus the elements on the basis of which different loans can be compared.[425]

317. The Panel then analyzed the meaning of the requirement in Article 14(b) that "the benchmark loan should be one that the borrower 'could actually obtain on the market'."[426] The Panel explained:

> We see this as a reference first and foremost to the individual characteristics of that particular borrower (essentially, its risk profile). In other words, how would a commercial lender evaluate that borrower in deciding whether to make the investigated loan? Most importantly, what interest rate would the commercial lender charge, and what repayment terms, collateral, etc., would it require, for a loan of the same structure and maturity as the government loan, based on its evaluation of the borrower's likelihood of defaulting?[427]

318. In sum, the Panel explained that:

> The guidelines thus would prevent, for instance, the amount paid on a one-year floating rate government loan from being directly compared to the amount that would be paid on a 10-year fixed rate commercial loan. Similarly, the guidelines would prevent the amount paid on a government loan to a AAA-rated borrower from being compared with the amount that would be paid on a commercial loan to a B-rated borrower. Furthermore, they would prevent the amount paid on a government loan denominated in Canadian dollars from being directly compared to the amount that would be paid on a commercial loan denominated in Japanese yen, and so forth. Ultimately, therefore, the guidelines of Article 14(b) provide that the benchmark interest rate used to determine the existence and amount of benefit from a government loan reflect not only the basic features of the government loan, but also reflect the risk level of the borrower.[428]

319. Based on the foregoing analysis, the Panel found that "it is clear that the 'ideal' benchmark . . . would be an actual loan from a commercial lender of the same size, maturity, structure and currency, to the investigated entity, taken out on the same day as the investigated

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[425] Panel Report, para. 10.112.

[426] Panel Report, para. 10.113.

[427] Panel Report, para. 10.113.

[428] Panel Report, para. 10.114.

government loan," but "[i]t also is clear . . . that in practice the existence of such an ideal benchmark loan will be extremely rare."[429] In the Panel's view:

> [t]he question then becomes how Article 14(b) addresses such situations, which will arise frequently, indeed probably in the large majority of cases. In particular, where there are differences in existing commercial loans held by the borrower such that in the strict sense of the term they are not 'comparable' with the investigated government loan, does Article 14(b) require an investigating authority to conclude that there simply is no benchmark, and that as a result no benefit amount can be determined (which would mean, in effect, that the benefit amount is zero)? In our view, this is not the case.[430]

Hence, the Panel found that "Article 14(b), by its own terms, makes allowance for the use of proxies when an identical or nearly-identical loan is not available as a benchmark."[431]

320. China argued before the Panel that "the particular case of RMB-denominated loans [is] a situation in which it is impossible to use any interest rate other than one found inside China as a benchmark, due to the impossibility of borrowing RMB anywhere outside China."[432] The Panel "acknowledge[d] that the currency in which a loan is denominated is of course one of its most important characteristics, and that using as a benchmark a loan in another currency poses particular challenges."[433] However, in the Panel's view:

> [C]urrency differences do not necessarily pose the insurmountable hurdle that China posits. In particular, there are means to determine the equivalence of loans expressed in different currencies, notably the various forms of swap transactions that are routinely used in international financial markets, whereby borrowers in different currencies swap principal amounts and/or interest payment streams on their respective loans. By definition, these exchanges between willing partners express the equivalence of the values of the dissimilar things being exchanged. We note that swap transactions of this type were originally developed to circumvent restrictions and limitations on borrowing in foreign currencies. Thus, unlike China, we do not consider that the geographic restriction of lending in a particular currency precludes, as a matter of law, a comparison with a benchmark loan expressed in a different currency from that of the government loan. Rather, this is a feature of a loan that can, at least in certain circumstances, be made to be

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[429] Panel Report, para. 10.115.

[430] Panel Report, para. 10.116.

[431] Panel Report, para. 10.117.

[432] Panel Report, para. 10.120.

[433] Panel Report, para. 10.120.

> "comparable", in the sense of Article 14(b), to the investigated government loan.[434]

321. On appeal, China argues that the Panel erred, *inter alia*, in its interpretation of the term "comparable." In China's view, "[w]hile all of the factors identified by the Panel are relevant to the comparability of different loans, the currency in which the loan is denominated is of *fundamental importance*."[435] China contends that "comparing a loan denominated in one currency to a loan denominated in another currency will *necessarily* measure the factors that cause interest rates to be different in different countries and currencies."[436] China simply denies the possibility that an investigating authority could make adjustments sufficient to render a benchmark loan denominated in a different currency "comparable" to the investigated loan. China's interpretation of the term "comparable" would effectively require that any benchmark loan used to determine whether an RMB loan provided by the government or any public body in China conferred a benefit "necessarily" must be identified from amongst loans within China.

322. The Panel rejected China's interpretation of Article 14(b) as being "excessively formalistic, in that it would effectively limit an investigating authority's ability to identify an appropriate benchmark, forcing it instead to fall back on a choice from among inappropriate benchmarks."[437] The Panel explained that:

> In particular, in our view, the implication of China's argument is that even if all loans in a given country were made by the government, the investigating authority would have no choice but to identify as a benchmark for the investigated government loan another government loan, so long as the second loan was made in the "ordinary course of commerce" (a term for which China offers no explanation). In our view *such a comparison would be entirely circular* given that the point of the exercise under Article 14(b) is to compare the government loan in question to something that is not a government loan. Similarly, we consider that pursuant to China's argument, if a loan were made in a particular currency which was only lent in the country subject to the investigation, then even if all of the loans in that currency were government-provided loans, the fact of the currency restriction again would force the investigating authority to identify the benchmark from among the same-currency government loans, in spite of the circularity of the resulting comparison. To us, this is directly counter to the

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[434] Panel Report, para. 10.120.

[435] China Appellant Submission, para. 381 (emphasis added).

[436] China Appellant Submission, para. 381 (emphasis added).

[437] Panel Report, para. 10.121.

> directives of Article 14 in general and Article 14(b) in particular, which are aimed at a meaningful comparison with the commercial market.[438]

323. In this respect, the Panel considered that "the logic of the Appellate Body's reasoning in *US – Softwood Lumber IV* in regard to Article 14(d) of the SCM Agreement [is] equally applicable to Article 14(b), and indeed to Article 14 in its entirety."[439] The Panel correctly pointed out that "the Appellate Body specifically indicated that where in-country benchmarks were not available, 'proxies' could be used . . . ."[440] The Panel then considered two hypothetical situations "in which, for example, the government is the only lender in a country" or "the government simply dictated the lending rates to be charged by 'commercial' banks," and reasoned that in both cases "any in-country comparison would be inherently circular."[441] The Panel thus concluded that:

> Similarly, some combination of a large government role as a lender to commercial borrowers, and significant direct control over lending and interest rates to commercial borrowers, also could result in a situation in which the interest rates to commercial borrowers do not reflect the operation of market forces, but instead are distorted in the sense that they are effectively established by the government. In this situation as well, we consider that comparing the interest rate on a government loan to another loan in the same country would be a circular exercise. We view such a situation as analogous to that analyzed by the Appellate Body in *US – Softwood Lumber IV* (government predominance as a supplier of a good), and as discussed we consider that inherent in Article 14(b), as in Article 14(d), is sufficient flexibility to permit the use of a proxy in place of observed rates in the country in question where no "commercial" benchmark can be found.[442]

324. The Panel's reference to the Appellate Body report in *US – Softwood Lumber IV* is appropriate, because the potential for a circular comparison is just as great under Article 14(b) as it is under Article 14(d), if these provisions are not properly interpreted.

325. China criticizes the Panel's analogy to the Appellate Body report in *US – Softwood Lumber IV*, arguing that it is "misplaced."[443] On the contrary, it is China's criticism that is misplaced. As Commerce determined, and as we will show below, "the government played a predominant role in the Chinese commercial lending market as both a lender and in terms of

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[438] Panel Report, para. 10.121 (emphasis added).

[439] Panel Report, para. 10.122.

[440] Panel Report, para. 10.122.

[441] Panel Report, paras. 10.128-129.

[442] Panel Report, para. 10.130.

[443] China Appellant Submission, para. 464.

controlling the operation of this market, and thus distorted interest rates, such that the observed rates were not suitable as benchmarks."[444] The Panel found "no basis in the evidence before [it] to question this judgement by the USDOC."[445]

326. As it does with respect to the Panel's interpretation of Article 14(d), China misunderstands, with respect to the Panel's interpretation of Article 14(b), the import of the Appellate Body report in *US – Softwood Lumber IV*. As we explained above, the problem being addressed – when an investigating authority determines that no in-country benchmark is suitable for use in measuring the benefit conferred by the investigated loan – is that the distortions in the lending market are such that the comparison of an in-country loan to the government-provided loan will be *circular*. Through its predominant role in the lending market and also through its regulatory control of the operation of that market, the government effectively establishes loan interest rates in that market. Accordingly, using a Chinese loan as a benchmark would result in a comparison of two loans, the interest rates of which were effectively established by the government. This would result in a circular comparison.

327. China's argument that there is no evidence of "distortion" in the Chinese lending market – in that there is no evidence that interest rates in China are "artificially low" and economic theory suggests that they would not be, and that all governments influence "benchmark interest rates" – misses the point. The concern is not that Chinese interest rates are necessarily "artificially low," but that they are effectively established by the government. Furthermore, China appears to confuse "benchmark interest rates," which are set or influenced by government monetary policy, with "commercial" interest rates that, under normal circumstances, are set by commercial banks operating in the market. As discussed in the next section, these flaws are fatal to China's argument that the Panel erred in upholding Commerce's determination to reject RMB loans within China as a benchmark.

328. As we have described above, the Panel engaged in a thorough, objective, reasoned analysis in its effort to interpret the meaning of Article 14(b) of the SCM Agreement. The panel's interpretation, that Article 14(b) does not prevent an investigating authority from using as a benchmark to measure the benefit of the investigated loan a "proxy" loan denominated in a currency different from the investigated loan is consistent with the terms of Article 14(b) and follows from the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV*.

329. In addition, the Panel's interpretation of Article 14(b) is consistent with and supports the object and purpose of the SCM Agreement. As we have noted, the Appellate Body has explained that the object and purpose of the SCM Agreement includes "disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic

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[444] Panel Report, para. 10.147.

[445] Panel Report, para. 10.147.

industries are harmed by subsidized imports to use such remedies."[446] The Appellate Body has emphasized the right of WTO Members to accurately measure and "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[447] The Panel's interpretation of Article 14(b) would permit Members to measure the benefit of government-provided loans in all situations and thus offset the effect of the subsidy through the imposition of countervailing duties, as provided by the SCM Agreement.

330. China's proposed interpretation of Article 14(b), on the other hand, is, as the Panel found, "excessively formalistic" and "would effectively limit an investigating authority's ability to identify an appropriate benchmark, forcing it instead to fall back on a choice from among inappropriate benchmarks."[448] This would prevent a Member from accurately measuring and offsetting the effect of the subsidy. China's proposed interpretation is unsupported by the text of Article 14(b) and inconsistent with the object and purpose of the SCM Agreement. It cannot be accepted.

331. Consequently, for the reasons we have given above, the United States respectfully requests that the Appellate Body reject China's appeal and uphold the Panel's legal interpretation of Article 14(b) of the SCM Agreement.

B. The Panel Correctly Found that Commerce's Determination to Reject RMB Loans Within China as a Benchmark Was Not Inconsistent with Article 14(b) of the SCM Agreement

332. After analyzing the text of Article 14(b) of the SCM Agreement and interpreting its meaning in accordance with the customary rules of treaty interpretation, the Panel next assessed whether, in light of the Panel's interpretation of Article 14(b), Commerce's determination to reject RMB loans within China as a benchmark for assessing the benefit conferred by government-provided loans was consistent with that provision of the Agreement. The Panel appropriately answered this question in the affirmative.

333. The Panel noted that Commerce "determined that there was not a functioning market for loans within China, and that therefore none of the sources of Chinese interest rates could be used as benchmarks."[449] The Panel summarized the reasons provided by Commerce for this determination:

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[446] *US – Softwood Lumber IV (AB)*, para. 95.

[447] *US – Softwood Lumber IV (AB)*, para. 95.

[448] Panel Report, para. 10.121.

[449] Panel Report, para. 10.131.

- SOCBs loans, which were found to be made under the "Government Policy Lending" program, could not [be] used as benchmarks since these loans were the very loans for which suitable benchmarks were needed;

- Chinese national interest rates were not reliable as benchmarks because of the pervasiveness of China's intervention in the banking sector – i.e., loans provided by Chinese banks reflected significant government intervention and did not reflect the rates that would be found in a functioning market; and

- Foreign bank lending in China was unsuitable as a benchmark since China's involvement in the banking sector created significant distortions, restricting and influencing foreign banks operating within China.[450]

334. The Panel further noted that Commerce's "assessment and conclusions in the three investigations that Chinese interest rates were distorted and did not reflect rates that would be established by a functioning market were based on its previous findings in the *CFS Paper* investigation," and that, "[i]n that investigation, the USDOC had reviewed the role of the Government of China in the banking sector and concluded that China's intervention in the lending market distorted the market."[451] Because Commerce had, in the challenged investigations, "determined that the respondents had not demonstrated that these findings no longer held," and thus Commerce's determinations were "based on, and cross-reference extensively, its determination in *CFS Paper*," the Panel examined and "summarize[d] the relevant portions of the *CFS Paper* determination."[452]

335. In particular, the Panel noted that Commerce, after considering contrary arguments from Chinese respondents, had determined in the *CFS Paper* investigation, *inter alia*, that China's banking system was still under state-control, China's banking system still operated in accordance with governmental planning-policies, interest rates are regulated by the government, foreign-owned banks in China were subject to the same restrictions as SOCBs, and foreign currency lending rates in China were unsuitable for measuring the benefit of loans issued in RMB.[453]

336. The Panel then examined and analyzed Commerce's determinations in the three challenged investigations. The Panel noted that, before Commerce, the Government of China argued that "government influence over the operations of the SOCBs was little and that state ownership of banks was diminishing and the state was not influencing competition among banks

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[450] Panel Report, para. 10.131.

[451] Panel Report, para. 10.132.

[452] Panel Report, para. 10.132.

[453] *See* Panel Report, paras. 10.133-134.

or influencing their lending decisions";[454] "[t]he Government of China noted that it had eliminated control of inter-bank lending, liberalized the ability of banks to determine lending and deposit rates, and provided greater latitude to the banks in paying interest on consumer deposits by only setting a ceiling on deposit interest rates";[455] and "the Government of China argued that the record evidence demonstrated that: (i) China had a commercially-oriented lending market; (ii) loan pricing was determined by market forces, with banks making lending decisions based upon commercial considerations, including proper risk assessment; and (iii) governmental industrial policy had a very limited role in lending decisions, and was only one factor that a bank might take into account in examining risk."[456]

337. Commerce rejected China's arguments, and the Panel agreed that "on the basis of the record evidence before [Commerce,] a reasonable and objective investigating authority could have concluded that the government played a predominant role in the Chinese commercial lending market as both a lender and in terms of controlling the operation of this market, and thus distorted interest rates, such that the observed rates were not suitable as benchmarks."[457] The Panel noted that Commerce had stated that "it would not be possible to make the necessary adjustments to the observed rates to convert them into usable benchmarks" and "China ha[d] not objected to this conclusion."[458] Consequently, the Panel found that China had not established that Commerce's decision to not rely on Chinese interest rates as benchmarks for SOCB loans denominated in RMB was inconsistent with the obligations of the United States under Article 14(b) of the SCM Agreement.[459]

338. On appeal, China argues that the Panel's conclusion was in error. China asserts that "the Panel's standard for identifying a 'distortion' of benchmark interest rates turned on whether 'government interventions of whatever kind … effectively dictate' the interest rates that are observed for loans denominated in a particular currency."[460] In China's view, "[t]he fundamental flaw with this standard is that all governments 'effectively dictate' benchmark interest rates in the ordinary course of implementing monetary policy . . ."[461] and thus it cannot be said that government intervention "distorts" interest rates.

339. The fundamental flaw in China's argument, as demonstrated in its characterization of the standard applied by the Panel, is that it confuses "benchmark interest rates" with interest rates

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[454] Panel Report, para. 10.137

[455] Panel Report, para. 10.137

[456] Panel Report, para. 10.140

[457] Panel Report, para. 10.147.

[458] Panel Report, para. 10.147.

[459] *See* Panel Report, para. 10.148.

[460] China Appellant Submission, para. 367.

[461] China Appellant Submission, para. 367.

that are suitable for use as benchmarks to measure the benefit of a government loan under Article 14(b) of the SCM Agreement. As China itself explains, China's argument is premised on the notion that all governments, in the ordinary course of implementing monetary policy, "effectively dictate" *benchmark* interest rates. Article 14(b), however, by its terms, is concerned with "commercial" loan interest rates and, as the Appellate Body has explained, loan interest rates determined by the "market."[462] All of China's legal and economic arguments that relate to "benchmark interest rates" are beside the point.

340. For example, China asserts that, "[b]efore the Panel, the United States and China agreed that the term 'commercial' means '[i]nterested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business.'"[463] China notes that "[p]rior dispute settlement panels have referred to the same definition of the term 'commercial'" and contends that "[a] 'commercial' loan under Article 14(b) is therefore a loan that is made with a view toward a 'financial return', *i.e.*, a 'profit', and that is made 'as a mere matter of business'."[464] China thus urges that, because Chinese banks are "highly profitable," and "provide loans with the objective – and the result – of making a profit," they "therefore provide 'commercial' loans within the ordinary meaning of that term."[465] Evidently, in light of such profitability, it should not matter whether the Government of China effectively establishes the interest rate of these "commercial" loans. Indeed, China argues that, because "*all* governments with their own currency 'effectively establish' benchmark interest rates for loans denominated in that currency," and "[t]his does not prevent loans from being 'commercial'," "the Panel erred in concluding that loans are not 'commercial' if they are made in an environment in which the government 'effectively establishes' benchmark interest rates."[466]

341. Again, the kind of "commercial" loan interest rate that is suitable for use as a benchmark for measuring benefit under Article 14(b) is, in virtually all cases, going to be different than the "benchmark interest rate" for a particular currency. While "benchmark interest rates" may be "effectively dictated" by government monetary policy, "commercial banks," as China recognizes, "charge different interest rates to different borrowers, based on their assessment of the borrower's credit" and this "interest rate differentiation is a way of managing the bank's risk."[467]

342. China notes that, in the United States, "[t]hrough the use of open market operations, the Federal Reserve maintains the Federal Funds rate at the desired level" and "[t]he Federal Funds rate, in turn, has a direct and proportionate effect on the interest rates charged by commercial

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

[463] China Appellant Submission, para. 406.

[464] China Appellant Submission, para. 406

[465] China Appellant Submission, para. 410.

[466] China Appellant Submission, para. 407 (italics in original, underlining added).

[467] China Appellant Submission, para. 445.

banks on loans to borrowers."[468] China makes much of the fact that the Prime Rate closely tracks the Federal Funds Rate.[469] In China's view, this demonstrates that the U.S. government "effectively dictates" the "benchmark interest rate" of loans denominated in U.S. dollars in a way that is no different from how China, through its predominant role and intervention in the Chinese lending market, "effectively dictates" the "benchmark interest rate" of loans denominated in the RMB.[470] China also suggests that other governments engage in similar activity, in the implementation of monetary policy, that "effectively establishes" "benchmark interest rates."[471]

343. Here again, however, China confuses "benchmark interest rates" and "commercial" loan interest rates. Furthermore, different from China's regulation of its banking sector, the Federal Reserve influences *wholesale*, *i.e.*, inter-bank, rates, while the PBOC effectively dictates *retail*, *i.e.*, bank-to-customer, rates. Retail rates in the United States are market-based. Specifically, the Federal Reserve engages in open-market operations that influence the wholesale rate, *i.e.*, the Federal Funds Rate. Banks then construct their retail rate upon the base of the Federal Funds Rate. That is, the "constructing" process for retail rates is market-based. Thus, to the extent that the Prime Rate may track the Federal Funds Rate, that is a function of the operation of the market. This is different from the situation in China, where there is no market-based building process underlying retail rates. The PBOC itself changes retail lending rates by administratively determining the floors that constrain them. Accordingly, the interest rate formation "processes" in China and the United States are fundamentally different. The price formation "process" is critical when considering whether a particular market is distorted for purposes of selecting a loan benchmark, even if, ultimately, the outcome of China's effective dictation of its retail lending rate can be made in some situations to mimic the outcome of a market-based process.

344. In addition, China's suggestion that its participation in and regulatory control of the Chinese lending market is equivalent to the implementation of monetary policy by the U.S. government and other governments of the world is simply without basis in fact. Commerce determined, based on record evidence, that, in addition to maintaining significant ownership of the banking sector, China also controlled the banks' lending through the regulation of interest rates. China's regulation of interest rates prevented banks in China from setting interest rates on a commercial basis.[472] Commerce found that, notably different from other countries, China maintained both a deposit rate cap and a lending rate floor, guaranteeing the banks a profit margin on each of their loans.[473] Therefore, banks in China did compete on deposit rates and had access to the savers' capital at very little cost because the government tightly restricted

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[468] China Appellant Submission, para. 418.

[469] China Appellant Submission, para. 419.

[470] *See* China Appellant Submission, paras. 420-422.

[471] *See* China Appellant Submission, paras. 423-424.

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

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

alternative investment channels.[474] Chinese savers had few options beyond depositing their savings with the banking system.[475] By channeling China's savings into the banking sector and setting a deposit rate cap, China has ensured that banks can retain profits while lending at the floor rate.

345. These regulatory controls were necessary because the SOCBs were not at a point where they could lend without such controls.[476] It is important to recognize that the use together of the floor on lending rates and the cap on deposit rates that China established by law is fundamentally different from what are considered traditional regulatory controls. China's system guarantees banks profit on their loans by prohibiting deposit rates above the cap or loan rates below the floor.[477] An official from the People's Bank of China, which sets the floor and cap rates, conceded that these limits set China apart from other countries and are necessary because the banks have not yet fully implemented risk control.[478]

346. Indeed, before the Panel, China provided evidence of the distortion created by its policies, conceding that "most commercial borrowers in China obtain interest rates of loans . . . that fall somewhere between the interest rate floor and the benchmark itself."[479] The loans do not have much differentiation in interest rates because banks can lend at the floor rate and are still ensured a profit.[480] The Panel noted that "there was extensive discussion in the *CFS Paper* determination to the effect that lending rates were largely undifferentiated, with most loans being made at rates close to the government-set benchmark rate" and, while before the Panel, China referred to this as evidence of interest rate competition, and the operation of market forces, the Panel considered that Commerce "was not unjustified in concluding that this was rather evidence that market forces were not operating, in particular, that banks still lacked adequate risk management and analysis skills."[481] Given the lack of differentiation in interest rates, comparing the investigated government loan to another loan within China would be a circular comparison, akin to comparing the government loan to itself.

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

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

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

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

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

[479] China Responses to Panel's First Set of Questions (July 28, 2009), para. 199.

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

[481] Panel Report, para. 10.146.

347. China misunderstands the problem. The problem is that the government's predominant role in the Chinese commercial lending market, as both a lender and in terms of controlling the operation of this market, results in this inherent circularity; the problem is not that this necessarily causes interest rates to be "artificially low."[482] China complains that "[n]either the United States nor the Panel explained how this factor would cause observed interest rates to be *lower* than they otherwise would be, or how any such effect would be 'clearly distinct' from the effect that governments have on benchmark interest rates through the implementation of monetary policy."[483]

348. China misses the point. In order to determine whether Chinese interest rates are "low," a comparison must be made to something other than a Chinese interest rate. China, as it does in its arguments concerning the interpretation of Article 14(d) of the SCM Agreement, which are discussed above, fails to appreciate the concern underlying the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV* and the Panel's interpretations of Articles 14(b) and 14(d) here. The problem is the circularity inherent in a comparison between the interest rate of a government loan and a loan for which the interest rate has been effectively dictated by government intervention in the market. The *benefit* measured by such a comparison would be "artificially low," regardless of whether the government interest rate that is compared to itself is, in fact, lower than "commercial" interest rates.

349. Finally, China warns that the Panel's interpretation of Article 14(b):

> would open the door to the use of countervailing duties as a means of sitting in judgment upon, or seeking to counteract, the monetary policies pursued by other WTO Members. This would be an entirely unwarranted expansion of the scope and purpose of countervailing duty disciplines. This would be a dangerous undertaking in the best of times, and a particularly dangerous undertaking in the current economic environment.[484]

For the reasons given above, China's concern is unfounded. It is not China's "monetary policies" that led Commerce and the Panel to conclude that the Chinese lending market is distorted. Rather, it is the government's predominant role in the Chinese lending market as both a lender and in terms of controlling the operation of the market, which distorted interest rates, that led Commerce and the Panel to conclude that observed rates in China were not suitable as benchmarks.[485]

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[482] China Appellant Submission, para. 440.

[483] China Appellant Submission, para. 447 (emphasis added).

[484] China Appellant Submission, para. 474.

[485] Panel Report, para. 10.174.

350. For the reasons described above, the Panel was correct to find that China failed to establish that Commerce's decision not to rely on Chinese interest rates as benchmarks for SOCB loans denominated in RMB was inconsistent with the obligations of the United States under Article 14(b) of the SCM Agreement. China's arguments on appeal are without merit, and the United States respectfully requests that the Appellate Body reject China's appeal.

C. The Panel Correctly Found that the Loan Benchmark Used by Commerce to Measure the Benefit of the Financial Contribution Was Not Inconsistent with Article 14(b) of the SCM Agreement

351. Having found that it is permissible, under certain conditions, for an investigating authority to rely on a "proxy" benchmark denominated in a currency different from that of the investigated loan, and having further found that Commerce's determination to do so in the challenged investigations was not inconsistent with Article 14(b) of the SCM Agreement, it was left for the Panel to assess whether the actual benchmark used by Commerce was consistent with the requirements of Article 14(b). The Panel correctly found in the affirmative.

352. The Panel began its analysis by recalling that it had "concluded that the terms 'would pay' and 'could actually obtain on the market' accommodate the use of proxies, and do not mean that where an actual benchmark loan is not available, the investigating authority is forced to conclude that it is impossible to calculate a benefit (effectively meaning a benefit of zero)."[486] The Panel considered that it must assess "whether the methodology applied by the USDOC is one that a reasonable and objective investigating authority could use, in the particular situation found to exist in the CWP, LWS and OTR investigations, to generate a proxy for the interest rate that 'would' have been paid on a commercial RMB loan that the borrower 'could actually' have obtained if the Chinese lending market were not distorted."[487] The Panel explained that:

> We consider this approach appropriate because, in view of the USDOC's finding that there were no undistorted RMB interest rates in China that could be used as benchmarks, there is no point of reference in the record evidence on the basis of which we could judge the absolute value of the benchmark used. We also note in this context that China makes no arguments as to specific flaws in the USDOC's methodology that could and should have been corrected, as indeed its argument is that no such proxy methodology based on other countries' interest rates is permissible as a matter of law, a proposition that we have rejected.[488]

Additionally, the Panel explained that:

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[486] Panel Report, para. 10.203.

[487] Panel Report, para. 10.205.

[488] Panel Report, para. 10.205.

> Given that constructing such a proxy is an exercise in estimation and approximation, in considering whether the USDOC's methodology is aimed at generating, in an unbiased and objective way, a proxy for commercial RMB interest rates that would exist (and thus "could" be obtained) in an undistorted market, we consider that our task is to evaluate the internal logic of the methodology employed, and the soundness and appropriateness of the data relied upon by the USDOC, in constructing the proxy.[489]

353. Applying this standard, the Panel found that Commerce's use of a basket of other countries' currencies as the basic source for its proxy interest rate was "permissible," and that reliance on the World Bank grouping of countries in the same income category as China based on gross national incomes ("GNIs") per capita also was "not unreasonable, as this is a pre-existing grouping, not one created for the investigations."[490] This appeared to the Panel "to introduce a certain element of macroeconomic similarity among these 'benchmark' countries, reflecting the USDOC's identification of a broad inverse relationship between real interest rates and income levels."[491] The Panel agreed that Commerce's "exclusion of countries whose interest rates it found to be anomalous, and of NME countries, enhances this macroeconomic similarity."[492] Likewise, "[t]he adjustment for inflation also seems appropriate, *inter alia*, as a way of accounting at least partially for exchange rate expectations, which are influenced by inflation, as noted by the USDOC."[493] Finally, the Panel indicated that it did not consider Commerce's "inclusion of factors related to the quality of the countries' institutions to be unreasonable, as factors such as political stability, government effectiveness and rule of law are taken into account by lenders when assessing the riskiness of lending to borrowers in a given country."[494] The Panel also noted that China had not "argued that there was a mismatch in terms of either maturities or dates of the benchmark interest rates and the investigated government loans."[495]

354. Thus, the Panel concluded that, while "not perfect," Commerce's benchmark determination:

> Seem[ed] to be based on a reasoned and even-handed approach to the unusual situation with which the USDOC was confronted, rather than appearing arbitrary, or biased. In particular, as noted, the USDOC had the right under Article 14(b) of the SCM Agreement to approximate on a reasonable basis the RMB interest rate

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[489] Panel Report, para. 10.206.

[490] Panel Report, para. 10.207.

[491] Panel Report, para. 10.207.

[492] Panel Report, para. 10.207.

[493] Panel Report, para. 10.207.

[494] Panel Report, para. 10.207.

[495] Panel Report, para. 10.207.

> that would have been available on "comparable commercial loans" that borrowers in China could "actually" have obtained if an undistorted market for such loans existed in China. We consider that a reasonable and objective investigating authority could have used the methodology used by the USDOC, and relied on the data that it did, to make such an approximation.[496]

The Panel therefore found that the benchmark actually used by Commerce to calculate the benefit from RMB-denominated SOCB loans was not inconsistent with the obligations of the United States under Article 14(b) of the SCM Agreement.[497]

355. On appeal, China argues that the Panel erred in finding that Commerce's loan benchmark was consistent with Article 14(b).[498] In China's view, "it was (and is) self-evident that Commerce's multi-currency regression model was not 'a comparable commercial loan which the firm could actually obtain on the market.'"[499] In its appellant submission, China separately addresses its concerns that Commerce's loan benchmark was not "comparable" and was not a "loan which the firm could actually obtain on the market."

356. In discussing comparability, China agrees with the Panel that:

> a "comparable" loan is one that (1) was provided at approximately the same time; (2) has the same interest rate structure (fixed versus floating); (3) has a similar maturity (*e.g.*, short-term versus long-term); (4) is for approximately the same amount as the government-provided loan; and (5) is denominated in the same currency. These are, as the Panel stated, "fundamental elements used to describe loans, and thus the elements on the basis of which different loans can be compared."[500]

357. However, despite agreeing that "all of the factors identified by the Panel are relevant to the comparability of different loans," China argues that "the currency in which the loan is denominated is of fundamental importance."[501] Indeed, China appears to consider currency the only relevant factor in determining whether a loan is comparable. At least, the only criticism China levels against Commerce's loan benchmark is that it incorporates interest rates of loans denominated in currencies other than the RMB.

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[496] Panel Report, para. 10.208.

[497] *See* Panel Report, para. 10.209.

[498] *See* China Appellant Submission, paras. 371-397.

[499] China Appellant Submission, para. 374.

[500] China Appellant Submission, para. 380.

[501] China Appellant Submission, para. 381.

358. China argues that currency is "of fundamental importance":

> because real interest rates differ by the currency in which the loan is denominated and the country in which the loan is issued. As a consequence, comparing a loan denominated in one currency to a loan denominated in another currency will necessarily measure the factors that cause interest rates to be different in different countries and currencies. These differences in interest rates are essentially idiosyncratic to each currency, and are not a measure of whether the recipient of a government-provided loan denominated in a particular currency is "better off" as a result of the financial contribution.[502]

359. This, however, is no criticism of the loan benchmark used by Commerce. Commerce used a group of interest rates, rather than just one out-of-country interest rate, because Commerce considered that various factors can impact national averages for interest rates.[503] Commerce selected a group of inflation-adjusted interest rates in countries with similar per capita GNIs to China.[504] Commerce then performed a regression analysis[505] of those rates, GNI data, and World Bank governance indicators to determine a yearly comparison interest rate, as explained further below.[506]

360. Commerce selected countries that had similar GNIs to China. Commerce noted that there is a broad inverse relationship between income levels and lending rates – countries with lower per capita GNI tend to have higher interest rates than countries with higher per capita GNI, a fact demonstrated by the lending rates across countries, as reported in the International Financial Statistics ("IFS").[507] Commerce determined which countries were similar to China in terms of

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[502] China Appellant Submission, para. 381.

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

[504] *Id.*

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

[506] *Id.*

[507] *See, e.g., LWS CVD Final Decision Memorandum*, at 12 (Exhibit CHI-3); *CWP CVD*
(continued...)

GNI, based on the World Bank's classification of countries as: low income; lower-middle income; upper-middle income; and high income. China falls in the lower-middle income category, a group that included 55 countries as of July 2007.[508]

361. Many in this group of countries reported short-term lending and inflation rates to the IFS.[509] Commerce excluded those countries that were anomalous[510] or were considered to be non-market economies for AD purposes for any part of the investigation period.[511] Commerce adjusted the calculation so that a country's data were only taken out of the analysis for the years in which the interest rate was considered aberrational.[512] The comparison interest rate also excluded any economy that did not report lending and inflation rates to the IFS for the years for which a comparison interest rate was needed and only included countries classified as lower-middle income during that year.[513] Finally, Commerce adjusted for inflation as a proxy for an adjustment for exchange rate expectations.[514]

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[507] (...continued)
Final Decision Memorandum, at 8 (Exhibit CHI-1); *and OTR Tires CVD Final Decision Memorandum*, at 8 (Exhibit CHI-4).

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

[509] *Id*.

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

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

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

[513] *Id.* at 8.

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

362. Commerce took additional steps to ensure that the constructed benchmark approximated a "comparable commercial loan which the firm could actually obtain on the market."[515] Specifically, it performed a regression analysis of the data, accounting for the countries' GNI and their various governance indicators used by the World Bank. As Commerce noted: "These indicators report the quality of each country's institutions across several dimensions, including political stability, government effectiveness, regulatory quality, rule of law, and control of corruption."[516] This regression analysis took into account a key factor involved in interest rate formation, that of the quality of a country's institutions, which is not directly tied to state-imposed distortions in the banking sector discussed above.[517] As Commerce explained: "Banks and other lenders in each of the countries included in the constructed benchmark will take into account various factors such as the quality of governance in a country, political stability, government involvement, and interference in the respective economies in assessing risk associated with lending to businesses in a country."[518] Therefore, to the extent that these indicators vary across countries, they will affect the perceived risk of lending in a particular country and that will be reflected in the interest rate.[519] Moreover, the U.S. Federal Reserve Board's analysis on these measures of institutional quality against interest rates found the correlation to be that "higher quality institutions are associated with lower real interest rates."[520]

363. Discussing the country data on which Commerce relied to determine a loan benchmark, China complains that "the data showed that there was a *20 percentage point spread* in real interest rates among these countries."[521] The existence of such a spread in real interest rates among countries is an argument *in favor* of performing a multi-currency analysis, rather than relying on data from one country alone. China's argument supports Commerce's approach.

364. Ultimately, China's argument regarding comparability is nothing more than another attempt to restrict Members' ability in all cases to use "proxy" loan benchmarks denominated in a currency different from the investigated loan. The Panel rightly rejected China's proposed interpretation of Article 14(b) in this regard as "excessively formalistic, in that it would

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

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

[517] *Id.*

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

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

[520] *CFS CVD Final Decision Memorandum*, at Comment 10, p. 71 (Exhibit CHI-93) (*referencing The Construction of the Benchmark Interest Rates in CVD Cases Regarding Government-Directed Loans*, Division of International Finance, Federal Reserve Board, at 2 (Exhibit US-74).

[521] China Appellant Submission, para. 386.

effectively limit an investigating authority's ability to identify an appropriate benchmark, forcing it instead to fall back on a choice from among inappropriate benchmarks."[522]

365. China also argues that Commerce's loan benchmark was not a loan that a company "could actually obtain on the market."[523] While China agrees with the Panel that "the credit rating of the borrower is one factor that is relevant to identifying a benchmark loan that the borrower 'could actually obtain on the market'," in China's view, "the phrase 'actually obtain on the market' has a broader meaning than the meaning given to it by the Panel."[524]

366. Quite to the contrary, however, the meaning China proposes for this phrase is far *narrower* than that given to it by the Panel. The Panel analyzed Article 14(b) and noted, in particular, that the phrase "'the amount the firm *would* pay on a comparable commercial loan [] which the firm *could* actually obtain on the market'"[525] is written in the "conditional mode."[526] Viewed "in conjunction with the reference to the individual borrower's situation," the Panel correctly explained that this:

> is an indication that where loans are concerned, the very individualized nature of borrowing, as discussed above, often will limit an investigating authority's ability to identify a fully comparable existing commercial loan held by the investigated borrower to use as a benchmark for the investigated government loan, meaning that some degree of approximation will be inevitable. Often this approximation can be accomplished by making adjustments to a loan that is not comparable in every respect, such that, following the adjustments, the resulting adjusted loan's terms have been made comparable. In this sense, an adjusted non-comparable loan would be a proxy for a theoretical "comparable commercial loan" that the borrower "could actually obtain on the market".[527]

367. The Panel further explained that "in many or most cases, certain adjustments will need to be made to ensure that ultimately the amount of the benefit that is calculated is based on the amount that 'would' be paid on a 'comparable commercial loan' that the borrower 'could' actually have obtained on the market," and "[t]hese are questions that could only be resolved on a case-by-case basis . . . ."[528] The Panel cautioned that:

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[522] Panel Report, para. 10.121.

[523] China Appellant Submission, paras. 391-395.

[524] China Appellant Submission, para. 392.

[525] Panel Report, para. 10.117 (emphasis supplied by the Panel).

[526] Panel Report, para. 10.117.

[527] Panel Report, para. 10.117.

[528] Panel Report, para. 10.118.

> There may be circumstances, however, where the actual differences between any of the commercial loans on a borrower's books and the investigated government loan are so significant that it is not realistically possible to address them through adjustments; or the investigated government loan might be the only loan on the borrower's books; or the borrower's only other loans might also be from the government. In these circumstances, the investigating authority would need to look beyond actual loans held by the investigated borrower, and use other sources of information. One possibility in this regard could be a similar commercial loan granted to another borrower with a similar credit risk profile as the investigated borrower (if such a loan could be identified). If no appropriate commercial loan benchmark can be identified, then the authority could *construct a benchmark loan proxy*. While Article 14(b) contains no specific guidance as to how this would need to be done, we see no *a priori* restriction to any geographical market (as exists, for example, in Articles 14(a) and 14(d)), or any prohibition of any particular approach to constructing a proxy. Rather, the fundamental rule in Article 14(b) is that the measurement of the benefit be based on what "would" have been paid on a comparable commercial loan that "could" actually have been obtained by the investigated borrower, *even if no such loan exists*.[529]

368. China, on the other hand, suggests that:

> The use of the word "actually" in Article 14(b) underscores that any benchmark loan must be one that the borrower could, in fact, obtain. This requirement, in turn, directly relates to the relevant "market" under Article 14(b). A "market" in which a company "could actually obtain" a loan is, necessarily, a market in which the company is actually able to borrow.
>
> In this regard, it is important to recognize that loans denominated in certain currencies (such as the U.S. dollar) can be borrowed in international markets, while loans denominated in other currencies (such as the RMB) can only be borrowed in the country that issues the currency. It is also important to recognize that there are a wide variety of commercial and regulatory factors that may affect the ability of a particular borrower to obtain loans from sources outside of its home country or in currencies other than the currency in which it principally does business.
>
> In light of these considerations, any benchmark used by an investigating authority must represent a loan from a "market" in which the firm "could actually obtain" a

[529] Panel Report, para. 10.119.

> "comparable commercial loan", given the sources of credit that are actually available to it.[530]

369. As an initial matter, we note that China's argument that "any benchmark loan must be one that the borrower could, in fact, obtain" would appear to be inconsistent with Chinese respondents' own proposal that Commerce use a "weighted-average [of] interest rates charged by Chinese banks, both state-owned and non-state-owned, during the period of investigation."[531] China argues that "[t]hese were 'comparable' loans denominated in the same currency, based on observed interest rates, and they were loans that the respondent borrowers 'could actually obtain on the market'."[532] However, a weighted average of interest rates charged by state-owned and non-state-owned Chinese banks is necessarily not "one [loan] that the borrower could, in fact, obtain."[533] China thus appears to concede the possibility that something other than an "actual" loan, such as a weighted-average of interest rates, may be used as a benchmark consistently with Article 14(b). We would note that Commerce's "multi-currency regression model," which China contends was "self-evident[ly] . . . not 'a comparable commercial loan which the firm could actually obtain on the market'" was, itself, a weighted-average of interest rates, although one which took into account additional factors in order to improve its reliability as a benchmark.

370. Furthermore, once again, China offers an "excessively formalistic" interpretation, which cannot be accepted. China would restrict the ability of Members to countervail injurious subsidies based on policies of a Member providing the subsidies that prohibit the recipients of the subsidies from accessing lending in markets other than their home market. In such a situation, Members would be required to determine the benefit conferred by a financial contribution using a benchmark from within the territory of the subsidizing Member even if the government of that Member provided one hundred percent of the loans in its territory or dictated interest rates. As the Panel correctly found, such an interpretation "would effectively limit an investigating authority's ability to identify an appropriate benchmark, forcing it instead to fall back on a choice from among inappropriate benchmarks."[534]

371. For these reasons, the Panel correctly found that the loan benchmark used by Commerce was not inconsistent with Article 14(b), and the United States respectfully requests that the Appellate Body uphold the Panel's finding and reject China's appeal.

D. The Panel Did Not Act Inconsistently with Article 11 of the DSU

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[530] China Appellant Submission, paras. 392-394.

[531] China Appellant Submission, para. 363; *see also id.*, para. 400.

[532] China Appellant Submission, para. 400.

[533] China Appellant Submission, paras. 392.

[534] Panel Report, para. 10.121.

372. In connection with its arguments that the Panel erred in its interpretation and application of Article 14(b) of the SCM Agreement, China also alleges that the Panel "fail[ed] to undertake an objective assessment of the matter in accordance with Article 11 of the DSU."[535] China's allegation is entirely unsubstantiated and utterly without merit.

373. The Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself."[536] The burden for demonstrating such failure is accordingly high, because an allegation that a panel has acted inconsistently with Article 11 of the DSU "impl[ies] not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel."[537] China's allegation falls far short of this standard, and is belied by the Panel's report.

374. In a number of places, China criticizes the brevity of the Panel's analysis. China notes that, in several instances, the Panel analyzed an issue in "a single paragraph" or a "single sentence."[538] In the first place, this would appear to be an argument under Article 12.7 of the DSU – which requires a panel to "set out [in its report] the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes" – rather than an argument under Article 11. As China failed to raise Article 12.7 of the DSU in its notice of appeal, no such claim is within the scope of this appeal.

375. Additionally, the Appellate Body has explained that, "[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim."[539]

376. Furthermore, China misrepresents the analysis contained in the Panel's report. As explained above, the Panel analyzed and interpreted the meaning of Article 14(b) of the SCM Agreement in accordance with the customary rules of treaty interpretation, the Panel engaged in a thoroughgoing and objective examination of the evidence on the record before it, and the Panel provided well reasoned and complete explanations for all of its findings. That the Panel may not have addressed certain economic arguments that were not relevant to its analysis is not grounds to find that the Panel acted inconsistently with Article 11 of the DSU.

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[535] China Appellant Submission, para. 396; *see also id.*, paras. 376-377.

[536] *EC – Poultry (AB)*, para. 133.

[537] *EC – Hormones (AB)*, para. 133.

[538] *See*, *e.g.*, China Appellant Submission, paras. 375, 376, 385, 388, 433, and 461.

[539] *EC – Poultry (AB)*, para. 135 (emphasis in original).

377. China also argues that, "[u]nder Article 11 of the DSU, the Panel was required to evaluate Commerce's benchmark for its 'conformity with the relevant covered agreements'. Actual 'conformity', not 'sufficient approximation', is the standard that the Panel was required to apply. Its failure to do so constitutes legal error."[540] China again misrepresents the Panel's report. As explained above, the Panel reasoned that "the legal question . . . is *whether the constructed proxy* used as a benchmark by the USDOC *sufficiently approximates* what 'would' have been paid on a comparable commercial loan that 'could actually' have been obtained on the market . . . ."[541] There is no indication in this explanation of the legal question that the Panel was applying a standard of "sufficient approximation" of "conformity with the relevant covered agreements," as China suggests. This is clear on the face of the Panel's report, which fully explains the logic, the reasoning, and the legal standard applied by the Panel.

378. For these reasons, China's allegation that the Panel acted inconsistently with its obligations under Article 11 of the DSU is without merit, and the United States requests that the Appellate Body reject it and find that the Panel did not act inconsistently with Article 11 of the DSU in connection with its interpretation and application of Article 14(b) of the SCM Agreement.

VI. THE PANEL CORRECTLY CONCLUDED THAT CHINA FAILED TO ESTABLISH THAT THE CVD DETERMINATIONS AT ISSUE WERE INCONSISTENT WITH ARTICLES 10, 19.3, 19.4, OR 32.1 OF THE SCM AGREEMENT OR ARTICLE VI:3 OF THE GATT 1994

A. Introduction

379. The Panel correctly concluded that China failed to establish that Commerce's use of its NME methodology in the AD determinations at issue in this dispute, concurrently with its determination of subsidization and the imposition of CVDs on the same products in the CVD determinations at issue, was inconsistent with Articles 10, 19.3, 19.4, or 32.1 of the SCM Agreement or with Article VI:3 of the GATT 1994.

380. China's primary challenge on appeal is based on Article 19.4 of the SCM Agreement, which provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist." In China's view, if a subsidy has been "offset" through the manner in which the importing Member calculates ADs, the subsidy no longer "exists" because it can no longer be attributed to the imported products as a cause of injury to domestic producers.[542] Under China's reasoning, because such subsidies no longer "exist" for

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[540] China Appellant Submission, para. 376.

[541] Panel Report, para. 10.204 (emphasis added).

[542] China Appellant Submission, para. 500.

purposes of the SCM Agreement, any CVDs on those goods necessarily exceed the amount of the subsidies, in violation of Article 19.4 of the SCM Agreement.

381. Contrary to China's mistaken interpretation, the Panel properly found that Article 19.4 does not provide a legal basis for China's claims. The Panel correctly found that the existence of subsidies for purposes of the SCM Agreement is governed by Articles 1 and 14 of the SCM Agreement, and has nothing whatsoever to do with the imposition of NME ADs on merchandise produced by subsidy recipients. The Panel recognized that Article 19.4 of the SCM Agreement is not concerned with the existence of subsidies, but with ensuring that any CVDs imposed do not exceed the subsidies attributable to the imported goods, in terms of subsidization per unit. China is simply recasting its argument that a Member cannot impose both CVDs and NME ADs as an argument over the "existence" of the subsidy. Article 1 of the SCM Agreement provides the conditions under which a subsidy "shall be deemed to exist." That express language in the definition proves that China's "existence" approach is wrong.

382. Similarly, the Panel properly found that China failed to demonstrate any inconsistency with Article 19.3 of the SCM Agreement. The Panel correctly found that CVDs are collected in the "appropriate" amounts within the meaning of Article 19.3 where the amount collected does not exceed the amount of subsidy found to exist. The Panel also properly rejected China's challenges under Articles 10 and 32.1 of the SCM Agreement, which China conceded were derivative of its Article 19.3 and 19.4 claims.

383. The Panel properly considered two primary sources outside the SCM Agreement in its analysis: Article VI:5 of the GATT 1994 and Article 15 of the Tokyo Round Subsidies Code. Article VI:5 provides that no product shall be subject to both ADs and CVDs to compensate for the "same situation of dumping or export subsidization." The Panel properly found it significant that "export subsidization" is limited to export subsidies, as opposed to the domestic subsidies at issue in the four underlying investigations. The Panel also found it significant that the predecessor to the SCM Agreement – the Tokyo Round Subsidies Code – contained a provision that explicitly addressed the concurrent use of NME ADs and CVDs, but that this provision was not included in the SCM Agreement. Thus, Article VI:5 of the GATT 1994 and Article 15 of the Tokyo Round Subsidies Code provide supportive context for the Panel's findings.

384. With respect to the object and purpose of the relevant agreements, China mistakenly asserts that an essential object and purpose of Part V of the SCM Agreement addressing CVDs is to ensure that CVDs do not remedy any subsidies that may have been remedied to any extent by NME ADs. To the contrary, the Panel correctly found (with the exception of export subsidies, as discussed above) that the SCM Agreement does not condition the application of CVDs upon the supposed effects of ADs on the same products. When the Panel considered the object and purpose of the SCM Agreement, it did so in light of the fact that the WTO Agreement establishes separate remedies for what have always been considered to be distinct unfair trade practices.

385. China also virtually ignores its Protocol of Accession to the WTO in which, consistent with the SCM and AD Agreements, it specifically agreed that WTO Members could apply both NME ADs and CVDs to its exports. The Protocol thus provides contextual support for the Panel's findings.

386. China further requests that the Appellate Body not only find the Panel's legal interpretation to be incorrect, but also "complete the analysis" and conclude that the measures at issue were inconsistent with the obligations of the United States under the covered agreements.[543] China's request is improper for two primary reasons. First, the burden to establish the existence of such an alleged double remedy would be on China. Second, the Panel made no finding regarding whether any double remedies resulted from the concurrent imposition of NME ADs and CVDs in the investigations at issue, and China has not placed sufficient undisputed facts on the record to complete the analysis in this regard.

387. For all of these reasons, as explained more fully below, China's appeal with respect to the concurrent application of CVDs and NME ADs should be rejected.

B. The Panel Correctly Interpreted Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994

388. The Panel correctly concluded that China failed to establish that Commerce's use of its NME methodology in the AD determinations at issue in this dispute, concurrently with its determination of subsidization and the imposition of CVDs on the same products in the CVD determinations at issue, was inconsistent with Article 19.4 of the SCM Agreement or with Article VI:3 of the GATT 1994. Before the Panel, China argued that, when the United States imposes an AD on an imported product, calculated in accordance with its NME methodology, and simultaneously imposes a CVD on the same product, it has necessarily levied a countervailing duty in excess of the subsidy found to exist.[544] In other words, under China's reasoning, where an NME AD theoretically may have offset any part of a subsidy, that subsidy no longer "exists" for purposes of Article 19.4, and any CVDs applied to the same goods are necessarily in excess of the subsidy that was previously found to have existed.

389. The Panel properly rejected China's argument, correctly concluding that Article 19.4 does not provide a legal basis to support China's claim.[545] The Appellate Body should uphold the Panel Report with respect to these provisions for three principal reasons. First, the "ordinary meaning" of these provisions, as interpreted by Article 31 of the Vienna Convention, supports the Panel's interpretation. Second, China's arguments concerning the Panel Report are unavailing. Third, the Appellate Body reports cited by China do not support its argument.

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[543] China Appellant Submission, para. 562.

[544] China First Written Submission before the Panel, para. 376.

[545] Panel Report, paras. 14.115 and 14.136.

1. The Ordinary Meaning of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Support the Panel's Interpretation

390. The Panel correctly interpreted the relevant provisions – Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 – applying the "ordinary meaning" of these provisions in accordance with Article 31 of the Vienna Convention. Accordingly, the Panel Report should be upheld.

391. Article 31 of the Vienna Convention provides that a treaty should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[546] Thus, the starting place for analysis is the plain language of the relevant agreement or agreements, which then expands to the context of the relevant language and to the object and purpose of the agreement.[547] As the Appellate Body has previously stated, "[t]he meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used."[548] Although the interpretative process under Article 31 of the Vienna Convention is a "holistic" one,[549] "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted."[550] Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.[551]

392. Article 19.4 of the SCM Agreement provides that, "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." Similarly, Article VI:3 of the GATT 1994 provides, in relevant part, that, "[t]he term 'countervailing duty' shall be understood to mean a special duty levied *for the purpose of offsetting any bounty or subsidy bestowed*, directly, or indirectly, upon the manufacture, production or export of any merchandise" (emphasis added).

393. The Panel properly focused its analysis on Article 19.4's limitation of CVDs "in excess of the amount of the subsidy found to exist." The Panel recognized that Article 19.4 limits the amount of CVDs that may be levied to "the amount of the subsidy found to exist," and concluded that the amount "found to exist" is the amount found in the CVD investigation consistent with

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[546] Vienna Convention, Art. 31; *see also US – Shrimp (AB)*, para. 114.

[547] Panel Report, para. 8.56, citing *US – Carbon Steel (AB)*, para. 62 ("[T]he task of interpreting a treaty must begin with its specific terms.")

[548] *US – Softwood Lumber IV (AB)*, para. 58.

[549] *China – Audiovisual Products (AB)*, para. 348.

[550] *US – Shrimp (AB)*, para. 114; *see also US – Carbon Steel (AB)*, para. 62.

[551] *US – Shrimp (AB)*, para. 114; *see also US – Carbon Steel (AB)*, para. 62.

Articles 1 and 14 of the SCM Agreement.[552] As the Panel noted, China did "not argue that the countervailing duties imposed in each of the investigations at issue, in and of themselves, exceeded the amount of the subsidy *calculated*" by Commerce.[553] Accordingly, there was neither an allegation nor a Panel finding that the duties were inconsistent with the literal terms of Article 19.4.

394. Article 1 of the SCM Agreement provides that a subsidy "shall be deemed to exist" if a "financial contribution by a government" . . . confers a "benefit." Article 14 provides that the value of the subsidy so created is measured in terms of the "benefit to the recipient." The Panel correctly noted that Article 1 of the SCM Agreement provides that a subsidy "shall be deemed to exist" as the result of a financial contribution and a benefit, and that Article 14 provides that such benefits are valued with reference to the marketplace.[554]

395. The Panel further explained that the ordinary meaning of the SCM Agreement applies only to countervailing duties, not to antidumping duties. "By its terms, Article 19.4 only imposes disciplines with respect to the levying of *countervailing duties*, which the covered agreements define as special duties levied 'for the *purpose* of offsetting' subsidies pursuant to investigations initiated and conducted in accordance with the provisions of the SCM Agreement."[555] "The facts that anti-dumping duties are calculated under an NME methodology and thus may be affected by subsidization, and/or that, as a result, the duties may effectively 'offset' subsidies granted in respect of the product, change neither the *purpose*, nor the *nature* of these duties as anti-dumping, as opposed to countervailing, duties."[556] The Panel thus properly rejected China's invitation to interpret the SCM Agreement as governing the imposition of ADs.

396. The Panel properly explained that, "the fact that an anti-dumping duty calculated under a methodology may have the effect of 'offsetting' a subsidy in totality or in part has no effect on the existence of the subsidy[.]"[557] In this sense, the Panel concluded that, "by its own terms, Article 19.4 of the SCM Agreement is oblivious to any potential concurrent imposition of anti-dumping duties."[558] The Panel thus properly concluded that, "the narrowly-crafted discipline contained in Article 19.4 of the SCM Agreement does not address situations of 'double remedies.'"[559]

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[552] Panel Report, para. 14.112.

[553] Panel Report, para. 14.109 (emphasis in original).

[554] Panel Report, para. 14.112.

[555] Panel Report, para. 14.114 (emphasis in original).

[556] Panel Report, para. 14.114 (emphasis in original).

[557] Panel Report, para. 14.112.

[558] Panel Report, para. 14.112.

[559] Panel Report, para. 14.112.

2. China's Arguments Concerning The Ordinary Meaning of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 Are Unavailing

397. In its Appellant Submission, China redoubles its effort to argue that the imposition by the United States of the NME ADs at issue on goods from China terminates the existence of subsidies to the producers of those goods for purposes of the SCM Agreement.[560] As before the Panel, China argues that, because those subsidies no longer "exist," any CVDs whatsoever impermissibly exceed their amount, in violation of Article 19.4.

398. China's argument is incorrect. Neither Article 19.4 nor any of the other relevant provisions condition the existence of a subsidy on a finding of injury to domestic producers, or on the imposition of NME ADs. The imposition of NME ADs on some fraction of the goods produced by a subsidy recipient does not extract that subsidy from the recipient and return it to the government. Likewise, it does not "extinguish" the benefit. The payment of NME ADs thus has no bearing on the "existence" of a subsidy under the SCM Agreement.

399. The Panel correctly found that Article 19.4 limits the amount of CVDs that may be assessed to the "amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product."[561] This "amount of the subsidy found to exist" plainly refers to the amount of the subsidy found to exist by the WTO Member in the CVD proceeding, consistent with Articles 1 and 14 of the SCM Agreement. The Panel thus properly concluded that the fact that "an anti-dumping duty calculated under a methodology may have the effect of 'offsetting' a subsidy in totality or in part in no way means that it extinguishes that subsidy."[562]

400. Article 19 of the SCM Agreement lists circumstances under which subsidies may not be countervailed. Article 19.1 provides that subsidies cannot be countervailed if they have been "withdrawn." Article 19.3 excepts from the imposition of CVDs imports from those sources which have "renounced any subsidies in question." These conditions correspond to the requirement under Article 1 for a subsidy to be "deemed to exist." Similarly, when describing the WTO remedies for an actionable subsidy, Article 7.8 of the SCM Agreement offers two alternative options: to "remove the adverse effects" of the subsidy or to "withdraw the subsidy." The SCM Agreement thus distinguishes between the "existence" or withdrawal of a subsidy, and the "effects" or removal of "effects" of a subsidy found to exist.

401. China's argument also ignores the ordinary meaning of Article 19.4's provision that no CVDs shall be levied in excess of the "amount of the subsidy found to exist, calculated in terms

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[560] China Appellant Submission, paras. 499-518.

[561] Panel Report, para. 14.107.

[562] Panel Report, para. 14.113.

of the subsidization per unit of the subsidized and exported product." The limitation to "subsidization per unit of the subsidized and exported product" means that the amount of the CVDs cannot exceed that portion of the total subsidy attributable to the imports in question. For example, if a subsidy of $100 is granted evenly with respect to the production of 100 items, the CVDs may not exceed $1 per item.

402. Acceptance of China's interpretation of Article 19.4 would replace this logical rule with a theory of subsidy existence with many consequences never contemplated by WTO Members. First, a variety of problems with timing and sequencing could arise. For example, in the U.S. system – as well as others – CVD rates are usually determined before AD rates. Because Commerce would not know at the time of the CVD determination whether the AD rate would be positive (or whether there would be an affirmative injury determination), it would be impossible to know whether NME ADs would be imposed – which, under China's reasoning, would have caused any subsidies to cease to "exist" – at the time of the CVD determination. China's reasoning would also bring into question whether other Members could impose CVDs for the subsidies deemed no longer to "exist," after some of the merchandise had been subject to U.S. NME ADs.

403. These difficulties demonstrate that a prohibition on "double remedies" should not be read into the SCM Agreement. If the drafters had intended such a prohibition, then it would have been more logical to include an obligation to go back and amend any CVD in such a situation. The lack of such a provision demonstrates that a prohibition on "double remedies" should not be implied.

404. Moreover, in the U.S. system – as well as several others – ADs are calculated retrospectively (in many cases, well after importation). Thus, a dumping margin calculated for the period of investigation preceding the filing of the petition may never be paid. Instead, following the petition, a foreign producer or exporter could increase its export price and/or decrease its normal value to reduce or eliminate the dumping margin going forward. Due to the possibility of such changes, post-petition reviews may result in lower dumping margins, or none at all. As a result, when the CVD rate is determined in the investigation, it is not possible to determine the amount of ADs, or even whether they will be assessed. Accordingly, China's argument that application of the NME AD procedures automatically causes subsidies to cease to "exist" conflicts with a retrospective duty assessment system expressly recognized in the SCM Agreement.

405. In sum, the SCM Agreement plainly states how subsidies come into existence (through financial contributions that confer benefits upon their recipients) and gives examples of when they may not be countervailed (*e.g.*, if the subsidy has been renounced or withdrawn). Nowhere is there any suggestion that the imposition by a Member of an NME AD on whatever portion of

the subsidized merchandise is exported to that Member has any effect upon the existence of the subsidies themselves.[563]

3. The Appellate Body Reports Cited by China Do Not Support Its Argument

406. China also incorrectly asserts that the Panel Report is inconsistent with certain Appellate Body reports. China contends that these reports teach that certain events external to the determination of financial contribution and benefit extinguish the subsidy. First, China argues that the Appellate Body report in *US – Countervailing Measures on Certain EC Products* determined that the United States could no longer impose CVDs on products manufactured by certain formerly state-owned enterprises, following the privatization of those enterprises.[564] This principle, however, is inapplicable to China's argument here.

407. China wrongly analogizes the effect of the arm's-length sale of a subsidy recipient to the imposition of NME ADs on goods manufactured by a producer whose ownership has not changed. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body found that an arm's-length, fair-market value privatization transaction terminated the benefit, inherently terminating the existence of the subsidy.[565] Here, however, the imposition of NME ADs on merchandise produced by a subsidy recipient does not terminate the benefit to that subsidy recipient and thus does not affect the existence of a subsidy under the SCM Agreement. Thus, *US – Countervailing Measures on Certain EC Products* is inapposite to the issue here.

408. China also incorrectly claims that the Panel Report is inconsistent with the Appellate Body Report in *US– Softwood Lumber IV*.[566] *US – Softwood Lumber IV* involved a finding that a subsidy to the manufacturer of an input sold to an unrelated producer of the subject merchandise did not pass through from the subsidy recipient to the producer of the subject merchandise, so

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[563] China argues that, "if a subsidy has been 'offset' through the manner in which the importing Member calculates anti-dumping duties, the subsidy no longer 'exists' because it can no longer be attributed to the imported products as a cause of injury to domestic producers." China Appellant Submission, para. 500. Although China's reasoning is not clear, it appears that China is implying that the application of *any* NME AD would extinguish the subsidy, even if the NME AD is minuscule in relation to the subsidy. Such an argument would mean that a $1 NME AD would "extinguish" the existence of a $1 billion subsidy, for purposes of the SCM Agreement, because the subsidy would no longer "exist" after application of the NME AD procedures.

[564] China Appellant Submission, paras. 510-513.

[565] *US – Countervailing Measures on Certain EC Products (AB)*, paras. 96-120, 126.

[566] China Appellant Submission, paras. 514-518.

that the producer never received a subsidy.[567] China claims that the imposition of NME ADs on exports of products produced or exported by an *admitted* subsidy recipient presents essentially the same situation. It does not.

409. *US – Softwood Lumber IV* does not address whether a subsidy ceases to exist as a consequence of applying NME ADs. In *US – Softwood Lumber IV*, the Appellate Body found that Article 19.4 of the SCM Agreement requires the product on which CVDs are assessed to be a "subsidized product." While the Appellate Body found in *US – Softwood Lumber IV* that the producer of the product had not received a subsidy, here the producer of the subject merchandise is admitted to have received a subsidy. China's claim is simply that the imposition of NME ADs on that merchandise upon importation into the United States extinguished the "existence" of that subsidy, just as if the producer had never received it. *US – Softwood Lumber IV* thus does not support China's argument.

C. The Panel Correctly Interpreted Article 19.3 of the SCM Agreement

410. Article 19.3 of the SCM Agreement requires Members to ensure that any CVDs imposed in respect of any product be levied "in the appropriate amounts in each case." Article 19.3 states, in pertinent part:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

411. Consistent with its interpretation of Article 19.4 of the SCM Agreement, the Panel correctly concluded that China failed to establish that Commerce's uses of its NME methodology in the AD determinations at issue concurrently with the CVD investigations at issue was inconsistent with Article 19.3 of the SCM Agreement.[568] Invoking the rationale of the panel in *EC – Salmon (Norway)*, the Panel reasonably interpreted the relevant language of Article 19.3 of the SCM Agreement as meaning that CVDs are collected "in the appropriate amounts insofar as the amount collected does not exceed the amount of the subsidy found to exist."[569] Because there is no suggestion in any of the four contested CVD investigations that the United States imposed CVDs exceeding its subsidy findings, the Panel correctly decided that the United States did not

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[567] *US – Softwood Lumber IV (AB)*, paras. 150, 153, 159.

[568] Panel Report, paras. 14.124-14.130

[569] Panel Report, para. 14.128.

act inconsistently with Article 19.3 of the SCM in applying CVDs on Chinese exports simultaneously with NME ADs.[570]

412. As discussed at length above, the calculation of NME ADs has no bearing on whether a subsidy can be "found to exist" under the provisions of the SCM Agreement. Nor, as explained above, is the SCM Agreement concerned with ADs, whose purpose is to "offset or prevent dumping."[571] Instead, the relevant inquiry under Article 19.3 of the SCM Agreement is whether there is a permissible correlation between the amount of the subsidy found to exist in a CVD proceeding and the amount of CVDs actually levied. For those reasons, the Panel correctly concluded that "the imposition of anti-dumping duties calculated under an NME methodology has no impact on whether the amount of the concurrent countervailing duty collected is 'appropriate' or not."[572]

413. Contrary to China's contention on appeal, the panel report in *EC – Salmon (Norway)* lends no support to a different interpretation of Article 19.3 of the SCM Agreement. The *EC - Salmon (Norway)* dispute concerned the European Communities' use of "minimum import prices" for salmon exports from Norway that were alleged to exceed normal value.[573] Norway disputed this practice under Article 9.2 of the AD Agreement, which in language and structure largely parallels Article 19.3 of the SCM Agreement by limiting ADs to "the appropriate amounts in each case". The Panel concluded that the "appropriate" amount of ADs must be an amount that results in offsetting or preventing dumping, when all other requirements for the imposition of ADs have been fulfilled.[574]

414. Article 19.3 of the SCM Agreement can and should be interpreted in a similar fashion. The "appropriate" amount of CVDs must be an amount no greater than the subsidies attributable to the subject merchandise[575] when all other requirements for the imposition of CVDs have been fulfilled. Thus, as the Panel properly found, "countervailing duties are collected in the appropriate amounts insofar as the amount collected does not exceed the amount of subsidy found to exist."[576] The interpretation of the term "appropriate" in *EC – Salmon (Norway)* thus does not support China's interpretation of Article 19.3.

415. China presents no cogent explanation of how the panel's interpretation of "appropriate" in *EC – Salmon (Norway)* supports its claim under Article 19.3 of the SCM Agreement. Despite

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[570] Panel Report, para. 14.130.

[571] GATT 1994, Article VI:2.

[572] Panel Report, para. 14.128.

[573] *EC – Salmon (Norway)*, para. 7.702.

[574] *Id.*, paras. 7.704-7.705.

[575] SCM Agreement, Article 10 and footnote 36; GATT 1994, Article VI:3.

[576] Panel Report, para. 14.128.

the fact that China contests various aspects of Commerce's subsidy findings in the four CVD investigations, there is no dispute that the amount of the subsidies calculated, or found to exist, by Commerce corresponded to the CVDs imposed by Commerce. Indeed, China does not argue that the CVDs imposed in each of the investigations at issue, in and of themselves, exceeded the amount of the subsidy *calculated*.[577]

416. China's argument rests on once again asserting a false equivalence between NME ADs and CVDs.[578] Yet, as the Panel correctly noted, "the manner in which the dumping margin is calculated – through an NME methodology or otherwise – has no impact on the existence of subsidies, which may be found to 'exist' in a parallel CVD investigation."[579] And as discussed in detail above, the potential of a "double remedy" from the imposition of NME ADs "does not transform these duties into countervailing duties under the agreements."[580]

417. Contrary to China's contentions, the Panel did engage in extensive consideration of the SCM Agreement, specifically referencing the definition of "appropriate amounts" as used in Article 19.3.[581] From that starting point, the Panel properly concluded that concurrent application to exports from China by the United States of CVDs and NME ADs was not inconsistent with Article 19.3 of the SCM Agreement. Thus, the Panel's findings with respect to Article 19.3 of the SCM Agreement should be upheld.

D. The Panel Correctly Interpreted Articles 10 and 32.1 of the SCM Agreement

418. As China acknowledges, its claims under Articles 10 and 32.1 of the SCM Agreement are premised upon the success of its central claims that the United States acted inconsistently with Articles 19.3 and 19.4 of the SCM Agreement.[582] China provides no other basis for its claims under Articles 10 and 32.1 of the SCM Agreement. As demonstrated above, the Panel properly interpreted Articles 19.3 and 19.4. Accordingly, the Panel's findings with respect to China's claims under Articles 10 and 32.1 of the SCM Agreement should also be upheld.

E. The Panel Correctly Construed the Context of the SCM Agreement

419. Despite China's assertions, the Panel did not err in its evaluation of the context of the relevant terms of the SCM Agreement. The Panel properly focused its attention on two elements – Article VI:5 of the GATT 1994 and Article 15 of the Tokyo Round Subsidies Code – that

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[577] Panel Report, para. 14.109.

[578] China Appellant Submission, para. 552-554.

[579] Panel Report, para. 14.128.

[580] *Id.*

[581] *Id.*

[582] China Appellant Submission, para. 556-557.

enabled it to achieve a thorough understanding of Members' obligations in imposing concurrent CVDs and NME ADs under the SCM Agreement, particularly under Article 19.4. Based upon that analysis, the Panel correctly concluded that "context confirms that the common intention of the parties to the SCM Agreement was not to address or prohibit, in Article 19.4, the imposition of 'double remedies' in respect of domestic subsidies."[583]

420. As previously stated, Article 31 of the Vienna Convention indicates that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The second paragraph of Article 31 goes on to define "context for the purpose of the interpretation of a treaty" to "comprise, in addition to the text, including its preamble and annexes":

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

421. The Panel did not misconstrue the context of the relevant provisions of the SCM Agreement. Rather, China engages in a flawed contextual analysis. In addition to identifying no context that would validate its interpretation of Articles 19.4 and 19.3, China fails to substantiate its assertion that the Panel erred in its contextual findings.

1. Article VI:5 of the GATT 1994

422. The Panel correctly observed that "the anti-dumping and countervailing duty instruments are provided for and addressed under two distinct agreements and are, with the notable exception of Article VI:5, addressed under distinct paragraphs of Article VI of the GATT 1994."[584] That provision of the GATT 1994 sets forth the sole limitation on a Member's ability to apply ADs and CVDs concurrently in the case of export subsidies.

423. Article VI:5 of the GATT 1994 provides:

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

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[583] Panel Report, para. 14.115.

[584] Panel Report, para. 14.116

424. Article VI:5 makes two things clear. First, the Members understood that, as a general matter, ADs and CVDs can be applied concurrently to the same product. It is only because of that general understanding that the text of Article VI:5—addressing the specific exception to such concurrent application in the context of export subsidization—becomes necessary.

425. Second, by its terms, Article VI:5 applies only to concurrent AD and CVD proceedings on the same product that involve "the same situation of dumping or export subsidization." As the Panel explained:[585]

> [B]y its very terms, Article VI:5 of the GATT 1994 is limited to "situation[s] of [...] export subsidization". In our view, these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI:5 to situations involving *export subsidies*, to the exclusion of situations in which domestic subsidies are granted on exported goods.

426. In considering the context provided by Article VI:5, as well as the distinction made between domestic *vs*. export subsidies in Article VI:3, the Panel further found that, "these provisions demonstrate that the drafters intended to make a distinction between subsidies granted with respect to the production or manufacture of goods (*i.e.,* domestic subsidies) and subsidies granted in respect of the export of goods (*i.e.,* export subsidies)." As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members agreed only to constrain concurrent application of ADs and CVDs where imposing ADs would compensate for "the same situation of dumping and export subsidization." If the Members intended to constrain concurrent application in other situations, they would have provided so explicitly, as they did in the case of Article VI:5.

427. Additionally, *Ad* Note 2 to Article VI:1 of the GATT 1994 provides further support to the Panel's findings with respect to context and the prohibition under Article VI:5 of concurrent application of ADs and CVDs in the case of export subsidies.[586] Added to the GATT in 1955, *Ad*

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[585] Panel Report, para. 14.117.

[586] The Panel noted the U.S. discussion of *Ad Article VI,* note 2, but did not appear to rely on it. *See* Panel Report, para. 14.87, note 992 (noting arguments by the United States concerning the second *Ad* Note to Article VI:1). The *Ad* note states in full:

> It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be

(continued...)

Note 2 to Article VI:1 provides, in the case of NME countries, that "contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate."[587] Although *Ad* Note 2 to Article VI:1 recognizes that an investigating authority conducting an AD proceeding may need to look beyond the exporting country to find appropriate prices for comparison with prices in the importing country, it was not accompanied by a modification – to Article VI:5 or to any other provision in the GATT – that required the offsetting of CVDs against ADs, or vice versa, in cases of concurrent investigations on the same product. *Ad* Note 2 to Article VI:1 thus provides further support for the context of the Panel's analysis of Article VI:5.

428. The Panel further found that its interpretation was confirmed by the principle of *effet utile*. According to the principle of *effet utile*, an interpreter should not "adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[588] Since only *imported* goods are subject to ADs or CVDs, reading Article VI:5 as encompassing situations in which domestic subsidies granted to exported goods are countervailed would effectively read the term "export" out of the relevant sentence of that provision.[589]

429. China's efforts to dismiss the Panel's findings on Article VI:5 are unpersuasive. China posits that the Panel undertook a distorted *a contrario* interpretation of Article VI:5 in light of the object and purpose of the SCM Agreement. Starting from the assumption that the concurrent imposition of CVDs and NME ADs always creates a complete double remedy, and then working backwards in its analysis, China argues that the Panel somehow concluded that "the drafters [of Article VI:5] affirmatively intended to *permit* double remedies in the case of domestic subsidies."[590] China, in effect, places the burden on the Panel (and, originally, on the United States) to prove a negative, *i.e.* that concurrent application of CVDs and NME ADs could never result in any potential overlap. This position was neither found by the Panel nor advocated by the United States. To the contrary, as the Panel's reasoning makes clear, the prohibition in Article VI:5 does not address domestic subsidies, but rather "export subsidization." Thus, the context of Article VI:5 contradicts China's argument.

430. In support of its position on Article VI:5, China mistakenly relies upon the Appellate Body's findings in *US – Upland Cotton*. However, as China acknowledges, that dispute involved reconciling "an express allowance in one of the covered agreements with an express prohibition

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[586] (...continued)
appropriate.

[587] *Ad* Note 2 to Article VI:1; *see also* Guide to GATT Law and Practice (1995), vol. 1, p. 228.

[588] *US – Gasoline (AB)*, p. 23.

[589] Panel Report, para. 14.117.

[590] China Appellant Submission, para. 532.

in another."[591] That is not the issue in this dispute. There is no express prohibition against the concurrent application of CVDs and NME ADs that the Appellate Body must reconcile with conflicting language found elsewhere in the covered agreements.

431. In fact, the focus of the Appellate Body in *US – Upland Cotton* was on the express language of the covered agreements, specifically Article 3.1(b) of the SCM Agreement and Article 6.3 of the *Agreement on Agriculture* concerning import substitution subsidies. Rooting its analysis in the language of the relevant agreements, the Appellate Body found "no provision in the Agreement on Agriculture *dealing specifically* with subsidies contingent upon the use of domestic over imported agriculture goods."[592] Thus, *US – Upland Cotton* stands for nothing more than the proposition that express language represents the essential starting point in interpreting the WTO Agreement.

432. Contrary to China's interpretation, the express language of Article VI:5 unambiguously limits its application to instances of export subsidization. Thus, in its analysis of context, the Panel correctly determined that the terms of Article VI:5 "are self-explanatory in their intention to limit the scope of the prohibition in Article VI:5 to situations involving *export subsidies*, to the exclusion of situations in which domestic subsidies are granted on exported goods."[593] The context provided by Article VI:5 thus supports the Panel Report.

2. Article 15 of the Tokyo Round Subsidies Code

433. Lending further support to the Panel's interpretation of Article 19.4 of the SCM Article is Article 15 of the Tokyo Round Subsidies Code.[594] Article 15.1 of the Tokyo Round Subsidies Code referenced *Ad* Note 2 to Article VI:1 of the GATT 1947, which described "a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are

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[591] China Appellant Submission, para. 534.

[592] *US – Upland Cotton (AB)*, para. 547.

[593] Panel Report, para. 14.117.

[594] Article 15, entitled "Special Situations," provided, in relevant part:

> 1. In cases of alleged injury caused by imports from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1, point 2) the importing signatory may base its procedures and measures either
>
> (a) on this Agreement, or, alternatively
>
> (b) on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

fixed by the State[.]"[595] Under Article 15 of the Tokyo Round Subsidies Code, where imports from such a country were alleged to have been causing injury by virtue of both subsidized imports and dumped imports, concurrent imposition of ADs and CVDs was not permitted. The importing signatory was required to choose which remedy it would use to address injury caused by those imports.

434. As the Panel found, it is "significant that the predecessor to the SCM Agreement – the Tokyo Round Subsidies Code – contained a provision that explicitly addressed the concurrent use of NME methodologies in anti-dumping investigations, and of countervailing duties, in respect of imports from NMEs."[596] Although not addressing the question of overlapping remedies, Article 15 directly confronts the fundamental issue in this dispute: whether a Member must choose between ADs and CVDs where the methodology used to calculate the dumping margin does not rely on domestic prices or costs of the exporting party. The inclusion of Article 15 in the Tokyo Round Subsidies Code provides meaningful evidence that parties to the Code considered that no other provision in the GATT 1947 contained such an "either/or" requirement. By extension, no other provision in the GATT 1994 contains such a requirement. Had such an "either/or" choice been required under other provisions of the GATT 1947, Article 15 of the Subsidies Code would have been superfluous.

435. Notably, Article 15 of the Tokyo Round Subsidies Code was dropped when the Uruguay Round agreements were negotiated. The texts of the WTO agreements contain no reference to the concurrent imposition of ADs and CVDs, other than in the circumstances of export subsidization expressly addressed by Article VI:5 of the GATT 1994. The existence of a provision in the Tokyo Round Subsidies Code specifically prohibiting the concurrent application of ADs and CVDs to certain countries, followed by the disappearance of that provision in the successor SCM Agreement, demonstrates that such a prohibition no longer exists and reinforces the presumption, created by the express limitation in Article VI:5 itself, that WTO Members never agreed on such a prohibition. Even though this issue previously arose under the Tokyo Round Subsidies Code, China did not address it in its accession.

436. As cited by the Panel, in *US – Underwear (AB)*, the Appellate Body identified "another element of the context" with respect to a provision that had appeared in a predecessor agreement but that was absent from the relevant WTO agreement.[597] In that dispute, Costa Rica challenged the retroactive application by the United States of a temporary safeguard measure under the Agreement on Textiles and Clothing (ATC). The Appellate Body noted that the ATC contained no provision on retroactivity, unlike its predecessor, the Multifibre Arrangement (MFA), which contained a provision expressly permitting the backdating of the effective date of a restraint measure. From this, the Appellate Body concluded that the removal of the earlier provision

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[595] GATT 1947, Annex I, Article VI, Paragraph 1, point 2.

[596] Panel Report, para. 14.119.

[597] *US – Underwear (AB)*, p. 16; *see also* Panel Report, para. 14.120, note 1027.

"strongly reinforces the presumption that such retroactive application is no longer permissible. This is the commonplace inference that is properly drawn from such a disappearance."[598]

437. China offers no persuasive response to the Panel's invocation of Article 15 of the Tokyo Round Subsidies Code. In addition to disputing Article 15 as "context" under the Vienna Convention, China reasserts that it is not challenging the WTO consistency of the U.S. concurrent application of ADs and CVDs against certain Chinese exports.[599] That characterization, however, is at odds with the fundamental premise of China's argument that concurrent application of NME ADs and CVDs results in offsetting the same subsidy twice.[600]

438. China also incorrectly argues that the Appellate Body Report in *US – Underwear (AB)* casts doubt upon the Panel's findings. *US – Underwear (AB)* does not support China's argument. As China states, in *US – Underwear (AB)*, the Appellate Body considered a backdating provision in the MFA that was removed from the ATC. As China notes, the Appellate Body held that the absence of a corresponding provision in the ATC reinforced its interpretive conclusion that backdating was no longer permitted.[601] China attempts to distinguish *US – Underwear (AB)* on the grounds that the removed provision had a clearer meaning than Article 15, and that the removal of a previous provision should only be given interpretive weight if the inference would "fit harmoniously with the applicable provisions of the agreement to be interpreted."[602] As explained above, however, the Panel properly interpreted the meaning of Article 15 and its removal. Accordingly, *US - Underwear (AB)* supports the Panel's interpretive approach.

F. The Panel Correctly Construed the Object and Purpose of the SCM Agreement

439. China argues that an essential object and purpose of Part V of the SCM Agreement addressing CVDs is to ensure that CVDs do not remedy any subsidies that may have been remedied to any extent by NME ADs.[603] As an initial matter, China errs in attempting to assign to an "object and purpose" to one part of the SCM Agreement. Article 31 of the Vienna Convention is clear that it is the "object and purpose" of the agreement as a whole that is relevant, not some purported "object and purpose" of individual provisions. Moreover, the Panel correctly rejected China's "object and purpose" argument, concluding that, ". . . the object and

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[598] *US – Underwear (AB)*, pp. 14-15.

[599] China Appellant Submission, paras. 541-42.

[600] China Appellant Submission, para. 542.

[601] China Appellant Submission, para. 545.

[602] China Appellant Submission, para. 545.

[603] China Appellant Submission, paras. 523-528.

purpose of Part V of the SCM Agreement is limited to imposition of disciplines with respect to [CVDs]."[604]

440. Contrary to China's interpretation, a review of the WTO agreements as a whole establishes that the Members created two distinct remedies for what were considered to be two separate unfair trade practices – dumping and subsidies. The AD rules generally compare prices at which a *company* sells products in the home market and in the export market to determine whether the price in the former exceeds the price in the latter. CVD rules, in contrast, focus on subsidies bestowed on products by *governments*.

441. Beginning with the signing of the GATT in 1947, separate rules have governed AD and CVD proceedings conducted by GATT Contracting Parties and now WTO Members. Articles VI:1 and VI:2 of the GATT 1994 permit the imposition of ADs, up to the amount by which the normal value of the imported product exceeds its export price, in order to offset this difference in pricing. Nowhere in Article VI:1 or VI:2 is there any reference to subsidies or CVDs, still less any indication that they are relevant to the calculation of ADs. Similarly, Article VI:3 of the GATT 1994 permits the imposition of CVDs, not in excess of the amount of the subsidy, in order to offset that subsidy. Nowhere in Article VI:3 is there any reference to dumping, or any suggestion that the effect of the subsidies on costs or prices is relevant to the amount of CVDs that may be imposed.

442. This distinctness was carried over into the Uruguay Round AD and SCM Agreements. Article 9 of the AD Agreement reiterates the discretion of the importing Member to impose an AD at any level up to the dumping margin.[605] Article 19.1 of the SCM Agreement similarly recognizes that an importing Member may impose CVDs at any level up to the full amount of the subsidy.[606]

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[604] Panel Report, para. 14.122.

[605] Article 9.1 of the AD Agreement provides, in part:

> The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.

[606] Article 19.1 of the SCM Agreement provides in part:

> The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing

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443. Neither the AD nor the SCM Agreement speaks to the remedy, or level thereof, made available under the *other* Agreement. Nor does either Agreement speak to the level of remedies to be imposed in situations where there are parallel AD and CVD proceedings. Instead, each Agreement makes clear that trade remedy action under the other Agreement would not be "preclude[d]."[607] The WTO Agreements therefore recognize that ADs and CVDs are separate remedies that address distinct unfair trade practices, and that those remedies may be applied to the fullest extent of the dumping margin or subsidy found to exist, regardless of the existence of parallel AD or CVD investigations.

444. Furthermore, as discussed above, the GATT Contracting Parties further reinforced the distinctness of the remedies available from AD and CVD proceedings by providing for only one instance – set forth in Article VI:5 of the GATT 1994 – in which both remedies may not be applied to the full amount provided for in Article VI of the GATT 1994. As discussed above, Article VI:5 applies only where a Member conducting concurrent AD and CVD proceedings on the same product finds "the same situation of dumping and export subsidization." Article VI:5 makes clear the understanding of Members that, as a general matter, ADs and CVDs could be applied concurrently to the same product. It is only because of this general understanding that the text in Article VI:5 – addressing the specific circumstance of such concurrent application in the context of export subsidization – becomes necessary. Consistent with the principle of *expressio unius est exclusio alterius*, the decision of GATT Contracting Parties to specify in Article VI:5 the limited circumstances in which ADs and CVDs may not be imposed concurrently reinforces the conclusion that they did not intend to prohibit such concurrent application in any other circumstance.

445. Lastly, in any event, the object and purpose of an agreement would not supersede the ordinary meaning of Article 19.4. As noted above, Article 31 of the Vienna Convention directs that a treaty should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[608] China's speculative arguments regarding "object and purpose" thus cannot supersede the ordinary meaning of the relevant provisions.

G. China's Protocol of Accession Provides Supportive Context for the Panel Report

446. In addition to the reasons stated by the Panel, Paragraph 15 of China's Protocol of Accession to the WTO provides supportive context to the Panel Report. The Protocol bears a

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[606] (...continued)
Member.

[607] Footnote 24 to Article 18.1 of the AD Agreement; footnote 56 of the SCM Agreement.

[608] Vienna Convention, Art. 31; *see also US – Shrimp (AB)*, para. 114.

direct relationship to the issues before the Appellate Body because the Protocol explicitly authorizes the application of both ADs and CVDs to China as an NME.[609] The Protocol, by its own terms, is to be considered "an integral part of the WTO Agreement."[610] As such, the Protocol is not "irrelevant" as claimed by China[611], but is context for the interpretation of Articles 19.3 and 19.4 of the SCM Agreement.

447. China's Protocol of Accession – and in particular, Part I, paragraph 15 – supports the Panel Report.[612] In paragraph 15(a) of the Protocol, China agreed that Members, when

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[609] China Accession Protocol, para. 15(a)-15(c).

[610] China Accession Protocol, para. 1.2.

[611] China Appellant Submission, para. 548.

[612] The Panel Report discusses paragraph 15 of the Protocol in paragraph 14.121, but the Panel does not appear to rely on the Protocol in making its findings. Paragraph 15 states in relevant part:

> **15. Price Comparability in Determining Subsidies and Dumping**
>
> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of

(continued...)

determining price comparability in AD proceedings involving imports from China, "may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."[613] In other words, Members may apply ADs based on normal values that do not employ domestic prices or costs in China.

448. Paragraph 15(b) makes clear that Members also have the right to apply the CVDs to imports from China. Having set out the right of Members to apply both remedies to China as an NME country, paragraph 15 imposes no limits on the concurrent application of both remedies. Instead, the Protocol expressly authorizes the application of both remedies to China as an NME country. As discussed above, the Panel interpreted the covered agreements, particularly Articles 19.3 and 19.4 of the SCM Agreement, as not conditioning application of CVDs on the existence, or lack thereof, of NME ADs. The Protocol is thus consistent with the interpretation of the Panel.

449. As provided in the Protocol itself, the "Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO

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[612] (...continued)
that product.

> (b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.
>
> (c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

[613] China Accession Protocol, para. 15(a).

Agreement."[614] Hence, as with any other covered agreement, the terms of the Protocol, including the terms of paragraph 15, must be interpreted in accordance with customary rules of interpretation of public international law.[615]

450. In addition to agreeing to be bound by the text of the SCM Agreement, China also agreed to the requirements of Paragraph 15 of the Protocol, which contemplate that Members may use in relation to Chinese exports NME ADs, CVDs, or both, including specifically NME ADs and CVDs based upon benchmarks outside of China. The Panel concluded that the Protocol "contains no provision explicitly addressing the issue of double remedies even though it appears to allow for the use of countervailing duties while China remains an NME."[616] Accordingly, the Appellate Body should determine that the Protocol provides supportive context for the Panel Report.

H. The Appellate Body Should Decline China's Request to Complete the Analysis

451. Lastly, China argues that, if the Appellate Body accepts all of China's other arguments, it should "proceed to complete the analysis in respect of the determinations at issue."[617] Two points are useful to keep in mind. First, the burden to establish the existence of such an alleged double remedy would be on China. Second, the Panel made no finding regarding whether China conclusively established that, in the investigations at issue, double remedies resulted from the concurrent imposition of NME ADs and CVDs, and China has not placed sufficient undisputed facts on the record to complete the analysis.

452. China claims that the burden is on the Member imposing CVDs and NME ADs to establish in the course of an investigation to establish whether, and in what amount, a subsidy remains attributable to the imported product.[618] China appears to believe that this means the burden of proof would be on the importing Member to establish this in a dispute as well. As an initial matter, as discussed above, there is nothing in the text to support China's view. No such requirement exists under the ordinary meaning of the SCM Agreement taking into account the context and in light of the object and purpose of that agreement. Thus, the Panel correctly declined to create such a requirement.

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[614] China Accession Protocol, para. 1.2; *see also China – Publications and Audiovisual Products (AB)*, para. 133 ("China's Accession Protocol provides that it shall, together with certain commitments referred to in China's Accession Working Party Report, 'be an integral part of the WTO Agreement.'").

[615] DSU, article 3.2.

[616] Panel Report, para. 14.121.

[617] China Appellant Submission, para. 559.

[618] Panel Report, para. 561.

453. Furthermore, China's approach would also confuse the obligations of Members in conducting an investigation with the burden of proof in a dispute settlement proceeding. As the Panel found, "The general principles regarding the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO agreement by another member assert and prove its claim."[619] Accordingly, the Panel found that "China, as the complaining party in this dispute, must therefore make a *prima facie* case of violation of the relevant provisions of the WTO agreements it invokes . . . ."[620] China did not appeal this finding. Thus, the Appellate Body should reject this attempt at burden shifting.

454. Because the Panel properly found that the WTO Agreement did not prohibit the concurrent application of CVDs and NME ADs, the Panel made no finding regarding whether double remedies resulted from the concurrent imposition of NME ADs and CVDs in the investigations at issue. Although the Panel stated that the concurrent application to exports from China of NME ADs and CVDs was "likely" to produce remedies that overlapped to "some" extent, it made no findings in this regard as to whether there was any such overlap in the determinations for any of the four products at issue.[621]

455. Indeed, the Panel could not have been more explicit on this point:

> Because . . . we conclude that China has not established that the imposition of "double remedies" is inconsistent with [the WTO Agreements], we do not need to examine further the extent to which the concurrent imposition of antidumping duties determined under the USDOC's NME methodology and of countervailing duties resulted in the imposition of "double remedies" in the four investigations at issue. For this reason, we do not decide whether China has conclusively established that, in the investigations at issue, double remedies resulted from the concurrent imposition of anti-dumping duties calculated under the U.S. NME methodology and of countervailing duties.[622]

Absent a finding by the Panel that China established that such "double remedies" were imposed, there is no basis for the Appellate Body to conclude that any alleged double remedy occurred as a factual matter.

456. China also mistakenly asserts that there are "no disputed facts that the Appellate Body must examine for this purpose," and that "the finding of inconsistency would follow directly

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[619] Panel Report, para. 7.5, citing *US – Wool Shirts (AB)*, p. 14.

[620] Panel Report, para. 7.6.

[621] Panel Report, para. 14.75.

[622] Panel Report, para. 14.76

from the reversal of the Panel's erroneous legal interpretations."[623] China further claims that it demonstrated, "based on undisputed evidence in the record, that double remedies occurred in the investigations at issue."[624] Contrary to China's arguments, China made no attempt in any of the proceedings before Commerce to present any evidence whatsoever that any actual double remedy was created, relying solely on theoretical arguments.

457. China also did not place undisputed facts on the record to support the existence of any alleged double remedy. China's argument to the Panel was based in part on the mistaken assumptions that subsidies in market economies would lower dumping margins on a *pro rata basis* (thus avoiding any double remedies),[625] but that subsidies have no effect whatsoever on dumping margins in NME countries.[626] China provided no evidence to support either of these theoretical assumptions. As explained in the U.S. Written Submissions to the Panel, given that the bulk of domestic subsidies would have, at most, an indirect effect upon both costs and prices, the assumptions underlying China's double remedy argument are unreasonable.[627]

VII. CONCLUSION

458. For the foregoing reasons, the United States respectfully requests that the Appellate Body affirm the findings and conclusions of the Panel listed in China's Notice of Appeal and dismiss China's appeal in all respects.

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[623] China Appellant Submission, para. 562.

[624] China Appellant Submission, para. 562, note 527.

[625] *See* U.S. First Written Submission before the Panel, paras. 456-458.

[626] *See* U.S. First Written Submission before the Panel, paras. 451-54; *see also* U.S. Second Written Submission before the Panel, paras. 204-07.

[627] *See* U.S. First Written Submission before the Panel, paras. 450-59; *see also* U.S. Second Written Submission before the Panel, paras. 180-207.