ANNEX C

EXECUTIVE SUMMARIES OF SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

(24 August 2009)

I. INTRODUCTION

1. This submission presents China's rebuttal to the arguments advanced by the United States in its first written submission and at the first meeting of the Panel in defence of the measures under challenge in this proceeding. This submission also incorporates China's comments on the United States' answers to the questions posed by the Panel following the first meeting.

II. COMMERCE'S "PUBLIC BODY" FINDINGS IN THE FOUR CVD INVESTIGATIONS UNDER CHALLENGE CANNOT BE RECONCILED WITH A PROPER APPLICATION OF THE INTERPRETIVE PRINCIPLES OF THE VIENNA CONVENTION TO ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

2. In its first submission, the United States confirmed that Commerce applied a *per se* rule of majority government ownership to determine whether SOEs were public bodies. It now offers the same *per se* rationale to defend Commerce's treatment of SOCBs as public bodies, even though this was not the rationale adopted by Commerce in the underlying investigations.

3. The first issue before the Panel with respect to the interpretation of the term "public body" is whether the United States' *per se* rule can be sustained when the term "public body" is interpreted in accordance with the principles set forth in Articles 31-33 of the Vienna Convention. China submits that this is not a close question, as evidenced by the virtual absence of third-party support for the United States' extreme position. As China has shown, the term "public body" must be interpreted to mean an entity that exercises authority that has been vested in it by the government for the purpose of performing functions of a governmental character.

4. In its first written submission, China set forth a number of definitions of the adjective "public," the common theme of which was that when used with the noun "body," it conveyed the meaning of acting on behalf of a nation or community as a whole, and under the authority of or officially on behalf of the nation or community as a whole. However, the United States argues that because one general definition of public is "the opposite of private," and one definition of "private" is "provided or owned by an individual rather than the State or a public body", that "if an entity is owned by the state … such entity *can be* 'a public body' under the SCM Agreement."

5. From this flawed syllogism, the United States then makes the interpretative leap that because a public body *can be* owned by the government, it "*is* an entity that is owned by the government." Needless to say, the mere fact that the term "public body" *may include* within its scope an entity owned by the government does not support the United States' categorical rule that such entities *necessarily are* public bodies *in all circumstances.*

6. The equally authentic Spanish and French texts of Article 1.1 also refute the ordinary meaning interpretation advanced by the United States and unequivocally support the one proposed by China. In Article 1.1(a)(1) of the SCM Agreement, where the English text uses the term "public body", the French text uses the term "organisme public," and the Spanish text uses the term

"organismo público." The French term "public" and the Spanish term "público" each carries a connotation of "governmental".

7. It is instructive to consider the Appellate Body's interpretation of the term "government agency" in *Canada – Dairy*. In this decision, the terms "organismo público" and "organisme public" are expressly equated with the English term "government agency," which the Appellate Body interpreted to mean "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character". It follows that when the identical terms – "organismo público" and "organisme public" – are used in Article 1.1(a)(1) of the SCM Agreement, they should be given the same meaning. A public body, like a government agency, therefore must be "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental character'".

8. The second issue before the Panel is the United States' persistent rejection of the relevance of the ILC Draft Articles. The United States is unable to explain away what it characterizes as the many "unhelpful" cases endorsing the general proposition that the ILC Draft Articles are an appropriate interpretative tool when interpreting the covered agreements generally, or the Appellate Body's express reliance on them when interpreting Article 1.1(a)(1) of the SCM Agreement in particular. Accordingly, the United States effectively has conceded that the question before the Panel is not *whether* the ILC Draft Articles should inform the Panel's interpretation of the term "public body", but *how* they should do so. On this subject, the United States literally has had nothing to say.

9. In contrast, China has demonstrated that the attribution of financial contributions to Members under Article 1.1 of the SCM Agreement when they are provided by (1) "a government", (2) any "public body within the territory of a Member", or (3) a "private body" that is "entrusted or directed" by government, closely parallels the three categories of attribution set forth in Articles 4, 5, and 8, respectively, of the ILC Draft Articles. The only logical inference is that Article 1.1 of the SCM Agreement was drafted against the normative background formed by the customary international law rules on attribution known to all Members of the WTO. The Appellate Body's reliance on the Commentary to ILC Draft Article 8 when interpreting the meaning of the term "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement is an unambiguous confirmation of this reality.

10. The United States' interpretation of the term "public body" flies in the face of each of these customary rules of international law codified in the ILC Draft Articles. Conversely, these provisions unambiguously support the interpretation of the term "public body" advanced by China on the basis of ordinary meaning, context and object and purpose.

11. China will not dwell on the final issue – Commerce's input subsidy findings in respect of purchases from private trading companies – because Commerce's unlawful conclusion that SOEs are public bodies within the meaning of Article 1.1 of the SCM Agreement renders *all* of its input subsidy determinations unlawful. China will just note two additional bases for concluding that Commerce's findings with respect to purchases from private trading companies were inconsistent with the United States' obligations under the covered agreements. First, in the CWP and LWR investigations, Commerce relied on "facts available" to determine the amount of HRS purchased from the private trading companies that allegedly had been produced by SOEs, even though it did not seek such information from the respondents in the investigations. The United States has essentially conceded that in doing so, Commerce acted inconsistently with Articles 12.1 and 12.7 of the SCM Agreement. Needless to say, subsidy findings predicated on an unlawful resort to facts available cannot stand.

12. Second, Commerce made no findings in the CWP, LWR or OTR investigations that the private trading companies *themselves* had made a financial contribution within the meaning of Article 1.1. As China previously has demonstrated, absent a finding of entrustment or direction, there was no basis for Commerce to conclude that the producers under investigation purchased "government-*provided* goods" when they acquired inputs from the trading companies.

13. For all of these reasons, the Panel should find that the United States' *per se* rule of majority government ownership is inconsistent with the proper interpretation of the term "public body". Without a valid finding that the SOEs and SOCBs were public bodies, Commerce's financial contribution findings in each of the four CVD investigations with respect to the alleged provision of inputs and loans are inconsistent with Article 1.1 of the SCM Agreement.

III. COMMERCE'S DETERMINATIONS OF "BENEFIT" IN THE FOUR CVD INVESTIGATIONS UNDER CHALLENGE VIOLATE THE UNITED STATES' OBLIGATIONS UNDER THE COVERED AGREEMENTS

14. The United States' statements at the first meeting of the Panel and its answers to Panel questions have usefully clarified the issues before the Panel with respect to whether Commerce's benefit determinations in the four CVD investigations under challenge were consistent with the covered agreements.[1]

15. *First*, the United States' defence of Commerce's input and land benefit calculations are predicated on the remarkable assertion that an investigating authority has no legal obligation under Article 14(d) of the SCM Agreement to perform an analysis establishing that private prices are distorted before resorting to out-of-country benchmarks.

16. This is tantamount to a frontal assault on one of the central tenets of the Appellate Body's decision in *US – Softwood Lumber IV*. As the Appellate Body emphasized, the rejection of private prices as potential benchmarks is permissible only "when it has been *established* that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." That determination, in turn, "must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."

17. *Second*, consistent with its flawed legal interpretation of Article 14(d), the United States now concedes that Commerce relied on nothing more than the purported predominance of SOEs as suppliers of inputs – determined *exclusively* by reference to their relative share of Chinese production – to reject Chinese private prices as benchmarks in the CWP, LWR and LWS investigations. Similarly, the United States apparently seeks to defend Commerce's rejection of land-use prices as potential benchmarks in China solely on the grounds that the Government of China is the ultimate owner of all land in China. The United States' position is fundamentally at odds with the Appellate Body's ruling that the mere fact that the government is the predominant supplier of goods for a particular market "*does not, in itself*, establish that all prices for the good are distorted" so as to justify rejection of private prices.

18. *Third*, the United States now concedes that it made no adjustments whatsoever to the Thailand benchmark it used as a proxy for private land prices in China, let alone "all necessary adjustments" the Appellate Body deemed required to ensure that a benchmark based on prices in one country "relates or refers to, or is connected with, prevailing market conditions" in another country. Thus, even if Commerce's decision to reject Chinese land prices and resort to an out-of-country benchmark were consistent with Article 14(d) (and it was not), its failure to make any adjustments whatsoever to the land price it selected in Thailand establishes that its chosen benchmark does not relate to prevailing market conditions in China, as Article 14(d) requires.

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[1] China wishes to note that the United States has now confirmed in its answers to the Panel's questions that it seeks to defend Commerce's benefit calculations in these cases exclusively on the basis that they are consistent with Article 14 of the SCM Agreement. In no instance does the United States ask the Panel to assess the conformity of Commerce's determinations with Article 15 of China's Protocol of Accession. For this reason, and for the reasons set forth in China's responses to the Panel's questions, Article 15 of China's protocol has no relevance to this proceeding.

19. *Fourth*, with respect to loans, the United States makes only a perfunctory (and incredible) argument that the interest rate benchmark Commerce derived from its 33-country regression model represented a "comparable commercial loan which the firm could actually obtain on the market," as required by Article 14(b).

20. Fundamentally, Article 14(b) is about comparing interest rates. Consistent with the definition of "benefit", the Appellate Body has said that the purpose of making this comparison is to determine whether the recipient of the government loan is "'better off' than it would otherwise have been" in the absence of the government loan. In this context, a benchmark loan cannot be "comparable" if it is denominated in a different currency than the currency in which the government-provided loan is denominated, because interest rates differ by currency. As a consequence, comparing a loan denominated in one currency to a loan denominated in another currency will necessarily measure *the factors that cause interest rates to be different in different currencies*. This is not a measurement of the extent to which the recipient of the government loan is "better off" as a result of the financial contribution.

21. The United States' real defence of its fictitious benchmark is predicated on its contention that Commerce was free to disregard the actual requirements of Article 14(b) based on its finding that interest rates in China were "distorted" by government "intervention". The United States' effort to assimilate the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV* into the entirely different benefit standard of Article 14(b) is misguided. But even accepting, *arguendo*, the relevance of the Appellate Body's interpretation of Article 14(d) to the interpretation of the benefit standard for loans under Article 14(b), the Appellate Body's decision in *US – Softwood Lumber IV* makes clear that any benchmark chosen by an investigating authority must conform to the relevant standard under Article 14.

22. Further, China notes that the "benefit" that Commerce purported to measure for the alleged "policy lending" subsidy – the difference between interest rates in China and the interest rates that it derived from its multi-country regression model – bears no relationship to the *ex post* "access to credit" rationale that the United States has advanced in these proceedings in support of Commerce's "policy lending" determinations.

23. *Finally*, with respect to China's claim that Commerce was required to take into account those transactions that were above the benchmark price when calculating the alleged "benefit" from rubber inputs purchased by the respondent producers during the POI, the United States does not dispute the facts presented by China in its first written submission. Rather, the U.S. argues that even though these producers in the aggregate paid *more than* the benchmark price for inputs purchased from SOEs, this fact is "irrelevant" when calculating the alleged "benefit" because Article 14(d) provides Commerce with the "leeway" and "latitude" effectively to choose whatever methodology it wishes when determining adequacy of remuneration.

24. In making this argument, the United States ignores the import of the text of Articles 10, 14(d), 19.1, 19.4, and 32.1 of the SCM Agreement, as well as Article VI:3 of the GATT 1994. Article 14(d) itself says that "adequacy of remuneration shall be determined in relation to prevailing market conditions for *the good* … in question". Where there are multiple transactions for the same "good", adequacy of remuneration must be calculated on an aggregated basis over the entire period of investigation, taking into account not just the transactions involving the "good" that are below the benchmark price, but those that are above it as well. This is nothing more than a straightforward application of the plain text of Article 14(d).

25. China's interpretation of Article 14(d) is also the only one compatible with the definition of a subsidy in Article 1.1 of the SCM Agreement. In *Canada – Aircraft*, the Appellate Body observed that a benefit within the meaning of Article 1.1 exists if a government's financial contribution "makes the recipient 'better off' than it would otherwise have been, absent that contribution." A producer is

not "better off" over a period of investigation if it ends up paying, on average, more than the market price for any "good" that it purchases from the government.

26. Where an investigating authority imposes a countervailing duty to offset an alleged "subsidy" calculated using a benefit methodology that produces a purported "benefit" when none exists, as Commerce did in OTR, it necessarily has acted inconsistently with Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.4 and 32.1 of the SCM Agreement.

IV. COMMERCE'S SPECIFICITY DETERMINATIONS IN RESPECT OF "POLICY LENDING" AND LAND-USE RIGHTS WERE NOT IN ACCORDANCE WITH THE REQUIREMENTS OF ARTICLE 2 OF THE SCM AGREEMENT

A. POLICY LENDING

27. In its first written submission, China demonstrated that Commerce had failed to clearly substantiate, on the basis of positive evidence, that the alleged "policy lending" subsidy was "explicitly limit[ed]" to "certain enterprises" within the meaning of Article 2.1(a) of the SCM Agreement. Apparently unable to rebut China's arguments, the United States found it necessary to invent an entirely new rationale for Commerce's specificity determination. Notwithstanding the fact that Commerce unmistakably considered the "subsidy" to involve the provision of loans at "preferential, non-commercial" rates of interest, and notwithstanding the fact that Commerce measured the "benefit" of the alleged subsidy on this basis, the United States now contends that interest rates have nothing to do with the alleged "policy lending" programme.

28. Under the new U.S. theory, which China will call the "access to credit" theory, the alleged "policy lending" subsidy involves the "allocation" or "availability" of credit at ordinary commercial interest rates. The United States apparently considers that the "preference" or "non-commerciality" of these "policy loans" arises merely from the fact of obtaining a loan, at *any* interest rate. Surprisingly, though, the *ex post* "access to credit" rationale did nothing to improve the conformity of Commerce's "policy lending" determination with the requirements of Article 2.1(a) of the SCM Agreement.

29. The U.S. has made clear in its answer to Question 61 from the Panel that it intends to stand by its assertion that the 539 "encouraged" industries listed in the *Guiding Catalogue of Industrial Restructuring*, which are organized into 26 broad economic sectors, collectively constitute "certain enterprises" within the meaning of Article 2. China has explained in response to Panel Question 54 why this assertion is wholly untenable and, indeed, not even credible.

30. The U.S. argument on specificity now comes down to the notion that the alleged "access to credit" subsidy is "explicitly limited to certain enterprises" because China's economic planning documents "prohibit" various types of enterprises from receiving the alleged "subsidy". The U.S. reasoning, it seems, is that because the economic planning documents purport to *prohibit* lending to one group of enterprises or industries, it follows that the category of "encouraged" industries must constitute "certain enterprises" within the meaning of Article 2.

31. It is beyond any reasonable dispute that the 539 "encouraged" industries in 26 broad economic sectors represent more than a "discrete segment" of the Chinese economy, and therefore do not constitute "certain enterprises" within the meaning of Article 2. The purported existence of a "prohibited" group of industries does nothing to alter this conclusion. Moreover, the United States has effectively conceded that the alleged "policy lending" subsidy was not specific, because the U.S. now admits that "Commerce did not make any particular findings in the OTR Tires CVD investigation regarding the rates paid by borrowers from SOCBs as compared to the rates paid by borrowers from other banks in China."

32. Article 14(b) of the SCM Agreement provides that "a loan by a government *shall not be considered as conferring a benefit*" unless there is a "difference" between the interest rate that the company pays on a loan from the government and the interest rate that it would pay on a "comparable commercial loan which the firm could actually obtain on the market". Thus, a government loan can only confer a benefit under Article 14(b) to the extent that there is a difference in *interest rates*. It follows, by definition, that "access to credit" at ordinary commercial interest rates is not, by itself, a "subsidy" that can be specific under Article 2.

B. LAND-USE RIGHTS

33. There is little left to say concerning Commerce's determination that the alleged land-use rights subsidy that it identified in the LWS investigation was "regionally specific" under Article 2.2 of the SCM Agreement. The United States has effectively conceded that companies paid the same (or lower) prices for land-use rights whether or not they were located within the New Century Industrial Park, which Commerce considered to be a "designated geographical region". There is no conceivable interpretation of Article 2.2 under which this alleged subsidy could be "limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority".

34. In the underlying investigations, Commerce found that "the *provision of land-use rights* [is] specific because the *provision of land-use rights* in an industrial park within the county's jurisdiction is *limited to* an enterprise or industry or group thereof located within a designated geographical region …", but Article 2.2 requires the investigating authority to determine that *the subsidy* is specific to certain enterprises located within a designated geographical region. If the investigating authority has found only that the *financial contribution* was limited to certain enterprises located within the designated geographical region, it has not found that the subsidy is specific under Article 2.2.

35. The subsidy that Commerce determined to be countervailable in the LWS investigation was the "government provision of land for less than adequate remuneration." While the United States now claims that this subsidy was "unique" and "only available to enterprises investing within the park", it fails to identify a *single aspect* of this alleged subsidy that was "only available" to companies located within the New Century Industrial Park. The subsidy that Commerce identified was the provision of land by the government at a price that Commerce considered to represent less than adequate remuneration. The same government – Huantai County – provided land to enterprises located *outside* of the "designated geographical region" at the same or lower prices. The subsidy that Commerce identified was therefore not "unique" or "only available" to companies located within the New Century Industrial Park, as the United States now claims.

36. For these reasons, the Panel should find that Commerce's determination of specificity in respect of the alleged land-use rights subsidy in the LWS investigation was not in accordance with the requirements of Article 2 of the SCM Agreement.

V. THE UNITED STATES ACTS INCONSISTENTLY WITH THE COVERED AGREEMENTS BY IMPOSING COUNTERVAILING DUTIES WITHOUT ESTABLISHING WHETHER THERE REMAINS A SUBSIDY TO OFFSET FOLLOWING THE USE OF ITS NME METHODOLOGY TO CALCULATE ANTI-DUMPING DUTIES

37. The U.S. position on the issue of double remedies remains as impenetrable and internally contradictory as ever. On the one hand, the United States does not dispute that the methods by which an investigating authority calculates anti-dumping duties can have the effect of offsetting subsidies, both domestic and export. Nor does the United States dispute that, when Commerce has encountered these situations in the past, it has taken all necessary steps to ensure that it does not offset the same subsidies through the imposition of two different duties. The United States does not even contradict Commerce's *own acknowledgement* that the use of an NME methodology to determine normal value

is a circumstance in which the method of calculating anti-dumping duties can have the effect of offsetting subsidies – an outcome that Commerce once proclaimed it was "determined to prevent".

38. In its answers to Panel questions, however, the United States now makes the remarkable claim that Members are under *no legal obligation* to ensure that they do not offset the same domestic subsidies twice. The United States asserts that "WTO rules do not contemplate the existence of, or an adjustment for double remedies in the context of domestic subsidies." This is a breathtaking assertion – that nothing in the covered agreements prevents a Member from offsetting a domestic subsidy through the manner in which it calculates anti-dumping duties, and then offsetting the same domestic subsidy again through the imposition of countervailing duties. The United States appears to suggest that, when Commerce has taken steps to avoid double remedies in the past, it has done so as an act of altruism in the exercise of its benign discretion.

39. The United States maintains that China's argument in respect of double remedies is that a WTO Member "must *choose* between using the AD remedy and using the CVD remedy" if it designates China as a non-market economy. This is a caricature of China's argument that the United States invented in its first written submission as a litigation tactic to avoid addressing the arguments that China actually made. China's contention, which the United States has either misunderstood or mischaracterized, is that the United States acts inconsistently with the covered agreements by imposing anti-dumping duties determined under its NME methodology simultaneously with the imposition of countervailing duties on the same imported products, *without accounting for the fact that it thereby offsets the same subsidies twice.*

40. China has explained why the use of the U.S. NME methodology to determine normal value in an anti-dumping investigation has the effect of offsetting the benefit of any subsidies that the producer in the NME country may have received. Fundamentally, this is because the effect of the U.S. NME methodology is to place the producer in the position of having market-determined costs of production. Having brought the producer's costs of production "to the market", and having calculated a duty on this basis, the United States necessarily offsets any benefit or advantage that the producer obtained by receiving financial contributions from the government on terms more favourable than those available in the market. China considers that this circumstance is broadly similar to the privatization of a subsidized enterprise in an arm's-length transaction for fair market value, or the sale of subsidized inputs to an unrelated downstream producer.

41. The U.S. continues to assert that China "has failed to provide the Panel with any evidence" that the effect of the U.S. NME methodology is to offset the same subsidies that are the subject of countervailing duties. China does not believe that the existence of a double remedy is an "evidentiary question." That said, it is undisputed that China has, in fact, provided the Panel with evidence, in both its first written submission and at the first meeting of the Panel, demonstrating conclusively that "the effect of the U.S. NME methodology is to offset the same subsidies that are the subject of countervailing duties."

A. THE UNITED STATES IS LEGALLY OBLIGATED TO AVOID OFFSETTING THE SAME SUBSIDIES TWICE THROUGH THE APPLICATION OF TWO DIFFERENT DUTIES

42. The United States has an affirmative legal obligation under the covered agreements to ensure that it imposes countervailing duties solely for the purpose of offsetting subsidies that exist in respect of imported products.

43. Article 10 of the SCM Agreement provides that "Members shall take *all necessary steps* to ensure that the imposition of a countervailing duty … is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement." Article VI:3 of the GATT 1994, referenced in Article 10, provides that Members shall not levy a countervailing duty "*in excess* of an

amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export" of the product under investigation. In accordance with these Articles, the Appellate Body has said that "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation." As China noted in response to Question 76 from the Panel, this obligation is further reinforced by Articles 19.3 and 19.4 of the SCM Agreement.

44. As they pertain to the issue of double remedies for domestic subsidies, these provisions establish: (1) that Members may not impose CVDs to offset subsidies that they simultaneously offset through the methods by which they calculate anti-dumping duties; (2) that Members must take "all necessary steps" to ensure that this does not occur; and (3) that investigating authorities must investigate and make a determination as to the "precise amount of a subsidy attributed to the imported products under investigation", taking into account the simultaneous use of an anti-dumping methodology that has the effect of offsetting the same subsidies.

45. By its own admission, Commerce did not take *any* steps, let alone "all necessary steps", to ensure that it imposed countervailing duties for the purpose of offsetting a subsidy that continued to exist in respect of the imported products. We know this because Commerce stated, unequivocally, that it has no authority under U.S. law to examine in the context of a countervailing duty investigation whether the use of an NME methodology in a parallel anti-dumping investigation has the effect of offsetting the same alleged subsidies.

46. Commerce therefore proceeded to impose countervailing duties in all four investigations without any examination of whether the amount of the countervailing duties would be in excess of the amount of the subsidies that accrued to the imported products, taking into account the simultaneous imposition of anti-dumping duties calculated under a methodology that had the effect of offsetting the same subsidies. Commerce did not "ascertain the precise amount of a subsidy attributed to the imported products under investigation", as it took no steps to determine "whether, and in what amount" the use of market-determined costs of production in the parallel anti-dumping investigations had the effect of offsetting the same subsidies that it identified in the countervailing duty investigations.

47. Commerce's failure to investigate and avoid the imposition of double remedies in the determinations at issue was inconsistent with the obligations of the United States under Article 10 of the SCM Agreement, Article VI:3 of the GATT 1994, Article 19.3 of the SCM Agreement, and Article 19.4 of the SCM Agreement. As a consequence, the "specific action against a subsidy" taken by the United States in these investigations was not "in accordance with the provisions of GATT 1994, as interpreted by the [SCM] Agreement", in contravention of Article 32.1 of the SCM Agreement.

48. The foregoing violations are both "as applied" and "as such". As detailed in response to Question 90 from the Panel, China has clearly demonstrated the precise nexus between Commerce's lack of legal authority to avoid the imposition of double remedies in parallel AD/CVD investigations of imports from NME countries (which the United States has effectively admitted in response to Question 78), and how this absence of legal authority is the source of the impairment of benefits that China has claimed in this dispute.

49. By effectively confirming Commerce's lack of legal authority to avoid double remedies in NME investigations, the United States has also confirmed the "as such" violation of Article I:1 of the GATT 1994. As China has demonstrated, Commerce has consistently avoided offsetting domestic subsidies through the application of two different duties, whether or not it had a legal obligation to do so. This is, undoubtedly, an "advantage, favour, privilege or immunity" that the United States has granted to imports from other countries with respect to the "methods of levying" charges imposed "on or in connection with importation", as well as a "rule or formalit[y] in connection with importation".

By refusing to take steps to avoid offsetting the same subsidies twice in connection with imports from countries that Commerce designates as NMEs, and by conditioning the avoidance of a double remedy upon the presentation of "evidence" that it has never required in any other circumstance, the United States has acted inconsistently with Article I:1 of the GATT 1994.

B. EVEN UNDER THE ALTERNATIVE THEORIES ADVANCED BY THE UNITED STATES AS TO WHEN A DOUBLE REMEDY WILL OCCUR, THE MEASURES AT ISSUE ARE INCONSISTENT WITH THE COVERED AGREEMENTS

50. The United States has presented various theories as to why the use of an NME methodology may "not constitute a *complete* remedy" for subsidies, or will "not necessarily capture *the full amount*" of any subsidies. The United States has alternatively argued that the existence of a double remedy depends on (1) whether there is "evidence" that "domestic subsidies pass through, *pro rata*, to U.S. prices"; (2) whether the normal value determined pursuant to the NME methodology is greater than or equal to the producer's actual (subsidized) cost of production plus the amount of any subsidies that the producer is determined to have received; or (3) whether the NME AD margin is greater than the corresponding CVD margin.

51. Theses theories do not detract from the fundamental point that Commerce uses its NME methodology to place the producer in the position of having market-determined costs of production, thereby offsetting the benefit of any subsidies that the producer might have received. Nonetheless, the U.S. theories all point in the direction of several important conclusions: (1) that the United States does not deny the existence of the double remedy problem (as, in fact, Commerce had already acknowledged); (2) that the United States appears to consider the existence of a double remedy to be a question of degree that depends on certain "factual circumstances"; and (3) that Commerce undertook no investigation whatsoever based on the theories that the United States now advances as to when a double remedy could occur.

52. For these reasons, the determinations at issue were inconsistent with the obligations of the United States under the covered agreements, even accepting the various U.S. theories.

VI. ARTICLE 12.1.1 OF THE SCM AGREEMENT ENTITLED CHINA AND RESPONDENT PRODUCERS AT LEAST 30 DAYS TO RESPOND TO ALL QUESTIONNAIRES ISSUED IN THE CVD INVESTIGATIONS

53. The plain language of Article 12.1.1 presents an insurmountable obstacle to the United States' position that Article 12.1.1 of the SCM Agreement only imposed an obligation to provide 30 days to respond to the initial questionnaire Commerce issued in the four CVD investigations, and not to the multiple subsequent ones Commerce issued in each case. Article 12.1.1. does not distinguish between the first questionnaire issued in a countervailing duty investigation, and any subsequent questionnaires.

54. Even under the United States' flawed interpretation, it is difficult to understand how the New Allegations Questionnaires provided by the U.S. in response to Panel Question 104 do not qualify as the "initial" questionnaire in these newly-initiated "investigations." In each instance, Commerce informs the relevant interested party that Commerce is "initiating an investigation" into one or more "new" programmes, and requests the party to submit its responses to the attached "New Allegations Questionnaire" within a certain period, ranging from 7 days to 14 days. Further, in virtually every case, the New Allegations Questionnaires contain, as Appendix 1, a list of "Standard Questions" for respondents to answer about the newly initiated programmes. This is the same Appendix that respondents must fill out with respect to the subsidy programmes initiated at the outset of the investigation.

55. Because the new subsidy allegations questionnaires and the supplemental questionnaires are "questionnaires" under 12.1.1, the United States has failed to comply with its obligation to give respondents a minimum of thirty days to reply to all "questionnaires used in a countervailing duty investigation."

VII. CONCLUSION

56. China respectfully requests that the Panel recommend that the United States bring the challenged measures into conformity with its obligations under the relevant covered agreements.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(24 August 2009)

I. REQUEST FOR PRELIMINARY RULINGS

1. The United States has demonstrated that China's "as such" claims are not within the Panel's terms of reference because China failed to consult on the "measure" at issue, as required by the DSU. The United States has explained how China's reliance on the Appellate Body Report in *US - Continued Zeroing* is misplaced. The United States has observed, moreover, that contrary to China's understanding, nothing in any Appellate Body or panel report, or, more importantly, the DSU, suggests that a Member may forego the prerequisite of consultations if the Member deems the new measure to be "sufficiently related" to the measures identified in the consultations request.

2. The United States has also demonstrated that the "measure" China seeks to challenge "as such" does not constitute an "omission" cognizable for purposes of WTO dispute settlement proceedings because it has not been connected to any affirmative WTO obligation to take a particular action. Furthermore, by avoiding any reference to specific aspects of U.S. law that result in the double remedies giving rise to the alleged WTO-inconsistency at issue, China has failed to "identify the specific measures at issue in this dispute," as required by Article 6.2 of the DSU. Rather than supporting China's argument under Article 6.2, the Appellate Body Report in *EC - Selected Customs Matters* highlights the inadequacy of China's panel request.

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

3. An analysis of the ordinary meaning of the term "any public body," in its context and in light of the object and purpose of the SCM Agreement, demonstrates that Commerce's financial contribution determinations were consistent with the SCM Agreement. The U.S. First Written Submission discussed why the term "public" means that a "public body" can be an entity that is owned or controlled by the government. In addition, the use of the term "any" before "public" indicates that there can be different *kinds* of public bodies. Contrary to China's argument, not all public bodies must be vested with governmental authority to entrust or direct a private body.

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

5. China argues that Article 1.1(a)(1)(iv) of the SCM Agreement requires that an entity responsible for entrusting or directing a private body must itself be vested with government authority. The SCM Agreement, however, defines the term "government" as "government or any public body," so Article 1.1(a)(1)(iv) does not relate strictly to "governmental authority." China also wrongly conflates the standard under Article 1.1(a)(1)(iv) with the question of whether an entity is a "public body." An entrustment or direction analysis involves an analysis of the actions of the government or

public body and the *actions* of the private body or bodies at issue. A public body analysis, on the other hand, involves an analysis of the *nature* of the entity or entities at issue.

6. The term "public body" is properly understood as an entity owned or controlled by the government, but not necessarily authorized by the government to perform government functions. The *Korea – Commercial Vessels* panel adopted this approach, rejecting an argument by Korea that was substantially similar to China's. That panel also rejected the contextual argument China makes here, which is based upon the definition of "public entity" in the GATS Annex on Financial Services. That definition, which applies only for purposes of the Annex on Financial Services, is not relevant to an interpretation of "public body" in the SCM Agreement. An analysis of similar terms in other covered agreements cannot outweigh the ordinary meaning and immediate context of a term in the SCM Agreement.

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

8. An interpretation of Article 1 of the SCM Agreement that treats the government-owned entity as a public body ensures that governments will not be able to hide behind their ownership interests to escape the disciplines of the SCM Agreement. Such a reading of Article 1 is consistent with the object and purpose of the SCM Agreement.

9. The Working Party Report on China's Accession further confirms the correctness of the U.S. interpretation with respect to the entities at issue in this dispute. Paragraph 172 of the Working Party Report reflects that the representative of China did not dispute the understanding of some Members that "when state owned enterprises (including banks) provided a financial contribution, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement." China thus indicated its own recognition that its state owned enterprises and state owned commercial banks are "public bodies."

10. China incorrectly argues that the Draft Articles on Responsibility of States for Internationally Wrongful Acts are relevant rules of international law that should be used to interpret the term "public body," and that the Appellate Body in *US – DRAMS* endorsed the use of the Draft Articles in interpreting Article 1 of the SCM Agreement. In *US – DRAMS*, the issue was whether the Korean government had entrusted or directed private bodies within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. The issue in this dispute is the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. The Appellate Body did not decide in *US – DRAMS* that government-owned entities cannot be "public bodies."

11. The Draft Articles are not relevant rules of international law applicable in the relations between the parties in this dispute, within the meaning of Article 31(3)(c) of the Vienna Convention. The threshold question is whether the Draft Articles, and particularly the attribution guidelines in Chapter II of Part One of those articles, are relevant and applicable. They are *not* relevant and *not* applicable, and the Panel is *not* required to rely upon them. The Draft Articles concern "the secondary rules" of state responsibility, and the "general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom." The Draft Articles say nothing about *whether* a breach occurred.

12. The question of whether goods or loans were provided by the "government or any public body" in China is not one of attribution of wrongful acts to China. That is, it is not a "secondary rule" question of attribution. It relates to the substantive conditions for something to be a subsidy, which, even if it is, is not prohibited as such. China is trying to graft secondary rules of general international

law (limited to wrongful conduct) onto one of several conditions under primary rules of international law that do not even define wrongful conduct.

13. Additionally, Article 55 of the Draft Articles contains a *lex specialis* clause. The SCM Agreement is a "special rule of international law" that supersedes the Draft Articles. Contrary to China's argument, the Draft Articles are not parallel to, or "fully aligned" with, the SCM Agreement and it is not clear that the detailed distinctions in those articles are "applicable in the relations between the parties" as customary international law. The panel in *Korea – Commercial Vessels* declined to read the Draft Articles into an interpretation of the term "public body."

14. With respect to sales through trading companies, Commerce concluded that the public bodies made financial contributions to the trading companies, and these financial contributions conferred benefits to the respondent subject merchandise producers. This was a proper application of the SCM Agreement. No entrustment or direction analysis was required.

III. COMMERCE'S DETERMINATIONS TO RELY UPON OUT OF COUNTRY BENCHMARKS WERE CONSISTENT WITH ARTICLE 14 OF THE SCM AGREEMENT

15. The United States and China appear to agree, although for different reasons, that it will not be necessary for this Panel to make any findings with respect to paragraph 15(b) of China's Accession Protocol. However, the United States notes that China incorrectly argues that Commerce was required to reference paragraph 15(b) of the Accession Protocol in its CVD determinations. The Appellate Body has explained that proceedings before a national authority, such as the CVD investigations at issue in this dispute, may properly focus solely on "the requirements of the national law, regulations and procedures."

16. Contrary to China's mischaracterization of the U.S. position, the United States underscores that the Accession Protocol sets forth *additional* terms and conditions to which China agreed as a condition for its accession to the WTO. Paragraph 15(b) was included in China's Accession Protocol because the "special difficulties" associated with the transitional nature of China's economy may justify the use of out-of-country benchmarks. The text of paragraph 15(b) does not impose on Members any obligation to make any particular factual findings or determinations, and does not impose restrictions on the use of out-of-country benchmarks beyond those contained in Article 14 of the SCM Agreement. Additionally, because the methodologies the United States used to identify and measure a benefit under paragraph 15(b) are the same as those used under Article 14, and are provided for under the laws and regulations the United States has already notified to the SCM Committee, the United States is in full compliance with paragraph 15(c) of China's Accession Protocol.

17. Contrary to China's argument, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber CVD Final* require a separate price distortion analysis before a Member may rely upon an out-of-country benchmark. The Appellate Body's analysis in *US – Softwood Lumber CVD Final* reflects the economic theory commonly referred to as the "Dominant Firm Model." Consistent with this theory, the Appellate Body noted that "[w]hen private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers *will align* their prices with those of the government provided goods, it will not be possible to calculate benefit having regard exclusively to such prices." The Appellate Body concluded that where an investigating authority has determined that a government plays such a predominant role, the investigating authority does not act inconsistently with Article 14(d) of the SCM Agreement by using an out-of-country benchmark.

18. In the investigations China challenges, Commerce applied the Appellate Body's reasoning in *US – Softwood Lumber CVD Final* to the facts before it. Commerce determined, based on record

evidence, in the case of the markets for hot-rolled steel and BOPP, that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's distortions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market determined prices to measure the adequacy of remuneration." Likewise, for loans and land-use rights, based on the evidence on the administrative record, Commerce determined that, due to the government's predominant role, it was necessary to use out-of-country benchmarks to measure the benefit.

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

20. Available evidence showed that China owned *96 per cent* of the producers in the hot-rolled steel market and at least *90 per cent* of the producers in the BOPP market. Thus, private suppliers consisted of only a small portion of the sales in those markets. Despite complaining that Commerce applied a *per se* rule, China does not explain what other factors Commerce should have addressed in determining whether the government had a predominant role and which relevant record evidence was not assessed. Also, during the investigation, China declined numerous requests to provide additional information. Thus, Commerce determined that China had a predominant role in the hot-rolled steel and BOPP markets and, therefore, used out-of country benchmarks to measure the benefit conferred by government-provided inputs. Commerce reached its determination by assessing all record evidence, not simply government ownership of domestic production.

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

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

23. In the OTR Tires and LWS CVD investigations, Commerce found that China "exercises control over the supply side of the land market in China as a whole so as to distort prices in the primary and secondary markets." Commerce found China not only owns all of the land, but retains and exercises significant control over the supply of land-use rights for private industrial use, and can therefore influence price. China essentially argues that Members should never be able to resort to an

out-of-country benchmark when determining the benefit for land-use rights. China's position is incompatible with the Appellate Body's findings in *US – Softwood Lumber CVD Final*.

24. Because prices for land-use rights within China were inappropriate for use as benchmarks, Commerce compared the prices respondents paid for land-use rights to the sales of certain industrial land in Thailand. In arriving at this determination, Commerce evaluated several criteria to ensure that the comparison prices would "relate or refer to or be connected with" China's prevailing market conditions, consistent with Article 14(d) of the SCM Agreement.

IV. CHINA HAS FAILED TO DEMONSTRATE THAT COMMERCE WAS REQUIRED TO PROVIDE A CREDIT IN THE BENEFIT CALCULATIONS FOR INSTANCES IN WHICH CHINA PROVIDED RUBBER INPUTS FOR ADEQUATE REMUNERATION IN THE OTR TIRES CVD INVESTIGATION

25. China has shifted away from its contextual argument based on the term "product" in various provisions of the SCM Agreement and the GATT 1994 *other than* Article 14 of the SCM Agreement, and now posits a new and different "textual" basis for its invented credit/offset obligation, suggesting that the use of the term "good" in Article 14(d) of the SCM Agreement establishes the obligation and limits its application to situations under Article 14(d). This is a complete shift in China's position. Moreover, contrary to China's argument, the mere use of the "singular term ‘good'" in Article 14(d) cannot establish an obligation to aggregate the benefits of all transactions during the entire period of investigation involving the provision of a good and provide credit in such an aggregate benefit calculation for transactions in which the good was sold for more than the established benchmark, and also limit this obligation to the unique situation of government-provided goods or services. China's argument is simply not credible.

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

27. The context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. The SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction by transaction basis. However, the ability of a Member to investigate more than one subsidy in a single proceeding is not disputed. When analyzing multiple subsidies, though, there is no obligation to provide a credit in that analysis when an investigating authority determines that a granting authority did not provide a subsidy.

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

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

30. China has not explained how the United States acted inconsistently with any of the provisions to which China makes reference. A string citation is not a substitute for a legal argument. China has failed to establish that the United States acted inconsistently with any of provision of any covered agreement.

31. Furthermore, with respect to Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because the SCM Agreement defines "levy" as "the definitive or final legal assessment or collection of a duty or tax," and the United States does not levy duties in a CVD investigation, there is simply no basis for China to claim a violation of these provisions based on the challenged CVD investigations. While China cites to the Appellate Body and panel reports in *US – Countervailing Measures* in support of its argument, neither the Appellate Body nor the panel in that dispute addressed the textual argument the United States has raised in this dispute. To be clear, the United States is not arguing that the obligations found in these provisions are inapplicable to the United States. Rather, the United States is explaining that these obligations are only applicable *when the United States actually levies duties*. Here, China's claims under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 are premature and must be rejected.

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

32. Commerce's specificity determinations for the policy lending subsidy and land-use rights subsidy were clearly substantiated by positive evidence and otherwise in accordance with the covered agreements. China argues that Commerce was required to determine that the benefits of these subsidy programmes, rather than the subsidy programmes themselves, were specific. China's reading of Article 2 of the SCM Agreement is not supported by the text or structure of the SCM Agreement, and must be rejected by this Panel. Neither Article 2.1(a) nor Article 2.2 requires an investigating authority to revisit the benefit determination to determine specificity. Prior WTO panels have recognized the separate and independent nature of a specificity determination. This is reflected in the structure of Article 1 of the SCM Agreement, which identifies three criteria for a countervailable subsidy: financial contribution, benefit, and specificity.

33. With respect to the OTR Tires CVD investigation, China complains that the legislation on which Commerce relied for its specificity determination does not "define[] the elements of the subsidy." But this is not required by the SCM Agreement. Instead, Article 2.1(a) of the SCM Agreement requires an investigating authority to determine only whether legislation explicitly limits access to the subsidy to certain enterprises. Here, national, provincial, and municipal legislation and policy documents, viewed as a whole, explicitly limited access to the policy lending subsidy to a group of industries including the tire industry.

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

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

36. With respect to the LWS CVD investigation, China argues that Article 2.2 of the SCM Agreement requires that a regional subsidy be limited to a subset of enterprises or industries within a designated geographical region. China's interpretation would require that, in order for a subsidy to be specific under Article 2.2, it would also have to be specific under Article 2.1 – limited to certain enterprises. China's interpretation renders Article 2.2 redundant with Article 2.1. This is contrary to customary international law rules of treaty interpretation.

37. China cites to the 1990 Dunkel draft of the SCM Agreement in support of its argument. However, recourse to such supplementary means is permissible only in limited circumstances. In this case, interpretation of Article 2.2 of the SCM Agreement in its context and in light of the object and purpose of the agreement does not lead to a manifestly absurd or unreasonable result or leave the meaning of Article 2.2 ambiguous or obscure. Consequently, there is no need to have recourse to the material that China has proffered. In any event, however, a much more reasonable explanation for the change in the text identified by China supports the U.S. understanding of regional specificity. That is, a subsidy that goes to every enterprise or industry in a region is regionally specific, but Article 2.2 does not require that all enterprises in the region receive the subsidy to find the subsidy regionally specific.

38. China argues that the land-use rights subsidy in the LWS CVD investigation was not regionally specific because enterprises both inside and outside the Park paid the same price for land-use rights. China conflates the benefit and specificity analyses. The text of Article 2 makes no reference to a subsidy benefit and the structure of Article 1 demonstrates that a specificity determination is separate and independent from a benefit determination. In addition, China's theory that a benefit must also be specific to find a subsidy regionally specific must be rejected because it would allow a granting authority to circumvent the disciplines of Article 2.2 simply by ensuring that at least one enterprise outside the region receives a similar benefit.

VI. THE UNITED STATES DID NOT ACT INCONSISTENTLY WITH THE SCM AGREEMENT OR THE GATT 1994 BY CONCURRENTLY APPLYING CVD AND AD MEASURES TO CERTAIN PRODUCTS FROM CHINA

39. The real locus of China's challenge is the concurrent application of AD and CVD measures. China's attempts to suggest that concurrent application would still be permissible where the investigating authority takes "steps" to ensure that the same subsidies are not offset twice are unavailing. Under China's own theory, the "steps" that an investigating authority would have to take would necessarily result in being required to *choose* between imposing AD duties on the basis of an NME methodology and imposing CVDs.

40. China's theory as to the existence of a so-called double remedy is premised on its view of the "overlapping rationales" of an NME methodology and the imposition of CVDs. China argues that a double remedy is created because the NME normal value "necessarily captures any trade-distorting effects of alleged subsidies." This theory contains multiple flaws.

41. <u>Incorrect Rationales for NME Methodology and CVDs</u>: China incorrectly asserts that subsidization is among the market distortions that the NME methodology is "meant to counteract."

The use of an NME methodology, however, is meant to replace unreliable costs and prices in the NME with surrogate values from a market economy, in order to calculate normal value to assess whether price discrimination exists. Commerce determines whether a country should be considered an NME based on a number of statutory criteria, none of which concerns subsidization. China relies on a statement by the U.S. Congress in support of its view that Commerce generally does not use factor values that may be subsidized. However, rather than ensuring that subsidized factor values are not used, Commerce considers subsidization only in a limited set of circumstances, as evidenced by the determinations in the investigations at issue.

42. China also asserts that the purpose of imposing CVDs is to offset any "competitive advantage" a firm may receive by virtue of a subsidy, or to correct any economic "distortions" that result from that subsidy, and in so doing, also erroneously suggests that the level of CVDs imposed is connected to and somehow reflective of the degree of "competitive advantage" or "distortions." The SCM Agreement, however, does not require any demonstration by an investigating authority, when considering the level at which CVDs may be imposed, that subsidies confer a "competitive advantage" upon their recipients or create economic "distortion." Article VI:3 of the GATT 1994 and Article 19.2 of the SCM Agreement make plain that CVDs may be imposed to offset the full amount of subsidies.

43. Normal Value is Not a "Remedy": China's theory obscures the basic point that the remedies at issue are AD duties and CVDs, while China's argument addresses NME normal values. Normal values, of course, are not in and of themselves AD duties. China's exclusive focus on normal value explains why China errs in emphasizing the similarity between some of the factor values selected by Commerce in determining normal value in the AD investigations, and the benchmarks that Commerce used to value subsidies in the concurrent CVD investigations. According to China, this demonstrates that the resulting AD duties and CVDs address the same economic "distortion," and, therefore, that the AD duties remedy subsidies. China, however, fails to actually compare the two *remedies* at issue, basing its conclusion instead on the antecedent determination of normal value.

44. Faulty Economic Logic: Even assuming, *arguendo*, that normal values, by themselves, could create a double remedy, China's theory about NME normal values is unsound because it is based on the assumption that NME normal values are completely unaffected by subsidies. This is simply not true. First, put simply, NME subsidies may easily affect the *quantity* of factors consumed by the NME producer, which, when multiplied by the surrogate factor *values*, results in lower normal values and, hence, lower dumping margins. Second, in determining normal value in NME cases, Commerce may use factor values based on the prices of inputs imported into China from market economy countries, which inputs may well be priced lower as the result of competing with subsidized products *in China*. Finally, in at least some cases where increased NME exports of the product account for a large enough share of the world market to lower world prices, these lower prices would reduce profits for producers selling in these markets, which would then reduce profit rates Commerce derives from their financial statements to add to normal value.

45. GATT Article VI:5 prohibits such concurrent application only in the circumstance where imposing both remedies would "compensate for the same situation of dumping or export subsidization." No other provisions of the covered agreements preclude the concurrent application of AD and CVD measures under any other circumstances. That other rules did not so preclude the concurrent application is confirmed by the adoption and ultimate elimination of Article 15 of the Tokyo Round Subsidies Code, which imposed upon Signatories the obligation to choose between AD investigations and CVD investigations when examining allegations of injury caused by imports from an NME country. Members did not include this requirement when they adopted the SCM Agreement, which contains no provision similar to Article 15 on concurrent application of AD and CVD measures. Nor did Members include in China's Protocol any limitation on a Member's right to concurrently apply CVDs and AD duties calculated on the basis of an NME methodology. Therefore,

the covered agreements do not contain the prohibition on concurrent application that China seeks to have this Panel effectively create.

46. Articles 19.3 and 19.4 of the SCM Agreement: China's claims under Articles 19.3 and 19.4 must be based on a CVD that has been "levied." However, no CVDs have been "levied" yet under the U.S. retrospective system. Furthermore, China erroneously asserts that the *AD duty* calculated under the NME methodology must be understood to somehow constitute a CVD within the meaning of the SCM Agreement. Moreover, because China considers such an AD duty to also be a CVD, a Member must first make the requisite findings of a CVD investigation. Accepting China's theory would mean that imposition of such an AD duty, without conducting a CVD investigation, would necessarily violate the SCM Agreement.

47. GATT Article I:1: The United States has explained that China's MFN complaint centers on the application of the NME methodology, and that because such application is expressly authorized by paragraph 15(a) of China's Protocol, it does not contravene Article I:1. With respect to China's "as applied" claims under Article I:1, the United States has noted China's failure to identify how the United States did not accord to products from China the same "advantage" accorded "like products" from market economies. The sole basis for China's conclusion that Commerce has accorded certain treatment to "like products" is mere speculation.

48. "As Such" Claims: China has failed to meet its burden as a threshold matter of establishing the existence of the "absence of legal authority" that it seeks to challenge "as such." None of the sources cited by China supports the conclusion China would need to establish, namely, that *no legal authority* exists for Commerce to take whatever (undefined) actions China considers necessary to "avoid a double remedy." Furthermore, because China does not challenge a "measure" that mandates any WTO-inconsistent action, but challenges how Commerce chooses to exercise its discretion, the so-called "absence of legal authority" is not inconsistent with U.S. obligations under the WTO Agreement.

VII. PROCEDURAL CLAIMS UNDER THE SCM AGREEMENT

49. In its written responses to the Panel's questions about its claim under Article 13.1 of the SCM Agreement, China states that, in the light of the U.S. confirmation that it would continue to afford a reasonable opportunity for consultations throughout an investigation, as required by Article 13.2, China "does not believe the Panel needs to address this issue further." The United States agrees that it is unnecessary for the Panel to make any findings on this claim.

50. With respect to China's claim under Article 12.1.1 of the SCM Agreement, the United States has explained that the thirty-day requirement in that provision applies only to the questionnaire issued at the outset of each investigation. China disputes this view, arguing that initial questionnaires and new subsidy allegation questionnaires are "indistinguishable."

51. China's argument ignores the conceptual difference between the initial questionnaire and subsequent requests for information, including new subsidy allegation questionnaires. The initial questionnaire, by its very nature, asks not only about specific programmes, but also general questions on a variety of other relevant issues. A new subsidy allegation questionnaire tends to include questions only on a specific programme and does not include general questions that have already been asked in the initial questionnaire. This critical difference, overlooked by China, is reflected in the full range of questionnaires issued to *all* interested parties, including respondent companies, in *all four* CVD investigations at issue.

52. The United States disagrees with China's assertion that reading Article 12.1.1 to apply only to initial questionnaires would provide investigating authorities "unfettered discretion" and would place interested Members and parties "entirely at the mercy of the demands of investigating authorities."

This hyperbolic concern ignores the other provisions of the SCM Agreement, in particular, the other sub-paragraphs of Article 12, which collectively ensure that interested Members and parties are given rights in proceedings before investigating authorities.

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