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THIRD PARTY SUBMISSIONS

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ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF ARGENTINA

(15 June 2009)

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I. INTRODUCTION

1. In this third-party submission, Argentina is setting out its views on some of the issues that form part of this dispute, in accordance with the written submissions to this Panel by China and the United States.

II. THE WTO RULES DO NOT CONTAIN ANY RESTRICTIONS ON THE SIMULTANEOUS APPLICATION OF ANTI-DUMPING DUTIES DETERMINED USING THE SURROGATE COUNTRY METHODOLOGY AND COUNTERVAILING DUTIES

2. China claims that the application of anti-dumping duties determined using the methodology corresponding to a non-market economy country concurrently with countervailing duties on the same product is contrary to Articles 10, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI of GATT 1994. In Argentina's opinion, China's claim is based on an incorrect interpretation of the rules.

A. ARTICLE VI.5 OF GATT 1994 DEALS SPECIFICALLY WITH THE SIMULTANEOUS APPLICATION OF ANTI-DUMPING DUTIES AND COUNTERVAILING DUTIES AND DOES NOT PROHIBIT SIMULTANEOUS APPLICATION IN THE TERMS SET OUT BY CHINA

3. GATT 1994 regulates combined application of anti-dumping duties and countervailing duties specifically in Article VI.5. The ordinary meaning of the wording in Article VI.5 shows that this provision prohibits the simultaneous application of anti-dumping duties (regardless of whether these have been determined according to Article 2 of the AD Agreement or using the surrogate country methodology provided in the second explanatory note to paragraph 1 of Article VI of the GATT) and countervailing duties that offset export subsidization to the extent that both duties are intended to remedy the "the same situation". This situation only occurs when the export price is lower in comparison with the normal value because of a subsidy in the same amount granted for the export of the goods.

4. It is therefore Argentina's opinion that the simultaneous application of anti-dumping duties and countervailing duties is consistent with the WTO rules provided that the countervailing duties in question are intended to offset domestic subsidies and not export subsidies.

5. In addition, the *chapeau* of Article 15 of China's Protocol of Accession introduces, as far as imports of Chinese origin are concerned, a series of rules in addition to those laid down in Article VI, the AD Agreement and the SCM Agreement. Argentina considers that if, when negotiating the terms of its accession to the WTO, China had obtained from Members the concession that imports of Chinese origin could not be subject to the simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties, Article 15 of the Protocol would have explicitly included such a provision.

B. ABSENCE OF AN EXPLICIT PROHIBITION ON THE SIMULTANEOUS USE OF ANTI-DUMPING DUTIES AND COUNTERVAILING DUTIES IN THE CASE IN QUESTION

6. The WTO rules include a series of provisions which, in different contexts, prohibit the simultaneous application of certain measures.[1] It is thus clear that, when Members agree to prohibit the simultaneous application of certain measures, such a prohibition is explicitly incorporated in the WTO rules. In fact, the principle *expressio unius est exclusio alterius* suggests that, as the WTO rules contain a specific prohibition on simultaneous application of certain measures but no specific prohibition on simultaneous application of anti-dumping duties determined using the surrogate

[1] See for example the footnote to Article 35 of the SCM Agreement; Articles 8.2 and 13 of the Agreement on Agriculture; and Article 6.1 of the Agreement on Textiles and Clothing (in force up until 2004).

country methodology and countervailing duties, simultaneous application in this latter case is consistent with the WTO rules

C. ARTICLE 19.3 AND 19.4 OF THE SCM AGREEMENT ARE NOT IN ANY WAY CONNECTED WITH THE ISSUE OF SIMULTANEOUS APPLICATION OF ANTI-DUMPING DUTIES DETERMINED USING THE SURROGATE COUNTRY METHODOLOGY AND COUNTERVAILING DUTIES

7. China's claim is mainly founded on the claim of violation of Article 19.3 and 19.4 of the SCM Agreement. Neither Article 19.4 nor Article 19.3 deal with the question of simultaneous application of anti-dumping and countervailing duties and, therefore, there is no textual basis at all for China's claim that the simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties violates these two provisions.

8. In Argentina's view, an assessment of whether Article 19.3 and 19.4 regulate the question of the simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties must necessarily take into account both Article VI.5 of GATT 1994 and Article 15 of the Protocol, which, as explained above, deal with the simultaneous application of anti-dumping duties and countervailing duties in general and the simultaneous application of anti-dumping duties determined according to the surrogate country methodology and countervailing duties in particular, respectively.

9. This approach would be consistent with the principle, well established in WTO case law, that one of the corollaries of the "general rule of interpretation" in the Vienna Convention is that the interpretation must have meaning and affect all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.[2]

D. THE SURROGATE COUNTRY METHODOLOGY IS NOT A METHODOLOGY RELEVANT TO COUNTERVAILING DUTIES AND CONSEQUENTLY DOES NOT YIELD A NORMAL VALUE FOR THE PURPOSES OF THE AD AGREEMENT, ADJUSTED FOR THE EFFECTS OF SUBSIDIZATION

10. China asserts that the surrogate country methodology applied in anti-dumping proceedings yields a market economy normal value already adjusted for the effects of subsidization on the prices and costs of the exporting non-market economy country.

11. Argentina does not share China's view that application of the surrogate country methodology yields not only a market economy normal value but also a normal value that is "subsidization free". There is no basis whatsoever, either conceptually or legally, for upholding this claim. Prices and costs in countries where subsidies are granted are distorted by the latters' effects, and obtaining prices and costs that reflect market economy conditions by applying the surrogate country methodology in no way implies that such prices and costs have already been adjusted by the distorting effects inherent in the subsidies.

III. INTERPRETATION OF THE TERM "PUBLIC BODY" IN THE SCM AGREEMENT

12. Argentina does not see why it should be considered that, in the context of the SCM Agreement, either the "welfare" or the "best interests" as objectives for action by an entity are more relevant than the effective control of a body by the State or government in order to be termed a "public body" in the context of the SCM Agreement.

[2] *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/R), Report of the Appellate Body, adopted on 20 May 1996, page 21, second paragraph (in the English text).

13. In fact, Argentina considers that the distinction between public and private relevant to Article 1.1 of the SCM Agreement concerns the corporate form in which the control of entities capable of providing such goods and services is organized, regardless of their final destination. In broad terms, therefore, there are private bodies that produce public goods, and public bodies that produce private goods. Characterization as one or the other entity depends on the control over the actor carrying out the activity and not on the destination of the goods or services produced. This issue had to be addressed by the Panel in *Korea – Measures Affecting Trade in Commercial Vessels*, and Argentina agrees with the Panel's evaluation of the issue in this case.[3]

14. For the foregoing reasons, Argentina considers that ownership of a public body by the government is sufficient to define it as such, in terms of its control, and for the purposes of Article 1.1 of the SCM Agreement.

IV. PROCEDURAL ASPECTS OF THE SCM AGREEMENT

A. FAILURE TO HOLD THE CONSULTATIONS PRESCRIBED IN ARTICLE 13.1 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)

15. The Argentine Republic endorses most of the points expressed by China in its submission regarding the "broad interpretation" of Article 13.1 of the SCM Agreement.

16. Argentina considers, in general terms, that failure to hold these consultations or their delayed holding nullifies the objective for which they were created, which is none other than to allow the countries involved to reach a mutually agreed and satisfactory solution, through the exchange of information, and so avoid the initiation of an investigation.

17. One argument that upholds the view expressed above can be found in a proper interpretation of footnote 44 to Article 13.2, which in the relevant part provides that: "*It is particularly important, […], that no affirmative determination whether preliminary or final be made without* ***reasonable opportunity*** *for consultations having been given*."

18. In this respect, Argentina deems it essential to express its disagreement regarding the 20-day deadline allowed by the Department of Commerce for determining whether or not to initiate an investigation as this period in no way suffices to enable a country under investigation to collect and transmit the information needed to defend its position.

B. FAILURE TO GIVE INTERESTED PARTIES THE PERIOD OF 30 DAYS PRESCRIBED IN ARTICLE 12.1.1 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)

19. The Argentine Republic also endorses China's interpretation of Article 12.1.1 of the SCM Agreement regarding the investigating authority's obligation to allow a period of 30 days for each one of the "questionnaires".

20. In this connection, Argentina wishes to emphasize that a balanced and appropriate interpretation of the WTO rules should above all observe the "due process principle" codified in Article 12.1.1 in the part which states: " … **ample opportunity** to present in writing all evidence which they consider relevant in respect of the investigation in question".

[3] Panel report, *Korea – Measures Affecting Trade in Commercial Vessels* (WT/DS273/R), especially paragraphs 7.45 to 7.50.

21. For the foregoing reasons, Argentina is of the view that it is an obligation inherent in Article 12.1.1 that every Member should allow a minimum period of 30 days in which to reply to all questionnaires sent out during the investigation procedure.

V. CONCLUSION

22. In accordance with the analysis set out in this submission, Argentina is of the view that:

- The simultaneous application of anti-dumping duties determined using the surrogate country methodology and countervailing duties is consistent with the WTO rules;
- government ownership of an entity is a sufficient factor to determine the existence of a public body in relation to the SCM Agreement;
- failure to hold the consultations or their delayed holding nullifies the objective laid down in Article 13.1 of the SCM Agreement; and
- the 30-day period allowed in which to reply to all questionnaires is consistent with a balanced interpretation of the SCM Agreement.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF AUSTRALIA

(15 June 2009)

A. INTRODUCTION

1. In its written submission Australia focuses on a select few topics which raise significant systemic issues and important questions of legal interpretation.

B. PUBLIC BODY

2. Australia submits that the Panel should be mindful not to conflate the test for entrustment or direction under Article 1.1(a)(1)(iv) with the definition of a public body for the purposes of Article 1.1(a)(1)(i)-(iii). In Australia's view, the term 'public body' is treated as an equivalent of government in Article 1.1(a)(1) because public bodies, by their nature, are an extension of government for the purposes of implementing government policy. This is consistent with the fact that Article 1.1(a)(1) provides that both governments and public bodies are referred to as "government" in the SCM Agreement. Conversely, Article 1.1(a)(1)(iv) recognises that private bodies can be used indirectly by governments to provide a financial contribution. Article 1.1(a)(1)(iv) imposes an additional test to attribute the actions of a private body to the government – that of entrustment or direction.

3. Australia considers that, consistent with the Appellate Body findings in *US - DRAMs*, a clear distinction needs to be maintained between the test required in subparagraphs (i)-(iii) which relate to the identity of the *actor* (public body) on the one hand, and subparagraph (iv) which relates to the nature of the *action* (including entrustment or direction), on the other. The Panel in *Korea - Commercial Vessels* highlighted the difficulty in defining an entity as public or private depending on the functions it was exercising at the time. It found that ultimately an entity can exercise dual government and non-government functions intermittently and that a body's activities are not conclusive of that body's character at any given time.

4. Australia submits that the test for identifying whether an entity is a public body should relate to evidence of government control over the entity and not the daily functions or actions of the entity as determined by the Panel in *Korea - Commercial Vessels*. Government ownership of an entity is strong evidence of government control but should be considered among other factors and evidence of control. In *Korea - Commercial Vessels* the Panel also looked at other indicia of government control, including:

- management of the entity (in that case the company was presided over by a president and executive directors who were appointed and dismissed by the Government of Korea);
- government ministerial approval of the operations and programmes of the entity; and
- the ability of the government to issue instructions to the entity.

C. ENTRUSTMENT OR DIRECTION OF A PRIVATE BODY

5. Article 1.1(a)(1)(iv) recognises that private bodies can also be an indirect channel through which governments can provide a financial contribution by "entrusting or directing" a private body to act in a particular way. An important issue that arises is the appropriate evidentiary standard to be applied to determine the existence of entrustment or direction.

6. In Australia's view, the text of Article 1.1(a)(1)(iv) relates to the government action of entrusting or directing a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii). The Appellate Body in *US - DRAMs* articulated the test for "entrustment and direction" in terms of "entrustment" requiring a government to "give responsibility to a private body", and "direction" requiring a government to "exercise its authority over a private body".

7. In Australia's view, entrustment or direction will not necessarily arise only in terms of a direct instruction to act or through the creation of a law by government. The Panel in *EC - DRAMs* noted that entrustment or direction "does not necessarily need to be 'explicit'". It elaborated that Article 1.1(a)(1)(iv) is to ensure that indirect government action is also captured by the SCM Agreement. If the scope of Article 1.1(a)(1)(iv) were limited to only explicit government acts, governments would be able to circumvent their commitments under this provision. The Appellate Body in *US - DRAMs* recalled that this provision is in effect an anti-circumvention provision.

8. The Panel in *Japan - DRAMs* stated that "since entrustment or direction of a private body will rarely be formal or explicit … allegations of government entrustment or direction are likely to be based on pieces of circumstantial evidence". This is consistent with the earlier Appellate Body statement in *US - DRAMs* that "entrustment or direction need not be determined on the basis of explicit acts". Instead, the Appellate Body determined in that case that a Panel's assessment requires "a consideration of the inferences that might reasonably have been drawn … on the basis of the *totality* of the evidence".

9. Article 1.1(a)(1)(iv) does not require that there be an explicit command or instruction to a private body in terms which satisfy the requisite elements of a subsidy under the SCM Agreement. Rather, a complaining party must provide evidence sufficient in its totality to justify a finding of entrustment or direction to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii).

D. SUBSIDIZED INPUTS PURCHASED FROM TRADING COMPANIES

10. In Australia's view, and as the Appellate Body noted in *US - Softwood Lumber IV*, Article 10 of the SCM Agreement and Article VI:3 of GATT 1994 are relevant provisions when examining subsidization of inputs to produce the imported product. The Appellate Body in that case found that a "pass through analysis" is not necessary in every situation in which a subsidy is provided on the production of an input product.

11. Australia notes that the Panel in *Mexico - Olive Oil*, in recalling the Appellate Body's analysis in *US - Softwood Lumber IV*, summarised the principles for when a pass-through analysis would be necessary stating that "a pass through analysis is required in circumstances in which *both* of the following conditions are present:

1. A subsidy is provided in respect of a product that is an input into the processed, imported product that is the subject of the countervail investigation; and

2. The producer of the input product and the producer of the imported product subject to the countervail investigation are unrelated."

12. This approach is consistent with the Appellate Body's findings in *US - Countervailing Measures* that there may be a direct or indirect recipient of the benefit of the financial contribution. Therefore, the direct recipient of the benefit may be the input producer and the indirect recipient may be the producer of the imported product.

13. Notwithstanding the issue of whether or not a pass-through analysis must be made, Australia is of the view that the Panel could also examine what could constitute a pass-through analysis. Such an analysis could include examination: (i) establishing the existence of a subsidy provided to an input product; and (ii) of the price paid by the producer of the imported product subject to the countervail investigation compared with an appropriate benchmark price, to reveal the benefit conferred to that producer. In Australia's view, this would reflect the understanding of "countervailing duty" as defined in footnote 36 of Article 10 of the SCM Agreement and Article VI:3 of GATT 1994, that countervailing duties are intended to offset subsidies bestowed directly or indirectly.

E. POLICY LENDING

14. In Australia's view, "policy lending" is a term that has been applied to describe a certain type of subsidy programme whereby a government makes a policy decision to provide loans to certain industries on preferential terms. Australia considers that a subsidy provided through a policy lending programme is subject to the same fundamental requirements under Articles 1 and 2 of the SCM Agreement as all other subsidies. In particular, the test for the existence of a subsidy under Article 1 of the SCM Agreement and for specificity under Article 2 of the Agreement, are separate tests. Consequently, where a financial contribution pursuant to a policy lending programme is not provided by the government or a public body, it must be demonstrated that the relevant private body was entrusted and directed according to Article 1.1(a)(1)(iv).

15. Statements of government policies, plans and intentions are highly relevant considerations in determining the existence of a subsidy and that the subsidies are targeted to certain industries or enterprises. In terms of *de jure* specificity under a policy lending programme, Australia considers that the policy statement that forms the basis of the programme must "explicitly limit access to a subsidy to certain enterprises". Australia finds no basis for the assertion that it must explicitly be "to the exclusion of other certain enterprises". Australia submits that if a programme is explicitly only available to certain enterprises or where eligibility is explicitly limited to certain enterprises, it is implicit that this will be to the exclusion of other certain enterprises. Thus a policy statement will be *de jure* specific if it explicitly refers to supplying loans only with respect to 'particular forms or branches of productive labour; a trade; a manufacture' as opposed to being "broadly available2 throughout the economy. Furthermore, *de jure* specificity does not require that there be legislation that identifies the elements of a subsidy.

16. China states that the policy banks have an express mandate from the central government to provide loans to targeted industries and 'state-supported' projects. In Australia's view, while commercial banks may take account of government policies when evaluating risks associated with loans, it is an entirely different matter for a commercial bank to be given, to take into account, and to act on a government direction in determining or evaluating lending decisions.

17. Once the existence of a subsidy is established in accordance with Article 1 of the SCM Agreement and specificity is established in accordance with Article 2 of the SCM Agreement, there is no need to impose an additional third requirement on instances of policy lending in terms of the "transaction" being "made pursuant to" the legislation. The issue of the connection between the policy statement and the provision of the financial contribution is addressed through the analysis of 'entrustment or direction' under an Article 1 analysis.

F. REGIONAL SPECIFICITY

18. Regional specificity under Article 2.2 of the SCM Agreement provides that a "subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific" (emphasis added). The test for regional specificity in Article 2.2 sits separately from the tests for specificity provided in Article 2.1(a)-(c). Article 2.2 can be distinguished from the tests in Article 2.1(a)-(c), because it specifically establishes regional locality as the limiting factor that renders a subsidy specific.

19. Australia does not accept that Article 2.2 involves an additional element so that the subsidy must be limited to certain enterprises within a limited designated geographic region within the jurisdiction of the granting authority. Australia notes that if this interpretation of regional specificity were to be adopted, it would be difficult to envisage a situation covered by Article 2.2 that would not already be covered by Article 2.1(a)-(c). Article 2.2 establishes an alternative basis upon which a subsidy might be specific. To require an additional test of limitation to certain enterprises within the regional specificity test already contained in Article 2.2, would render Article 2.2 meaningless.

20. Australia agrees with the United States that Article 8.1(b) and Article 8.2(b) may provide relevant context in determining regional specificity under Article 2.2. Article 2.1 provides that "an enterprise or industry or group of enterprises or industries" be referred to in the SCM Agreement as "certain enterprises". In Australia's view, "certain enterprises" in the Agreement should be read as "an enterprise or industry or group of enterprises or industries". Australia submits that this interpretation, in particular with respect to "certain enterprises" in Article 2.2, would be relevant to the Panel's examination. The Panel could also usefully clarify whether the use of the term "certain enterprises" in Article 2.2 is descriptive to distinguish between enterprises that are located within the designated geographical region and those that are outside.

G. BENCHMARK FOR THE DETERMINATION OF BENEFIT

21. Another important issue that arises in this case is the appropriate market benchmark to be applied to determine the existence of "benefit" under Article 1.1(b) of the SCM Agreement with respect to a "loan by a government" under Article 14(b) of the SCM Agreement.

22. As the Appellate Body stated in *Canada - Aircraft*, "Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison". The question then becomes, which "marketplace"; how to determine the boundaries of the relevant market place; and whether the firm could actually obtain a comparable commercial loan on the market. Article 14 clearly distinguishes between the appropriate market comparisons for government loans (subparagraph (b)) and those for "equity capital" (subparagraph (a)), "loan guarantees" (subparagraph (c)) and "goods and services2 (subparagraph (d)).

23. Article 14(b) states that the comparison should be with a "comparable commercial loan" actually obtainable on "the market". It does not refer to "prevailing market conditions … in the country of provision or purchase", as subparagraph (d) does. This distinction is due to the fact that subparagraph (b) relates to "loans" and not to "goods and services" as in subparagraph (d). Consequently, Australia submits that Article 14(b) does not also require the market benchmark to "relate or refer to, or be connected with the conditions prevailing in the market of the country of provision". Article 14(b) simply does not have the same explicit connection to the "country of provision or purchase". This is because "loans" are available on an international financial market that is subject to international influences.

24. Furthermore, Australia considers that there is no basis in the text of Article 14(b) of the SCM Agreement to limit consideration of a comparable market benchmark to loans in the same

currency as the RMB-denominated government loans under investigation. Loans obtained in one currency can be used to purchase any particular currency at rates determined by international markets. Again, Australia considers there is no basis to impose an Article 14(d) market comparison that relates or refers to, or is connected with the conditions prevailing in the market of the country of provision.

H. CONCURRENT APPLICATION OF ANTI-DUMPING AND COUNTERVAILING MEASURES

25. In Australia's view, anti-dumping and countervailing measures are trade remedies that address two distinct trade practices and have different purposes and effects. Anti-dumping measures address dumped products that cause injury to the domestic industry in the importing country. Countervailing measures on the other hand address subsidized imports that cause injury to the domestic industry.

26. As provided in Article VI:1 of GATT 1994 and Article 2.1 of the *Agreement on Implementation of* Article *VI of the General Agreement on Tariffs and Trade 1994* (the AD Agreement), an anti-dumping investigation entails a price comparison between the normal value of the product in the home market of the exporting country and the export price in the export market. Article VI:2 of GATT 1994 provides that an anti-dumping duty may be levied to offset or prevent dumping (that is, the difference between the normal value and the export price). Article VI:3 of GATT 1994 provides that a countervailing investigation will determine the existence, degree and effect of alleged subsidies which are provided by governments or public bodies. Article VI:3 of GATT 1994 further provides that a countervailing duty may be imposed to the amount of the subsidy, granted directly or indirectly on the manufacture, production or export of the product.

27. The SCM Agreement and the AD Agreement provide, respectively, that the imposition of the full amount of the subsidy as a countervailing duty or the full margin of dumping as an anti-dumping duty is a decision to be made by the investigating authorities.[1] However, neither Agreement addresses concurrent or parallel anti-dumping and countervail investigations. They do not specify that consideration of the imposition of the full dumping margin or the full amount of the subsidy must take into account other trade remedy actions which may be underway in the importing country. Nor does anything in GATT Article VI or elsewhere in the WTO Agreements prevent concurrent or parallel anti-dumping and countervailing duty investigations into the same product. Indeed, the text of Article VI:5 reinforces the right of Members to do both.

28. The Panel could usefully examine the following aspects of Article VI:5 of 1994:

(a) Whether the meaning of "situation" refers to the existence of dumping or subsidisation or to the injurious effects of those actions;
(b) Whether the meaning of "compensate" relates to the level of the dumping and subsidy margins;
(c) Whether "export subsidization" has a different meaning to "manufacture, production or export" of a product under Article VI:3 of GATT 1994;
(d) Whether the meaning and use of "export subsidization" is distinct from determining whether a subsidy is an export subsidy or a subsidy provided for the manufacture or production of a product;
(e) Whether the meaning and use of 'export subsidization' limits its application to export subsidies; and
(f) Whether the meaning and use of "export subsidization" may also capture subsidies provided for the manufacture or production of a product which is nevertheless exported.

[1] Article 19.2 of the SCM Agreement and Article 9.1 of the AD Agreement.

29. Australia fails to see that there is a "double remedy" of the effect of any subsidy where there are concurrent investigations. It could be entirely consistent for investigating authorities to make determinations of subsidization by an exporting Member and at the same time, determine that there are no sales in the ordinary course of trade in the domestic market of the exporting country due to a particular market situation where, for example, government influences prices. If a "surrogate" market is used to establish a normal value in an anti-dumping investigation because there are no sales in the ordinary course of trade, Australia is of the view that such sales do not reflect the subsidized production in the home market. Indeed, it could be argued that such prices are used to ensure that there is no perversion of prices in determining the normal value.

I. CONCLUSION

30. For the reasons set out in its Submission, Australia submits that the Panel in this dispute should:

(a) Take into account Australia's observations on the appropriate definition of "public body" under Article 1.1(a)(1) of the SCM Agreement;
(b) Draw on guidance provided by the highlighted WTO cases on the appropriate test for entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement;
(c) Consider what elements of an examination would constitute a pass-through analysis in determining whether a subsidy is provided on production of an input product;
(d) Note that China has conflated the elements of Article 2.1(a) and Article 1 of the SCM Agreement for determining *de jure* specificity when considering "policy loans";
(e) When interpreting Article 2.2 of the SCM Agreement, be mindful of its relationship with Article 2.1(a) of the SCM Agreement;
(f) Take into account Australia's observations on the proper market benchmark for a "loan by a government" when determining the existence of benefit under Article 14(b) of the SCM Agreement; and
(g) Note Australia's observations when interpreting Article VI:5 of GATT 1994 when considering China's claims about the concurrent application of anti-dumping and countervailing duties.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF BRAZIL

(15 June 2009)

I. ARGUMENTS

A. THE CONCEPT OF "PUBLIC BODY" IN ART. 1.1(A)(1) OF THE SCM AGREEMENT

1. Brazil is of the view that the ordinary meaning of the expression "public body" in Article 1.1(a)(1), interpreted in its context, and in light of the object and purpose of the SCM Agreement, indicates that shareholding control or ownership by a Government does not warrant, in and of itself, a presumption that a company is a "public body" for purposes of establishing the existence of a financial contribution. This view is supported by both WTO jurisprudence and general international public law, which confirm that corporate entities that are legally separate from the State, even if wholly or partly owned by that State, are presumed to be private entities, and therefore their actions are to be considered *prima facie* of a private nature.[1]

2. Brazil believes that nothing in Article 1.1(a)(1) supports an interpretation of the term "public" in "public body" as referring to "public property". On the contrary, the immediate context of the expression "public body" indicates that it refers to an entity closely assimilated to the government itself. The use of the term "government" throughout the SCM Agreement to refer indistinctly to "a government or any public body" underscores the closeness of the nexus between the two concepts. This same approach was adopted by the Appellate Body in *US - CVD DRAMs*.[2]

3. In order to be closely assimilated to the government, the link of an entity with the government must go beyond mere ownership. It must perform functions and exercise attributions that are typical of the government. It must, for all purposes, be considered part of the government itself. That is certainly not the case of companies that operate in the market, under the rule of private law, conducting businesses that are typical of privately-owned companies, regardless of whether the government owns a majority stake in it or not. This understanding is corroborated by the *ILC Draft Articles*[3] and by Appellate Body precedents.

4. In *US - CVD DRAMs* the Appellate Body noted that "the conduct of private bodies is presumptively not attributable to the State" and, to support such view, quoted approvingly to the following extract of the Commentaries to the ILC Draft Articles: "[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

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[1] *Commentaries to the ILC Draft Articles on State Responsibility of Internationally Wrongful Acts* (ILC Draft Articles), Article 8, Commentary (6), as referred to in *Appellate Body Report, United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) From Korea*, WT/DS296/AB/R, adopted 20 July 2005 (*US – CVD DRAMs*).

[2] *US – CVD DRAMs*, footnote 166.

[3] The ILC Draft Articles have been frequently relied on by the Appellate Body, panels, and also arbitrators acting under Article 22.6 of the DSU in interpreting WTO law. The *ILC Articles* have been cited as "rules of general international law", and as reflective of "customary international law".

exercising elements of governmental authority". By connecting its interpretation of private bodies to a commentary that specifically affirms that the conduct of corporate entities owned or controlled by the State is *prima facie* not attributable to the State, the Appellate Body has made it clear its opinion on two interconnected issues: *first*, that shareholding control or ownership is not sufficient to define a public body; and *second*, that control or ownership can be a relevant factor in the analysis of whether the company (or corporate entity) is exercising elements of governmental authority. Or, under the terms of 1.1(a)(1)(iv) of the SCM Agreement, of whether the company is being entrusted or directed by the government.

5. In this connection, it is important to differentiate between the enquiries undertaken in order to ascertain if a state-owned company is (a) a "public body" under Article 1.1(a)(1) of the SCM Agreement; or (b) a "private body" entrusted or directed by the government to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii) thereof. In Brazil's view, the first enquiry must be directed at the nature of the entity in question, whereas the second enquiry refers to specific instances in which the actions of the entity reveal governmental involvement in the form of entrustment or direction. The issue of ownership is not, in itself, determinative of the status of a state-owned entity in either enquiry. Conversely, state ownership may be a relevant element, among others, in assessing both if an entity has the nature of a "public body" or if it is a "private body" entrusted or directed to act as a proxy of the government in specific instances.

6. It is worthy noting, in this regard, that in the investigation at issue in *US – CVD DRAMs* the investigating authorities seem to have understood that control or ownership by the government does not suffice to characterize a company as a "public body". In that investigation several companies owned or controlled by the government were not found by the investigating authorities to be public bodies.[4]

7. Brazil agrees with the view that SCM provisions were constructed with the intent of preventing as much as possible circumvention of its disciplines.[5] Nevertheless, Brazil believes that the mechanism built into the SCM Agreement to fulfil this goal is the 'entrustment or direction' clause in Article 1.1(a)(1)(iv), whereby the possibility of targeting operations disguised as private in nature but actually resulting from the exercise of governmental authority is provided for. Brazil does not consider that this objective was meant to be achieved by a broad, "fast track" interpretation of the "public body" definition, one which would actually allow the circumvention of the steps set out in Article 1.1(a) for a financial contribution to be found.

8. It follows from the above that, when undertaking a countervailing duty investigation, the investigating authorities bear the burden of proof regarding the identification of a possible 'entrustment or direction' situation involving companies that, albeit owned or controlled by the government, are *prima facie* private entities. As explained before, whereas government shareholding control may be relevant evidence, it cannot be determinative in itself. Furthermore, Brazil understands that a finding of entrustment or direction of an entity by the government should be restricted to the specific action under consideration by the investigating authorities, and should not be automatically extended to any other actions attributable to such entity.

9. However, if the investigating authority believes that the company in question has the nature of a public body and not of a private entity, it must establish that such company is fundamentally and permanently devoted to the promotion of public goals determined by the government, performing functions and exercising attributions that are typical of the government itself. In this case, Brazil contends that the burden faced by the investigating authority is substantially heavier, since it is required not simply to demonstrate the government's entrustment or direction in respect of specific

[4] *See US – CVD DRAMs*, para. 131.
[5] United States' First Written Submission, para. 117

actions, but it must demonstrate that the entity in question is, by its very nature, and in relation to all its actions, public and not private.

B. THE SIMULTANEOUS APPLICATION OF AD AND CVD MEASURES

10. Article VI.2 of the GATT 1994 and Article 9.1 of the AD Agreement authorize Members to impose antidumping duties up to the amount of the dumping margin determined according to the requirements and criteria set out in Article VI of the GATT 1994 and in the provisions of the AD Agreement. Concurrently, Article VI.3 of the GATT and Article 19.4 of the SCM Agreement allow Members to levy countervailing duties up to the amount of the subsidy found to exist pursuant to Article VI of the GATT 1994 and the disciplines of the SCM Agreement.

11. In Brazil's view, provided that the requisite legal requirements for the imposition of each remedy are properly observed, there is nothing in the AD Agreement or in the SCM Agreement to suggest that parallel AD measures and CVD measures cannot be imposed on the same product exported by the same Member. Not surprisingly, no cross-references can be found in the AD Agreement or in the SCM Agreement conditioning the imposition of one remedy on the satisfaction of requirements established in relation to the other remedy. It is clear, therefore, that AD measures and CVD measures have been conceived as autonomous remedies, which should stand or fall on their own respective merits or faults.

12. This understanding is supported by Article VI:5 of the GATT 1994 which contains the only limitation on the concurrent application of AD and CVD measures that can be found in the covered agreements. Article VI:5 establishes certain constraints on the parallel application of AD and CVD remedies in specific circumstances of export subsidization. Apart from the limitation explicitly set out in Article VI:5, which is circumscribed to export subsidies, no other limitation in this regard is provided for anywhere in the GATT 1994, in the AD Agreement or in the SCM Agreement. The text of Article VI:5 shows that Members were well aware that if they intended to impose any restrictions or conditions on the parallel application of AD and CVD measures, they had to so explicitly. In this context, it does not seem credible to argue that, decades after the entry into force of the GATT 1947, the drafters of the AD and SCM Agreements intended to limit the parallel application of the two remedies but decided to do so implicitly.

13. The GATT 1994 treats remedies adopted to offset export subsidies more stringently than those aimed at subsidies "granted on the manufacture or the production" of a product due to the direct link between export subsidies and pricing practices adopted by their recipients. The economic operation of an export subsidy typically allows greater returns on foreign sales than on domestic sales. In principle, this type of governmental intervention induces recipients to lower the prices of their foreign sales while keeping their domestic prices stable; i.e., they are induced to dump in the amount of the export subsidy received. Conversely, the potential effects of manufacture or production subsidies on pricing practices are normally much less direct. It is therefore inappropriate to apply the logic behind the limitation of Article VI:5 of the GATT to subsidies that are not contingent on export performance.

14. Brazil also holds the view that the legal permissibility for the parallel application of AD and CVD measures, and its underlying logic, apply indistinctly to investigations conducted in relation to "market economy" Members and "non-market economy" Members. Accepting the argument that methodological challenges arising from price comparability difficulties in "non-market economy" Members somehow constrain the parallel application of AD and CVD measures in relation to them would result in discrimination against "market economy" Members. This result is not supported by the letter or the spirit of the GATT 1994, the AD Agreement or the SCM Agreement. In fact, WTO

rules do not establish any provision that create exceptions to the possibility of parallel application of the two remedies based on the characteristics of the economy of the Member concerned.

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF CANADA

(15 June 2009)

I. INTRODUCTION

1. Canada is participating in these proceedings because it has a systemic interest in the interpretation of WTO subsidy rules and the important consequences the findings of the Panel in this dispute will have for the future application of those disciplines, both in general and to cases involving China.

2. The *Protocol on the Accession of the People's Republic of China,* the *Report of the Working Party on the Accession of China*, and the transitional nature of China's economy inform Canada's views on many of the issues in this dispute and should likewise guide the Panel.

II. CHINESE STATE-OWNED ENTERPRISES AS PUBLIC BODIES

3. Canada submits that entities controlled by the government are public bodies within the meaning of Article 1.1(a)(1) of the *SCM Agreement*. A government may exercise such control through whole or majority ownership.

4. Canada's position is consistent with the Panel's decision in *Korea – Commercial Vessels*. The Panel in that case found that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)". The Panel found that government control over a Korean entity was "evidenced primarily by the fact that [the entity] is 100 per cent owned" by the government or other public bodies. Evidence suggesting government control over the entity also included the fact that the operations were presided over by directors who were appointed and dismissed by the government, and the fact that governmental approval of the operations programme was required. These factors are consistent with the means that a majority owner would ordinarily have to control a company.

5. Upon its accession, China conceded that its state-owned enterprises ("SOEs") constitute public bodies. Indeed, in light of the special characteristics of China's economy (including the prevalence of SOEs), members of the Working Party sought to clarify that when Chinese SOEs make financial contributions they do so as government actors for the purposes of Article 1.1(a)(1). The representative of China did not challenge this clarification.

6. China's position is not consistent with the context of Article 1.1(a)(1). Under China's interpretation, an SOE is a private body when it is not exercising governmental authority conferred to it by the law of the state. It is only when it exercises governmental authority that it would become a "public body". Where the SOE does exercise governmental authority and sells goods, its actions would constitute a financial contribution under Article 1.1(a)(1)(iv) of the *SCM Agreement*. In that case, the Chinese Government could be said to have entrusted or directed the putative private body (the SOE) to sell goods. Consequently, there would be no need for the SOE to be characterized as a public body for its action to be characterized as a financial contribution (under Article 1.1(a)(1)(iii) of

the *SCM Agreement*). As such, China's interpretation of the term "public body" would essentially make the term inutile.

III. COMMERCE'S USE OF BENCHMARKS OUTSIDE CHINA TO MEASURE THE BENEFIT CONFERRED BY THE PROVISION OF GOODS BY STATE-OWNED ENTERPRISES

7. Canada submits that the United States' reading of the Appellate Body's decision in *US – Softwood Lumber IV* in the context of this dispute is erroneous. Nevertheless, in the investigations at issue, Commerce's actions were consistent with the United States' WTO obligations by virtue of subparagraph 15(b) of China's *Accession Protocol*.

8. In *US – Softwood Lumber IV*, the Appellate Body indicated that, under Article 14(d) of the *SCM Agreement*, an importing WTO Member may only reject private prices in the market of the country of provision if it can demonstrate on the basis of facts that the government's status as a significant supplier of goods actually distorts the private prices for the goods in that country.

9. In *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China and Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, Commerce considered that Chinese prices were significantly distorted due to the Chinese Government's status as a substantial provider of goods.

10. Such an approach did not satisfy the requirement of Article 14(d) of the *SCM Agreement*, as interpreted by the Appellate Body in *US – Softwood Lumber IV*.

11. However, the *Working Party Report* and China's *Accession Protocol* provide an exception to this requirement for imports of Chinese origin.

12. At paragraph 150 of the *Working Party Report*, members noted that the transitional nature of China's economy could make it difficult to apply Article 14 of the *SCM Agreement*.

13. Accordingly, subparagraph 15(b) of China's *Accession Protocol* provides that an importing WTO Member may calculate a Chinese subsidy benefit on the basis of costs or prices outside China if there are "special difficulties" in the application of Article 14 of the *SCM Agreement*.

14. The dominance of Chinese SOEs – a legacy of China's history as a centrally planned economy – and the potential resulting distortion on private prices for the products they sell are precisely the sort of "special difficulties" in the application of Article 14 of the *SCM Agreement* that are contemplated in subparagraph 15(b) of China's *Accession Protocol*.

15. Such special difficulties arise when Chinese SOEs are the predominant providers of goods in China. Chinese private prices may be distorted and may not constitute appropriate benchmarks as a result of the role of the SOEs in the market.

16. Under such circumstances, Canada submits that subparagraph 15(b) of China's *Accession Protocol* allows an importing WTO Member to rely on prices outside China without having to demonstrate in accordance with Article 14(d) of the *SCM Agreement* that Chinese private prices are distorted.

IV. THE CONCURRENT APPLICATION OF ANTI-DUMPING AND COUNTERVAILING DUTIES WHERE NORMAL VALUE IS CALCULATED USING COSTS OR PRICES OUTSIDE CHINA

17. The *WTO Agreement* treats dumping and subsidization as two different causes of injury to domestic industries, and provides distinct sets of rules for each, giving rise to separate remedies: an anti-dumping duty to remedy injurious dumping and a countervailing duty to remedy injurious subsidization.

18. When an imported product happens to be both dumped and subsidized, and causes injury, an importing Member may impose both an anti-dumping duty equal to the margin of dumping and a countervailing duty equal to the amount of the subsidy.

19. Article VI:5 of *GATT 1994* confirms the ability of WTO Members, as reflected in practice, to impose concurrent anti-dumping and countervailing duties except to the extent that they both remedy dumping or *export* subsidization.

20. Nothing in the *WTO Agreement* prevents the concurrent application of duties determined on the basis of prices or costs found outside the market of the exporting Member whose products are under investigation.

21. Article 15 of the *GATT Subsidies Code* prohibited importing countries from applying both anti-dumping duties determined on this basis and countervailing duties. However, this prohibition was not carried over during the Uruguay Round.

22. If WTO Members intended to prohibit the concurrent application of anti-dumping duties calculated on the basis of subparagraph 15(a)(ii) of China's *Accession Protocol* and countervailing duties, they could have stated that intention in China's *Accession Protocol* as they had done earlier in the *GATT Subsidies Code*. Instead, taken together subparagraphs 15(a)(ii) and 15(b) of China's *Accession Protocol* enable an importing WTO Member to impose both anti-dumping duty calculated on the basis of costs or prices outside China and countervailing duty at the same time.

23. A countervailing duty on a Chinese product will be in "the amount of the subsidy found to exist" under Article 19.4 of the *SCM Agreement* if it is calculated in accordance with Article 14 of the *SCM Agreement* or subparagraph 15(b) of China's *Accession Protocol*.

24. As long as the importing WTO Member does not impose countervailing duty in excess of "the amount of the subsidy found to exist", the duty will be in the "appropriate amount", as required by Article 19.3 of the *SCM Agreement*.

25. The Panel in *EC – Salmon (Norway)* interpreted the phrase "appropriate amounts" in largely the same way under the analogous provision of the Anti-dumping Agreement. The Panel in *Argentina – Poultry Anti-Dumping Duties* reached essentially the same conclusion.

V. REGIONAL SPECIFICITY

26. Article 2.2 of the *SCM Agreement* simply covers subsidies that are limited to a designated geographical region.

27. Pursuant to Article 2.1 of the *SCM Agreement*, where access to a subsidy is limited to certain enterprises, that subsidy shall be specific. Reading this requirement into Article 2.2 as well would render Article 2.2 redundant and inutile.

28. Reading Article 2.2 as including both requirements would allow subsidies provided to all enterprises located in a designated geographical region to escape the disciplines of the *SCM Agreement* even though these potentially trade-distorting subsidies are not broadly available in the country.

VI. QUESTIONNAIRES

29. The 30-day requirement in Article 12.1.1 of the *SCM Agreement* only applies to the initial questionnaire that the investigating authority sends to respondents.

30. The Panel in *Egypt – Steel Rebar* addressed this issue in the context of Article 6.1.1 of the *Anti-dumping Agreement*, which is analogous to Article 12.1.1 of the *SCM Agreement*. The panel found that "the term 'questionnaires' in Article 6.1.1 [refers] only to the original questionnaires sent to interested parties at the outset of an investigation".

31. While the requirement in Article 12.1 of the *SCM Agreement* that parties receive "ample opportunity" to present evidence in writing applies throughout the course of an investigation, Article 12.1.1 deals only with a particular instance during an investigation – the issuance of the initial questionnaire – where what is "ample" is defined by the drafters of the *SCM Agreement* as at least 30 days.

32. If an investigating authority had to extend a new 30-day response period to a respondent every time it had a new or follow-up question arising from its obligation under Article 12.5 of the *SCM Agreement*, it would be very difficult for it to complete the investigation in accordance with Articles 11.11 and 12.12 of the *SCM Agreement*.

33. This could have troubling implications for respondents: pressed to complete an investigation within the timeframes stipulated in Articles 11.11 and 12.12, the investigating authority might refrain from asking follow-up questions or pursuing new lines of questioning arising from the information it has gathered, and rely instead on the facts available.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

(15 June 2009)

I. INTRODUCTION

1. Whilst not taking a final position on the specific facts of this case, the European Communities will provide its views on (i) the claims relating to the provision of goods by State-Owned Enterprise ("SOEs"), (ii) some issues relating to the policy loans and the provision of land-use rights (iii) the simultaneous application of anti-dumping and countervailing measures (iv) due process requirements, in particular those mentioned in Articles 13.1 and 12.1.1 of the *SCM Agreement*.

II. PROVISION OF GOODS BY SOEs

A. FINANCIAL CONTRIBUTION

2. The key question on this point appears to be whether the USDOC's application of majority ownership as the only factor to establish that SOEs are "public bodies" is consistent with the *SCM Agreement*. Whilst not entering into the specific facts of this case, the European Communities agrees with the United States that the Working Party Report on China's accession is a relevant document that the Panel should examine in its assessment. To the extent that China might reasonably be considered to be under an obligation to respond to the specific clarification requested, and China's silence a reasonable basis on which to construe consent, this would be a relevant factor, to be taken into consideration with all the relevant facts and evidence, in the determination by the United States that the SOEs in this case were "public bodies" providing financial contributions under Article 1.1(a)(1) of the *SCM Agreement*.

3. Leaving aside the particularities of the Working Party Report, the European Communities considers that a high level of government ownership is a very relevant factor in determining whether an entity is a "public body" in the sense of Article 1.1(a)(1) of the *SCM Agreement*. This factor should be examined in the light of the specific circumstances of the case in order to establish whether actions by SOEs can be attributed to the government. In the EC view, a fundamental element in the financial contribution determination is the participation of the government, either directly (as a government or public body) or indirectly (through private parties). In other words, the action of the entity at hand must be somehow attributable to the government. In this respect, the European Communities observes that majority ownership has been considered a very relevant factor (although not the only one) when establishing that actions of private bodies were attributed to the government. Consequently, in order to determine whether the actions of an entity can be attributed to the government directly or indirectly, *the degree of ownership* is a highly relevant factor.

4. The European Communities further notes that a test such as the "five-factor" test is not expressly referred to in the *SCM Agreement* as a basis on which to determine whether or not an entity is a public body within the meaning of Article 1(1)(a) of the *SCM Agreement*. In some cases such a test may be appropriate. In other cases, depending on the totality of the facts and evidence, and the particular procedural circumstances, the extent of ownership may have a preponderant role to play in determining that an entity is a "public body" under Article 1.1(a)(1) of the *SCM Agreement*. If no other facts or evidence are available, and the appropriate procedural steps have been followed, or if all

other available facts and evidence confirm the systematic role of the State, then State ownership could be determinative.

5. As regards the provision of goods by private trading companies, whilst not taking a position on the facts of this case, the European Communities would like to highlight that, in general terms, the provision of the goods by a trading company can be understood as a mere *intermediate act* which does not change the nature of the financial contribution (*i.e.*, the fact that SOEs are the suppliers of the inputs which are then incorporated into the subsidised products).

B. BENEFIT

1. Selection of Market Benchmarks

6. The European Communities considers that prices set by public bodies may not be considered as a relevant market benchmark in cases where those bodies are also involved as players in the market concerned. Furthermore, the European Communities considers that the Appellate Body's observations in *US - Softwood Lumber IV* would be pertinent to this case. They indicate that the fact that the government is the predominant supplier of certain goods in the market is likely to be a determining factor when examining all the relevant facts and evidence in order to ascertain whether market prices established by private parties can be used as the benchmark for the benefit determination, or whether, exceptionally, another benchmark should be used. If it is demonstrated that domestic prices are almost fully determined by SOEs representing public bodies and are highly distorted, then an investigating authority would have a sufficient ground to depart from the general rule of prices in the country of provision also in light of the above jurisprudence interpreting and applying Article 14 of the *SCM Agreement*. Finally, the European Communities considers that China's Protocol of Accession does not weaken the relevance of the observations made by the Appellate Body in *US - Softwood Lumber IV*.

2. Private Trading Companies: Pass-Through

7. Whilst not taking a position on the facts of this case, the European Communities considers that insofar as trading companies act as mere intermediaries in the transaction, without resulting in any transformation of the product concerned, it would be unnecessary for the U.S. authorities to show pass-through. Furthermore, as the European Communities understands that USDOC has calculated the subsidy benefit at the level of the exporters concerned, no adjustment at the level of the trading companies would appear necessary.

3. Denial of Offsets of Benefits Found When Calculating the Amount of Subsidisation ("Zeroing")

8. The European Communities considers that injurious subsidisation is not investigated on an individual transaction basis; rather, Article VI:3 of the *GATT 1994* and Articles 10, 11.2(ii), 12.9, 12.10, 13.1, 13.2, 13.4, 15.3, 15.5, 16.1, 16.3, 18.6, 19.3, 19.4, 20.1, 20.6, 22 and footnote 36 and 46 of the *SCM Agreement* refer to "merchandise", "product" or "product under investigation". Since the purpose of imposing countervailing duties is to offset any subsidy or subsidies given to a product, the calculation of the total amount of subsidisation granted to a particular product allows for the aggregation of *all* subsidies found to have been granted to that product during a particular period of time (*i.e.*, the period of investigation or "POI"). Thus, it is undisputed that aggregation of all subsidies is necessary to offset the total benefits obtained by the subsidised product.

9. However, an issue that arises in the present dispute seems to be whether a similar aggregation can be done when calculating the amount of subsidisation in a particular subsidy scheme. In this respect, the European Communities observes that, although investigating authorities have

considerable leeway in calculating benefits in accordance to Article 14 of the *SCM Agreement*, any methodology used to calculate the amount of subsidisation must be *reasonable*. In the EC view, when calculating the amount of subsidisation in a given case the question is what amount of benefit has been given to a particular product through the specific subsidy scheme during a defined period of time (*i.e.*, period of investigation). Thus, when calculating the amount of injurious subsidisation in a given case investigating authorities must identify the various subsidy schemes from which a particular product has benefited from during an established period of time. In doing this exercise, great importance should be given to how investigating authorities define the relevant subsidy scheme, the specific terms and conditions to obtain the subsidy by the recipient as well as the POI. Once the subsidy scheme has been defined and the POI has been selected, investigating authorities must be *coherent* with their own selection throughout the investigation when calculating the *overall* benefit granted to the product concerned through that subsidy practice in the selected period.

10. In comparing a particular price with a benchmark under the *SCM Agreement*, in order for the result of the comparison to be meaningful, the guiding principle is that like must be compared with like, due adjustment being made where necessary, unless there is a justification for doing otherwise. Accordingly, the terms and conditions and timing of the price should in principle be comparable to those of the benchmark. Thus, for example, if the price, amount and normal delivery date are fixed (*ex ante*) in the contract, then the market benchmark must also be that prevailing (*ex ante*) on the date of the contract, on the same terms and conditions. On the other hand, if the price, amount and normal delivery date are only fixed subsequent to the contract at the time of order (*ex post*), then the market benchmark must be that prevailing (*ex post*) on the date of the order. Similarly, if the market benchmark is a monthly average of spot prices, then one would expect that to be compared with a monthly average of transaction spot prices. Of course, the ideal objective of ensuring comparability may depend in practice on the facts and evidence that are reasonably available during the municipal administrative proceedings, which depends on the facts of each case.

III. POLICY LOANS

A. FINANCIAL CONTRIBUTION

11. The European Communities understands that, in the financial contribution determination, the USDOC found that SOCBs were "public bodies" in the sense of Article 1.1(a)(1) of the *SCM Agreement*, by relying *inter alia* on the state-ownership of the banking sector, China's legal framework limiting the SOCB's independence from the government and the continued government influence in the bank sector and bank lending decisions. However, China argues that the SOCBs are "commercial banks" and not state-policy banks with the express purpose of providing financing for state-supported projects. As mentioned before, in the case of SOCBs (*i.e.*, banks more than 50 per cent owned by the government), it may be easier for the government to influence them to act in a certain manner. Other factors may also be relevant.

B. BENEFIT

12. As regards the calculation of the benefit, the European Communities notes that, the interpretation followed by the Appellate Body in *US – Softwood Lumber IV* (although in the context of Article 14(d) of the *SCM Agreement*) may be relevant for clarifying the meaning of Article 14(b). The Appellate Body based its interpretation on the objective of Article 14 of the *SCM Agreement*, which is the "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient". In view of this objective, if the relevant market conditions are distorted, the comparison contemplated by Article 14 would become useless. In the case of commercial loans, if it can be shown that the "comparable commercial loan which the firm could actually obtain on the market" is also distorted because of the government intervention, then it would follow that having recourse to other benchmarks could be possible on a reasonable basis.

C. SPECIFICITY

13. The European Communities would like to add that if a subsidy in the form of a loan can be obtained by companies of all sizes (as long as they are sufficiently credit-worthy) with respect to projects across all sectors of the economy, it is unlikely that those loans could be specific under Article 2.1(a) or Article 2.1(c) of the *SCM Agreement*. Thus, the fact that a subsidy reaches a wide number of beneficiaries and industries may call into question the specificity of the measure. Furthermore, the European Communities is of the view that the analysis of the specificity of a subsidy should focus on the characteristics of the measure at issue rather than merely on the disbursements made thereunder. In other words, it is the subsidy itself which *de jure* or *de facto* limits access to an "enterprise or industry or group of enterprises or industries".

IV. PROVISION OF LAND-USE RIGHTS FOR LESS THAN ADEQUATE REMUNERATION

14. On the issue of specificity, the European Communities would like to point out that regional subsidies are not *per se* specific under the *SCM Agreement*. Indeed, Article 2.2 of the *SCM Agreement* addresses the specificity of subsidies limited to *certain enterprises* located within a designated geographical region within the jurisdiction of the granting authority. By contrast, subsidies destined to *all* enterprises in *a* geographical region are not considered specific *under Article 2.2 of the SCM Agreement*. In this respect, the European Communities notes that the text of Article 2.2 of the *SCM Agreement* was changed with respect to the *Dunkel Draft* which would have rendered all regional subsidies specific. Thus, such a change should have a meaning. Whether such regional subsidies are specific under Article 2 of the *SCM Agreement* has to be established by an *integrated reading* of Article 2.

15. As regards the calculation of the benefit, the European Communities considers that the Appellate Body's observations in *US – Softwood Lumber IV* are relevant to the present dispute. Indeed, if it is found that prices are distorted in the relevant market, it would be necessary to have recourse to an alternative market benchmark to establish the existence and amount of the benefit granted. In this respect, the European Communities also notes that the fact that a piece of land is located 3,000 kilometres away is not sufficient reason alone to conclude that the market benchmark used is unreasonable.

V. SIMULTANEOUS IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING MEASURES

16. On this issue, the European Communities understands that several arguments can be made in relation to the simultaneous imposition of anti-dumping duties and countervailing duties in cases involving NME countries. The European Communities invites the Panel to interpret the relevant provisions of the covered agreements involved (*i.e.*, the *GATT 1994*, the *Anti-Dumping Agreement* and the *SCM Agreement*) in an harmonious manner, applying the customary rules of interpretation of public international law as required by Article 3.2 of the *DSU*.

VI. DUE PROCESS

A. U.S. FAILURE TO REQUEST CONSULTATIONS UNDER ARTICLE 13.1 OF THE SCM AGREEMENT

17. The European Communities considers that Article 13.1 of the *SCM Agreement* establishes a temporal moment where the invitation for consultations must occur: after an application under Article 11 is accepted and before the initiation of the investigation. The specific reference to Article 11 (entitled "Initiation and Subsequent Investigation") of the *SCM Agreement* would seem to indicate that Article 13.1 deals with the situation where the investigating authority has not yet

complied with the substantive requirements mentioned in Article 11 that must be satisfied before an importing Member may initiate a countervailing duty investigation. By contrast, Article 13.2 of the *SCM Agreement* (which should serve as *immediate context*) contains the obligation throughout the period of investigation to afford "a reasonable opportunity to *continue* consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution" (*emphasis added*). This would seem to indicate that, if investigating authorities find new subsidy schemes in the course of an investigation, they may continue the investigation including the new subsidy allegations provided that due process rights are not disregarded. In this respect, the obligation for continued consultations with the country concerned throughout the investigations would seem to have an identical objective as the obligation to invite that country for consultations before the initiation of the investigation pursuant to Article 11: to preserve the Member's due process rights by allowing both parties to clarify the factual situation and try to reach a solution.

B. U.S. FAILURE TO ISSUE NEW QUESTIONNAIRES

18. The European Communities considers that the interpretation of Article 12.1.1 of the *SCM Agreement* should be read in light of the chapeau provided by Article 12.1. The European Communities considers that Article 12.1 of the *SCM Agreement* calls for an *adequate balance* between the rights given to interested parties (which should be given ample opportunities to provide the necessary evidence) on the one hand, and the obligation for the authorities to conclude investigations in a timely manner, on the other hand. Such analysis should be made on a case by case basis and on *reasonable grounds*.

ANNEX B-6

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF JAPAN

(15 June 2009)

I. INTRODUCTION

1. In this third party submission, Japan would like to present its views on systemic aspects of the following issues: (a) the underlying concept of the double remedy in Article VI:5 of the General Agreement on Tariffs and Trade 1994("*GATT 1994*"), and the consistency of the simultaneous imposition of anti-dumping and countervailing duties with Articles 19.3 and 19.4 of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"); (b) the definition of "public body" under Article 1.1(a) of the *SCM Agreement*; (c) the consistency of the calculation of benefit with the *SCM Agreement*; and (d) the application of the non-zeroing principle in the context of the *SCM Agreement*.

II. DISCUSSION

A. THE SIMULTANEOUS IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES

1. Article VI:5 of the *GATT 1994* Expresses the Underlying Concept that Members Are Not Allowed to Impose the Double Remedy with Respect to the Same Subsidy

2. Article VI:3 of the *GATT 1994*, which allows an importing Member to impose a countervailing duty up to the amount of the subsidy at issue, predicates that the export price would be lowered by the per-unit amount of the export subsidy. If an exporting Member grants a subsidy only on a product for export, only the export price of the product would be lowered due to the effects of the export subsidy while the normal value remains unaffected. In such a case, if the importing Member calculates the margin of dumping of such product to impose an anti-dumping duty, the resulting margin would consist of two parts: (i) the difference between the normal value (which is unaffected by the export subsidy) and the export price without the effects of the export subsidy; and (ii) the difference between the export price without the effects of export subsidy and the actual export price, which was lowered by the export subsidy. In such a situation, if the importing Member also imposes a countervailing duty for the amount of the subsidy, the countervailing duty also would remedy the effect of export subsidization, which already had been captured and remedied by the anti-dumping duty. Article VI:5, therefore, explicitly prohibits the simultaneous imposition of anti-dumping and countervailing duties where export subsidization is involved.

3. Article VI:5 of the *GATT 1994*, however, provides no explicit requirement on the prohibition of the double remedy in other situations. For example, when a subsidy was conferred on inputs for the production of a product, and when the product is sold in the home market and for export, both the home market price and the export price would be lowered by the same amount due to the effects of the subsidy. In such a case, if the dumping margin is based on the difference between the actual home market price and the actual export price, the resulting margin would not be affected by the subsidy. Accordingly, a double remedy would not occur in such an instance even when the importing Member also imposes a countervailing duty to account for the per-unit amount of the subsidy at the same time.

In the same situation, however, a double remedy may occur if the margin of dumping is calculated by adjusting the home market price upward for the per-unit amount of the subsidy without an adjustment of the actual export price.

4. Whether the potential double remedy exists in the situation of dumping and subsidization other than export subsidization depends on how the investigating authority calculates the margin of dumping. The underlying concept of the prohibition on double remedies may not be disregarded when an authority imposes the anti-dumping duty and the countervailing duty on the same product from the same exporting Member at the same time.

2. The Imposition of a Countervailing Duty Must Be Consistent with Articles 19.3 and 19.4 of the *SCM Agreement*

5. According to China, the countervailing duties on the four products in question are inconsistent with Article 19.4 of the *SCM Agreement* because anti-dumping duties on the same product would already include the amount of subsidies. Article 19.4 concerns the amount of subsidies found to exist through the countervailing duty investigation. Article 19.1 of the *SCM Agreement* clarifies that the amount of subsidy is based on evidence collected through the countervailing duty investigation. The provisions of Article 19.4 set forth no further limitation on the maximum amount of the countervailing duty. This Article is irrelevant to how an anti-dumping duty would be determined by the separate anti-dumping investigation in accordance with the provisions of the *AD Agreement*.

6. China also argues that the imposition of the countervailing duties in this dispute was not necessary and thus inconsistent with Article 19.3 of the *SCM Agreement*. In the context of this Article, Article 19.2 of the *SCM Agreement* provides, "the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member." Article 19.2 clarifies that the investigating authority of the importing Member has discretion to set the amount of the countervailing duty up to the full amount of the subsidy found in the countervailing duty investigation. Article 19.4 confirms this discipline, setting forth that the maximum amount of the countervailing duty shall be the amount of the subsidy found to exist during the period of the countervailing duty investigation. In this context, Article 19.3 accords the importing Member the discretion to impose a countervailing duty deemed as appropriate to the extent that the duty does not exceed the amount of the subsidy found to exist. No further obligations are placed on the authority's decision of the "appropriate amount".

B. THE DEFINITION OF "PUBLIC BODY" UNDER ARTICLE 1.1(A)(1) OF THE *SCM AGREEMENT*

7. China argues that a public body in Article 1.1(a)(1) of the *SCM Agreement* should be defined as an entity which "has been empowered by the law of the State to exercise functions of a governmental or public character", based on Article 5 of the *Responsibility of States for Internationally Wrongful Acts* adopted by the *International Law Commission* ("*ILC Articles*").

8. Although the *ILC Articles* might be referred to when interpreting the WTO agreements in some cases, Article 5 of the *ILC Articles* is not a "relevant" rule of international law in terms of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. While the issue in the present case is the meaning of the term "public body", Article 5 of the *ILC Articles* neither defines nor uses the term in any way.

9. As the Vienna Convention clarifies, the meaning of the terms of the *SCM Agreement* must be considered in their ordinary meanings in the context of the *SCM Agreement* and other relevant *WTO Agreements*. In this connection, Japan notes that the term of "public body" is undefined in the

SCM Agreement. Japan also notes that the panel in *Korea - Commercial Vessels* found that an entity will be recognized as a "public body" in light of the government control over it under the *SCM Agreement*.

10. At minimum, no provision of the *WTO Agreements* suggests that a "public body" under Article 1.1(a)(1) of the *SCM Agreement* would be limited to entities which have been empowered by "the law of the State". A public body under the Article may include an entity that is empowered by other means to exercise an element of the government.

11. The analysis of the term "public body", as discussed above, indicates that the consistency of the USDOC's finding of public bodies should be examined based on the totality of facts of the respective cases in dispute. On this aspect, China correctly argues that the mere fact of government ownership of an entity would not conclusively establish that the entity is a public body. It appears that the United States also takes a similar view by arguing that the USDOC's findings were not solely based on the mere ownership of the Chinese government.

12. In sum, the consistency of the investing authority's finding of public bodies should be examined in accordance with the particular facts of the underlying investigations.

C. THE CONSISTENCY OF THE USDOC'S BENEFIT DETERMINATION WITH ARTICLES 14(B) AND (D) OF THE *SCM AGREEMENT*

1. Article 14(d) of the *SCM Agreement*

13. If the state-owned enterprises ("SOEs") are found to be public bodies, their sales of hot-rolled steel ("HRS") or petrochemical products, on which China argues that sales prices by SOEs were not controlled by the Chinese government, would be financial contributions under Article 1.1(a)(1) of the *SCM Agreement*. The sales price of a financial contribution by a public body itself cannot be a benchmark to measure the benefit.

14. The question under Article 14(d) in this dispute would be whether transaction prices other than sales by SOEs in China can be a benchmark, or more specifically, whether private prices in the Chinese market were distorted by the transaction prices of financial contributions. The Appellate Body in *US - Softwood Lumber IV* stated, "[w]henever the government is the predominant provider of certain goods, … it is likely that it can affect … the prices of private providers for those goods, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices." "Thus, while requiring investigating authorities to calculate benefit "in relation to" prevailing conditions in the market of the country of provision, Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market."

15. As the Appellate Body clarified, the question presented to this Panel is whether the USDOC had sufficient evidence and facts found in their totality, including adverse inferences, to arrive at its conclusions that private prices of HRS or petrochemical products in China were distorted and thus unusable as a benchmark under Article 14(d).

16. Where the evidence on the record shows that the private prices were distorted by financial contributions by the government, an investigating authority has certain discretion to find a reasonable methodology. This discretion, however, is not unlimited. As the Appellate Body has stated in *US – Softwood Lumber IV*, the terms "shall" and "guidelines" in the last sentence of the chapeau of Article 14 "establish mandatory parameters within which the benefit must be calculated". The USDOC was required to find benchmarks "related or referred to, or were connected with, prevailing

market conditions in Canada, (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)" under Article 14(d).

2. Article 14(b) of the *SCM Agreement*

17. Should this Panel find that RMB-denominated loans by the government-owned banks are financial contributions by the government, such loans cannot serve as a benchmark. Furthermore, if such government loans are found to be predominant in the financial market of China, an investigating authority could disregard the remaining loans by private banks in China as the benchmark.

18. Where the government loan dominates the relevant financial market, there would be no commercial loans "which the firm could actually obtain on the market," as provided in Article 14(b). In such a case, as the Appellate Body has stated in *Japan - DRAMs (Korea)*, the authority would have "some latitude as to the method it chooses to calculate the amount of benefit." Even in such a case, however, the requirement to identify "a comparable commercial loan" as a benchmark under Article 14(b) still remains. As clarified by the Appellate Body in *Japan - DRAMs (Korea)*, "informational constraints do not alter the basic framework from which the analysis should proceed." An investigating authority must find a benchmark, which is "comparable" to the government loan in question and is "commercial", even where private loans undistorted by government loans are not available in the domestic market of the exporting Member.

19. In conclusion, the question presented to this Panel, therefore, is whether sufficient evidence and intermediate findings support the USDOC's conclusion that there were no private loans or private prices of inputs, which were not distorted by the financial contributions of the government. Should the Panel find that there were no such benchmarks, the Panel then should further review the USDOC's adopted benchmark to determine whether they are consistent with the framework of Articles 14 (b) and (d).

D. THE BENEFIT SHOULD BE EXAMINED ON A SUBSIDY-SPECIFIC BASIS WITHOUT ZEROING

20. China argues, "[m]ultiple provisions of the SCM Agreement, including Articles 10, 19.3 and 19.4, likewise make clear that a countervailing duty is to be imposed in respect of '*product'* under investigation."

21. A countervailing duty may be imposed to offset the amount of a subsidy if the amount exists at the time of its imposition, as provided for in footnote 36 and Articles 19.2 and 19.4 of the *SCM Agreement*. The question before the investigating authority, and accordingly, before this Panel is to define the scope of "a subsidy".

22. Article 1.1(a)(1) of the *SCM Agreement* provides that "*a subsidy* shall be deemed to exit if there is *a financial contribution*". Subparagraph (i) then provides that there is a financial contribution where "*a* direct transfer of funds" is involved. The paragraph (c) of Article 2.1 of the *SCM Agreement* then provides that "*a* subsidy ... is specific" where it will be granted upon "use of a subsidy program". These provisions indicate the premise of the *SCM Agreement* that "a subsidy" may be granted by "a financial contribution" from the government, such as a direct transfer of funds, under one subsidy programme.

23. Article 14 of the *SCM Agreement* does not define what would constitute a subsidy. Investigating authorities are required to first determine the financial contribution, which consist of a subsidy. The determination of a benefit conferred on the recipient, including identification of an appropriate benchmark, follows the determination of the financial contribution.

24. What constitutes a specific financial contribution under a subsidy programme is an issue of fact. For example, a government might agree to sell input materials under certain terms and conditions for a certain period of time through multiple shipments. In such a case, the entire series of shipments as a whole may be considered to be a financial contribution. Accordingly, the calculation of the amount of the subsidy from such a financial contribution should be based on the total value of all shipments covered by the agreement, rather than the assessment of the benefit for an individual shipment based on the value of its shipment.

25. The issue of the amount of a subsidy from the input transactions in question, therefore, must be based on the finding of one financial contribution upon an examination of underlying facts of these transactions.

III. CONCLUSION

26. Japan respectfully requests the Panel to examine carefully the facts presented by the parties to this dispute in light of Japan's arguments above to ensure the fair and objective application of the *SCM Agreement* and the *GATT 1994*.

ANNEX B-7

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF MEXICO

(15 June 2009)

1. Mexico is setting out its views on the interpretation of certain provisions of the GATT 1994, the Protocol of Accession of the People's Republic of China (the "Protocol"), the Anti-dumping Agreement ("AD Agreement") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), given the systemic importance the Panel's conclusions will have.

2. As regards the simultaneous application of anti-dumping and countervailing duties, we note that neither the AD Agreement nor the SCM Agreement contain any provisions in this respect. On the other hand, Article VI:5 of the GATT 1994 does explicitly address this point. Indeed, it prohibits such simultaneous application when both duties are intended to compensate the "same situation". It does not explain when dumping and export subsidization result in the "same situation", but this can be deduced from the negotiating history of Article VI:5.

3. According to the negotiating history, the prohibition in Article VI:5 of the GATT 1994 does not apply to countervailing duties that offset domestic subsidies because these do not result in dumping. Consequently, Mexico takes the view that when countervailing duties target domestic subsidies (and not export subsidies), the simultaneous application of anti-dumping and countervailing duties is consistent with the rules of the WTO.

4. In our view, the Protocol permits such simultaneous application. We note that there is no basis for assuming that Article VI:5 applies only to Members with market economies. Article 15 of the Protocol contains specific provisions in addition to those of GATT Article VI, the AD Agreement and the SCM Agreement for imports of Chinese origin (normal value, measuring benefit, etc.). With respect to the AD Agreement, Article 15 recognizes the surrogate country methodology and acknowledges that the imports may form the subject of a countervailing duty investigation. If China, in negotiating its accession, had succeeded in negotiating a prohibition on applying simultaneous duties to its products, this would have been specified in the Protocol. As there is no such provision, it can only be concluded that Article 15 of the Protocol <u>does</u> allow the combined application of anti-dumping and countervailing duties.

5. Moreover, exempting China from the parallel imposition of anti-dumping duties and countervailing duties would lead to China's being given preferential treatment relative to all other Members, to which they can be applied simultaneously under Article VI of the GATT 1994. For us, China's claim looks like an attempt to obtain from the dispute settlement system a result that it should have tried to obtain when negotiating its accession to the WTO.

6. The fact is, that when the negotiators of the WTO agreements considered it necessary to prohibit the simultaneous application of different mechanisms, they said so expressly, so that there is no basis whatsoever for assuming that the WTO Agreements establish such a restriction. Thus, according to the principle *expressio unius est exclusio alterius*, as the simultaneous imposition of countervailing duties and anti-dumping duties calculated under the surrogate country methodology has not been expressly prohibited, it cannot be held that it is contrary to WTO rules.

7. If Members had wanted to prohibit the simultaneous imposition of countervailing duties and anti-dumping duties calculated under surrogate country methodology, the SCM Agreement, or failing that the Protocol, would have included a provision to that effect. In Mexico's opinion, the fact that such a provision was not incorporated either in the AD Agreement, in the SCM Agreement or in the Protocol reinforces the conclusion that such "simultaneous imposition" is permitted under the rules of the WTO.

8. Nor is it acceptable, in Mexico's view, to seek to give the articles of the SCM Agreement a meaning that they do not have. China claims that simultaneous imposition violates articles 19.3 and 19.4 of the SCM Agreement. However, as neither of these provisions concerns the matter at issue, we consider that China's claim has no basis at all. Consequently, we consider that China has not proved *prima facie* violation by the United States of these provisions of the SCM Agreement.

9. At the same time, China omits to mention that Article VI:5 of the GATT 1994 deals expressly with the simultaneous imposition of anti-dumping duties and countervailing duties, and that the Protocol regulates aspects of the Anti-Dumping Agreement and the SCM Agreement with regard to imports of Chinese origin that relate to simultaneous imposition.

10. Article VI:5 of the GATT does not prohibit, nor does the Protocol limit, simultaneous application as China contends. In fact, what China claims is tantamount to negating Article VI:5 of the GATT 1994 and Article 15 of the Protocol, which would be totally contrary to the principle of effectiveness recognized in WTO precedent (*United States – Gasoline*).

11. With regard to the surrogate country methodology in anti-dumping investigations, China argues that application of this methodology yields a normal value free from distortions (including distortions caused by subsidies granted in non-market economy countries).

12. There is no basis for this at all. Application of the surrogate country methodology does not enable prices and costs adjusted for the distorting effects of the subsidy to be obtained. Consequently, Mexico sees no reason whatsoever to consider that the simultaneous imposition of countervailing duties and anti-dumping duties calculated under the surrogate country methodology is inconsistent with the WTO agreements. Thus, we consider that China has not proved *prima facie* violation by the United States on the grounds that the surrogate country methodology implies determination of market-economy normal value adjusted for the effects of subsidies.

13. Basing itself on *United States – DRAMs*, China claims that for a company owned by the State to be termed a "public body", the requirements in the Draft Articles[1] of the United Nations International Law Commission must be met, namely (1) the enterprise must be empowered by the State to exercise functions of a public character normally exercised by the State, and (2) the conduct of the entity must concern governmental activity and not other private or commercial activity in which the entity may engage.

14. Mexico considers China's approach to be erroneous. The definition of the term "public body" was not addressed in *United States – DRAMs.* In that case, the Appellate Body examined whether an act by a private entity could be considered as being instructed by a government to make a financial contribution and based itself on the *Draft Articles*. At no time did it say anything about whether the public character of a body depended on the form in which the body acted.

15. In our view, the function performed by the entity is irrelevant in determining its "public body" status. That status must be determined on the basis of government shareholdings in the entity in question, and not on the basis of the intended purpose of the goods or services it produces or provides

[1] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries.*

(see *Korea – Commercial Vessels*). In other words, we take the view that government shareholding in a body is sufficient to consider it public.

16. Moreover, the Draft Articles refer to the concept of "public entity" in the context of "wrongful acts". The granting of subsidies is not a wrongful act, so that the concept of "public entity" in the Draft Articles does not apply to this dispute.

17. At the same time, the standard proposed by China is unacceptable. Since State enterprises which sell goods and services are not established by "the law of the State to exercise functions of a public character normally exercised by State organs", and their sales of goods and services would not qualify as "functions relating exclusively to their governmental activity and unconnected with private or commercial activity", State enterprises that sell goods and services would never be considered to be "public bodies", despite the fact that Article 1.1(a)(1)(iii) of the SCM Agreement clearly includes them.

18. As regards the analysis of pass-through of the benefit, China argues that the analysis was necessary in cases where the investigated enterprises bought inputs from private trading companies which, in their turn, had purchased them from State enterprises. China claims that by failing to carry out this analysis, the United States acted inconsistently with the WTO agreements.

19. Mexico does not agree with China. As can be seen from several precedents in both the GATT and the WTO (*United States – Pork; United States – Softwood Lumber IV;* and *Mexico – Olive Oil*), it is clear that this analysis is only needed when the subsidies are given for the production of a good that is an input for the product under investigation. As in this case the subsidies were granted for the production of the goods investigated themselves, the pass-through analysis was not required, regardless of whether the State enterprises sold to private trading companies which then sold to the companies under investigation.

20. Regarding the determination of the existence of benefit for the trading companies, it should be pointed out that the Appellate Body determined (*United States – Countervailing Measures on Certain EC Products*) that a financial contribution may be granted to a company indirectly. In this case, because the private trading companies were only the vehicle through which the contribution reached the companies under investigation, they received the contribution indirectly, so that there was no reason whatsoever to determine whether these trading companies had obtained a benefit.

21. Concerning the benchmark used by the United States, Mexico considers that the standard applicable is that indicated by the Appellate Body in *United States – Softwood Lumber IV*, according to which an investigating authority may indeed use a reference point other than prices in the country under investigation provided that it is determined that the prices are distorted by the role played by the government.

22. China claims that the United States failed to establish its benchmark properly and points out that in the *Laminated Woven Sacks* investigation, there was no single or uniform government-set price, that there was no Chinese government agency that set prices for inputs, and that significant private investment existed in the petrochemical industry in China, so that their internal data had to be used.

23. In Mexico's view, the points raised by China have nothing to do with the key element for determining whether the U.S. benchmark was proper or not, namely whether or not there was distortion due to the role played by the Chinese government.

24. Thus, Mexico considers that if the U.S. had sufficient evidence of the existence of such distortion, the Panel should find that the U.S. acted in conformity with the WTO agreements.

Obviously, since we do not know whether that evidence existed, our opinion is not intended to prejudge whether the U.S. could, indeed, use the benchmark or whether that benchmark was properly determined.

25. Mexico is grateful to the Panel for the opportunity to comment on these questions of interpretation with systemic implications.

ANNEX B-8

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF NORWAY

(15 June 2009)

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I. INTRODUCTION

1. As a third party to this Norway would like to address the following interpretative issues:

- The criteria for defining a "public body" under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*") (chapter II);
- The use of a "zeroing" methodology when calculating "benefit" received from inputs provided by State Owned Enterprises (SOEs) (chapter III); and
- "Double Remedy" (chapter IV).

II. WHETHER STATE OWNED ENTERPRISES ("SOE") AND STATE OWNED COMMERCIAL BANKS ("SOCB") MUST BE CONSIDERED "PUBLIC BODIES"

A. INTRODUCTION

2. For a measure to constitute a subsidy according to Article 1 of the *SCM Agreement*: (i) it must entail a financial contribution or income or price support by a government or a public body; and (ii) it must confer a benefit.

3. As regards State Owned Enterprises ("SOE") and State Owned Commercial Banks ("SOCB"), a key issue in the dispute is whether these enterprises can be considered "public bodies" within the meaning of Article 1.1(a)1 of the *SCM Agreement.* Were the Panel to consider that these enterprises are <u>not</u> public bodies, then the United States would have had to show that a non-public body was nevertheless "entrusted or directed" by the State to provide a financial contribution to the exporter or producer under investigation. Such analysis was not performed by the United States.[1]

B. INTERPRETATION OF THE TERM "PUBLIC BODY"

4. The question at issue is whether majority state ownership alone is sufficient to conclude that an enterprise is a "public body" within the meaning of article 1.1 of the SCM Agreement, or whether "public body" requires a functional relationship to the exercise of some form of governmental authority when providing the financial benefit.

5. Norway believes that it is important to read the reference to "government or any public body" also in light of Article 1.1(a)(1)(iv) and its reference to situations where the government "entrusts or directs a private body to carry out one or more of the type of <u>functions ... which would normally be vested in the government</u>..." (emphasis added).

6. By focussing on situations where a private body has been "entrusted or directed" to perform <u>functions that would normally be vested in the government,</u> Article 1.1(a)(1)(iv) gives a clear indication that the dividing line between the "public bodies" and the "private bodies" is based on a <u>functional delimitation</u> where the key element is whether the body in question performs governmental functions or not. If the body in question does not perform governmental functions, any financial contribution it provides is only attributable to the State if the government has *entrusted or directed* it to provide such contribution.

7. In *EC – DRAMS,* the Panel noted that "...it should be clear that, in our view, government ownership, in and of itself , is not sufficient to establish entrustment or direction under

[1] *United States, First Written Submission ("US FWS"),* para. 65.

Article 1.1(a)(1) of the *SCM Agreement."*[2]. The Panel went on to state that "In the case of a 100 per cent government-owned bank, such as Woori Bank, it thus needs to be demonstrated that the government *actually exercised* its shareholder power to direct the bank to support to Hynix."[3] When government ownership is not sufficient to establish "entrustment or direction", Norway submits that it is even less suited to establish that such companies shall be considered as "public bodies".

8. The same Panel stated, more as an *obiter* in footnote 129, that "We do not wish to imply that it would not be possible or justified to treat a 100 per cent government owned entity as a public body, depending on the circumstances. [...]". Norway submits that the particular circumstance that could lead to a conclusion that a 100 per cent government owned entity was a public body, would only be present where the government owned company exercises governmental functions.

9. The Panel in *Korea - Commercial Vessels* took the opposite view that government 100 per cent ownership and control could be sufficient to consider that the Korean Export Credit Guarantee Institute (KEXIM) was a public body.[4] The Panel, however, noted that it also relied on such factors as government appointment of officers, government approval of budget and operations programme and Koreas own description of KEXIM as a "special governmental financing institution" and as an "export credit agency".[5]

10. Although the Panel reports are differently worded, Norway considers that both reports lend support to the position that government ownership is not sufficient in and of itself to determine that a company is a "public body". Other elements must be present, of which Norway suggests that a key element would be the exercise of governmental functions.

11. Based on the above, Norway submits that Article 1.1(a)(1) of the *SCM Agreement* cannot be interpreted to mean that all companies with more than 50 per cent government ownership are automatically to be considered "public bodies". Where the body, after a factual analysis of its functions, is found not to perform governmental functions, it is not a "public body" within the meaning of Article 1.1(a)(1) – but may well be a private body covered by the *SCM Agreement* by virtue of Article 1.1(a)(1)(iv).

III. EXCLUSION OF TRANSACTIONS AT PRICES BELOW THE EXTERNAL BENCH-MARK IN THE CALCULATION OF OVERALL BENEFIT

A. INTRODUCTION

12. China claims that the United States acted inconsistently with Article 14 of the *SCM Agreement* and Article VI:3 of the GATT in the calculation of benefit in the OTR CVD investigation. China argues that the United States would have concluded that there was no benefit, if it had conducted an aggregate analysis over the whole period of investigation, without the use of "zeroing" of certain transactions.[6]

B. ANALYSIS

13. The issue before this Panel is whether the reasoning that led Panels and the Appellate Body to conclude that "zeroing" is prohibited under the *Anti-Dumping Agreement* and Article VI:1 and VI:2 of

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[2] Panel Report, *EC – DRAMS,* para. 7.119.
[3] *Id.,* para. 7.120.
[4] Panel Report, *Korea – Commercial Vessels,* para. 7.50. Similar statements were made in respect of four other Korean government agencies.
[5] *Id,* paras. 7.50 – 7.52.
[6] China FWS, paras. 142 – 143.

the GATT, applies equally to the benefit calculations under Article 14 of the *SCM Agreement* and Article VI:3 of the GATT. Norway will point to two elements that support the claim that the "zeroing" methodology employed by the United States in this case is inconsistent with Article VI:3 of the GATT.

14. Article VI:3 of the GATT provides that a countervailing duty is levied on *a* product, and that any such countervailing duty shall not be in excess of the benefit (bounty) granted on the manufacture, production or export of *such* product. The use of the singular form of the noun makes clear that the calculation of benefit from inputs received from SOEs must be for all input transactions during the period of investigation. The reasoning that led the Appellate Body to find that similar words in Article VI:2 of the GATT precluded a finding of dumping for individual transactions applies with equal force to the calculation of benefits derived from single input transactions viewed separately.

15. Furthermore, as Norway understands the case, the United States created monthly external benchmark prices to measure benefit from subsidization. Using monthly benchmark prices in such a situation, and "zeroing" monthly results which showed no "benefit", made a finding of a countervailable subsidy almost certain from the outset. The application of a methodology that is almost certain to lead to a conclusion of "benefit" and countervailable subsidization in all cases, based on single transactions compared to a benchmark set by the investigating authorities, cannot be said to comply with the requirements of Article 14(d) of the *SCM Agreement* and Article VI:3 of the GATT.

IV. "DOUBLE REMEDY"

A. INTRODUCTION

16. Norway in this part only addresses certain interpretative issues related to China's claim that the U.S. Department of Commerce's use of its Non-Market Economy methodology to determine normal value in the anti-dumping determinations, concurrently with a determination of subsidization and the imposition of countervailing duties on the same products, was inconsistent with Articles 10, 19.3, 19.4, and 32.1 of the *SCM Agreement* and with Article VI of the GATT. [7]

B. ANALYSIS

17. Norway does not exclude that it may be permissible in certain situations to apply anti-dumping duties and countervailing duties simultaneously to the same imports, notwithstanding the provision of Article VI:5 of the GATT, but to wishes to draw the Panel's attention to certain elements that may be pertinent to its analysis of the legal issues surrounding simultaneous application of the two instruments.

18. An investigating authority under the anti-dumping agreement, in its determination of normal value for the product under consideration, may apply a Normal Value based on different methodologies provided for in Article 2.2 of the *Anti-dumping Agreement* and in the *ad note* to Article VI:1 of the GATT. The choice of methodology and the cost elements that go into the calculation of Normal Value can have an important bearing on the issue of subsidization.

19. Where the Normal Value is based on the producer's sales price in his home market in the ordinary course of trade, that price may have been lowered due to e.g. subsidization of inputs into the production. In such cases, a dumping duty only offsets the dumping itself (the "price differentiation" between home market price and export price), not the subsidization of his "cost of production".

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[7] *China FWS*, para. 468(h) and Section VI(E).

20. Where the Normal Value is based on constructed normal value (CNV), the question is whether CNV is based on the producers actual data for the inputs (i.e. subsidized inputs are included with the subsidized price), or constructed prices for the inputs. If CNV is calculated using the subsidized input prices in its calculation, the CNV will be lower than for non-subsidized production. In such cases AD + CVD may be applied. If the CNV is not calculated with subsidized prices for the inputs – but with "non-distorted" or "benchmark" prices for the (otherwise subsidized) inputs, then the effect of any subsidy is "extinguished" in the CNV calculation and applying an anti-dumping duty up to the maximum permitted under the *Anti-dumping Agreement* will provide a remedy for the subsidization at the same time. In such cases, applying a CVD will neither be appropriate under the *SCM Agreement* Article 19.3 of nor permissible under Article 19.4.

21. Where the Normal Value is based on a Third Country Market as benchmark, the same issues relating to how the benchmark is calculated applies. China argues, and the United States does not appear to dispute, that in calculating the constructed normal value based on a Third Country Market benchmark, US DOC avoids the use of any surrogate value that may itself be subsidized.[8] It would thus appear that the Chinese producer's export price to the United States is compared to a market economy cost of production free from any dumping or subsidy distortion. By applying the full anti-dumping duty up to this Third Country Market benchmark, all effects of subsidization is extinguished at the same time. Applying a CVD in such cases will neither be appropriate under Article 19.3 of the *SCM Agreement* nor permissible under Article 19.4 of the *SCM Agreement.*

[8] *China FWS,* para. 371 and corresponding footnote 315.

ANNEX B-9

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF SAUDI ARABIA

(15 June 2009)

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I. INTRODUCTION

1. The Kingdom of Saudi Arabia has joined as a third party in this dispute to provide its views on a number of fundamental issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). The Kingdom takes no position on the merits of the claims that are based on the particular facts of this case.

II. STATE OWNERSHIP IS INSUFFICIENT FOR AN ENTITY TO BE CONSIDERED AS A "PUBLIC BODY" UNDER ARTICLE 1 OF THE SCM AGREEMENT

2. For an entity to be considered a "public body" under Article 1.1(a)(1), it must: (i) be vested with governmental authority, thus allowing the government to control its activities; and (ii) function as a governmental entity that serves a public policy objective rather than a commercial objective.

3. The ordinary meaning of the term "public body" denotes a **governmental** function, not State ownership. The Kingdom notes that the Spanish version uses the term "organismo público" to refer to both "public body" as well as to "government agency." The same is true for the French term "organisme public" in the French version of the text. In *Canada – Dairy* the Appellate Body interpreted these terms to mean an entity which exercises powers vested in it by a government to perform functions of a governmental character, *i.e.*, to regulate, restrain, supervise or control the conduct of private citizens. The fact of State ownership by no means plays a dispositive role in this interpretation. The Panel should therefore consider "public body" as synonymous with a government agency.

4. The context in which the term "public body" appears in Article 1.1 of the SCM Agreement supports a narrow reading of the term as a government agency. Article 1.1(a)(1) refers to a "financial contribution by a government or any public body within the territory of a Member (***referred to in this Agreement as 'government'***)….". Thus, ***the drafters of the SCM Agreement made clear that a "public body" is to be regarded as a subset of "government."***

5. The SCM Agreement relates to the actions of WTO Members, *i.e.*, to the behaviour of governments. Indeed, this point is reinforced by the inclusion of the "entrustment or direction" disciplines set out in Article 1.1(a)(1)(iv). Only entities possessing some type of governmental authority are able to "entrust or direct" private bodies to act in a particular manner. Furthermore, even in the context of "entrustment or direction", State ownership plays a relatively limited role. Since complete government ownership does not suffice to conclude that an entity acts under the entrustment or direction of the government, then, *a fortiori*, such government ownership is not sufficient to consider the entity to be a "public body" (*i.e.*, the government itself), as such a finding would obviate the need to determine the existence of entrustment or direction.

6. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body accepted the International Law Commission conclusion that where corporate entities are owned by the State, their conduct is not attributable to the State "unless they are exercising elements of governmental authority."[1] It is important to stress that the Appellate Body's comment was made in the context of Article 1 of the SCM Agreement, and so is highly relevant in the present dispute. A state-owned enterprise (SOE) that is not "exercising elements of governmental authority" is not a "public body" under Article 1.

7. The GATS definition of the closely-related term "public entity" reinforces the governmental nature of a "public body" under Article 1.1(a)(1) of the SCM Agreement. The GATS definition of a

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

"public entity" requires more than simple government ownership or control - the entity's primary functions must be "governmental."

8. In terms of relevant context, the Kingdom would respectfully caution the Panel against the use of China's Working Party Report as the basis for the interpretation of a term as important as "public body" in the SCM Agreement. China's WPR may contain commitments specific to China. It cannot, however, serve as the basis for interpreting provisions of the WTO agreements that apply to all WTO Members, such as Article 1 of the SCM Agreement.

9. The object and purpose of the SCM Agreement further support a narrow interpretation of the term "public body." The Appellate Body has stated that the object and purpose of the SCM Agreement is "to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[2] The interpretation of "public body" cannot be so broad as to allow Members to apply countervailing measures to any sales made by certain entities simply because they are partially or wholly owned by the State.

10. Finally, the Kingdom is of the view that the Panel Report on *Korea – Commercial Vessels* supports a reading of the term "public body" as an entity that is controlled by government such that it is acting in a governmental capacity. The Panel in *Korea – Commercial Vessels* found that an entity will constitute a "public body" if it is "controlled" by the government, such that its actions may be attributed to the government. The ***criterion used by the Panel was "control", not "ownership." Ownership was simply part of the evidence of such control.*** The Panel also attached great importance to the "public policy" objective of an entity, and the fact that it acted in an "official capacity." According to the Panel, an entity that is vested with governmental authority and acts in an "official capacity" is a public body, even if it makes its financial contribution based on commercial principles.[3]

11. In sum, the Kingdom is of the view that the term "public body" in Article 1.1(a)(1) of the SCM Agreement, based on its ordinary meaning, its context and the Agreement's object and purpose, refers to an entity vested with governmental authority that exercises a governmental function. To interpret this term to include an entity on the sole ground of State ownership would be an error in treaty interpretation.

III. THE USE OF ALTERNATIVE BENCHMARKS FOR THE DETERMINATION OF BENEFIT IS PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, AND IS SUBJECT TO STRICT DISCIPLINES

12. The principal benchmark for calculating a benefit under Article 14(d) of the SCM Agreement is the domestic market price in the country of provision. The use of an alternative benchmark is permissible only in exceptional circumstances. If exceptional circumstances necessitating the use of an alternative benchmark have been established, then the cost of production of the goods in the country of provision serves as the most appropriate alternative to domestic market prices.

13. Article 14(d) of the SCM Agreement establishes domestic market price as the principal standard for determining whether and to what extent a benefit is conferred by the provision of a good for the purpose of Part V of the Agreement. Price is foremost among the "prevailing market conditions" enumerated in Article 14(d) and it should thus be the first reference point used by an investigating authority to determine benefit.

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[2] Appellate Body Report, *US – Softwood Lumber IV*, para. 64.
[3] Panel Report, *Korea – Commercial Vessels*, para. 7.48.

14. In *US – Softwood Lumber IV*, the Appellate Body made clear that alternative benchmarks may be used only in exceptional circumstances, and emphasized that the possibility under Article 14(d) for investigating authorities to use a benchmark other than private prices in the country of provision is "very limited."[4] The Appellate Body has interpreted Article 14(d) to allow for the use of alternative benchmarks only as an exception of last resort, when it has been established that private prices are distorted, such that "private suppliers will align their prices with those of the government-provided goods."[5] As stated by the Appellate Body, distortion cannot be presumed to exist simply because the government is a significant supplier or has a major presence in the market of the goods in question. Instead, investigating authorities are obliged to establish that the prices are actually distorted "on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."[6]

15. Furthermore, as is clear from the Appellate Body's reasoning in *US – Softwood Lumber IV*, if such distortion is established, any alternative benchmark employed by the investigating authority must properly reflect domestic market conditions in the country in question.

16. In the Kingdom's view, external benchmarks are an inappropriate alternative for the calculation of a benefit under Article 14(d) of the SCM Agreement. The nature and extent of the adjustments that would be required for external market prices to reflect in-country market conditions make meeting these requirements practically impossible in virtually all cases. The Appellate Body has warned that countervailing measures cannot be used to "offset differences in comparative advantages between countries."[7] Moreover, the use of external benchmarks is demonstrably inappropriate with respect to financial contributions in the form of the provision of land.

17. The Kingdom submits that benchmarks based on the domestic cost of production of the goods or services in question are the most appropriate and WTO-consistent alternative to domestic market prices when an investigating authority has made a determination that such prices are distorted. The cost of production benchmark is not only the most reliable possible alternative, but it has also been supported and endorsed in previous Appellate Body jurisprudence.

IV. AN INVESTIGATING AUTHORITY MUST BASE LOAN BENCHMARKS ON THE ACTUAL COMMERCIAL BORROWING EXPERIENCE OF A FIRM

18. An investigating authority, in determining a benchmark under Article 14(b) of the SCM Agreement, is required to inquire into the actual commercial borrowing experience of the recipient firm in order to determine what comparable commercial loans the firm could "actually obtain."

19. The use of the term "comparable" in Article 14(b) strongly suggests that the benchmark loan should be a loan that is expressed in the same currency, and subject to the same generally applicable financial regulations of the country providing the government loan. The word "commercial" refers to any transaction that is made in the ordinary course of commerce. Finally, the phrase "which the firm could actually obtain on the market" imposes a requirement that the benchmark be based on the actual borrowing experience of the recipient firm.

20. Contrary to what the United States is arguing, the Appellate Body's interpretation of Article 14(d) in *US - Softwood Lumber IV* is not "equally applicable" to the determination of benefit under Article 14(b) SCM Agreement. The Appellate Body Report in *US - Softwood Lumber IV* was demonstrably not "based on the entirety of Article 14", as the United States argues, but rather was

[4] Appellate Body Report, *US - Softwood Lumber IV*, para. 102. Emphasis added.
[5] Appellate Body Report, *US - Softwood Lumber IV*, para. 115.
[6] Appellate Body Report, *US - Softwood Lumber IV*, para. 102.
[7] Appellate Body Report, *US - Softwood Lumber IV*, para. 109.

based on the specific terms of Article 14(d). Moreover, assuming *arguendo* that the Appellate Body's reasoning in *US - Softwood Lumber IV* did apply to Article 14(b), then the Appellate Body's clear admonitions on the use of outside benchmarks would apply as well.

V. IN CASES OF ALLEGED SUBSIDIZED INPUTS, THE INVESTIGATING AUTHORITY MUST CONDUCT A "PASS-THROUGH" ANALYSIS TO DETERMINE IF THE DOWNSTREAM PRODUCER HAS RECEIVED A BENEFIT

21. The issue of "pass-through" relates to a basic principle of WTO disciplines with respect to the use of countervailing measures: a countervailing duty can only be levied on a product where an investigating authority determines that a subsidy has been granted, directly or indirectly, on the product subject to the duty.

22. The basic principle of GATT Article VI:3 is that an authority may only impose a countervailing duty on a product to offset a subsidy granted either directly or indirectly to that product. In case of "arm's length" sales between unrelated parties, an investigating authority may not presume that all or part of the benefit was passed through.

23. There is no basis to use a different approach simply because the subsidy has had an alleged "effect" on the market price for the product sold by the direct recipient of the subsidy. A contrary approach would render the need for a "pass-through" analysis meaningless, as any subsidy granted to the upstream producer could have some effect on the market price for its products.

24. The problem caused by an expansive approach to the application of the pass-through concept would be exacerbated by the use of out-of-country benchmarks. Investigating authorities could use a broad pass-through approach to ignore domestic market prices for upstream products which are allegedly "distorted" by the original subsidy on those products. Instead, the authority would use market prices in a third country as a benchmark for determining the benefit that upstream inputs confer on unrelated downstream exporters purchasing the inputs in arm's length transactions at market prices. This would lead to a finding of subsidization where in fact no subsidies were granted to the producers of the product subject to the investigation.

VI. CONCLUSIONS

25. The Kingdom respectfully urges the Panel to resolve this dispute in a manner that maintains the balance that was clearly intended by the drafters of the Agreement.

ANNEX B-10

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF TURKEY

(16 June 2009)

I. INTRODUCTION

1. Turkey thanks the Panel for this opportunity to present its views in this proceeding. Although the dispute between the U.S. and China covers many issues, Turkey will focus on three major subjects namely "public body determination", use of out-of country benchmark" and "pass through of a benefit" arise from this dispute.

II. DETERMINATION OF PUBLIC BODY

2. Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains two separate terms "government" and "public body". Therefore in order to accept that a subsidy is granted, a financial contribution must be provided either by "government" or a "public body".

3. Since the SCM Agreement used two terms, in Turkey's view, the meanings of these terms should be construed differently. However, SMC Agreement does not provide any definition with regard to these two terms. Therefore, what constitutes "government" or "public body" under the article in question needs to be interpreted. This interpretation should be made in accordance with the ordinary meanings taken into account in the context, object and the purpose of the SCM Agreement pursuant to Article 31.1 of the Vienna Convention.

4. China argued that in order to accept an entity as a public body, both an entity should perform governmental functions and the powers to perform these functions should be vested by the state. However China's claim to take governmental character as a prerequisite to determine an entity as a public body narrows the actual meaning of the "public body" and equates it to "government". Such an interpretation would annul the distinction between the two terms and render the "public body" meaningless.

5. In Turkey's views, Paragraph 5(c)(i) of the Annex on Financial Services to the GATS is not the relevant legal basis to interpret the term public body used in the SCM Agreement. Firstly, while the SCM Agreement states "public body", the referred paragraph of the Annex in question provides the definition of "public entity", so it is clear that these two terms are not the same. Secondly, it is clear from the *"For the purpose of this Annex ...*" expression mentioned in the same paragraph that, the "public entity" definition is only for the scope of the Annex in question.

6. On the other hand Turkey also considers ILC Articles as an irrelevant legal basis for interpreting the term "public body" for several reasons. First of all ILC Articles are not among the annexes of the Marrakesh Agreements. In addition, the scope and the application of the ILC Articles are totally distinct from the SCM Agreement. Furthermore due to the *lex specialis* clause contained in the Article 55 of the ILC Articles, it is not possible to apply the ILC Articles to this dispute.

7. Turkey is of the view that "government control" criterion[1] set forth by the Korea - Commercial Vessels Panel is the most proper criteria for determining whether an entity is a public body and Turkey also considers that the ownership is the main indicator of the control of an entity.

III. USE OF EXTERNAL BENCHMARK

8. During its accession to the WTO China acknowledged the fact that it had a centrally-planned economy and undertook some commitments in its Accession Protocol including commitments on the application of trade remedies by other Members.

9. Specifically, in the Article 15(b) of the Accession Protocol, China accepted to be subject to special rules with regard to subsidies. It is clear from this article that, the Members are allowed to use appropriate ways to ensure applicability of the rules against subsidies.

10. Besides, Turkey is of the view that the Accession Protocol is not the only source which allows using external benchmark. Pursuant to Article 14 of the SCM Agreement external benchmarks may be used in some cases.

11. Similarly, the Appellate Body also ruled that, even for market economies the primary benchmarks provided in the Article 14(d) of the SCM Agreement may not work. If the investigating authority determines that private prices in that country are distorted because of the predominant role of the government, it may use another benchmark.[2] Turkey considers that in cases where the prevailing market conditions in a Member do not provide an appropriate base to make a meaningful comparison to determine whether a benefit has been conferred due to the predominance of the government in the economy, the rules of the SCM Agreement will still be applicable.

12. In the Accession Protocol, China has already accepted that the prevailing terms and conditions in China may not always be available as appropriate benchmarks. If the investigating authority uses the private prices as the benchmark while the predominance of the government is a fact, benefit will probably be artificially low or even zero. As a result, the full extent of the subsidy would not be captured and the rights of Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the SCM Agreement" [3] would be injured.

IV. PASS THROUGH OF A BENEFIT

13. In Turkey's view, the SCM Agreement does not require that the recipients of a benefit and a financial contribution should be the same. This approach is also in line with the reasoning stated in *Mexico - Olive Oil* Panel Report.[4] Acceptance of the opposite would lead to the circumvention of the disciplines on subsidization by including a private party to the chain.

V. CONCLUSION

14. For the reasons stated above, Turkey requests the Panel, in deciding the dispute, to take into account observations and comments stated in this submission.

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[1] Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749, para 7.50

[2] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, para. 90

[3] *US - Softwood Lumber CVD* Final (AB), Para.95.

[4] Panel Report, *Mexico - Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, para 7.152

ANNEX B-11

THIRD PARTY ORAL STATEMENT OF ARGENTINA

(7 July 2009)

1. Argentina thanks the Panel and the parties to this dispute for the opportunity of attending the hearing today, as a third party, and putting forward its points of view on certain issues that are of systemic interest.

2. Argentina has already referred to the question of simultaneous application of anti dumping and countervailing measures on exports from China by the United States Department of Commerce. In this statement, Argentina will not reiterate the elements already set forth in its written submission, but will instead refer to complementary elements.

3. Argentina considers that, when deciding whether or not determination of an anti-dumping duty *using the surrogate country methodology* simultaneously with determination of a countervailing duty is consistent with the WTO rules, it must be established whether there is any provision in these rules prohibiting a Member from such simultaneous application. China has not pointed to any express provision establishing this, nor has Argentina been able to find one in the Articles of the GATT 1994 (GATT), or in the Anti-dumping Agreement (AD Agreement), or in the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Moreover, neither Article 19.3 nor Article 19.4 of the SCM Agreement, on which China implicitly bases its argument, regulate the question of "double remedy" or duplication in the terms claimed by China.

4. In its first written submission, the United States brings into the discussion Article 15.1 of the Subsidies and Countervailing Measures Code of the Tokyo Round (SCMC)[1], which expressly contains a prohibition on the simultaneous determination of anti-dumping and countervailing duties in the cases covered by paragraph 1.2 of the Note Ad Article VI of the GATT 1994. This provision was not retained in the SCM Agreement, which lacks a similar prohibition. The relevance of Article 15 of the SCMC is twofold: on the one hand, why should particular significance be attached to the absence of a similar rule in the SCM Agreement? On the other, why should this provision, or rather its absence, be relevant when interpreting Article 19.3 and 19.4 of the SCM Agreement?

5. The wording of Article 19.4 of the SCM Agreement is identical to Article 4.2 of the SCMC of the Tokyo Round, whereas the first sentence of Article 19.3 of the SCM Agreement, which is the part put forward by China to substantiate its claim, is reasonably similar to Article 4.3 of the Tokyo Round SCMC.[2] Presumably, if both rules had the scope claimed by China in its assertions to the effect that in themselves they establish a prohibition on the simultaneous application of the two measures, Article 15.1 of the Tokyo Round SCMC would be devoid of meaning and this redundancy cannot be

[1] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.

[2] The difference between the two texts is limited to use of the singular "appropriate amount" in the Tokyo Round SCMC and "appropriate amounts" in the current SCM Agreement.

inferred on the basis of the principle of interpretation which the Appellate Body indicated as a corollary to the general rule of interpretation of the Vienna Convention.[3]

6. In the absence of any express legal prohibition substantiating the argument relating to the alleged prohibition on the use of both measures simultaneously, China turns to reasoning that equates the concepts of distortion and subsidization.[4] Following this line of reasoning, China concludes that "[h]aving made this determination and calculated anti-dumping duties on this basis, Commerce has necessarily addressed any allocation of productive resources within that economy that was not determined by market forces, including the provision of subsidized resources. A double remedy will therefore arise in all cases in which Commerce applies the two remedies simultaneously".[5]

7. Argentina does not agree. Argentina considers that not every measure involving price or cost distortion in an economy can be classified a subsidy in the terms of Article 1 of the SCM Agreement. The Panel adopted this line of reasoning in *United States – Measures Treating Export Restraints as Subsidies*, in which it found that the SCM Agreement "was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement".[6]

8. The goal of the surrogate country methodology is to provide an alternative for transparent prices in situations where there are distortions in the economy, and not to offset any subsidies that might exist. Even if we could agree with China that subsidies are the quintessence of distortions[7], they are not the only category of distortions that can affect variables in a market and, in any event, offsetting them must be done according to the terms of the relevant Agreement.

9. Accordingly, the application of the two measures – anti-dumping according to the surrogate country methodology, and countervailing duties – simultaneously, does not in itself imply the situation of duplication that China claims, and is therefore not inconsistent with the rules of the WTO.

10. Argentina thus concludes its oral submission at this hearing, once again expresses its thanks for the opportunity given and is ready to answer any questions or expand on the elements it has set out should the Panel so require.

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[3] *United States – Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R), report of the Appellate Body, section IV, page 21 of the English text.

[4] First written submission of China (FWS), paragraph 373, which states: "Indeed, seen at one level, one might say that a non-market economy is an economy in which *all* resources are subsidized, i.e., *none* of the productive resources within that economy are allocated according to market forces. Thus, the rationale for using an NME methodology in an antidumping investigation, necessarily subsumes the rationale for imposing countervailing duties, i.e., that a government has provided a 'trade distorting' financial contribution that leaves the recipient of the subsidy 'better-off' than it would have been had it obtained the same resource on market determined terms" (emphasis in the original text).

[5] FWS of China, paragraph 374.

[6] Report of the Panel, WT/DS/194/R, paragraph 8.63.

[7] FWS of China, paragraph 373, which states: "A subsidy is the quintessential example of a government intervention that disrupts the normal allocation of resources".

ANNEX B-12

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF AUSTRALIA

(17 July 2009)

A. 'PUBLIC BODY' UNDER ARTICLE 1.1(A)(1)

1. Australia is concerned that a definition of 'public body' that would require a body to: (i) be vested with governmental authority, and (ii) carry out governmental functions for governmental purposes[1], has no basis in the text of the *Agreement on Subsidies and Countervailing Measures* (Subsidies Agreement). It instead appears to be created by conflating the test for entrustment or direction under Article 1.1(a)(1)(iv) and by using external sources of international law[2] which are not relevant in this instance.

The necessary distinction between 'public body' and the test for entrustment or direction

2. In Australia's view, it is necessary to maintain a distinction between the definition of 'public body' and the test for entrustment or direction. Fundamentally, the test for entrustment or direction serves a different purpose; that is, to capture those incidents when private bodies are used by governments to provide a financial contribution. This should not be conflated with the definition of 'public body,' which goes to the nature of the body in question.

3. The interpretive context that Article 1.1(a)(1)(iv) provides is a point of contrast and distinction, not one from which parallels or analogies can be drawn.[3] Australia is concerned that attempts to artificially introduce the concepts of government authority and the exercise of governmental functions into a definition of 'public body' would undermine the distinction between the meaning of 'public body' and the test for entrustment or direction.

Recourse to other international texts for interpretative context

4. China has advocated recourse to Articles 5 and 8 of the *United Nations International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts* as relevant context for the interpretation of Article 1 of the Subsidies Agreement.[4] Australia considers that the Articles offer no interpretive assistance in this case.

5. Articles 5 and 8 of the ILC Draft Articles address the 'conduct of persons or entities exercising elements of government authority' and 'conduct directed or controlled by a State',

[1] See First Written Submission of China paras. 65 and 68; Third Party Submission of the Kingdom of Saudi Arabia para. 5; Third Party Submission of Norway, paras. 12-13.

[2] First Written Submission of China, para. 72.

[3] Third Party Written Submission of Norway, para. 12.

[4] Article 31(3)(c) of the *Vienna Convention on the Law of Treaties:* First Written Submission of China, paras. 72, 77, and 83.

respectively.[5] They do not address the definition of public body. Instead they would appear to address the situation where an otherwise private or non-state actor's actions can be attributed to a government - a situation that would more closely mirror entrustment or direction, if any.

6. Similar arguments apply in relation to the attempt to use the definition of 'public entity' in paragraph 5(c) of the GATS Annex on Financial Services.[6] The GATS Annex specifically prefaces its definition of 'public entity' with the phrase '*For the purpose of this Annex*…'. The scope and purpose of the Annex as stated in paragraph 1(a) is for 'measures affecting the supply of financial services.' This points to the specialised role of the definition of a 'public entity' within the GATS.

7. More fundamentally, Australia does not agree that an apparent recourse to 'context' for the purposes of interpretation can be used to transform the scope of a provision in a way that is not otherwise available from the text. Nor can interpretative context be used to include an additional test of exercising government authority that is not apparent from the text, particularly when to include such a test would undermine a clear distinction between the definition of public body and the test for entrustment or direction.

B. PRIVATE TRADING COMPANIES AND PASS-THROUGH

8. Further to Australia's statements in section D of its written submission, Australia considers that where trading companies act as mere intermediaries in a transaction, it may be unnecessary to conduct a full pass-through analysis, particularly where the trading companies appear to have constituted an indirect route for providing a subsidy to exporters. This approach is consistent with the Appellate Body statement in *US – Softwood Lumber* that a 'pass through analysis' is not necessary in every situation in which a subsidy is provided on the production of an input product.[7]

9. Furthermore, Australia considers that in the case of an indirect subsidy, where an intermediate act does not change the nature of the input, the benefit is most accurately calculated at the level of the exporters concerned. This approach is consistent with the Appellate Body's findings in *US − Countervailing Measures* that there may be a direct or indirect recipient of the benefit of a financial contribution.[8]

C. ARTICLE 14(D) AND THE USE OF BENCHMARKS OTHER THAN PRIVATE PRICES IN THE HOME MARKET

10. Australia considers that Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market so long as 'investigating authorities calculate benefit "in relation to" prevailing conditions in the market of the country of provision.'[9]

11. Australia further considers that there is nothing in the Subsidies Agreement to support the argument that the provision of land should be treated differently to the provision of other goods under Article 14(d). On the contrary, the term 'goods' has been given a broad meaning under

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[5] Articles 5 and 8 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations International Law Commission, Report on the Work of its Fifty Third Session (10 August 2001).

[6] China First Written Submission, para. 62; Third Party Submission of Saudi Arabia, para. 42-43; Third Party Submission of Norway, para. 22-23.

[7] Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 17 February 2004, para. 141.

[8] Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, WT/DS212/AB/R, 9 December 2002, para. 143.

[9] Appellate Body Report, *United States − Softwood Lumber*, Ibid, para. 101.

Article 1.1(a)(1)(iii) of the Subsidies Agreement to include immovable property.[10] As the Appellate Body stated in *US - Softwood Lumber*, a broad interpretation, as reflected in the French and Spanish language texts, suggests that land is indeed a 'good' for the purposes of the Subsidies Agreement.[11]

D. POLICY LENDING AND SO CALLED 'DOUBLE REMEDIES'

12. In relation to policy lending, Australia would like to reiterate the key point that 'statements of government policies, plans and intentions are highly relevant considerations in determining the existence of a subsidy and whether the subsidies are targeted to certain industries or enterprises.'[12]

13. In terms of the issue of so-called 'double remedies', Australia would like to reiterate that anti-dumping and countervailing duties are two separate remedies under two distinct WTO Agreements. Nothing in GATT Article VI or elsewhere in the WTO Agreements prevents concurrent or parallel anti-dumping and countervailing duty investigations with respect to the same product.

[10] Appellate Body Report, *United States − Softwood Lumber*, Ibid, at paras. 59 and 65.
[11] Appellate Body Report, *United States − Softwood Lumber*, Ibid, at paras. 59 and 65.
[12] See Third Party Written Submission of Australia, para. 30.

ANNEX B-13

THIRD PARTY ORAL STATEMENT OF BRAZIL

(7 July 2009)

Mr. Chairman, distinguished Members of the Panel,

1. Brazil appreciates the opportunity to present this oral statement as a Third Party in the current proceedings. The present dispute raises several questions of systemic interest to many WTO Members, as the number of Third Party Submissions makes evident. Brazil would like to contribute to this debate by furthering additional elements to some specific issues discussed in its submission. The first issue Brazil wishes to address is the definition of the expression "public body" in Article 1 of the SCM Agreement. Clarification of the meaning and scope of this expression will contribute to the proper application of CVD measures.

2. As indicated in its Third Party Submission, Brazil does not opine on the specific factual context of this dispute and takes no position on whether the Chinese companies involved in the present case are encompassed by a proper definition of "public body". This assessment will depend on the examination of the totality of facts before the panel, which may well include, for instance, issues related to determinations made in light of non-cooperation on the part of investigated companies. Such assessment is beyond the remit of this intervention.

3. As regards the legal interpretation of the expression "public bodies" in Article 1 of the SCM Agreement, Brazil does not consider appropriate the classification of enterprises totally or partially-owned by the State as "public bodies" in CVD investigations based solely on majority state shareholding. This automatic classification could lead to regular market transactions involving non-public state-owned companies being regarded as financial contributions under the SCM Agreement, potentially burdening these entities unfairly. It is not infrequent to find state-owned companies operating in the market with autonomy, indistinguishably from any other private company, despite an ownership link to the government.

4. For this reason, Brazil advocates the necessity of a two-tiered evaluation: firstly, the investigating authority should delve into the evidence provided in order to ascertain if the underlying nature of the entity in question is that of a "public body"; if a negative answer is found, the examination should instead search for specific instances where governmental entrustment or direction was present.

5. Article 1.1(a)(1)(iv) of the SCM Agreement expressly refers to private bodies that carry out functions "which would normally be vested in the government". This is the more immediate "context" under which the expression "public body" in the SCM Agreement should be interpreted, as per the guidelines of treaty interpretation found in the Vienna Convention. It can be directly inferred from Art 1.1(a)(1)(iv) that the main dividing line between actions determined by public or by private motivations should be the presence of public interest – be it *incidental*, as in the case of entrusted or directed private bodies, or more *permanent*, as is characteristic in public bodies.

6. Moreover, the Panel in *EC-DRAMS*[1] assumed that even when actions involve entities wholly owned by the State, it must be demonstrated that the government actually exercised its power over that entity and directed it to take actions against market logic. As previously stated, non-public state-owned companies typically enjoy a significant degree of autonomous decision-making in pursuing its objectives in the marketplace. For obvious reasons, such an analysis is even more important in regard of partially state-owned enterprises, where private agents may be directly affected and therefore exert an opposing force to a hypothetical governmental intervention.

7. For these reasons, Brazil respectfully submits that an overly broad definition of the expression "public body" would disturb the balance of the disciplines of the SCM Agreement.

8. Regarding the alleged "double remedy" issue, Brazil contends that, the SCM and AD Agreements should be treated as independent sets of disciplines, to the extent that there is no provision establishing cross-references between them. The only linkage between anti-dumping and countervailing duty disciplines found in the Covered Agreements is GATT Article VI.5, which expressly refers to export subsidies.

9. The possibility of simultaneous application of anti-dumping and countervailing duties on the same imported product is evident from at least two different perspectives. Firstly, the existence of an explicit ban in the legal text regarding export subsidies can be easily read, *contrario sensu*, to allow for the concomitant application of both duties in all other situations. This is synthesized in the *expressio unius est exclusio alterius* general legal principle. Secondly, this argument is reinforced by the existence of a specific discipline within SCM Agreement's predecessor, the GATT *Subsidies Code*, which prohibited the simultaneous application of both duties on imports from a certain set of countries. The fact that this prohibition was not replicated in the current SCM Agreement underscores the intention of its drafters not to prohibit the combined imposition of AD and CV duties on imports from Members, irrespective of their status as Market or Non-Market Economies.

10. This concludes Brazil's Oral Statement.

[1] Panel Report, EC – DRAMS, para. 7.120.

ANNEX B-14

THIRD PARTY ORAL STATEMENT OF CANADA

(7 July 2009)

INTRODUCTION

1. Mr. Chairman, distinguished members of the Panel, Canada would first like to express its appreciation to the Panel and the Secretariat for their work in this dispute.

2. This dispute concerns the imposition of anti-dumping and countervailing duties on Chinese products. In this connection, Canada would like to emphasize the status and importance of China's *Accession Protocol* and the commitments made by China that are noted in the *Working Party Report* on its accession. Both documents are integral parts of the WTO Agreement. They relate specifically to China and are central to a finding of WTO-consistency or inconsistency with respect to certain issues in this dispute.

3. In this oral statement, I will discuss two issues not addressed in Canada's written submission: pass-through and the offsetting of benefit. I will then make some additional comments on one issue addressed in Canada's written submission: the concurrent imposition of anti-dumping and countervailing duties.

I. PASS-THROUGH

4. I will first deal with issues arising in the context of the successive sales of input goods by state-owned enterprises to trading companies and by the trading companies to respondent producers.

5. In three of the investigations at issue, the U.S. Department of Commerce found that the sales by state-owned enterprises constituted financial contributions that conferred a countervailable benefit to respondent producers.

6. China argues that Commerce violated the *SCM Agreement* by failing to find that the trading companies themselves provided a financial contribution when they sold the inputs and by failing to find that the trading companies had received a benefit from the sale of inputs by the state-owned enterprises. For its part, the United States alleges that there was no obligation on Commerce to make these findings.

7. Under Article 1.1 of the *SCM Agreement*, a subsidy shall be deemed to exist if there is a financial contribution and a benefit is thereby conferred.

8. To impose a valid countervailing duty on a product as a result of the successive sales at issue, Commerce had to determine that the sales of inputs by the state-owned enterprises to the trading companies constituted a financial contribution that conferred a benefit both directly upon the trading companies and indirectly upon the respondent producers.

9. The possibility that a single financial contribution could confer both a direct and indirect benefit is confirmed by the Appellate Body's decision in *United States – Softwood Lumber IV*. Indeed, the Appellate Body found that the requirement for a financial contribution could be fulfilled

where the government made a financial contribution to an input producer who in turn sold the input to a respondent producer.

10. The Appellate Body did not require that the input producer make a separate financial contribution to a respondent producer for the purposes of determining whether the respondent producer is subsidized under Article 1.1 of the *SCM Agreement*.

11. Similarly, in the current matter, there was no requirement for Commerce to find that the trading companies made financial contributions to the respondent producers. Finding that the sale of inputs by state-owned enterprises constituted a financial contribution was sufficient.

12. However, to countervail a subsidy, Commerce had to demonstrate that the financial contribution made by the state-owned enterprises ultimately conferred a benefit upon the respondent producers.

13. China argues that, without a valid finding that the trading companies had received a benefit, there was no legitimate basis for Commerce to conclude that all or some portion of the benefit was conferred on the respondent producers who purchased the inputs from the trading companies. China adds that Commerce undertook no examination of the price the trading companies paid for the inputs they purchased.

14. The United States answers that it was not necessary for Commerce to measure any benefit that the trading companies may have received.

15. Canada submits that a direct recipient of a benefit cannot pass through to an indirect recipient a higher amount of benefit than what it received. The amount of benefit conferred on the direct recipient is the maximum amount of benefit that can pass through to the indirect recipient and be countervailed.

16. Therefore, in most cases, a precise calculation of the amount of benefit conferred on a direct recipient is necessary to determine the amount of the benefit that passes through to an indirect recipient.

17. However, such a precise calculation may not be necessary if the direct recipient purchases goods from a government or public body, does not further process them, and simply resells them for at least as much as it purchased them. In that case, the difference between the resale price paid by the indirect recipient and the benchmark price reflects the extent to which the direct recipient passed the benefit received from the financial contribution through to the indirect recipient.

II. OFFSETTING OF BENEFIT

18. I now turn to the issue of the proper calculation of benefit provided by way of the provision of goods by a government or public body in a situation where some transactions are made above a relevant benchmark price.

19. China argues that Commerce should have taken such transactions into account. The United States responds that Commerce was entitled to ignore them.

20. I will make a few general observations on this issue.

21. Article 14(d) of the *SCM Agreement* is the key provision with respect to the calculation of the amount of benefit conferred on a recipient through the provision of goods. It provides that the provision of goods by a government or public body must not be considered as conferring a benefit

unless the provision is made for less than adequate remuneration. The adequacy of remuneration will generally be assessed by comparison with a benchmark price.

22. There is no provision in the *SCM Agreement* that specifically requires that a benefit conferred on a recipient through one or more transactions be offset where other transactions between the recipient and the government or public body are on terms that are less favourable than prevailing market terms.

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

III. CONCURRENT IMPOSITION OF COUNTERVAILING AND ANTIDUMPING DUTIES

24. Finally, I wish to address the WTO-consistency of the concurrent imposition of countervailing and anti-dumping duties determined on the basis of prices or costs outside China; that is, using the so-called "non-market economy methodology".

25. China argues that such concurrent imposition gives rise to a "double remedy" and is inconsistent with Articles 19.3 and 19.4 of the *SCM Agreement* and Article I:1 of *GATT 1994*. The United States replies that the concurrent imposition of duties is not inconsistent with the WTO Agreement.

26. Canada demonstrates in its written submission that, in the case of products of Chinese origin, the concurrent imposition of duties is consistent with Articles 19.3 and 19.4 of the *SCM Agreement*.

27. It is also Canada's position that neither the use of the "non-market economy methodology" nor the concurrent imposition of duties on Chinese products using that methodology is inconsistent with Article I:1 of *GATT 1994*.

28. Article VI:1 of *GATT 1994* and Article 2 of the *Anti-dumping Agreement* require a strict comparison with domestic prices or costs to establish the normal value of products from "market economy" Members. However, subparagraph 15(a)(ii) of China's *Accession Protocol* specifically allows an importing Member to calculate the normal value of Chinese products using the "non-market economy methodology". Thus, the application of that methodology to Chinese products does not amount to an importing Member according an "advantage, favour, privilege or immunity" to "market economy" Members in breach of Article I:1 of *GATT 1994*.

29. Nor is Article I:1 breached when an anti-dumping duty based on the "non-market economy methodology" is imposed on a Chinese product concurrently with a countervailing duty. Notwithstanding China's allegation that the concurrent imposition gives rise to a "double remedy", Section 15 of the *Accession Protocol*, Article VI of *GATT 1994,* and the provisions of the *SCM Agreement* and the *Anti-dumping Agreement* permit such concurrent imposition.

30. Moreover, as discussed in Canada's written submission, a subsidized and dumped product from a "market economy" Member is also subject to both countervailing and anti-dumping disciplines. Therefore, the concurrent imposition on Chinese products of countervailing and anti-dumping duties, however calculated, is consistent with Article I:1 of *GATT 1994*.

CONCLUSION

31. Mr. Chairman, distinguished members of the Panel, this concludes Canada's oral statement.

ANNEX B-15

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(7 July 2009)

Mr. Chairman, distinguished Members of the Panel,

1. In this oral statement the European Communities will further comment on one issue: the concurrent application of anti-dumping and countervailing duties to the "same situation", responding in particular to certain observations contained in the third party written submissions.

2. We agree with the United States that China has not pursued a claim under Article VI:5 of the *GATT 1994*, which is the only provision in the covered agreements that expressly addresses the concurrent application of anti-dumping and countervailing duties.[1] China's silence implies that it does not challenge the interpretation of that provision advanced by the United States. We note that China does make a claim under the "appropriate" standard referenced in Article 19.3 of the *SCM Agreement*[2], but we do not see why, as the pleadings stand, the Panel need reach the question of the interpretation of Article VI:5 of the *GATT 1994*. Accordingly, given that Article VI:5 of GATT 1994 has not been invoked and that the United States appears not to have exceeded the amount of subsidy when imposing countervailing duties, we would invite the Panel to reject China's claims under both Article 19.3 and Article 19.4 of the *SCM Agreement*.

3. In any event, the European Communities agrees with the United States' interpretation of Article VI:5 of the *GATT 1994*.

4. We have carefully noted the observations of a number of third parties with respect to the interpretation of Article VI:5.[3] We agree with the United States[4] that the term "export subsidization" is synonymous with various other terms as used in the covered agreements, such as, notably: "export subsidization";[5] "subsidy … on the … export";[6] "subsidy … upon … the export";[7] "export subsidy" or "export subsidies";[8] "subsidy to exports";[9] "subsidies contingent, in law or in fact, … upon export performance";[10] and "subsidy … in fact tied-to … exportation or export earnings"[11] (as evidence of a subsidy contingent upon export performance).[12]

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[1] Request for Consultations, para. (6); Panel Request, paras B.1.(f) and B.2; China's First Written Submission, Section VI; United States First Written Submission, Section VIII.

[2] China's First Written Submission, Section VI.

[3] For example, Australia's Third Party Written Submission, para. 49; Japan's Third Party Written Submission, para. 7; Norway's Third Party Written Submission, paras. 41 to 47.

[4] For example, United States First Written Submission, paras. 397 and 399.

[5] For example, *Agriculture Agreement*, Article 9(3).

[6] For example, *GATT 1994*, Article VI:3, first sentence and Article XVI, paras. 2, 3 and 4.

[7] For example, *GATT 1994*, Article VI:3, second sentence.

[8] For example, *GATT 1994*, Article XVI, Section B, title; *SCM Agreement*, footnote 5 and Annex I; *Agriculture Agreement*, Article 1(e) (defining "export subsidies" as subsidies contingent upon export performance).

[9] For example, *GATT 1994*, ad note to Article VI, paragraphs 2 and 3, second paragraph.

[10] For example, *SCM Agreement*, Article 3.1(a).

5. We also agree with the United States that this contingency or tie between the subsidy and the export is confirmed by the *ordinary meaning* of the term "export subsidization".[13] The juxtaposition of these terms, and particularly the choice of the term export as opposed to any other term, implies such a contingency or tie. In our view, the ordinary meaning of the term "export subsidisation" does not extend to the situation in which there is no such contingency or tie – and in particular does not extend to the situation in which there is a mere allocation of part of a neutral subsidy to exports.

6. We further agree with the United States that this view is well-supported by the *context*, including, but not only, the provisions we have referred to above, in particular Article VI:3 of the *GATT 1994*.[14] In particular, we find that the context suggests that the term "export subsidization" in Article VI:5 refers back to the term "subsidy … on the … export" in Article VI:3. We believe that this view is supported by the French and Spanish versions. Further, we note that the terms "manufacture" and "production" may overlap; that these terms, together with the term "transportation" may overlap with the term "export"; and that these terms may not describe all possible types of countervailable subsidies – that being something assured in any event by the term "indirectly". In these circumstances, we agree with the United States that it is significant that the term "export" is specifically picked out in Article VI:3, suggesting that it refers to a particular type of subsidy – that is, an export subsidy. Taken together with the other context we have referred to, we find that this confirms that the term "export subsidization" in Article VI:5 does not include a situation in which a neutral subsidy (for example, on the "manufacture" or "production" of a product) is partially allocated to exports. Contrary to what is suggested by some of the other Third Party submissions, this is not contradicted by the term "indirectly" in Article VI:3, which rather ensures that all types of subsidy are captured, and does not suggest that the relationship between the subsidy and the export for the purposes of Article VI:5 of the *GATT 1994* could be "indirect". Furthermore, contextually, we find it significant that, whilst Section V of the *SCM Agreement*, Section A of Article XVI of the *GATT 1994* and Section III of the *SCM Agreement* all contemplate the possibility of neutral subsides having an effect on exports, none of them use in this context the specific term "export subsidy" or one of its synonyms.

7. Consequently, we agree with the United States that the mere fact that a countervailing duty has been imposed does not necessarily mean that a determination has been made that there is "export subsidization" within the meaning of Article VI:5 of the *GATT 1994*. A countervailing duty may be imposed not only to counter a subsidy contingent upon export (which is what Article VI:5 of the *GATT 1994* refers to), but also a neutral subsidy, allocated in part to exports, which does not fall within the scope of the term "export subsidization" in Article VI:5.

8. Turning to *object and purpose*, we agree with the United States[15] that the limited scope of Article VI:5 of the *GATT 1994* is explained by the fact that, where normal value is based on sales, a neutral subsidy may reasonably be considered to press down equally on both sides of the dumping calculation. The dumping calculation therefore remains unaffected by the subsidy analysis. On the other hand, a subsidy contingent upon export may reasonably be assumed to have a direct impact on the price or quantity of exports – and exports alone. It follows that, since the export contingent subsidy affects prices or quantities, the anti-dumping and countervailing duties would indeed be imposed to compensate for the "same situation" (that is, a situation in which the subsidy, by reducing only the export price, or increasing only the export volume, would increase the amount of dumping). This is what justifies, for example, an adjustment in the rate of anti-dumping duty applied.

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[11] For example, *SCM Agreement*, footnote 4.
[12] Appellate Body Report, *EC - Export Subsidies on Sugar*, paras. 279 to 282.
[13] For example, United States First Written Submission, para. 397.
[14] For example, United States First Written Submission, para. 398.
[15] For example, United States First Written Submission, para. 397.

9. We have carefully considered China's argument that, if the normal value is constructed or derived from an analogue country, and therefore not depressed by that part of the neutral subsidy allocated to the domestic market of the exporting Member, there is no difference, in economic terms, between an export contingent subsidy of 5 (where an adjustment is required) and a neutral subsidy of 10, of which 5 has been allocated to exports in the countervailing duty determination (where no adjustment is made).[16] However, as well as failing from the point of view of ordinary meaning[17] and context,[18] we think this argument also fails from the point of view of object and purpose. It appears to us to assume that the countervailing determination must be taken to mean that a neutral subsidy allocated in part to exports has necessarily decreased the price or increased the quantity of the exports, thus falling foul of the "same situation" parameter. However, under the terms of the *SCM Agreement*, it is only necessary to show a subsidy, injury, and that the subsidised imports, through the effects of the subsidies (based particularly on evidence about the volume of subsidised imports and their effect on prices in the importing Member), cause the injury. It is not necessary to demonstrate any causal link between the subsidy and the export.[19] Nor is it necessary to demonstrate that the subsidy has caused the price of the export to decrease – the enquiry is rather what effect the subsidised imports have had on prices in the importing country. Thus, a neutral subsidy might be used, for example, to pay for advertising, benefiting both domestic sales and exports. This might not increase the volume or decrease the price of exports. But it could force producers in the importing country to reduce their prices in order to compensate for the unfairly subsidised advertising campaign. In such a situation, we agree with the United States that the legal conditions for the application of a countervailing duty would be satisfied; and yet, at the same time, it could not be said that an anti-dumping and countervailing duty would be imposed to compensate for the "same situation" of dumping or export subsidization.

10. For these reasons we respectfully invite the Panel to agree with the United States, and reject China's claims with respect to this matter.

[16] China's First Written Submission, Section VI.
[17] See para. V.4 of this Oral Statement.
[18] See para. V.5 of this Oral Statement.
[19] Appellate Body Report, *Japan - DRAMs*, paras. 257 to 278.

ANNEX B-16

THIRD PARTY ORAL STATEMENT OF INDIA

(7 July 2009)

Mr. Chairman,

India thanks the Panel for this opportunity to present its views in these panel proceedings concerning a disagreement between China and the United States as to the conformity with the covered agreements of four sets of anti-dumping duty and countervailing duty determinations made by the United States. India intervenes in this case as a third party because of its systemic interest in the correct interpretation and application of the General Agreement on Tariffs and Trade 1994 (GATT 1994), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

While not taking any final position on the facts of the case, India wishes to express its views on some of the issues raised in this dispute.

A. THE CONCEPT OF "PUBLIC BODY" IN ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

One of the issues in this dispute is the concept of 'Public Body' under Article 1.1(a)(1) of the SCM agreement and the extent to which Government shareholding control is determinative for the characterization of a company as a 'public body'.

In India's view the ordinary meaning of the term 'Public body' in Article 1.1(a) (1) does not warrant a presumption that the shareholding control or ownership by the Government in itself may lead to a determination that a company is a 'public body' for the purpose of establishing the existence of a financial contribution.

India respectfully submits that a high level of government ownership may indeed be a pertinent factor in determining whether an entity is a 'public body' as understood under Article 1.1(a)(1)of the SCM Agreement. At the same time, however, India disagrees that the degree of government ownership shall in itself be the necessary and sufficient condition for considering an entity as a 'public body'. In previous cases where the Panel has treated an entity as a 'public body' or a 'private body' entrusted with governmental functions on the basis of the extent of government ownership, it has also looked at other relevant factors.

The Panel in the *EC - DRAMS* case, while addressing the issue of whether wholly or partially owned government banks could be considered to have been entrusted with the function of providing financial contribution, observed that, "*government ownership, in and of itself, is not sufficient to establish entrustment or direction under Article 1.1(a)(1) of the SCM Agreement*." It further stated that, "*in case of a 100 percent government owned bank, such as Woori Bank, it thus needs to be demonstrated that the government actually exercised its shareholder power to direct the bank to support to Hynix*."

In India's view in order to be closely assimilated to the government, the link of an entity with the government must go beyond mere ownership and it must perform functions or attributions that are typical of the government.

In *US - CVD DRAMs* the Appellate Body noted that 'the conduct of private bodies is presumptively not attributable to the State' and to support this view the AB quoted that 'since 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'.

India considers and submits that when government ownership in the Panel's own opinion could not be considered to be sufficient to guarantee entrustment of governmental functions as under Article 1.1(a) (1) (iv) of the SCM Agreement, it is even more implausible to argue that ownership shall in itself lend to the conclusion that an entity is a 'public body'.

B. USE OF OUT OF COUNTRY BENCHMARKS TO CALCULATE THE AMOUNT OF SUBSIDIY IN TERMS OF THE BENEFIT TO THE RECIPIENT UNDER ARTICLE 14(D) OF THE *SCM AGREEMENT*

On the question of use of out of country benchmarks to calculate the amount of subsidy, U.S. maintains that the use of alternative market benchmarks outside China is permitted by paragraph 15(b) of China's Protocol of Accession which allows for use of out of country benchmarks with reference to China in case of *special difficulties* in applying provisions contained in Articles 14(a), 14(b), 14(c) and 14(d) of the SCM Agreement. Further the United States contends that the fact that government of China was the predominant owner of production of the inputs concerned was the only factor which was taken into account. However, the USDOC also contends that they have examined other evidence, including prices of inputs established by private parties in China and import data, in order to arrive the conclusion that the prices in China were distorted because of government of China's predominant role as supplier of the inputs concerned. However, China argues that sale prices by SOEs were not controlled by the Chinese government, and therefore did not distort the market price.

In India's view the Panel may have to examine the contentions of the Parties taking the existing jurisprudence on Article 1.1(a)(1) of the SCM Agreement including the facts of the case on hand to ascertain whether China's SOEs are authorities or 'public bodies' for the purpose of Article 1.1(a)(1) of the SCM Agreement.

With respect to the U.S.'s assertion that use of out of country benchmarks is also permissible as per the *SCM Agreement [Article 14(d)]* and the AB decision in *US - Softwood Lumber IV* concerned*, India* believes that the Panel may also have to consider the Appellate Body's decision in the light of the limitations that the AB itself had expressed while giving its decision. The AB had *inter alia* opined that the circumstances in which a Member may use benchmarks other than the private prices in the country of provision are 'very limited'. It had further stated that:

> *"The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the facts underlying each countervailing duty investigation."*

In India's view the Panel should consider U.S.'s use of out of country benchmarks in the present case in light of the specific limitations that the Appellate Body had prescribed for using it while determining the quantum of benefit under Article 14(d) of the SCM Agreement.

C. CONCURRENT IMPOSITION OF ANTIDUMPING AND COUNTERVAILING DUTY IN CASES WHERE NORMAL VALUE IS DETERMINED USING PRICES OR COSTS OUTSIDE THE NON MARKET ECONOMY COUNTRY ('NME')

India believes that the issue of "double remedy" has not been dealt with in the past and therefore requires careful consideration by the Panel. China has argued that the United States has imposed double remedy, in the form of AD as well as CVD, in contravention of Article 19.3 and 19.4 of the *SCM Agreement*. According to China the United States by using NME methodology in calculating anti-dumping duties will offset any alleged subsidies through two duties.

Article VI:3 of GATT 1994 allows Members to apply CVD "equal to the estimated bounty or subsidy determined to have been granted". The *SCM Agreement* contains detailed provisions relating to what constitutes a subsidy, calculation of benefit and the amount of duty that may be imposed. Articles 19.3 and 19.4 provide that the CVD shall be in appropriate amount and no duty shall be levied in excess of the amount of subsidy found to exist. Further Article VI:5 permits the application of both AD and CVD on product except when the two duties compensate for the same situation of dumping or export subsidization.

India notes that whilst it is true that the Appellate Body has confirmed that the WTO Agreement constitutes a single undertaking, the context of the relevant agreements is potentially relevant to the process of interpretation of any particular provision. Anti-dumping and Countervailing duties are two separate remedies to counter two different types of situations of trade distortion. The relevant provision which expressly limits the right of WTO Members to impose both types of duty is Article VI:5 of GATT 1994.

India accordingly holds the view that the legal permissibility for the parallel application of AD and CVD measures, and its underlying logic apply to investigations conducted both in relation to 'market economy' Members and 'non-market economy' Members.

D. THE USE OF A 'ZEROING' METHODOLOGY WHEN CALCULATING 'BENEFIT' RECEIVED FROM INPUTS PROVIDED BY STATE OWNED ENTERPRISES ('SOES')

Mr. Chairman, India's position against the use of "zeroing" methodology is well documented. India was the original complainant in *EC-Bed Linen* case where the practice of zeroing was the first time held to be against the provisions of the *AD Agreement* and believes that the existence and use of "zeroing" under *SCM Agreement* too needs to be reviewed.

In the case of *OTR* investigation China alleges that the United States unlawfully *created* a benefit where none existed by including only those transactions that produced a positive benefit, while excluding those transactions, which did not confer any benefit. According to China this methodology cannot be reconciled with Article VI:3 of GATT 1994 as well as multiple provisions of the *SCM Agreement* such as Articles 10, 19.3 and 19.4 which suggest that a CVD may be imposed only with reference to a "*product"*. According to China in order to determine if goods provided for *less* than *adequate* remuneration provided a subsidy to the production or manufacture of the product as a whole, Commerce was obliged to conduct an *aggregate analysis* of all the transactions during the *period of investigation*.

The *SCM Agreement* does not define a period of investigation. The length of the period of investigation is upon the discretion of the investigating authority. During the said period on investigation numerous export transaction of the *product* may be undertaken. According to Article VI:3 of GATT 1994 the CVD may be "equal to the estimated bounty or subsidy determined to have been granted". Further as per Article 19.2 of the *SCM Agreement* the CVD can be up to the full

amount of the subsidy or less. Thus the CVD imposed should be equal or less than the amount of subsidy found to exist during the period of investigation.

According to Article 19.2 and 19.4 of the *SCM Agreement* the investigating authority is required to calculate "*a subsidy*". Further according to the Appellate Body's decision in *Canada – Aircraft* a subsidy provided is when a government makes a *financial contribution,* which subsequently confers a benefit. In India's view the task of the investigating authority is to determine if a financial contribution has been made, and if so the benefit should be calculated for all transactions over the period of investigation and not with reference to isolated transactions, disregarding other transactions. India believes that an *aggregate analysis* of all transactions during the period of investigation must be conducted to determine the "benefit", and not merely of those transactions which *confer* benefit.

India appreciates this opportunity to present its views to the Panel and we are confident that the Panel will apply an appropriate interpretative methodology and add to its analysis in this very important dispute, in accordance with the principles set out under Article 3.2 of the DSU.

ANNEX B-17

THIRD PARTY ORAL STATEMENT OF JAPAN

(7 July 2009)

I. INTRODUCTION

1. Mr. Chairman, and distinguished Members of the Panel, on behalf of the Government of Japan, I thank you for your attention to this dispute, which involves important systemic issues on the disciplines of Article VI of the *GATT 1994* and the *SCM Agreement*. Because time is limited, however, Japan would like to focus on two issues today.

II. DISCUSSION

A. SIMULTANEOUS IMPOSITION OF ANTI-DUMPING AND COUNTERVAILING DUTIES

2. The first issue is the discipline of the avoidance of the double remedies when a Member imposes anti-dumping and countervailing duties simultaneously. In our third party submission, Japan explained that Article VI:5 of the *GATT 1994* is the expression of the underlying concept of the prohibition on double remedies.

3. Article VI of *GATT 1994* provides for two types of trade remedy measures. One is anti-dumping duties, which an importing Member is permitted to impose in an amount not exceeding the margin of dumping. The other is countervailing duties, which the importing Member may impose up to the amount of subsidies. These two trade remedy measures are aimed to counteract different types of practices in the exporting Member. As the Appellate Body correctly found, "the concept of dumping relates to the pricing behaviour of exporters or foreign producers".[1] On the other hand, the countervailing duties relate to the actions by the government of the exporting Member. So far as each measure captures their object and does not go beyond its scope, no overlap of the two measures would occur, and accordingly, no double remedies would occur.

4. In certain situations, however, as the matter of dumping margin calculation methodology set forth in Article VI:1 of the *GATT 1994*, the dumping margin captures not only the dumping behaviour of exporters, but also the effects of financial contributions by the government. In such a situation, if the importing Member also imposes a countervailing duty, the Member would counteract the effects of the financial contribution by the government twice. Such a double remedy unavoidably occurs in the case of export subsidies. Article VI:5 of the *GATT 1994* therefore explicitly prohibits the simultaneous imposition of antidumping and countervailing duties on export subsidies.

5. Although Article VI:5 of the *GATT 1994* does not prohibit the simultaneous application of antidumping and countervailing duties in any other situations in which a double remedy may occur, Japan believes that Members should give due regards to the underlying concept to avoid the imposition of double remedies.

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[1] The Appellate Body report, *US – Zeroing (Japan)* (WT/DS322/AB/R), para. 156.

B. SELECTION OF BENCHMARKS UNDER ARTICLE 14 OF THE *SCM AGREEMENT*

6. The second issue is the requirements that the *SCM Agreement* imposes on investigating authorities in their selecting benchmarks to calculate the amount of subsidy.

7. Article 14 of the *SCM Agreement* sets forth "guidelines", which provide "the 'framework within which this calculation is to performed'."[2] The Appellate Body found that "calculating benefit consistently with the guidelines is mandatory".[3] It also found that "the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstances'". [4] In a case of the provision of goods by a government, for example, investigating authorities are required to find benchmarks, which "related or referred to, or were connected with, prevailing market conditions" in an exporting country,[5] as the Appellate Body has stated, "any comparative advantage would … have to be taken into account and reflected in the adjustments made to any method used for the determination of adequacy of remuneration." [6] The reference to "any" method in the chapeau of Article 14, on the other hand, "provides a WTO Member with some latitude as to the method it chooses to calculate the amount of benefit." [7]

8. The interpretation of Article 14 must also be made "in the light of its object and purpose" as Article 31.1 of the Vienna Convention provides. In this connection, the Appellate Body has correctly stated that Part V of the *SCM Agreement* is "aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so."[8] The guidelines as provided in paragraph (a) though (d) must be interpreted in a manner that does not upset this delicate balance. For example, an interpretation of Article 14(d) that it requires an investigating authority to replicate market conditions prevailing in the exporting country at a level practically too high to comply, would ignore this delicate balance.

9. Japan does not take any specific position on whether the USDOC's choices of benchmarks in the specific factual settings in the disputed investigations are consistent with the provisions of Article 14. Japan respectfully requests this Panel to review whether the USDOC's choices were reasonable in light of the latitude given to investigating authorities under Article 14.

III. CONCLUSION

10. In conclusion, Japan respectfully requests the Panel to examine carefully the facts presented by the parties in this dispute in light of the arguments presented in Japan's submission and this oral statement. Japan is happy to answer any questions that the Panel or parties in dispute may have.

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[2] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[3] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[4] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[5] Appellate Body Report, *US – Softwood Lumber IV*, para. 116.
[6] Appellate Body Report, *US – Softwood Lumber IV*, para. 109.
[7] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 191. Also see, Appellate Body Report, *US – Softwood Lumber IV*, paras. 91 and 92.
[8] Appellate Body Report, *US – Carbon Steel,* para. 74.

ANNEX B-18

THIRD PARTY ORAL STATEMENT OF MEXICO

(7 July 2009)

1. In its submission as a third party, Mexico set out its views on the interpretation of certain provisions of the GATT 1994, the Protocol of Accession of the People's Republic of China (the "Protocol"), the Anti-dumping Agreement ("AD Agreement") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), given the systemic importance the Panel's conclusions will have.

2. As regards the **simultaneous application of anti-dumping and countervailing duties**, Article VI.5 of the GATT 1994 prohibits the simultaneous application of anti-dumping duties and countervailing duties to offset export subsidies insofar as both duties are intended to remedy the "same situation". In Mexico's view, this prohibition does not apply to countervailing duties that offset domestic subsidies because these do not result in dumping. Consequently, when countervailing duties offset domestic subsidies, simultaneous application is consistent with the rules of the WTO.

3. In this dispute, we are not faced with a case of double remedies for the same situation. On the contrary, in this case anti-dumping duties were imposed in order to offset the effect of dumping by Chinese exporters, and countervailing duties to offset the effect of the domestic subsidies granted by China, which artificially lower prices both within China and for export. We are, therefore, not facing a single situation, affected by two types of remedy, but rather two prejudicial situations offset through the remedy applicable to each of them.

4. Moreover, we consider that if China had succeeded in negotiating a prohibition on applying simultaneous duties to its products, this would have been specified in the Protocol. As this is not the case, the Protocol does allow the combined application of anti-dumping and countervailing duties. In addition, when the negotiators of the WTO Agreements considered it necessary to prohibit the simultaneous application of different mechanisms, they said so expressly. As there is no prohibition on simultaneous application of duties, we must thus conclude that such application is consistent with WTO rules.

5. As regards the provisions of Article 19.3 and 19.4 of the SCM Agreement, Mexico considers that they do not regulate the simultaneous application of duties, therefore China's claim in this respect has no basis at all. We consider that China has not proved *prima facie* violation of these provisions by the United States. Claiming that Article 19.3 and Article 19.4 regulate simultaneous application is tantamount to negating Article VI.5 of the GATT 1994 and Article 15 of the Protocol, which would be contrary to the principle of effectiveness recognized in *United States – Gasoline*.

6. With regard to the **surrogate country methodology** in anti-dumping investigations, contrary to what China and Norway[1] assert, Mexico considers that this methodology does not enable prices and costs adjusted for the distorting effects of the subsidy to be obtained. We do not therefore agree with their claim that the simultaneous application of countervailing duties and anti-dumping duties determined using this methodology is inconsistent with the WTO rules. Once again, we consider that China has not proved *prima facie* violation by the United States in this respect.

[1] Submission by Norway as third party, paragraph 46.

7. In an anti-dumping investigation, the authority has no way of knowing – precisely because it is an anti-dumping investigation – whether the prices or costs for a surrogate country do or do not reflect the effects of the subsidization that may have been granted in this surrogate country. Consequently, when calculating the normal value in accordance with the surrogate country methodology, the authority takes the prices or costs in that country just as they are and does not adjust them to take into account these subsidies because, as we have stated, it does not know whether these prices and cost reflect the subsidies.

8. Let us suppose that the authority is certain that the surrogate country does not grant subsidies and, therefore, its prices and costs have not been "contaminated" by this concept. Even in this case, the prices and costs of the surrogate country would be "subsidy free" only as far as the surrogate country itself is concerned, but would not reflect the prices or costs of the exporting country, already free of the subsidies granted by the exporting country. In other words, the surrogate country methodology would yield the prices and costs which the exporting country would have if it had a market economy and did not grant subsidies, but does not reflect the prices and costs of the exporting country already adjusted upwards in order to offset the subsidies granted by this exporting country.

9. Regarding the question of "**public body**", China bases itself on *United States – DRAMs* to claim that for a company owned by the State to be termed a "public body", the requirements in the *Draft Articles*[2] of the United Nations International Law Commission must be met, namely (1) the enterprise must be authorized by the State to exercise functions normally exercised by the State, and (2) the conduct of the entity must concern governmental activities.

10. Mexico does not agree. The definition of the term "public body" was not addressed in *United States – DRAMs*. In this case, the Appellate Body examined whether an act by a private entity could be considered as being instructed by a government to make a financial contribution and based itself on the *Draft Articles*. At no time did it determine whether the public character of a body depended on the form in which the body acted. For Mexico, the action of the entity is not relevant for the purpose of determining whether this entity is a public body. In any event, ascertaining whether or not it acted consistently with market principles could be important when concluding whether a benefit was granted, but this is irrespective of the public character of the body.

11. Mexico shares the view of Argentina, Australia, Canada and Japan that, as found in *Korea – Commercial Vessels*, an entity is a public body when it is controlled by the government or by another public entity. The fact that the government has control of a company is sufficient justification to consider it to be a "public body", provided that there is proof[3] that the government has in practice exercised control over the enterprise rather than playing the role of a passive investor.

12. Obviously, the degree of control is not always directly in proportion to the degree of ownership. This depends on the way in which the shares have been organized.[4] Nevertheless, China does not question the United States determination that the Chinese Government controls certain companies because it holds the majority. What China questions is that the determination that the Chinese Government controls these companies has led to a subsequent determination that these companies are "public bodies" within the meaning of the SCM Agreement. To put it another way, China agrees that these companies are controlled by its Government, but claims that this does not

[2] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries.*

[3] For example, the government has appointed the members of the Board of Directors, the chief executives, the enterprise's activities and/or budget are subject to government approval, or the State enterprises must follow industrial development plans that set growth targets. Any of these factors by itself suffices to determine this status.

[4] In some schemes, majority ownership may result in minority control, or *vice versa* (as in the case of the so-called "*golden shares*").

make them "public bodies". So the key point is whether the fact that the Government controls a company suffices to consider the company to be a "public body" according to the SCM Agreement. We recall that, in *Korea – Commercial Vessels*, control by the government was indeed sufficient to consider a company to be a "public body".

13. The purpose of Article 1.1(a)(1)(iii) of the SCM Agreement is to prevent the granting of financial contributions in the form of goods or services – through entities that are not "government" entities – remaining outside the scope of the SCM Agreement. Consequently, in our view the definition to be adopted by this Panel in relation to the term "public body" must be sufficiently broad to enable Article 1.1(a)(1)(iii) of the SCM Agreement to be applied to State enterprises which produce goods and/or services.

14. The standard proposed by China, Brazil, Norway and Saudi Arabia would prevent Article 1.1(a)(1)(iii) of the SCM Agreement from being applied to State enterprises which produce goods or services, which is contrary to the purpose of this Article. In effect, such enterprises would be unable to meet the criteria of being established by "the law of the State to exercise functions of a public character normally exercised by State organs"; to "perform functions and exercise powers of a governmental character"; to "exercise powers vested in it by the government to … regulate, restrain, supervise or control the conduct of individuals"; or that their sales of goods should not be governmental activities "unconnected with private or commercial activity". Because it cannot fulfil these criteria according to the standard proposed by these countries, Article 1.1(a)(1)(iii) of the SCM Agreement could not apply to State enterprises which produce goods or services, which is unacceptable.

15. We note that Saudi Arabia holds that in *Canada – Dairy*, the Appellate Body interpreted "public body" in accordance with Article 9.1(a) of the Agreement on Agriculture and that this is the line of reasoning that the Panel should follow in interpreting the term "public body" under the SCM Agreement. Mexico does not agree. The fact that an expression appears in several WTO Agreements does not imply that its meaning is the same in all the Agreements. According to the rules of interpretation adopted by the WTO, if the ordinary meaning of a term is not conclusive, the context and purpose of the rule in which it appears must be taken into account. For example, the words "like product" have different meanings in Articles 2.1, 3.1 and 5.8 of the AD Agreement. Similarly, "like product" has other meanings in Articles I, III, IX and XIII of the GATT 1994. If we accept Saudi Arabia's approach, the term "like product" would have to be interpreted in the same way in all these provisions, irrespective of the context and purpose of each provision.

16. To summarize, in Mexico's view an entity is a "public body" according to the SCM Agreement if: (1) the government controls the entity (because it holds the majority); and (2) there is evidence that the government has not played the role of passive investor but has in practice exercised control. Likewise, we consider that any definition of "public body" adopted by this Panel should be sufficiently broad to enable Article 1.1(a)(1)(iii) of the SCM Agreement to apply to State enterprises supplying goods and services.

17. As regards the **analysis of pass-through of the benefit**, Mexico does not agree with China. As can be seen from several precedents in both the GATT and the WTO[5], it is clear that this analysis is only needed when the subsidies are given for the production of a good that is an input for the product under investigation (in other words, upstream). As in this case the subsidies were granted for the production of the goods investigated themselves (the industries which produced the exported goods received subsidies in the form of inputs at prices lower than the market price), the pass-through analysis was not required.

[5] *United States – Pork; United States – Softwood Lumber IV;* and *Mexico – Olive Oil*.

18. Regarding the determination of the **existence of benefit for the trading companies**, it should be pointed out that the Appellate Body determined[6] that a financial contribution may be granted to a company indirectly. In this case, because the private trading companies were only the vehicle through which the contribution reached the companies under investigation, they received the contribution indirectly. It was thus not necessary to undertake a pass-through analysis.

19. Concerning the **benchmark used by the United States**, Mexico considers that the standard applicable is that indicated by the Appellate Body in *United States – Softwood Lumber IV*, according to which an investigating authority may indeed use a reference point other than prices in the country under investigation provided that it is determined that the prices are distorted by the role played by the government. Consequently, in order to determine whether the benchmark is contrary to the WTO rules, the essential factor to be analysed is the presence or absence of distortions caused by the role of the Chinese Government. The points raised by China in order to claim that the benchmark was contrary to the WTO rules, however, are in **no way** related to this essential factor.

20. Mexico considers that, if the United States had sufficient evidence that the Government **played a predominant role** in Chinese markets, then the internal prices of suppliers in China could be rejected as a point of reference when determining the existence of the benefit. As we do not know whether this evidence existed, Mexico cannot express an opinion on whether in this case the United States could use this benchmark or whether it was properly determined.

21. Mexico thanks the Panel for this opportunity to express the foregoing comments.

[6] *United States – Countervailing Measures on certain EC Products*.

ANNEX B-19

THIRD PARTY ORAL STATEMENT OF SAUDI ARABIA

(7 July 2009)

Mr. Chairman, members of the Panel,

1. The Kingdom of Saudi Arabia welcomes this opportunity to express our views on some of the key systemic issues raised in this dispute. We affirm all of the positions that were set out in our written Third Party submission, although we need not repeat them today. Instead, we wish to reiterate some of the essential points that the Panel should keep in mind when interpreting the relevant provisions of the SCM Agreement.

I. A PUBLIC BODY IS AN ENTITY THAT IS VESTED WITH GOVERNMENTAL AUTHORITY AND FUNCTIONS LIKE A GOVERNMENTAL ENTITY

2. We begin with the "public body" issue. For the reasons explained in our Third Party submission, the Kingdom considers that for an entity to be considered a "public body", it must:

- be vested with governmental authority, thus allowing the government to control its activities; and

- function as a governmental entity that serves a public policy objective rather than a commercial objective.

3. It follows from this basic proposition that the mere fact of State ownership – even majority ownership – cannot determine whether an enterprise is a public body.

4. In its ordinary meaning, "public body" denotes a **governmental function**, not merely State ownership. The Spanish version of the SCM Agreement, which is equally authentic, is instructive on the ordinary meaning of "public body." The Spanish version uses the term "organismo público" to refer a "public body" in Article 1.1. The Appellate Body has interpreted this term in the context of the Agreement on Agriculture to mean an entity that exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character. The Appellate Body has made clear that there is a very close relationship between the subsidies disciplines of the Agreement on Agriculture and the SCM Agreement.

5. The relevant question is whether there is anything in the context of the SCM Agreement that would argue in favour of a different, broader interpretation to be given to the same terms based on mere State ownership. The answer is demonstrably no.

6. Article 1.1 of the SCM Agreement equates "public body" with "government" when it expressly references both by the use of the term **"government."** This common reference is consistent with an understanding that both terms (government and public body) share the same essential characteristics of entities that possess or act under governmental authority and perform governmental functions. It is consistent with the conclusion that the drafters considered the terms to be equivalent − the two terms refer to different aspects of governmental authority.

7. The SCM Agreement provides that public bodies can entrust or direct private bodies to provide a financial contribution. That means that public bodies, by definition, are vested with governmental authority. A private body cannot be "entrusted or directed" by any entity that does not have governmental authority itself.

8. There is no support in the SCM Agreement or in the other WTO Agreements for an interpretation of the term "public body" based on mere government ownership. Those who claim otherwise have essentially advanced a single argument to support their position: that this Panel should follow the approach supposedly taken by the Panel in *Korea – Commercial Vessels*. As this is the only Panel ruling on the "public body" issue in the SCM context, it is of critical importance to be clear about what the *Korea – Commercial Vessels* Panel did – and did not – decide.

9. First, the criterion actually applied by the *Korea – Commercial Vessels* Panel was "control", not ownership. The Panel did not find that an entity owned by the government was necessarily a public body. None of the Korean entities were considered by that Panel to be public bodies merely by virtue of governmental ownership.

10. Second, in applying the test of government "control", the *Korea – Commercial Vessels* Panel considered a range of factors, including – but by no means limited to – government ownership. Other equally relevant factors taken into consideration by the Panel included the extent of government involvement in the operational policy of the entities, in their day-to-day operations, and in the direction of their investments. All of this the Panel considered relevant under the test of "control."

11. Third, it is not correct to say that the Panel rejected the relevance of the public policy objective when examining an entity's "public body" nature. The Panel did not accept the argument of Korea that where a specific transaction was commercially reasonable and not motivated by a public policy objective, the providing entity was not a "public body." The Panel correctly noted that the question of whether an entity was a "public body" went to the nature of the entity, and was not determined on a case-by-case basis, or whether the particular financial contribution was commercially reasonable.

12. Indeed, the Panel was right to point out that a public policy objective alone does not suffice. It is the combination of a governmental authority with the governmental function and public policy objective of the entity that determines the entity's nature as a "public body." This is consistent with the two-part test that the Kingdom has offered for the identification of a public body and is in line with the Appellate Body's definition of this term.

13. Mr. Chairman, the determination of whether an entity is a public body is of crucial importance to the first part of the definition of a subsidy - whether a financial contribution has been provided by the government. The next issue of systemic importance that the Kingdom wishes to highlight today concerns the second part of the subsidy definition – the determination of benefit.

II. THE USE OF ALTERNATIVE BENCHMARKS FOR THE DETERMINATION OF BENEFIT IS PERMISSIBLE ONLY IN EXCEPTIONAL CIRCUMSTANCES, AND IS SUBJECT TO STRICT DISCIPLINES

14. Article 14(d) of the SCM Agreement is quite clear in establishing that the principal benchmark for calculating a benefit is the domestic market price in the country of provision. The use of an alternative benchmark is permissible only in very exceptional circumstances and only after *actual* distortion of the domestic market is found. Presumptions based on indirect evidence or on theoretical economic deductions are insufficient to meet this requirement. This includes any

presumption of distortion based on the mere fact that the government is a significant supplier or has a major presence in the market in question.

15. If exceptional circumstances necessitating the use of an alternative benchmark have been established, then the cost of production of the goods in the country of provision serves as the most appropriate alternative to domestic market prices. First, the cost of production is a direct result of the "prevailing market conditions… in the country of provision", consistent with the language of Article 14(d). Second, cost of production avoids the inevitable practical pitfalls of an out-of-country benchmark. The cost of production benchmark is not only the most reliable possible alternative, but it has also been supported and endorsed in previous Appellate Body jurisprudence.

III. AN INVESTIGATING AUTHORITY MUST BASE LOAN BENCHMARKS ON THE ACTUAL COMMERCIAL BORROWING EXPERIENCE OF A FIRM

16. With respect to the loan benchmark under Article 14(b), the Kingdom is of the view that a "comparable commercial loan that the firm could actually obtain" should be a loan that is expressed in the same currency, and subject to the same generally-applicable financial regulations of the country providing the government loan. By this explicit standard, constructed out-of-country loan benchmarks that are only theoretically available are not a permissible benchmark under Article 14(b).

IV. IN CASES OF ALLEGED SUBSIDIZED INPUTS, THE INVESTIGATING AUTHORITY MUST CONDUCT A "PASS-THROUGH" ANALYSIS TO DETERMINE IF THE DOWNSTREAM PRODUCER HAS RECEIVED A BENEFIT

17. Finally, we would like to comment briefly on the issue of "pass-through." This issue relates to a basic principle of WTO disciplines with respect to the use of countervailing measures. A countervailing duty may be levied on a product only where an investigating authority determines that a subsidy has been granted, directly or indirectly, on the product subject to the duty.

18. The Kingdom wishes to underline the fundamental rule that in case of "arm's length" sales between unrelated parties, the Agreement does not permit an investigating authority to **presume** that all or part of the benefit has been passed through.

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19. Mr. Chairman, this concludes the Kingdom's intervention at today's meeting. We would be pleased to respond to any questions the Panel or any of the parties may have for us. Thank you.

ANNEX B-20

THIRD PARTY ORAL STATEMENT OF TURKEY

(7 June 2009)

Esteemed Panelists,

Distinguished Representatives of the Parties to the Present Panel Hearing,

1. I am glad to present you with the views of Turkey at this stage of the panel proceedings regarding the complaint launched by People's Republic of China. I will summarize Turkish position on the subject, to the extent possible, by refraining from repetition of details presented in our written submission.

2. Although the dispute covers many issues, I will focus on three major subjects namely "public body determination", use of out-of country benchmark" and "pass through of a benefit" arise from this dispute.

3. Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) contains two separate terms "government" and "public body". Therefore in order to accept that a subsidy is granted, it is clear that a financial contribution must be provided either by "government" or a "public body".

4. Since the SCM Agreement used two terms, in Turkey's view, the meanings of these terms should be construed differently. However, SCM Agreement does not provide any definition with regard to these two terms. Therefore, what constitutes "government" or "public body" under the article in question needs to be interpreted. This interpretation should be made in accordance with the ordinary meanings taken into account in the context, object and the purpose of the SCM Agreement pursuant to Article 31.1 of the Vienna Convention.

5. China argued that in order to accept an entity as a public body, both an entity should perform governmental functions and the powers to perform these functions should be vested by the state. However China's claim to take governmental character as a prerequisite to determine an entity as a public body narrows the actual meaning of the "public body" and equates it to "government". Such an interpretation would annul the distinction between the two terms and render the "public body" meaningless.

6. In Turkey's views, Paragraph 5(c)(i) of the Annex on Financial Services to the GATS is not the relevant legal basis to interpret the term public body used in the SCM Agreement. Firstly, while the SCM Agreement states "public body", the referred paragraph of the Annex in question provides the definition of "public entity", so it is clear that these two terms are not the same. Secondly, it is clear from the "For the purpose of this Annex…" expression mentioned in the same paragraph that, the "public entity" definition is only for the scope of the Annex in question.

7. On the other hand Turkey also considers ILC Articles as an irrelevant legal basis for interpreting the term "public body" for several reasons. First of all ILC Articles are not among the annexes of the Marrakesh Agreements. In addition, the scope and the application of the ILC Articles

are totally distinct from the SCM Agreement. Furthermore due to the *lex specialis* clause contained in the Article 55 of the ILC Articles, it is not possible to apply the ILC Articles to this dispute.

8. Consequently, Turkey is of the view that "government control" criterion set forth by the Korea-Commercial Vessels Panel is the most proper criteria for determining whether an entity is a public body and Turkey also considers that the ownership is the main indicator of the control of an entity.

9. During its accession to the WTO China acknowledged the fact that it had a centrally-planned economy and undertook some commitments in its Accession Protocol including commitments on the application of trade remedies by other Members.

10. Specifically, in the Article 15(b) of the Accession Protocol, China accepted to be subject to special rules with regard to subsidies. It is clear from this article that, the Members are allowed to use appropriate ways to ensure applicability of the rules against subsidies.

11. Besides, Turkey is of the view that the Accession Protocol is not the only source which allows using external benchmark. Pursuant to Article 14 of the SCM Agreement external benchmarks may be used in some cases.

12. Similarly, the Appellate Body also ruled that, even for market economies the primary benchmarks provided in the Article 14(d) of the SCM Agreement may not work. If the investigating authority determines that private prices in that country are distorted because of the predominant role of the government, it may use another benchmark. Turkey considers that in cases where the prevailing market conditions in a Member do not provide an appropriate base to make a meaningful comparison to determine whether a benefit has been conferred due to the predominance of the government in the economy, the rules of the SCM Agreement will still be applicable.

13. In the Accession Protocol, China has already accepted that the prevailing terms and conditions in China may not always be available as appropriate benchmarks. If the investigating authority uses the private prices as the benchmark while the predominance of the government is a fact, benefit will probably be artificially low or even zero. As a result, the full extent of the subsidy would not be captured and the rights of Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the SCM Agreement" would be injured.

14. In Turkey's view, the SCM Agreement does not require that the recipients of a benefit and a financial contribution should be the same. This approach is also in line with the reasoning stated in *Mexico - Olive Oil* Panel Report. Acceptance of the opposite would lead to the circumvention of the disciplines on subsidization by including a private party to the chain.

15. Turkey wishes to thank the Panel for the opportunity to submit its views during this hearing.