ANNEX A

EXECUTIVE SUMMARIES OF FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

(27 April 2009)

I. INTRODUCTION

1. This dispute presents fundamental issues regarding the proper interpretation and application of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") and other covered agreements. The four sets of anti-dumping duty ("AD") and countervailing duty ("CVD") determinations at issue are *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China ("CWP")*, investigations A-570-910 and C-570-911; *Light – Walled Rectangular Pipe and Tube from the People's Republic of China ("LWR")*, investigations A-570-914 and C-570-915; *Laminated Woven Sacks from the People's Republic of China ("LWS")*, investigations A-570-916 and C-570-917; and *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China ("OTR")*, investigations A-570-912 and C-570-913. In each of these determinations the United States Department of Commerce ("Commerce") made findings and conclusions that were inconsistent with multiple provisions of the SCM Agreement. Commerce's conduct of the underlying investigations was likewise unlawful, leading to frequent denials of the due process and procedural rights of China and other interested parties in these investigations.

II. LEGAL ARGUMENT

A. COMMERCE'S INPUT SUBSIDY DETERMINATIONS IN EACH OF THE FOUR CVD INVESTIGATIONS WERE BASED ON FINDINGS OF "FINANCIAL CONTRIBUTION" INCONSISTENT WITH ARTICLE 1 OF THE SCM AGREEMENT

2. In each of the four CVD investigations under challenge, Commerce concluded that the Government of China bestowed countervailable subsidies without any legitimate basis for finding the requisite financial contributions by a "government" within the meaning of Article 1.1 of the SCM Agreement. None of the financial contributions deemed to confer countervailable input subsidies in these investigations was provided by the Government of China or any of its official agencies. Rather, all of the allegedly subsidized inputs were sold by corporate entities with separate legal personalities, owned in part or in whole by China (so-called State Owned Enterprises ("SOEs")), and in some cases, by private trading companies.

3. The Appellate Body recognized in *US –DRAMS* that under well-established principles of customary international law, the actions of state-owned corporate entities are *prima facie* private, and thus presumptively are not attributable to a Member under Article 1.1 of the SCM Agreement.[1] Their ordinary commercial sales thus cannot be deemed financial contributions unless they have been "entrusted or directed" within the meaning of Article 1.1.(a)(1)(iv) to provide the goods in question. Commerce made no such inquiry in any of the four CVD investigations. The record before the Panel is therefore devoid of any findings that the Government of China entrusted or directed SOEs to provide inputs to respondent producers.

[1] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112 & n.179.

4. Commerce sought to avoid the burden of making an entrustment or direction showing by concluding that the SOEs were "public bodies" within the meaning of Article 1.1(a)(1). Commerce reached this conclusion *solely* on the basis of what it characterized as a "rule of majority ownership," *i.e.*, if an SOE were majority-owned by the Government of China or a state-owned entity, Commerce treated that entity as a "public body" with no further inquiry or analysis. China submits that the conclusion that an entity is a "public body" solely because it is majority-owned by the government cannot be reconciled with the meaning of that term, as properly interpreted in accordance with the principles of Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention").

5. The ordinary meaning of "public body," read in light of the immediate context of Article 1.1(a)(i) and the SCM Agreement's object and purpose, establishes that it is an entity that exercises powers and authority vested in it by the State for the purpose of performing governmental functions. That conclusion is fully supported by the context provided by other WTO Agreements, particularly the GATS, as well as by "relevant rules of international law applicable in the relations between the parties," both of which must be examined under the interpretative framework set forth in Article 31 of the Vienna Convention.

6. Both the Appellate Body and Panels alike repeatedly have acknowledged that the ILC Articles[2] reflect a codification of customary international law and thus constitute "relevant rules of international law" for purposes of interpreting the WTO Agreements. Most relevant for present purposes is the Appellate Body's express endorsement of the principles set forth in the ILC Articles with respect to when the conduct of state-owned entities may constitute a financial contribution within the meaning of Article 1.1(a)(1). In *US – DRAMS*, the Appellate Body favourably cited the Commentary to ILC Article 8, which recognizes that "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority [within the meaning of Article 5]."[3] Thus, mere state ownership is insufficient, as a matter of international law, to attribute the conduct of a state-owned corporate entity to a State, and by extension, to a Member for purposes of Article 1.1 of the SCM Agreement. Thus, in the typical case, the conduct of state-owned corporate entities is not to be attributed to a State unless they are acting on the instructions of, or under the direction or control of the government within the meaning of Article 8, which is closely analogous to the standard enshrined in Article 1.1(a)(1)(iv), as the Appellate Body recognized in *US – DRAMS*.

7. The only other basis recognized under international law for attributing the conduct of state-owned corporate entities to a State is if they are "exercising elements of governmental authority" within the meaning of Article 5 of the ILC Articles, as the Appellate Body recognized in *US – DRAMS*. Article 5 of the ILC Articles addresses the conduct of entities that are "empowered by the law of the State to exercise functions of a public character normally exercised by State organs." Article 5 encompasses within its scope the type of entity that the SCM Agreement characterizes as a "public body" in Article 1.1. Accordingly, the standards it establishes for attributing State responsibility are directly relevant to interpreting the proper scope of that term. The key lesson they offer is that government ownership *per se* has little to do with attributing responsibility under Article 5, and by extension, with determining whether an entity is a public body for purposes of Article 1.1. As the Commentary to ILC Article 5 emphasizes, the "decisive criteria" for purposes of attribution with respect to such entities is not the degree of government ownership or control over them, but rather the fact that they are empowered to exercise governmental authority.[4]

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[2] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, adopted by the International Law Commission at its Fifty-third Session (2001) [hereinafter ILC Articles] (CHI-102).

[3] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112 and n.179 (quoting ILC Article 8, Commentary para. (6)).

[4] ILC Articles, p. 43, Commentary to Article 5, para. 3 (CHI-102).

8. In none of the CVD investigations did Commerce establish that any of the multiple SOEs alleged to have provided financial contributions were empowered under Chinese law to sell inputs at below-market prices in support of governmental policies, or that they in fact exercised such authority when making sales of inputs to the respondent producers or their trading company suppliers. Accordingly, all of the financial contribution findings in relation to inputs provided by SOEs were inconsistent with Article 1.1 of the SCM Agreement.

9. With respect to the sale of inputs by private trading companies, Commerce's financial contribution analysis was even more flawed. Commerce made no inquiry into whether China "entrusted or directed" these entities to provide inputs to the respondent producers, the only basis for finding that these entities made a financial contribution within the meaning of Article 1. Commerce asserted that no such findings were necessary because the trading companies sold inputs they purchased from SOEs, which Commerce had concluded (unlawfully) to be public bodies. In Commerce's view, because the trading companies had thus received a financial contribution, there was no need to determine whether they, in turn, had made a financial contribution to the respondent producers that purchased their goods.

10. The SCM Agreement requires a finding of a financial contribution by a government for every transaction or series of transactions that an investigating authority determines to be an actionable subsidy. It necessarily follows that when a respondent producer purchases goods from a private trading company, a financial contribution may be deemed to exist only if the evidence supports a finding that the trading company *itself* was entrusted or directed by the government to provide such goods to the respondent producer. However, in none of the CVD investigations did Commerce establish that any of the many private trading companies alleged to have provided financial contributions had been entrusted or directed to do so. Commerce thus failed to discharge its burden to establish through actual evidence the existence of a financial contribution by a government.

B. COMMERCE'S FINDINGS THAT SOEs AND PRIVATE TRADING COMPANIES PROVIDED INPUTS FOR LESS THAN ADEQUATE REMUNERATION WERE INCONSISTENT WITH THE SCM AGREEMENT

11. Commerce's benefit analysis, like its financial contribution analysis, failed to conform to the standards established in the SCM Agreement. Commerce (1) unlawfully presumed that Chinese private prices were distorted when selecting benchmarks to measure the adequacy of remuneration, (2) unlawfully presumed that trading companies received benefits in their purchases of inputs from SOEs, and (3) unlawfully found a benefit where none existed by including in its calculations only those purchases made for less than the benchmark price, while excluding all purchases made for more than the benchmark price.

12. The Appellate Body has made clear that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision *is very limited*."[5] The records in the CWP, LWR, and LWS investigations contained evidence of the prices at which private suppliers in China sold the same inputs alleged to be provided by SOEs for less than adequate remuneration. As the Appellate Body recognized in *US – Softwood Lumber IV*, those private prices should have been the "primary benchmark" for determining the adequacy of remuneration under Article 14(d) of the SCM Agreement. Instead, Commerce rejected them solely on the basis that they were presumptively distorted by virtue of the degree of state ownership of the industries producing the relevant inputs.

13. Commerce's exclusive focus on the degree of government ownership of input suppliers to conclude that private prices were distorted cannot be reconciled with the Appellate Body's recognition that "an allegation that a government is a significant supplier *would not, on its own, prove distortion*

[5] Appellate Body Report, *US – Softwood Lumber IV*, para. 102 (emphasis added).

and allow an investigating authority to choose a benchmark other than private prices in the country of provision."[6] It also is inconsistent with Commerce's obligation to undertake the "case-by-case" factual analysis that Article 14(d) requires before a finding of distortion lawfully can be made. Commerce's reliance on alternative benchmarks for measuring adequate remuneration with respect to the provision of inputs in the CWP, LWR and LWS investigations, both from SOEs and from private trading companies, was predicated exclusively on its invalid findings that private prices were distorted. Accordingly, all of Commerce's benefit calculations relying on those alternative benchmarks are invalid.

14. In the CWP, LWR and OTR CVD investigations, Commerce countervailed the purchases of inputs not only from the SOEs, but from the private trading companies as well. Commerce's determinations were flawed, because Commerce never established that the private trading companies themselves received subsidies by virtue of their purchases of hot-rolled steel ("HRS") and rubber inputs from SOEs. Although Commerce concluded that the trading companies had received financial contributions from the SOEs (unlawfully, as explained above), it never investigated whether such purchases conferred a benefit. Therefore, when Commerce concluded that "all or some portion of the benefit" purportedly received by the trading companies was conferred on the producers who purchased inputs from these companies, Commerce presumed the "pass through" of a benefit that had not been found to exist in the first place.

15. Finally, Commerce unlawfully created a benefit where none existed by including in its benefit calculations in the OTR investigation only those transactions that produced a positive benefit, while excluding transactions that yielded no benefit. Commerce's calculation methodology cannot be reconciled with Article VI:3 of the GATT 1994 and relevant provisions of the SCM Agreement, which make clear that a countervailing duty is to be imposed in respect of the "*product*" under investigation "*as a whole*". When goods were purchased frequently over the period of investigation, determining whether remuneration was "adequate" thus necessarily required an *aggregate* analysis that took into account *all* of the respondents' purchases over the *entire* period of investigation, including those that were made for more than the benchmark price, and not merely those that were made for less than the benchmark price.

C. COMMERCE'S IMPOSITION OF COUNTERVAILING DUTIES BASED ON ALLEGED "POLICY LENDING" PROGRAMMES WAS CONTRARY TO THE SCM AGREEMENT

16. In the OTR, CWP, and LWS determinations, Commerce imposed countervailing duties based on its finding that state-owned commercial banks ("SOCBs") provided preferential, below-market loans to respondent producers pursuant to what Commerce characterized as "policy lending" programmes. China challenges Commerce's findings of financial contribution, specificity, and benefit as they pertain to the OTR determination, and Commerce's findings of benefit as they pertain to the CWP and LWS determinations.

17. The alleged "policy lending" programme that Commerce identified in the OTR investigation does not exist. The basic path of reasoning that underlies Commerce's "policy lending" construct, while difficult to discern, seems to be as follows: (1) Various economic planning documents in China contain general statements that encourage the development of different industries in China, including the industries in which the respondent producers allegedly operate; (2) the Government of China has ownership interests in SOCBs; (3) therefore, all loans by SOCBs to respondent producers must be "preferential, non-commercial" loans that the SOCBs made "pursuant to" the alleged "policy" defined by the economic planning documents, even though these planning documents do not refer to preferential loans by SOCBs, and do not in any way target the relevant industries for the provision of such loans.

[6] Appellate Body Report, *US – Softwood Lumber IV*, para. 102 (emphasis added).

18. Commerce rejected Chinese interest rates for RMB-denominated loans as the applicable benchmark under Article 14(b) of the SCM Agreement, on the grounds that these interest rates are "distorted" by "government interventions", and instead used fictitious interest rates to evaluate whether the loans were "preferential". In this way, the "policy lending" construct became self-fulfilling: because Chinese interest rates were lower than the fictitious benchmarks, the loans to respondent producers must have been "preferential", the "policy lending" programmes must therefore exist, and the SOCBs must have made these loans "pursuant to" the alleged "policies". Commerce's "policy lending" construct is a circular form of reasoning that brings the "subsidy" into creation through its own internal logic.

19. It is undisputed that all of the loans in question in OTR were made not by the Government of China, but by commercial banks in which the government has ownership interests. Commerce based its financial contribution finding on the theory that the SOCBs are "public bodies", but made no finding that the SOCBs made loans in the exercise of governmental authority, an essential prerequisite to a "public body" finding. Nor would any such finding have been possible on the OTR record, because the Government of China has not bestowed authority on SOCBs to provide preferential loans to tyre producers, either through the national and provincial planning documents on which Commerce relied, or through any other means.

20. The same economic planning documents upon which Commerce relied to find a financial contribution provided the cornerstone of Commerce's specificity analysis, and once again these documents were unsupportive of the conclusions that Commerce reached. The "legislation" on which Commerce relied for its finding of *de jure* specificity did not, as Article 2.1(a) of the SCM Agreement requires, define the elements of the subsidy that Commerce countervailed. It therefore could not provide the basis for Commerce's finding that the alleged "policy lending" subsidy was *de jure* specific to the tyre industry. In addition, Commerce did not find that the "subsidy" it purported to identify in these measures was "explicitly limited" to the tyre industry. Nor could Commerce plausibly have reached this conclusion, because the "subsidy" that Commerce identified for RMB-denominated loans, even assuming it existed, was available to virtually every borrower in China and therefore could not be specific under Article 2.

21. Finally, in all three of the "policy lending" determinations, Commerce was able to find an alleged "benefit" for RMB-denominated loans only by resorting to a fictitious benchmark based on interest rates that it derived from 33 different countries. This fictitious interest rate was not a "comparable commercial loan which the firm could actually obtain on the market", and was inconsistent with Article 14(b) for this reason alone. Nor does Commerce's rationale for rejecting the applicable benchmark under Article 14(b) – that interest rates in China are "distorted" by "government interventions" – withstand analysis. Interest rates are a tool of monetary policy and are directly influenced by government intervention. These interventions, which are an ordinary feature of monetary policy all over the world, cannot provide a basis to disregard the plainly applicable requirements of Article 14(b).

D. COMMERCE'S IDENTIFICATION OF A "LAND-USE" SUBSIDY IN THE LWS INVESTIGATION WAS INCONSISTENT WITH THE SCM AGREEMENT

22. In the LWS investigation, Commerce found that the Huantai County Land Bureau provided land-use rights in the New Century Industrial Park to Aifudi, a respondent producer, for less than adequate remuneration. Commerce's finding that the alleged subsidy was "regionally specific" under Article 2.2 of the SCM Agreement was deficient on its face. A finding of specificity under Article 2.2 requires a finding that the subsidy is "*limited to certain enterprises* located within a *designated geographical region* within the jurisdiction of the granting authority …". Pursuant to Article 2.4 of the SCM Agreement, any determination of specificity under Article 2.2 must be "clearly substantiated on the basis of positive evidence." Commerce failed to make the necessary finding that the alleged provision of land use rights for less than adequate remuneration was limited according to the terms of

Article 2.2, and an investigating authority cannot rely upon Article 2.2 as the basis for a finding of specificity in the absence of the required finding of limitation.

23. Even if Commerce had evaluated the evidence on the record, it could not possibly have determined that the alleged subsidy was limited under the terms of Article 2.2. First, if a subsidy is available to *all* enterprises within the designated geographical region, then it is not limited to *certain enterprises* within the region. Evidence on the record demonstrated that all companies inside New Century Industrial Park, including Aifudi, paid the same lease rate, except for a few companies that negotiated earlier leases. Second, if a subsidy is available to enterprises located *outside* the designated geographical region, it is likewise not specific under Article 2.2. The record established that commercial leaseholders located elsewhere in Huantai County paid the same or *lower* lease rates than those leaseholders inside the industrial park. Therefore, it would have been impossible for Commerce to make the required finding that the alleged subsidy was specific, even had Commerce undertaken the necessary evaluation of the record evidence.

24. Further, Commerce's finding of benefit was inconsistent with Article 14 of the SCM Agreement. As it did with respect to the alleged input subsidies and "policy lending" programmes, Commerce rejected the use of land prices in China as the applicable benchmark under Article 14(d) of the SCM Agreement. Commerce determined that Huantai County provided land-use rights for less than adequate remuneration based on a comparison to prices for certain industrial property in Bangkok, Thailand, over 3,000 kilometres away. In *Softwood Lumber*, the Appellate Body cautioned that, even in the "very limited" circumstances in which an investigating authority can resort to a benchmark other than private prices in the country of provision, "the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in [the country of provision], and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)."[7] Commerce's use of a Thai land benchmark to value land-use rights in China does not satisfy the Appellate Body's standard. Land prices in Thailand (or in any other country) do not "relate or refer to … prevailing market conditions" for land-use rights in China.

E. THE SIMULTANEOUS IMPOSITION OF COUNTERVAILING DUTIES AND ANTI-DUMPING DUTIES CALCULATED UNDER THE U.S. NME METHODOLOGY RESULTS IN AN IMPERMISSIBLE DOUBLE REMEDY FOR THE SAME ALLEGED ACTS OF SUBSIDIZATION

25. In August 2006, Commerce concluded that "market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis."[8] Accordingly, Commerce continues to designate China as a non-market economy ("NME"), and to reject Chinese producers' actual costs and prices for the purpose of determining normal value. In March 2007, seven months after Commerce elected to continue to designate China as an NME, Commerce found that "market forces now determine the prices of more than 90 per cent of products traded in China" and these market forces are sufficiently developed to evaluate whether a particular alleged subsidy "constitutes a distortion in the normal allocation of resources."[9]

26. This paradoxical set of findings led Commerce, for the first time, to apply its NME methodology in AD investigations *simultaneously with* the application of countervailing duties to the same categories of imports. This is contrary to Commerce's stated position, over the course of nearly 25 years, that it is "impossible" to identify subsidies in a country that Commerce has designated as an

[7] Appellate Body Report, *US – Softwood Lumber IV*, para. 103.

[8] PRC Lined Paper Memo, p. 4 (30 Aug. 2006) (Final Loan Benchmark and Discount Rate Memorandum, Attachment 2 (7 July 2008) (OTR)) (CHI-88).

[9] Georgetown Steel Memo, p. 5 (29 Mar. 2007) (CHI-89).

NME, "because the concept that the receipt of a subsidy constitutes a distortion in the normal allocation of resources has no meaning in such an economy."[10]

27. The rationale for designating a country as an NME is that prices and costs within an NME are not determined by market forces and, therefore, are not considered an appropriate basis for determining normal value. It is this determination that allows an investigating authority to replace the producer's actual costs and prices with what it considers to be market-determined costs and prices, and to calculate a dumping margin from this market-determined position.

28. Likewise, the rationale for imposing countervailing duties is that a government has provided productive resources to a company on terms that were not market-determined. The Appellate Body has repeatedly emphasized that a subsidy "benefit" exists if a company has received a financial contribution on terms more favourable than those available to the recipient in the market. It is the market-determined outcome that provides the baseline for determining whether a company is better off than it would have been in the absence of the government financial contribution. The purpose of a countervailing duty is to offset the competitive advantage that the producer thereby obtains.

29. And therein lies the problem of imposing two remedies for the same alleged acts of subsidization. Fundamentally, the rationale for using an NME methodology to determine normal value in an anti-dumping investigation subsumes the rationale for imposing countervailing duties on imported products. By applying both remedies simultaneously, Commerce necessarily will offset any alleged subsidies twice – once when it calculates an anti-dumping margin on the basis of a "surrogate" market-determined cost of production, and again when it calculates a countervailing duty on the basis that the producer obtained its productive resources on market-determined terms. Prior to its determination in *CFS Paper*, Commerce had consistently maintained that, with respect to a particular country or industry, it could *either* apply its NME methodology in an anti-dumping investigation *or* it could apply countervailing duties, but it could not apply both simultaneously. This understanding was affirmed by the U.S. courts, endorsed by the U.S. Congress, and directly reflected in Commerce's CVD regulations. In *CFS Paper*, however, Commerce abandoned this principle – at least as it relates to China.

30. Commerce does not deny that the concurrent application of the NME methodology and countervailing duties could give rise to a double remedy, but Commerce has taken the seemingly contradictory positions that: (a) it lacks authority under U.S. law to avoid the imposition of double remedies in the case of imports from NME countries; but (b) to the extent that it actually has some unspecified authority to address this problem, the existence of a double remedy is a factual question for which the respondent producer bears the burden of presenting "evidence" that "domestic subsidies automatically lower prices (including export prices) *pro rata*…."[11]

31. First, to the extent that Commerce lacks authority to avoid the imposition of double remedies in the case of imports from NME countries, U.S. law is inconsistent with the covered agreements, both as such and as applied in the present investigations. According to the SCM Agreement, the purpose of a countervailing duty is to "offset[] any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994." Article 19.4 of the SCM Agreement states 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." And Article 19.3 of the SCM Agreement states that "[w]hen 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 …." When the United States imposes an anti-dumping duty on an imported product, calculated in accordance with its NME methodology, and simultaneously imposes a

[10] CFS Paper I&D Memo, pp. 23-24 (internal citations omitted).
[11] CFS Paper I&D Memo (AD), p. 13.

countervailing duty on the same product, it has necessarily levied a countervailing duty that is "in excess of the subsidy found to exist" and is not "in the appropriate amounts", in violation of the SCM Agreement.

32. China considers that a double remedy arises in *all* cases in which Commerce applies its NME methodology in conjunction with countervailing duties, while Commerce appears to consider that a double remedy arises only where there is "evidence" that "subsidies pass through, *pro rata*, to U.S. prices". In either event, U.S. law is inconsistent with the covered agreements if Commerce lacks legal authority to address the problem of double remedies in NME investigations under *any* circumstance. In addition, without regard to whether Commerce has any legal authority to avoid the imposition of double remedies, its imposition of double remedies for the same alleged acts of subsidization in the investigations at issue in this dispute was inconsistent with the United States' obligations under the covered agreements.

33. Second, to the extent that Commerce has legal authority to avoid the imposition of double remedies in parallel AD/CVD investigations of NME imports only if producers present "evidence" that "subsidies pass through, pro rata, to U.S. prices", U.S. law is again inconsistent with the covered agreements, both as such and as applied. Contrary to Commerce's assertions in *CFS Paper* and in the subsequent determinations at issue in this dispute, the existence of a double remedy is *not* a factual issue for which the respondent producer bears the burden of presenting "evidence". Rather, as Commerce correctly understood for nearly 25 years prior to *CFS Paper*, the use of an NME methodology in an anti-dumping investigation and the application of countervailing duties to the same products are mutually exclusive of each other, in their entirety. To the extent that some unspecified provision of U.S. anti-dumping law allows Commerce to avoid the imposition of double remedies, but only if the respondent producer presents "evidence" on the irrelevant issue of whether "subsidies pass through, *pro rata*, to U.S. prices", this provision of law, whatever it might be, is inconsistent with the United States' obligations under the covered agreements.

34. This inconsistency is both as such and as applied. For the reasons set forth above, the imposition of double remedies for the same alleged acts of subsidization is inconsistent with the SCM Agreement and Article VI of the GATT 1994. To the extent that U.S. law conditions the avoidance of a double remedy for the same alleged acts of subsidization upon the presentation of "evidence" that is irrelevant to the occurrence of a double remedy, this provision of law is and will be inconsistent with the United States' obligations under the covered agreements in all cases in which it is applied. Without regard to whether there is, in fact, any provision of U.S. law that requires "evidence" that "subsidies pass through, *pro rata*, to U.S. prices", Commerce's insistence upon such "evidence" in the present investigations as a condition to the avoidance of a double remedy was likewise inconsistent with the United States' obligations under the covered agreements.

35. Finally, separate and apart from the unlawful imposition of double remedies for the same alleged subsidies, the United States has denied imports from China most-favoured nation treatment under Article I:1 of the GATT 1994 by failing to extend to these imports the same unconditional entitlement to the avoidance of double remedies that it extends to imports from countries that it designates as market economies. Commerce has maintained a consistent set of policies and practices to avoid offsetting the same subsidies twice through the manner in which it calculates anti-dumping duties, at least in investigations involving imports from countries that the United States has designated as market economies. In the case of imports from China, Commerce has stood these policies and practices on their head. This treatment not only deprives Chinese imports of most-favoured nation treatment under Article I:1 of the GATT, but it also serves to underscore Commerce's consistent recognition of the impermissibility of offsetting the same subsidies twice.

F. COMMERCE'S CONDUCT OF THE FOUR CVD INVESTIGATIONS UNDER REVIEW FAILED TO COMPLY WITH THE DUE PROCESS AND PROCEDURAL REQUIREMENTS OF THE SCM AGREEMENT

36. Commerce violated Article 13.1 of the SCM Agreement when it failed to invite China for consultations prior to the initiation of investigations into so-called "new subsidy allegations". Long after a countervailing duty investigation is initiated, U.S. law permits petitioners effectively to start an entirely new investigation by submitting subsidy allegations not presented in their original petition. This occurred in each of the four determinations at issue, and twice each in the CWP and OTR investigations. In total, Commerce initiated six separate investigations into new subsidy allegations, without once inviting China for consultations. Commerce also failed to comply with Article 12.1.1 of the SCM Agreement by refusing to give China and the respondent producers at least 30 days to respond to all questionnaires issued in the CVD investigations, including questionnaires issued in response to new subsidy allegations, as well as so-called "supplemental" questionnaires. Finally, in connection with its determinations in CWP and LWR that producers obtained a countervailable subsidy whenever the HRS they purchased from private trading companies had been produced by an SOE, Commerce failed to give China and the respondent producers notice of the information it required, in violation of Article 12.1 of the SCM Agreement. Having failed to give such notice, Commerce improperly resorted to "facts available" in order to determine the amount of SOE-produced hot-rolled steel that respondent producers had purchased from trading companies, in violation of Article 12.7 of the SCM Agreement.

III. CONCLUSION

37. For the reasons set forth in China's First Written Submission, as summarized herein, China respectfully requests that the Panel recommend that the United States bring the challenged measures into conformity with its obligations under the relevant covered agreements.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(8 June 2009)

I. INTRODUCTION

1. In this dispute, China urges the Panel to accept unsupported interpretations of WTO provisions so as to limit the effective applicability of the anti-dumping (AD) and countervailing duty (CVD) disciplines, and to ignore the particular features of China's economy, well documented on the records of the investigations at issue, that substantiate the determinations made by the Department of Commerce (Commerce) in those investigations.

II. REQUEST FOR PRELIMINARY RULINGS

2. The alleged "failure of the United States to provide legal authority for [Commerce] to avoid the imposition of a double remedy" is not a "specific measure at issue" in this dispute and, accordingly, is not within the Panel's terms of reference. China's complaint is not about the absence of any "legal authority," but a requirement it believes to exist under U.S. law to apply AD and CVD measures in a way that results in the alleged "double remedy." By failing to identify the U.S. legal provisions underlying this alleged requirement, China denied the United States and third parties notice, to which they were entitled under Article 6.2 of the DSU, of the measure that give rise to the alleged impairment of benefits at issue in this dispute.

3. In addition, by introducing this alleged "measure" for the first time in its panel request – and not in its request for consultations – China seeks to expand the scope of the dispute and enlarge the Panel's terms of reference. In its consultations request, China explicitly limited the matter at issue to determinations and orders issued in connection with eight specific investigations by Commerce. Notwithstanding this clear limitation of the scope of the dispute, in its panel request China went beyond those specific, identified investigations to add claims against this wholly new "measure." China's addition of this new "measure" converted the dispute from one limited to a series of "as applied" claims to a dispute that now includes a "measure" challenged "as such."

III. COMMERCE'S FINANCIAL CONTRIBUTION DETERMINATIONS ARE CONSISTENT WITH THE SCM AGREEMENT

4. Commerce's determinations in the challenged CVD investigations that certain Chinese state-owned enterprises (SOEs) and state-owned commercial banks (SOCBs) were public bodies were based on a proper interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. The ordinary meaning of the term "public body", read in its context and in light of the object and purpose of the SCM Agreement, indicates that a public body is an entity that is owned by the government, but not necessarily authorized to exercise, or in fact exercising, government functions.

5. The ordinary meaning of the term "public" includes the following: "belonging to, affecting, or concerning the community or nation"; "[r]elating or belonging to an entire community, state, or nation"; "of or relating to the people as a whole; that belongs to, affects or concerns the community or the nation"; and "[i]n general, and in most of the senses, the opposite of *private*." However one

examines the term "public," the ordinary meaning of that term includes the notion of belonging to, or owned by, the state. If an entity is owned by the state, the ordinary meaning of the term "public" indicates that such entity can be a "public body".

6. The context of the term "public body" supports this interpretation. The SCM Agreement uses two different terms in referring to the types of entity that can provide a financial contribution, "government" and "public body." Thus the terms "government" and "public body" must have distinct and different meanings. China mistakenly conflates these two terms, suggesting that they are "functional equivalents". This cannot be the case, or there would have been no need to use two different terms in Article 1.1(a)(1) of the SCM Agreement.

7. China's reliance on the definition of the term "public entity" in the GATS as context for the interpretation of "public body" is also inappropriate, as the terms are different, and the two agreements relate to different subject matter. The Working Party Report on China's accession, however, is relevant context and provides a recognition by China that its state-owned enterprises are public bodies that provide financial contributions and a commitment by China to this effect.

8. China's interpretation of "public body" also cannot be reconciled with the object and purpose of the SCM Agreement, which the Appellate Body has explained includes the right of WTO Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement." Consistent with this object and purpose, and the need to prevent circumvention of the SCM Agreement, the term "public body" should be interpreted so that subsidizing governments cannot use SOEs to avoid the reach of the SCM Agreement.

9. The meaning of the term "public body" was at issue in the *Korea – Commercial Vessels* dispute. The panel there concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)." That panel's reasoning is consistent with the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement. Majority government ownership can demonstrate control.

10. Commerce's determinations that certain state-owned enterprise producers of hot-rolled steel, rubber, and petrochemicals are "public bodies" are consistent with Article 1.1(a)(1) of the SCM Agreement. Commerce applied a rule of majority ownership to determine whether an entity was a public body. Because Commerce properly determined that certain SOEs and SOCBs were public bodies, no entrustment or direction analysis was required.

11. In addition, Commerce's treatment of sales made through private trading companies was proper and fulfilled the requirements of Article 1 of the SCM Agreement. China argues that Commerce was required to find that public bodies "entrusted or directed" the trading companies to sell goods to the respondents. China ignores the fact that the SCM Agreement contemplates situations in which the benefit might be received by different recipients. China appears to assume that Article 1.1 of the SCM Agreement requires there to be only one recipient, and that this recipient must receive both the financial contribution and the entire amount of the benefit. China has offered no basis for this assumption. In this case, the financial contribution occurred with the sale of goods (whether hot-rolled steel or rubber) by the public body SOEs to the intermediary trading companies. This government provision of goods then conferred benefits upon the respondent producers of *CWP*, *LWRP*, and *OTR Tires*, when the trading companies sold the goods to these respondents. Although the intermediary trading companies received the financial contribution and perhaps some benefit, this possibility does not preclude the respondent subject merchandise producers from receiving a benefit.

12. Commerce's finding in the *OTR Tires* CVD determination that SOCBs are "public bodies" is consistent with Article 1.1(a)(1) of the SCM Agreement. Commerce found that the Government of China holds dominant ownership stakes in the SOCBs. Outside commentators have remarked that the

government's ownership of banks is "exceptional." China does not dispute this. Given China's ownership of its banks, these banks are "public bodies."

13. China's argument that Commerce's benefit analysis undermines its public body determination conflates the "public body" question with the question of benefit. This is the same mistaken interpretation of Article 1.1 of the SCM Agreement rejected by the panel in *Korea – Commercial Vessels*.

IV. COMMERCE'S BENCHMARK DETERMINATIONS ARE CONSISTENT WITH THE SCM AGREEMENT

14. The Appellate Body has previously acknowledged that Article 14 of the SCM Agreement provides flexibility, should not be interpreted or applied in an overly restrictive manner, and permits the use of out-of-country benchmarks in certain situations. In addition, paragraph 15(b) of China's Accession Protocol and paragraph 150 of the Working Party Report confirm the permissibility of using out-of-country benchmarks to measure any benefit in CVD investigations concerning imports from China. Paragraph 15(b) expressly recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks."

15. Commerce's determinations to use external benchmarks were based on findings that the dominant role of the Chinese government in various markets distorted prices and interest rates in China. Commerce used Chinese prices whenever they were available and appropriate as market benchmarks. Where the facts demonstrated that Chinese prices were distorted by the government's predominant role in a market and unsuitable as commercial benchmarks, Commerce used market-derived prices from outside of China.

16. China alleges that Commerce applied a "*per se* rule" that only considered the degree of state ownership of the industries. China mischaracterizes Commerce's decisions and ignores the detailed rationale Commerce provided for each of its factual conclusions. Commerce reviewed all record evidence and determined appropriate benchmarks on a case-by-case basis in each of the challenged investigations. Indeed, in the *OTR Tires* CVD investigation, based on record evidence, Commerce did not find government distortion of the PRC rubber markets, and used actual import prices and domestic purchase prices from private producers as benchmarks, even where the government owned the majority of the domestic production.

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

18. Furthermore, China's assertion that Commerce did not "make any effort whatsoever to ensure that these benchmarks related to prevailing market conditions in China" is without foundation. For input subsidies, Commerce relied upon world market prices and made adjustments to account for "prevailing market conditions," consistent with Article 14(d) of the SCM Agreement.

19. In evaluating the benefit of government-provided loans, after Commerce established that it would not be possible to use RMB-denominated loans provided in China, it developed an out-of-country benchmark interest rate to measure benefit. To do so, Commerce used a group of interest rates, rather than just one out-of-country interest rate, because various factors can impact national averages for interest rates. Commerce's benchmark accounted for the maturity of the loans, adjusted for exchange rate expectations through an inflation adjustment accounting for currency differences, matched lending during the same time periods, and factored in the quality of the countries'

institutions, a known influence on interest rates. Through these means, Commerce calculated comparison interest rates that were tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market," as required by Article 14(b) of the SCM Agreement.

20. China's argument that Commerce was required to use RMB-denominated loans as benchmarks, which would mean that Commerce was required to use in-country benchmarks because RMB-denominated loans are not available outside China, is untenable. China's position is inconsistent with the Appellate Body's interpretation of Article 14 of the SCM Agreement and the commitments China made in its Accession Protocol. Moreover, under China's interpretation, assuming the absence of any commercial loans in a particular currency, if a government provides loans in that currency, it would not be possible for another Member to measure benefit at all. Not only does the text of Article 14 not require that interpretation, but such an outcome would be incongruous with the flexible nature of the guidelines in Article 14 and the object and purpose of the SCM Agreement to permit Members to fully offset the benefit of injurious subsidies.

21. China's argument that Commerce improperly used a yearly average LIBOR rate as a benchmark is without support. Article 14(b) of the SCM Agreement contains no preference for a daily rate over a yearly average. The benchmark developed by Commerce for these loans matched the duration and the currency denomination, and was structured on the same basis as GTC's loans (LIBOR plus a spread). In light of the flexibility afforded by Article 14, Commerce's comparison was consistent with the guideline in Article 14(b) of the SCM Agreement.

22. Similar to its position on RMB lending, China argues that Article 14(d) of the SCM Agreement prevents Members from ever using an out-of-country benchmark to measure the benefit of land-use rights provided by a government. China's position is inconsistent with the Appellate Body's interpretation of Article 14 of the SCM Agreement and the commitments China made in its Accession Protocol.

23. Based on record information, Commerce determined to measure benefit by comparing respondents' land-use rights to the sales of certain industrial land in industrial estates, parks, and zones in Thailand. By selecting land prices in a country with a comparable per capita GNI and population density and by using prices for comparable types of land (*e.g.*, industrial zones, allocated versus granted land-use rights), the comparison prices reasonably reflected the "prevailing market conditions for the good or service in question," while at the same time ensuring that the benefit calculation did not contain distortions caused by China's predominant role in the market.

V. COMMERCE WAS NOT REQUIRED TO PROVIDE A CREDIT IN THE BENEFIT CALCULATIONS FOR INSTANCES IN WHICH CHINA PROVIDED RUBBER PRODUCTS FOR ADEQUATE REMUNERATION IN THE *OTR TIRES* CVD INVESTIGATION

24. Commerce was under no obligation to provide a credit in its benefit calculations for instances in which China provided rubber for adequate remuneration, *i.e.*, when China did not provide a subsidy, in the *OTR Tires* CVD investigation. China's argument to the contrary is based on a misreading of the SCM Agreement and the GATT 1994, coupled with a misapplication of the reasoning in Appellate Body reports.

25. Article 14 of the SCM Agreement provides investigating authorities flexibility in the methodology applied to calculate the benefit of a subsidy. Article 14 does not prescribe any particular level of aggregation at which the calculation of subsidy benefit must be conducted, but instead permits investigating authorities to apply methodologies that account for different factual situations and the conditions under which the subsidy was provided. Additionally, the text of Article 14 explicitly pertains to the calculation of the "benefit" to the recipient. The concept of "benefit" relates only to situations in which a firm receives a "favourable or helpful factor or circumstance" or "an

advantage," rather than a detriment or disadvantage. Article 14 imposes no obligation on Members to conduct an "aggregate" analysis nor to provide credit in the benefit calculation when a government provides goods for adequate remuneration. Indeed, China does not argue that such a requirement is even contained in Article 14.

26. Rather, China argues that the use of the term "product" in Article VI:3 of the GATT 1994 and Articles 10, 19.3, and 19.4 of the SCM Agreement required Commerce to provide a credit in the benefit calculation for those instances in which China sold rubber for adequate remuneration. China mistakenly relies on the Appellate Body's zeroing reports to support its argument. However, the legal provisions on which those decisions are based apply solely to AD determinations and do not apply to CVD determinations. Accepting China's argument would mean that the mere use of the term "product" in other provisions of the SCM Agreement and the GATT 1994 overrides the "latitude" and "leeway" that panels and the Appellate Body have found in the guidelines set forth in Article 14 of the SCM Agreement.

27. Moreover, China's argument cannot be reconciled with the definition of a subsidy in Article 1 of the SCM Agreement. Any time a government provides a financial contribution and a benefit is thereby conferred, a subsidy is "deemed to exist." Instances of non-subsidies cannot eliminate or diminish the benefits conferred when a government provides a financial contribution.

28. In addition, China ignores the troubling implications of its argument. If China's interpretation were accepted, it would necessarily apply to all of Article 14 and would require that credit be provided whenever an investigating authority found that a financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even different types of subsidies. China's interpretation would result in a benefit calculation that is artificially low, or even zero, preventing the United States from fully offsetting the effect of subsidies found to exist. China's interpretation of Article 14 thus fails to read that article in light of the object and purpose of the SCM Agreement, and for that reason as well, China's interpretation must be rejected.

VI. COMMERCE PROPERLY MEASURED THE BENEFIT CONFERRED UPON PRODUCERS OF SUBJECT MERCHANDISE IN INSTANCES WHERE PRODUCTION INPUTS WERE PURCHASED FROM TRADING COMPANIES

29. China fails to identify any provision of the SCM Agreement or GATT 1994 with which Commerce's benefit determinations are purportedly inconsistent. China merely asserts that Commerce was required to determine the benefit conferred upon trading companies engaged in buying and selling an input product, in addition to determining the benefit conferred upon producers of the merchandise that was the subject of Commerce's CVD investigations. However, it was not necessary to measure any benefit that may have been received by the trading companies. The amount or portion of any benefit received by the trading companies is irrelevant for the purpose of determining the benefit conferred upon the subject merchandise producers.

30. To the extent that a trading company may have received a benefit from the financial contribution provided by an SOE, and some portion of the benefit of that financial contribution, in effect, passed through the trading company to a producer of subject merchandise, Commerce accounted for this and properly calculated the benefit conferred upon the producer of subject merchandise. To do so, Commerce compared the price the producer of subject merchandise paid for the input product with an appropriate benchmark price. As a result, Commerce's analysis identified only the amount of benefit that effectively "passed through" the trading companies and was conferred upon producers of subject merchandise.

VII. COMMERCE'S SPECIFICITY DETERMINATIONS IN THE *OTR TIRES* AND *LWS* CVD INVESTIGATIONS WERE CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

31. China challenges Commerce's specificity determination for policy lending with respect to the *OTR Tires* CVD investigation, though not with respect to the other CVD investigations in which Commerce made similar specificity findings for similar policy lending subsidies. Commerce found policy lending in the *OTR Tires* CVD investigation specific because the loans were provided as part of government programmes guiding financial institutions to lend to tire producers. This finding was based on evidence in the record of the *OTR Tires* CVD investigation, which contains central, provincial, and municipal-level government plans and policies that guided lending to a group of industries, including the tire industry.

32. China argues that none of the measures relied upon by Commerce "defines a subsidy," none of the measures "explicitly limits" access to the subsidy to "certain enterprises," and none of the loans were "made pursuant to the measures" identified by Commerce. The three points that China asks the Panel to examine are not the elements that Article 2.1(a) of the SCM Agreement contains, and on that basis alone, China's argumentation should be rejected.

33. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether: (i) the granting authority explicitly limits access to a subsidy to "certain enterprises;" or (ii) the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to "certain enterprises." Nothing in Article 2.1(a) requires Members to identify legislation that defines the elements of a subsidy (*i.e.*, financial contribution and benefit).

34. The central, provincial, and municipal policy documents each clearly substantiate that the various levels of government guided lending to a *group* of industries, which included the OTR tire industry. The policies focus on stimulating the quantity of credit, or the availability of credit at all, rather than reducing the price of credit. The policies target certain industries for the direction of credit, and prohibit credit to other industries. Article 2.1 of the SCM Agreement defines "certain enterprises" to include a group of industries and permits a specificity determination based on a subsidy that is specific to a group of industries.

35. Evidence on the record of the *OTR Tires* CVD investigation showed that the SOCBs acted pursuant to the central, regional, and municipal government policies in making their lending decisions. Thus, contrary to China's arguments, Commerce correctly determined that SOCBs do, in fact, act pursuant to industrial policies in making loans.

36. China also challenges Commerce's specificity determination for land-use rights in the *LWS* CVD investigation. Pursuant to Article 2.2 of the SCM Agreement, a subsidy is specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. Commerce determined that Huantai County created New Century Industry Park for the purpose of providing selected companies, including Aifudi, with land-use rights. Thus, Huantai County limited this land-use rights subsidy to enterprises located in a designated geographical region.

37. New Century Industry Park meets the ordinary meaning of a designated geographical region. There is no basis in the SCM Agreement for the narrower definition for which China argues, and, in any event, the New Century Industry Park meets the requirements of China's narrower definition.

38. China argues that if a subsidy is available to all enterprises within a designated geographical region, it is not specific pursuant to Article 2.2 of the SCM Agreement. Following China's reasoning, the only difference between Articles 2.1(a) and 2.2 of the SCM Agreement is that, pursuant to the latter, the "certain enterprises" to which a subsidy is explicitly limited happen to be located within a

designated geographical region within the jurisdiction of the granting authority. However, even if they were not located within a designated geographical region, the subsidy granted to them would nevertheless be specific pursuant to Article 2.1(a) by virtue of the explicit limitation. China's interpretation of Article 2.2 would render that provision redundant, which is incompatible with the rules of treaty interpretation. Furthermore, China's interpretation of Article 2.2 is also contrary to Article 8.1(b) and 8.2(b) of the SCM Agreement.

39. As demonstrated in the record, the land-use rights subsidy at issue was used as an incentive to relocate producers to the New Century Industry Park and was tied to the level of investment within the park. Therefore, the subsidy is unique and only available to enterprises investing within the park. The fact that Huantai County granted other types of land-use rights to other leaseholders for other purposes outside the industrial park is irrelevant to determining whether the particular subsidy at issue was only accessible to enterprises within the industrial park. Interpreting Article 2.2 of the SCM Agreement as requiring an investigating authority to find that the benefit was not available to any enterprise outside of the designated geographical region would be too restrictive and would enable circumvention of the subsidies disciplines.

VIII. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH THE SCM AGREEMENT OR THE GATT 1994 IN THE CONCURRENT APPLICATION OF CVD AND AD MEASURES TO CERTAIN PRODUCTS FROM CHINA

40. The WTO agreements and their predecessors have always recognized that the dumping and subsidization of imports are distinct unfair trade practices, to which, where they cause injury, Members are entitled to apply separate remedies. Beginning with the signing of the GATT in 1947, separate rules have generally governed the conduct of AD and CVD proceedings. The separate nature of the two remedies was recognized in the separate Tokyo Round AD Code and Subsidies Code, and subsequently in the Uruguay Round AD Agreement and SCM Agreement.

41. The GATT Contracting Parties reinforced the separate nature of the remedies available from AD and CVD proceedings by providing for only one instance – set forth in Article VI:5 of the GATT 1994 – in which both remedies may not be applied to the full amount provided for in Article VI of the GATT 1994. As the only provision linking the remedy in an AD proceeding with the remedy in a CVD proceeding, Article VI:5 reveals that Members considered when it would be appropriate to constrain Members' resort to the concurrent application of AD and CVD remedies, and agreed that it would be appropriate only where imposing AD duties together with CVDs would compensate for "the same situation of dumping or export subsidization."

42. Article 15 of the Tokyo Round Subsidies Code provides further evidence that parties to the Code considered that no other provision in the GATT 1947 contained such a requirement. The addition of Article 15 would not have been necessary if there had been any other restriction on the concurrent application of AD and CVD measures to exports from non-market economy (NME) countries. The disappearance of that provision in the successor SCM Agreement reinforces the presumption, created by the express limitation in Article VI:5 itself, that WTO Members never agreed on such a prohibition.

43. China's Accession Protocol makes clear that Members, including China, contemplated the concurrent application of CVD and AD measures to China, in full, notwithstanding China's continued treatment as a non-market economy country. In paragraph 15(a) of its Accession Protocol, China agreed that Members, when determining price comparability in AD proceedings involving imports from China, have the right to use special measurement methodologies that are not based on a strict comparison with domestic prices or costs in China. In other words, Members may apply AD duties to offset the full dumping margins, while treating China as a non-market economy country. Paragraph 15(b) makes clear that Members also have the right to apply the WTO's CVD rules to

imports from China. Nothing in paragraph 15 limits a Member's right to concurrently apply both remedies.

44. China argues that the AD duties imposed by Commerce are, in fact, really CVDs, and therefore the duties should be added together when examining their consistency with the provisions of the SCM Agreement that limit the level of CVDs that may be imposed. Based on this theory, China argues that the United States acted inconsistently (i) with Article 19.4 of the SCM Agreement because the AD duties and CVDs, taken together, are in excess of the amount of subsidy found to exist, and (ii) with Article 19.3 of the SCM Agreement because the AD duties and CVDs, taken together, are in excess of the "appropriate amounts" of the CVDs. However, the GATT 1994 and the SCM Agreement define a CVD as a duty "levied for the purpose of offsetting" any subsidy. The AD duties calculated on the basis of Commerce's non-market methodology cannot be equated with CVDs, as China suggests, because the AD duties are levied to offset *dumping* of imported products that have caused injury. Commerce's use of the methodology expressly provided for in China's Accession Protocol to calculate dumping margins in the investigations at issue does not somehow transform the *AD duty* itself into a CVD. China does not contest the fact that the duties imposed pursuant to the four CVD investigations at issue in this dispute are themselves *not* in excess of the levels permitted under Articles 19.3 and 19.4.

45. In respect of Article I:1 of the GATT 1994, the United States notes, as a threshold matter, that China makes "as such" and "as applied" claims of inconsistency. **With regard to the "as applied" claims, China has failed to substantiate this claim because it has not identified "like products" to which the alleged "advantage" is applied. In any event, with respect to the two aspects of the calculation of the dumping margin discussed by China,** Commerce treats products from China no differently than it treats products from other Members. Just as it would in an AD proceeding involving a product from a market economy, Commerce did not deduct CVDs in calculating the export price of a product in any of the four AD proceedings at issue in this dispute. Similarly, Commerce did not add the amount of subsidies actually received to the cost of production of any Chinese producer in the four AD investigations at issue in this dispute.

46. Moreover, China fails to recognize that a number of WTO rules explicitly recognize that, in the context of AD and CVD proceedings, a Member may—and in some circumstances must—accord certain treatment to products from one Member that may not be accorded to like products from another Member. These include Paragraph 2 of the *Ad* Note to Article VI:1 of the GATT 1994, Article 2.2 of the AD Agreement, Article 14(d) of the SCM Agreement, and paragraph 15 of China's Protocol. Given the explicit authorization for such actions, it is clear that, as in the present dispute, these actions, where they conform to the requirements of these other WTO provisions, are not inconsistent with Article I:1.

47. Finally, China has failed to demonstrate the theoretical premise of each of its "as such" and "as applied" claims, namely, that a so-called double remedy *inheres* in the concurrent application of AD duties calculated using a methodology not based on a strict comparison of domestic costs and prices in China and CVDs. For example, first, China's theory fails to account for the fact that subsidies may easily reduce the normal value determined pursuant to the NME methodology by reducing the *quantity* of factors consumed by the NME producer in manufacturing the product at issue. Under Commerce's methodology, multiplying the surrogate factor values by lower factor quantities results in lower normal values and, hence, lower dumping margins. Second, one of the premises underlying China's argument–that subsidies reduce costs *pro rata*–is unsubstantiated and inconsistent with how many subsidies may be offered and used in the real world. Other weaknesses in China's theory reinforce the failed premise of its claims.

IX. THE UNITED STATES REMAINED AVAILABLE FOR CONSULTATIONS WITH THE GOVERNMENT OF CHINA BEFORE INITIATION AND THROUGHOUT EACH INVESTIGATION, AND AFFORDED INTERESTED PARTIES AMPLE TIME AND NUMEROUS OPPORTUNITIES TO SUBMIT RELEVANT INFORMATION IN THE INVESTIGATIONS

48. China claims that the United States did not comply with its obligation under Article 13.1 of the SCM Agreement because the United States did not formally invite China for consultations before examining, within the same investigation, information received about new subsidies that had not been identified in the application under Article 11. Contrary to China's reading, the only "investigation" referred to in Article 13.1 is the investigation triggered by the filing of a duly substantiated application as provided for in Article 11, and not by the filing of information on newly-reported subsidies. This is confirmed by additional provisions in the SCM Agreement that clarify that the procedural focus for purposes of consultations is whether the investigation covers a *product* that is alleged to have been subsidized and imports of which are causing injury, so that the examination of additional subsidies on a product already subject to investigation would not constitute a new "investigation."

49. China similarly argues that the United States did not comply with its obligation under Article 12.1.1 of the SCM Agreement by failing to provide 30 days for reply not only to the questionnaire issued at the outset of an investigation, but to subsequent requests for information as well. Understood in its proper context, including Annex VI of the SCM Agreement, the obligation in Article 12.1.1 to provide thirty days for reply applies only to the former, and not to the latter. China's reliance on the Appellate Body's statement in *Mexico – Rice* that Article 12 of the SCM Agreement "as a whole" provides for evidentiary rules and due process rights that apply "throughout" an investigation is misplaced. Not only does this statement fail to address the particular text of Article 12.1.1, but China's argument overlooks the Appellate Body's recognition in *US – Hot-Rolled Steel* that Article 6.1.1, a parallel provision in the AD Agreement, "prescribes an absolute minimum of 30 days for the *initial response to a questionnaire*."

50. China argues that, by failing to request certain necessary information from respondents in the *CWP* and *LWRP* CVD investigations and consequently relying on facts available, the United States acted inconsistently with Articles 12.1 and 12.7 of the SCM Agreement. It was not until a very late stage in these investigations that Commerce was made aware that information about the amount of steel purchased through trading companies that came from SOEs was necessary to determine the existence of a benefit conferred on producers of the product subject to investigation. Commerce relied on evidence from the records of the investigations in order to make these determinations. Before any definitive rate of CVD is levied, respondents in the *CWP* and *LWRP* CVD investigations would be provided the opportunity to present evidence with respect to the amount of hot-rolled steel purchased from trading companies that was produced through SOEs.

X. CONCLUSION

51. For the foregoing reasons, the United States respectfully requests that the Panel grant the U.S. requests for a preliminary ruling and reject the remainder of China's claims.

ANNEX A-3

RESPONSE OF CHINA TO THE U.S. REQUEST FOR PRELIMINARY RULINGS

(12 June 2009)

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TABLE OF REPORTS CITED IN THIS SUBMISSION

Short Title	Full Report Title and Citation
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by Appellate Body Report WT/DS70/AB/R, DSR 1999:IV, 1443
Columbia – Ports of Entry	Panel Report, *Colombia - Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R, circulated to WTO members on 27 April 2009
EC – Customs Matters	Appellate Body Report, *European Communities - Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX,
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, circulated to WTO Members on 4 February 2009
US – Continued Zeroing	Panel Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/R, circulated to WTO Members 1 October 2008
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
US – Customs Bond Directive (India)	Appellate Body Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties*, WT/DS345/AB/R, adopted 1 August 2008
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3

1. In accordance with paragraph 12 of the Panel's working procedures for this dispute, China hereby responds to the request by the United States for certain preliminary rulings, as set forth in the United States' first written submission to the Panel.

2. The requests for preliminary rulings by the United States relate to the identification by China in its panel request of a specific measure, namely, the failure of the United States to provide the U.S. Department of Commerce ("Commerce") with legal authority to avoid the imposition of a double remedy for the same alleged subsidies when it imposes anti-dumping duties determined pursuant to the U.S. non-market economy ("NME") methodology simultaneously with the imposition of countervailing duties on the same product. The United States contends that this is not a "specific measure at issue" within the meaning of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and is outside the Panel's terms of reference because it was not identified in China's request for consultations under Article 4 of the DSU. As China will demonstrate, both of these requests for preliminary rulings are unfounded and should be rejected.

3. Before turning to the merits of the U.S. requests for preliminary rulings, China considers that it is important to place the U.S. arguments in their proper context. As China will demonstrate, from the very beginning of its consideration of whether to apply the U.S. countervailing duty laws to imports from countries that it designates as NMEs, Commerce has been vague and evasive as to whether it possesses legal authority to address the question of double remedies. The United States has continued to pursue this strategy of obfuscation into the present dispute, refusing to identify in its first submission to the Panel whether Commerce has legal authority to avoid the imposition of double remedies that arise from the simultaneous application of countervailing duties and its NME methodology, and what the nature and extent of that legal authority might be.

4. Against this backdrop, it is surprising that the *United States* should now accuse *China* of an alleged lack of clarity in specifying the measures at issue in this dispute. Not only are these accusations legally baseless, but they fail to reflect the fact that it is the United States' *own conduct* that is the origin of whatever uncertainty exists as to the provisions of U.S. law – or their absence – that relate to the problem of double remedies. Having refused to provide any indication to respondent producers, the Government of China, and now this Panel of the legal framework in which Commerce would address the double remedy problem – a problem that Commerce has acknowledged to exist and claims to be "determined to prevent … from arising"[1] – the United States simply is not in a position to fault China for the manner in which it has chosen to define the measures at issue in this dispute.

I. BACKGROUND

5. Beginning with its anti-dumping and countervailing duty investigations of *Coated Free Sheet Paper* ("*CFS Paper*"), Commerce has recognized the problem of double remedies that arises from simultaneous AD and CVD investigations of imports from NME countries. In March 2007, Commerce issued a press release to accompany its preliminary determination in the countervailing duty investigation of *CFS Paper*, in which Commerce stated that "the possibility of double counting result[s] from simultaneous anti-dumping and countervailing duty investigations" of imports from NME countries.[2] In June 2007, Commerce released its preliminary determination in the parallel anti-dumping investigation of *CFS Paper*. There, it stated that "the question of whether a double remedy has been or could be applied, *or whether the Department has the authority to adjust for such a situation*, involves complex factual, methodological and *legal* issues that will require additional time

[1] CFS Paper I&D Memo (AD), p. 13 (CHI-94).

[2] U.S. Department of Commerce, Office of Public Affairs, "Commerce Applies Anti- Subsidy Law to China", press release dated 30 March 2007 (CHI-135) (emphasis added). In an official Department of Commerce newsletter published the next month, Commerce reiterated that "[a] possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from NME countries. U.S. Department of Commerce, International Trade Administration, *International Trade Update*, April 2007, p. 4 (CHI-136).

to analyze."[3] Commerce stated that it would "analyze comments regarding the double remedy that are submitted by interested parties during the course of this investigation, and may seek additional information on the topic."[4]

6. Commerce's statements in connection with *CFS Paper* unambiguously acknowledge that "[a] possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from countries that Commerce designates as NMEs and that "whether the Department has the authority to adjust for such a situation, involves complex … legal issues". Commerce also made clear that it would "have to respond" to issues and evidence that interested parties identified during the course of the investigations concerning the existence and extent of a double remedy for the same alleged acts of subsidization.[5]

7. Notwithstanding Commerce's clear recognition of the problem of double remedies, and notwithstanding its concession in the *CFS Paper* preliminary determination regarding the uncertain nature of its legal authority to address the problem, Commerce never identified for the interested parties in the *CFS Paper* investigations: (1) the legal framework in which it would evaluate the unidentified "specific facts" it considered relevant to determine whether a double remedy would arise; or (2) the specific steps it would take within that legal framework to avoid the imposition of a double remedy.

8. As China documented in its first written submission to the Panel, to this day Commerce still has not identified the legal framework in which it would analyze the double remedy issue. Beginning with the final determinations in *CFS Paper*, and continuing into the investigations at issue in this dispute, Commerce has adopted an internally contradictory, two-pronged position on the question of double remedies. As China explained in its submission, Commerce has (1) proclaimed that it has no legal authority to address the problem of double remedies in the context of NME investigations; while (2) blaming the respondents for allegedly failing to present "data" or "evidence" relevant to the question of double remedies, even though Commerce has never identified what this "data" or "evidence" might be.[6]

9. Remarkably, the United States has continued to pursue this strategy of evasion in its first submission to the Panel. China has plainly challenged the United States in this dispute to identify whether Commerce has legal authority to address the imposition of double remedies, what the nature of this authority might be, what types of evidence are required within this legal framework, and why this evidence is relevant to the existence or extent of a double remedy. In its first written submission to the Panel, the United States says literally nothing in response. In fact, the United States more or less abandons Commerce's theory that the relevant issue is whether "subsidies pass through, *pro rata*, to U.S. prices", leaving China – and now the Panel – even *more* in the dark as to when the United States considers that a double remedy would arise, and under what legal authority it would fulfil its "determin[ation] to prevent any double remedies from arising" in these unspecified circumstances.[7]

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[3] Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 30758, 30760 (4 June 2007) (CHI-137) (emphasis added).

[4] Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China, 72 Fed. Reg. 30758, 30760 (4 June 2007) (CHI-137).

[5] U.S. Department of Commerce, Office of Public Affairs, "Commerce Applies Anti- Subsidy Law to China", press release dated 30 March 2007 (CHI-135).

[6] *See* China First Written Submission, paras. 359-361.

[7] CFS Paper I&D Memo (AD), p. 13 (CHI-94), As China will demonstrate in its rebuttal submission, the United States' attempt to dismiss Commerce's "*pro rata*" theory as one that the *respondents* invented is patently disingenuous. *See* U.S. First Written Submission, n.607. Commerce stated in the OTR AD

10. As China will proceed to demonstrate, China has done nothing more than take Commerce's own statements at face value for the purpose of defining the relevant measures and claims in this dispute. There is no respect in which China's identification of the absence of legal authority as a measure at issue in this dispute failed to comport with the requirements of Article 6.2 of the DSU.

II. THE FAILURE OF THE UNITED STATES TO PROVIDE LEGAL AUTHORITY FOR COMMERCE TO AVOID THE IMPOSITION OF DOUBLE REMEDIES IS A SPECIFIC MEASURE AT ISSUE IN THIS DISPUTE

11. In its request for establishment of a panel, China specified as a measure at issue in this dispute, as an omission, "the failure of the United States to provide legal authority for the U.S. Department of Commerce to avoid the imposition of a double remedy when it imposes anti- dumping duties determined pursuant to the U.S. NME methodology simultaneously with the imposition of countervailing duties on the same product."[8] The United States contends that this is not a "specific measure at issue" within the meaning of Article 6.2 of the DSU. This contention is entirely without basis.

12. The Appellate Body has observed that Article 6.2 requires the complaining Member to "identify the specific measures at issue" and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[9] These requirements serve two purposes. First, "as a panel's terms of reference are established by the claims raised in panel requests, the conditions of Article 6.2 serve to define the jurisdiction of the panel."[10] Secondly, these requirements "serve the due process objective of notifying respondents and potential third parties of the nature of the dispute".[11]

13. The Appellate Body has stated that "the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[12] An examination of the sufficiency of a panel request under Article 6.2 "does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement."[13] The relevant inquiry is whether the complaining Member has "present[ed] the problem clearly" so as to define the scope of the dispute and advise other Members as to the nature of the dispute.

14. As China will proceed to demonstrate, the United States does not even remotely establish that China failed to "present the problem clearly" when it identified Commerce's lack of legal authority to avoid the imposition of double remedies as a measure at issue in this dispute.

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determination, for example, that "[t]he GOC and the responding parties have not demonstrated that a double remedy will result from this investigation *because they have failed to present any data* showing that the benefits received from any domestic subsidy *lowers U.S. prices, pro rata* …" OTR I&D Memo (AD), p. 12-13 (emphasis added). This was *Commerce's* articulation of what it considered to be the relevant factual issue, not the respondents'.

[8] Request for the Establishment of a Panel by China (WT/DS379/2) (12 December 2008), p. 3. As discussed below, this measure follows directly from Commerce's own statements in the final anti-dumping and countervailing duty determinations that China also specified as measures at issue in this dispute.

[9] Appellate Body Report, *Korea – Dairy*, para. 120.

[10] Appellate Body Report, *US – Continued Zeroing*, para. 161.

[11] Appellate Body Report, *US – Continued Zeroing*, para. 161.

[12] Appellate Body Report, *US – Continued Zeroing*, para. 169.

[13] Appellate Body Report, *US – Continued Zeroing*, para. 169.

A. THE UNITED STATES' ARGUMENT IS PREMISED ON A MISCHARACTERIZATION OF CHINA'S CLAIMS CONCERNING THE ISSUE OF DOUBLE REMEDIES

15. The United States' argument concerning the measure identified by China in its panel request is inextricably bound up with its erroneous contention that China's claims are based on a "supposed *requirement* in U.S. law to impose a double remedy" (*i.e.*, to apply concurrent AD and CVD measures)".[14] This is a false characterization of China's claims. Contrary to the United States' argument, China's complaint does not relate to any provision of U.S. law that ***requires*** Commerce to apply countervailing duties concurrently with anti-dumping duties determined in accordance with its NME methodology. Any such claim would be absurd in light of Commerce's two-decade long history of taking the position that it could *not* apply the U.S. countervailing duty laws concurrently with its NME anti-dumping methodology.

16. Contrary to the United States' attempt to re-characterize China's claims, China's contention is that ***when*** Commerce ***chooses*** to apply countervailing duties concurrently with anti- dumping duties determined in accordance with its NME methodology, as it has done in the four investigations at issue in this dispute, a necessary consequence of that choice is the imposition of a double remedy for the same alleged acts of subsidization. This is because, as Commerce itself has stated, it lacks authority under U.S. law to account for the double remedies that arise in these circumstances, and therefore has "no choice but to apply both duties without making any adjustments" for double remedies.[15] The double remedy arises as a necessary result of the operation of the two remedies whenever they are used in conjunction with each other, not from any "requirement" of U.S. law to impose double remedies or to apply the two remedies concurrently.

17. This is precisely why it is the *absence* of legal authority to *avoid* the imposition of double remedies that is the gravamen of China's complaint. As China documented in its first written submission to the Panel, and as discussed in more detail below, the United States – including Commerce – has repeatedly recognized the problem of double remedies arising from the simultaneous application of countervailing duties and its NME methodology. While China and the United States appear to differ on the circumstances in which a double remedy will arise, the existence of the double remedy problem cannot seriously be in doubt. Commerce has repeatedly invoked the absence of legal authority as a reason why it cannot take steps to avoid the imposition of double remedies in the case of parallel AD/CVD investigations of imports from NME countries. Clearly, then, it is the absence of legal authority to avoid the imposition of double remedies that is among the sources of China's complaint.[16]

18. Accordingly, the only remaining question under Article 6.2 of the DSU is whether China has "present[ed] the problem clearly". As China will demonstrate next, its request for establishment of a panel easily meets that test.

B. CHINA'S DESCRIPTION OF THE ABSENCE OF LEGAL AUTHORITY PRESENTS THE PROBLEM CLEARLY

19. The omission that China has identified in its request for establishment of a panel is the failure of the United States to give Commerce legal authority to avoid the imposition of double remedies for

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[14] U.S. First Written Submission, para. 70.

[15] GAO Report, p. 29 (CHI-121).

[16] The Appellate Body has stated that "a 'nexus' must exist between the responding Member and the 'measure', such that the 'measure' – whether an act or omission – must be 'attributable' to that Member", and "the 'measure' must be the *source* of the alleged impairment …". Appellate Body Report, *US – Gambling*, para. 121 (emphasis original). Based on Commerce's own words and actions, it is clear that the absence of legal authority – an omission – is the source of the impairment of which China complains in this dispute in respect of double remedies.

the same alleged subsidies in those instances in which Commerce applies countervailing duties simultaneously with the application of anti-dumping duties determined in accordance with its NME methodology. In the investigations at issue in this dispute, Commerce identified this lack of legal authority as at least one justification for its failure to avoid the imposition of double remedies for the same alleged subsidies.

20. While "an examination regarding the specificity of a panel request does not entail substantive consideration as to what types of measures are susceptible to challenge in WTO dispute settlement"[17], there is no question that China may properly challenge under the DSU the absence of legal authority for Commerce to avoid the imposition of double remedies in parallel AD/CVD investigations of imports from NME countries. The Appellate Body has repeatedly stated that "[i]n principle, any act *or omission* attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[18] The failure of a Member to enact legislation that would permit its investigating authority to avoid acting inconsistently with the covered agreements is certainly a type of "omission" that is cognizable within WTO dispute settlement.

21. In its first written submission to the Panel, China has exhaustively documented the facts and circumstances that demonstrate this omission by the United States. In particular, China has demonstrated that:

- The U.S. Government Accountability Office ("GAO") found that "U.S. law does not provide Commerce with any specific authority to avoid double counting" when it imposes countervailing duties simultaneously with anti- dumping duties determined in accordance with its NME methodology;

- The Department of Commerce informed the GAO that, for this reason, Commerce "would have no choice but to apply both duties without making any adjustments" for double remedies;

- The GAO recommended that the U.S. Congress "consider adopting legislation to provide Commerce clear authority to … make corrections to avoid double counting domestic subsidy benefits when applying both CVDs and antidumping duties to the same products from NME countries …";

- The U.S. House of Representatives did, in fact, pass a bill that *would* have given Commerce authority to avoid the imposition of double remedies in the case of imports from NME countries, but this bill was never enacted into U.S. law; and

- In *CFS Paper*, and continuing into the investigations at issue in this dispute, Commerce repeatedly referred to the absence of legal authority as a reason why it could not take steps to avoid the imposition of double remedies for the same alleged subsidies.[19]

22. The fact that the U.S. House of Representatives considered it necessary to pass a bill that would have given Commerce the authority to avoid double remedies in the case of parallel AD/CVD investigations of NME imports is strongly indicative of the possibility that Commerce lacks such authority. The fact that this bill never became a law is even more indicative of the possibility that Commerce *continues* to lack such authority, and that this lack of authority explains its failure to account for double remedies in the investigations at issue in this dispute. Most importantly, the fact

[17] Appellate Body Report, *US – Continued Zeroing*, para. 169.

[18] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81 (emphasis added); *see also* Appellate Body Report, *EC – Customs Matters*, para. 133; Appellate Body Report, *US – Continued Zeroing*, para. 176.

[19] *See* China First Written Submission, paras. 357-359.

that Commerce invoked the absence of legal authority in these investigations as a justification for its inaction confirms that it is, in fact, the *absence* of legal authority that is the origin of the impermissible double remedies of which China complains.

23. In sum, it is hard to imagine how China could have been any more precise in describing and documenting: (1) the omission of the United States in failing to provide legal authority for Commerce to avoid the imposition of double remedies when it imposes anti-dumping duties determined pursuant to the U.S. NME methodology simultaneously with the imposition of countervailing duties; and (2) the relationship between this omission and the legal claims that China advances in this dispute. China has clearly demonstrated, based on Commerce's own words, that the absence of legal authority is one possible explanation for Commerce's imposition of double remedies in the investigations at issue, and has further demonstrated that this imposition of double remedies for the same alleged subsidies impairs benefits that accrue to China under the covered agreements.

24. In light of these considerations, it is difficult to understand the basis for the United States' suggestion that China's request for establishment of a panel failed to "present the problem clearly" for the purposes of Article 6.2 of the DSU.[20] There can be no doubt that China's panel request goes well beyond the minimal requirement of identifying the relevant measures "with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue".[21] The "gist of what is at issue" is whether Commerce has authority under U.S. law to avoid the problem of double remedies in parallel AD/CVD investigations of NME imports – a problem that Commerce itself has acknowledged and purports to be determined to prevent.

25. Moreover, the United States has not even suggested, let alone demonstrated, that its ability to defend its interests in this dispute has been impaired by the manner in which China chose to define the measure at issue. There is no plausible prejudice to the United States arising from the identification as a measure of a legal deficiency that has been the subject of extensive discussion within the U.S. Government, and that Commerce specifically identified in the investigations at issue. In point of fact, it is entirely within the power of the United States to resolve this matter by indicating whether Commerce does or does not have authority under U.S. law to avoid the imposition of double remedies in parallel AD/CVD investigations of NME imports, and, if Commerce does have such authority, to describe what this authority is. In the absence of any prejudice to the United States, the due process concerns of Article 6.2 of the DSU simply are not implicated in this case.

26. For these reasons, the Panel should reject the United States' claim that the failure to provide legal authority is not a specific measure at issue in this dispute.

III. THE ADDITIONAL MEASURE IDENTIFIED BY CHINA IN ITS PANEL REQUEST IS WITHIN THE TERMS OF REFERENCE

27. In its request for preliminary rulings, the United States claims that the one additional measure that China set forth in its request for establishment of a panel is outside the terms of reference because it was not the subject of consultations. The U.S. argument wholly disregards the direct relationship between the one additional measure that China included in its panel request and the measures that were the subject of consultations, and ignores the Appellate Body's jurisprudence on the relationship between consultations requests and panel requests.

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[20] Indeed, China suspects that the problem is all *too* clear to the United States – after repeatedly acknowledging the problem of double remedies in the context of NME investigations, the United States would prefer to avoid any discussion of why it has been unable to specify the legal framework in which it would evaluate this issue, or to explain why Commerce failed to avoid the imposition of double remedies in the investigations at issue.

[21] Appellate Body Report, *US – Continued Zeroing*, para. 169.

28. It is well-established that Articles 4 and 6 of the DSU do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."[22] The Appellate Body has stated that, "[a]s long as the complaining party does not expand the scope of the dispute," it would "hesitate to impose too rigid a standard for the 'precise and exact identity' between the scope of consultations and the request for establishment of a panel, as this would substitute the request for consultations for the panel request."[23]

29. The Appellate Body recently re-emphasized this point, explaining that a complaining Member may add measures to a panel request so long as the additional measures "relate to essentially the same dispute" that was the subject of consultations.[24] In evaluating this issue, the Appellate Body examined whether the additional measures "relate" to the measures identified in the consultations request, and whether the "legal basis" of the claims raised in respect of the additional measures is the same as the legal basis of the claims set forth in the consultations request.[25]

30. The one additional measure that the United States challenges in its request for preliminary rulings easily satisfies both of these standards, and unquestionably "relate[s] to essentially the same dispute" as the dispute that was the subject of consultations. The one additional measure that the United States challenges states as follows:

> In certain of the investigations specified above, the U.S. Department of Commerce stated that U.S. law provides no basis to make any adjustment to either the anti-dumping or countervailing duty calculations to avoid the imposition of a double remedy for the same unfair trade practice, where such a double remedy arises from the use of the U.S. non-market economy (NME) methodology to impose anti-dumping duties simultaneously with the imposition of countervailing duties on the same product. The measures therefore include, as an omission, the failure of the United States to provide legal authority for the U.S. Department of Commerce to avoid the imposition of a double remedy when it imposes anti-dumping duties determined pursuant to the U.S. NME methodology simultaneously with the imposition of countervailing duties on the same product.[26]

31. This additional measure clearly "relates" to the measures that were the subject of consultations. The paragraph begins by noting that "*in certain of the investigations specified above*" – *i.e.,* the measures that were the subject of consultations – Commerce stated that it lacks legal authority to avoid the imposition of double remedies in the context of parallel AD/CVD investigations of imports from NME countries. Thus, Commerce's lack of legal authority to avoid the imposition of double remedies in parallel NME investigations was *already evident* on the face of the measures that were the subject of consultations.[27] China's panel request does nothing more than identify this

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[22] Appellate Body Report, *Brazil – Aircraft*, para. 132 (original emphasis).

[23] Appellate Body Report, *US – Upland Cotton*, para. 293.

[24] Appellate Body Report, *US – Continued Zeroing*, para. 235. The United States' failure to address this recent jurisprudence on the relationship between consultation requests and panel requests is a telling omission. The argument that the United States advances in the present dispute concerning the one additional measure that China included in its panel request is at least as tenuous as the argument that the United States advanced in *US – Continued Zeroing* in respect of the 14 additional measures at issue in that dispute. Both the panel and Appellate Body rejected the U.S. argument that the additional measures were outside the terms of reference.

[25] Appellate Body Report, *US – Continued Zeroing*, para. 228.

[26] Request for the Establishment of a Panel by China (WT/DS379/2) (12 December 2008), p. 3.

[27] *See* First Written Submission of China, para. 359.

absence of legal authority as a distinct measure, in the form of an omission by the United States in failing to provide Commerce with legal authority to avoid the imposition of double remedies.[28]

32. In its request for preliminary rulings, the United States makes no attempt to demonstrate that this one additional measure is unrelated to the measures that were the subject of consultations. The United States baldly asserts that the additional measure is "wholly new", but ignores the fact that the description of the measure in China's panel request establishes a direct connection to the measures that were the subject of consultations.[29] The United States likewise disregards the fact that China's first written submission clearly establishes the relationship between the measures that were the subject of consultations and the omission that China specified as an additional measure in its panel request.[30] The United States simply pretends that Commerce never made the statements that it actually made in the underlying determinations.

33. Even if Commerce had not specifically referred to the absence of legal authority in the underlying determinations, the omission that China has specified in its panel request relates to the measures that were the subject of consultations because the absence of legal authority is one possible explanation for Commerce's failure to avoid the imposition of double remedies in the investigations at issue. China has demonstrated that there has been extensive consideration by different parts of the U.S. Government as to whether Commerce has legal authority to avoid double remedies in parallel NME investigations.[31] That Commerce may lack such authority plainly relates to Commerce's failure to avoid the imposition of double remedies in the measures that were the subject of consultations.

34. It is equally clear that the legal basis for China's claims in respect of the additional measure is identical to the legal basis for China's claims in respect of the measures that were the subject of consultations. Fundamentally, the legal issue with respect to *all* of these measures is whether the imposition of double remedies for the same alleged acts of subsidization is inconsistent with the covered agreements. In particular:

- With respect to the measures that were the subject of consultations, China's claim is that the United States acted inconsistently with specified provisions of the covered agreements, because it applied both anti-dumping and countervailing duties to the same products without

[28] For this reason, the United States' reliance upon *US – Customs Bond Directive (India) (AB)* is misplaced. See U.S. First Written Submission, n. 79. China has not expanded the scope of the dispute to include a broader set of legal authorities, as was the case in *US – Customs Bond Directive.* It is only by mischaracterizing the nature of China's claims that the United States can argue that the additional measure identified by China in its panel request "derive[s] from an unspecified set of statutory provisions that … operate jointly so as to deprive Commerce of certain legal authority that China believes it should have." U.S. First Written Submission, para. 84. As discussed above, this re-characterization of China's claims is entirely misguided. China's claims in respect of double remedies do not arise from an "unspecified set of statutory provisions"; they arise from Commerce's stated lack of legal authority to avoid the imposition of double remedies when it decides to apply anti-dumping duties determined in accordance with its NME methodology simultaneously with the imposition of countervailing duties. This absence of legal authority was evident on the face of the determinations that were the subject of consultations and was specifically invoked by Commerce as a rationale for its inaction. China has identified this aspect of Commerce's determinations as a distinct measure in its panel request merely to highlight the apparent importance of the absence of legal authority as an explanation for why Commerce failed to avoid the imposition of double remedies in these determinations.

[29] U.S. First Written Submission, para. 81.

[30] *See, e.g.*, China First Written Submission, para. 395 ("Commerce stated, unequivocally, that the U.S. countervailing duty laws do not give it authority to avoid the imposition of double remedies in this instance. In respect of the U.S. anti-dumping laws, Commerce continued to make statements that are consistent with its previous position that it lacks authority to avoid double remedies in NME investigations.").

[31] *See* China First Written Submission, paras. 347-354.

accounting for the fact that its anti-dumping methodology necessarily offset the same alleged subsidies for which it imposed countervailing duties.

- With respect to the omission that China identified as an additional measure in its panel request, China's claim is that the United States acts inconsistently with the identical provisions of the covered agreements, because the absence of legal authority for Commerce to account for double remedies in the context of NME investigations ensures that the United States will act inconsistently with the same provisions of the covered agreements in all cases in which Commerce applies the two remedies simultaneously.

35. In short, the legal issues relating to these measures are identical. Just as the 14 additional measures at issue in *US – Continued Zeroing* concerned the same zeroing methodology that Commerce had used in the 38 measures that were the subject of consultations, the measures that China identified in its consultations request and the one additional measure that it identified in its panel request relate to the same basic question: whether the United States may impose countervailing duties to offset subsidies that it necessarily offsets through the use of its NME methodology in a parallel anti-dumping investigation. Hence, it is clear that China's consultations request and its panel request refer to the same subject matter and constitute the same dispute. China has not expanded the scope of this dispute, and therefore the one additional measure that China included in its panel request is within the terms of reference of this Panel.

36. It is evident from the U.S. submission that its *actual* grievance is that China has challenged "as such" the failure of the United States to provide legal authority to Commerce to avoid the imposition of double remedies in parallel AD/CVD investigations of imports from NME countries. The United States appears to suggest that China's "as such" claims have some bearing upon the measures that China was required to identify in its consultations request.[32] But as the Appellate Body has recently observed, "the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement."[33] This distinction is no more than a "heuristic device" that provides "an analytical tool to facilitate the understanding of the nature of a measure at issue."[34] The fact that China has challenged a measure "as such" is not relevant to whether that measure relates to the dispute that was the subject of consultations. As China has just demonstrated, the additional measure in its panel request clearly relates to the same dispute that was the subject of consultations, and is therefore within the terms of reference without regard to whether China raises "as applied" or "as such" claims, or both, in respect of this additional measure.

37. For these reasons, China respectfully requests the Panel to find that the omission specified by China in its panel request is within the Panel's terms of reference.

IV. CONCLUSION

38. As China has demonstrated, the United States has steadfastly refused to identify (1) when, if ever, it would consider a double remedy to arise; (2) the legal authority under which it would evaluate the existence and extent of a double remedy; (3) the types of "facts" or "evidence" that would be relevant to its analysis; (4) why these "facts" or "evidence" are relevant to determining the existence or extent of a double remedy; (5) the specific steps that it would take to avoid the imposition of double remedies, if the relevant "facts" or "evidence" were presented; and (6) whether it considers that

[32] U.S. First Written Submission, para. 82.

[33] Appellate Body Report, *US – Continued Zeroing*, para. 179. *See also* Panel Report, *US – Continued Zeroing*, para. 7.46 ("In our view, the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement, nor is this distinction intended to replace or override the requirements of Article 6.2 of the DSU as to how measures have to be identified in a panel request.").

[34] Appellate Body Report, *US – Continued Zeroing*, para. 179.

it has any legal obligation, either under U.S. law or under the covered agreements, to avoid the imposition of double remedies in the context of parallel AD/CVD investigations of NME imports.

39. China considers that the United States' request for preliminary rulings is merely a continuation of the U.S. strategy of avoiding any response to these questions. Ironically, if the United States wanted to respond to China's "as such" claims with respect to the issue of double remedies, it would need to do nothing more than identify the specific authority that Commerce possesses under U.S. law to identify and avoid the imposition of double remedies in the context of NME investigations. If the United States were to come forward with this authority, the parties could then debate before the Panel whether this authority is *sufficient* to address the problem of double remedies, and the United States could explain why Commerce did not *apply* this authority in the investigations at issue in this dispute. Having failed to do so, however, the United States should not be heard to criticize China for the manner in which it has chosen to specify the measures at issue in this dispute.

40. For the reasons stated herein, China respectfully requests that the Panel reject the United States' requests for preliminary rulings.[35]

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[35] While China considers that the United States' requests for preliminary rulings have no legal foundation, China believes that the Panel should follow the practice of other panels in deferring any ruling on these requests until the final report. *See, e.g.*, Panel Report, *US – Continued Zeroing*, para. 7.28; Panel Report, *Columbia – Ports of Entry*, para. 7.14; Panel Report, *Canada – Aircraft*, para. 9.15. Among other considerations, the Panel will then be in a position to assess whether the United States' due process rights were prejudiced by the alleged deficiencies in China's panel request.