ANNEX D

ORAL STATEMENTS OF THE PARTIES, FIRST AND SECOND PANEL MEETINGS

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA – FIRST MEETING

(20 July 2009)

Introduction

1. In its first written submission, the United States vacillates between two extremes. For the most part, it chooses to repeat the rationales set forth in Commerce's final determinations without amplification. Alternatively, in a number of critical areas, the U.S. abandons entirely the rationales Commerce adopted in its final determinations, offering up wholly new ones in their place. For example, while Commerce clearly did *not* apply a per-se rule of majority ownership in finding that state-owned commercial banks are "public bodies", the United States now claims that it did. And while the predicate of Commerce's "policy lending" subsidy was the provision of loans at preferential, non-commercial interest rates, the U.S. now disavows that characterization entirely, and claims that the real "subsidy" was the "allocation" of credit at ordinary commercial interest rates. These abrupt shifts in the U.S. position reflect the basic lack of coherence in Commerce's determinations, and the inability of the United States to defend these determinations based on their stated rationales.

2. It is well-established that a panel's "critical and searching" examination of an investigating authority's conclusions must "be based on the information contained in the record and the explanations given by the authority in its published report", not on *ex post* rationalizations. In light of the large number of *ex post* rationalizations contained in the U.S. submission, we will have to be vigilant in holding the United States to the rationales that Commerce actually set forth in its published determinations.

3. I will now turn to the four key issues that I would like to address in this opening statement. These are: (1) the interpretation of the term "public body"; (2) Commerce's benefit calculations and the use of non-Chinese benchmarks; (3) Commerce's specificity determinations in respect of "policy lending" and land; and (4) the issue of double remedies.

Financial Contribution / Public Body

4. I would first like to turn to the proper interpretation of the term "public body" in Article 1.1 of the SCM Agreement. As the panel is aware, the overwhelming majority of the financial contributions that Commerce found in the CVD investigations at issue were provided by State Owned Enterprises (SOEs) and State Owned Commercial Banks (SOCBs). In every instance, Commerce found that SOEs were public bodies, applying what the United States concedes is a *per se* rule of majority government ownership. It now offers the same *per se* rationale to defend Commerce's treatment of SOCBs as public bodies, even though Commerce offered a different justification in the determinations at issue.

5. The United States' exclusive focus on government ownership finds no support in the text or context of Article 1.1. Article 1.1 explicitly defines "government" and "public body" *collectively* under the single heading of "government". The only reasonable inference to draw from this is that the drafters considered that a public body must possess characteristics similar to those that define a government. In *Canada Dairy*, the Appellate Body explained that the "essence of government" flows

from the *functions* it performs and the *authority* it possesses to perform them. This led it to conclude that a "government agency" is an "entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character".

6. I would like to emphasize that the term for "government agency" in the Spanish text of the Agreement on Agriculture – "organismo público" – is *identical* to the term used for "public body" in Article 1.1 of the SCM Agreement. The French versions of the two Agreements likewise use essentially identical language for the phrases "government or any public body" and "governments or their agencies". In light of the obligation of the treaty interpreter "to seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language", the English terms "public body" and "government agency" should be treated as functional equivalents, just as the comparable terms in the Spanish and French texts are. The interpretation of the term "public body" that China advocates is consistent with all three authentic texts of the SCM Agreement; the U.S. interpretation is directly in conflict.

7. As China has shown, the ILC Articles on State Responsibility are relevant rules of international law that have frequently have been relied upon by panels and the Appellate Body when interpreting the covered agreements. They make clear that mere government ownership is legally insufficient to attribute the conduct of a state-owned entity to a State. Remarkably, the United States asks the panel to disregard this internationally accepted principle, stating that the Appellate Body in *US – DRAMS* only cited the ILC Articles when addressing Article 1 of the SCM Agreement for the "unremarkable proposition that the conduct of private parties is presumptively not attributable to the State", a proposition that the United States "does not dispute".

8. As the language from the Appellate Body determination makes clear, the "unremarkable proposition" the Appellate Body endorsed, and that the United States now "does not dispute", is that the "private bodies" whose conduct presumptively is not attributable to the State include "*corporate entities ... owned by and in that sense subject to the control of the State*". What the United States apparently fails to appreciate is that SOEs are precisely the type of state-owned corporate entities whose conduct the Appellate Body recognized is presumptively not attributable to the State "*unless they are exercising elements of governmental authority*". Commerce's *per se* rule is irreconcilably in conflict with the international law rule the United States now concedes it "does not dispute".

Benefit / Article 14

9. China notes that the United States' entire defence of Commerce's resort to out-of-country benchmarks relies on its assertion that "the Appellate Body has found that Article 14 of the SCM Agreement affords Members a great deal of flexibility in the calculation of benefit". This is a gross mischaracterization of the relevant Appellate Body decisions.

10. The chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the recipient ... *shall be consistent* with the following guidelines". The Appellate Body has said that use of "the term 'shall' in the last sentence of the chapeau" together with the term "guidelines" establish "*mandatory parameters* within which the benefit *must be calculated*". The mandatory parameters for determining whether the provision of goods has conferred a benefit are set forth in Article 14(d). It provides that "the adequacy of remuneration *shall be determined* in relation to *prevailing market conditions* for the good … in question *in the country of provision* … (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)".

11. All parties agree that the Appellate Body's decision in *US – Softwood Lumber IV* is the touchstone for evaluating compliance with this provision. However, the Appellate Body *did not* provide the unqualified endorsement of out-of-country benchmarks that the U.S. repeatedly attributes

to it in its first submission. To the contrary, the Appellate Body said that the "possibility" of resorting to a benchmark other than private prices is "very limited".

12. According to the Appellate Body, resorting to an out-of-country benchmark is permissible only "when it has been *established* that those private prices have been distorted by the predominant role of the government in the market as a provider of the same or similar goods". That determination cannot be presumed, and "must be made on a case-by-case basis, according to the underlying facts of each countervailing duty investigation". The 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.

13. In each of the CWP, LWR, and LWS investigations, Commerce rejected private prices on the grounds that they were distorted merely by virtue of the extent of state-ownership in the relevant markets. By employing a *per se* rule of distortion based on nothing more than the extent of SOE involvement in the input markets, Commerce did precisely what the Appellate Body said it could not do, under any circumstance: it presumed distortion.

14. Turning next to land, Commerce again found that prices were distorted based largely on the mere fact that the government was a significant supplier in the market. But Commerce went further, and cited a number of factors wholly unrelated to the government's role as a provider of the financial contribution at issue, that, in its view, justified resort to an external benchmark because "property rights remain poorly defined and weakly enforced" in China. With respect, Commerce's subjective characterization of the legal status of property rights in China is no basis for rejecting Chinese land prices as a benchmark under Article 14(d).

15. The practical problems the Appellate Body identified in *Softwood Lumber IV* are so severe in the context of land-use rights as to preclude resort to an external benchmark in any circumstance. But whether the Panel agrees or disagrees with this point, there can be no dispute that the Thailand benchmark Commerce chose in this case does not begin to meet the standards the Appellate Body established in *Softwood Lumber IV*.

16. Commerce's use of out-of-country benchmarks for loans raises equally alarming implications for the proper operation of Article 14. Under Article 14(b), the benchmark for determining whether a government-provided loan confers a benefit is a "comparable commercial loan which the firm could actually obtain on the market". Yet Commerce's benchmark for loans was an "interest rate" it derived from a 33-country regression model. It barely needs mention that no borrower in China could "actually obtain" a loan at this fictitious interest rate. But China's principal objection to Commerce's application of Article 14(b) is the *premise* that led Commerce to undertake its search for an interest rate outside of China. Namely, that because of the purported predominant role of the Chinese government in the banking sector, there are no "fully market-determined" interest rates in China.

17. Commerce's rationale is based on the false premise that interest rates ordinarily are determined in the absence of significant government intervention, but they are not. Not in China, not in the United States, nor anywhere else in the world. As explained by an expert on monetary economics, "[g]overnment intervention in the credit market to affect the level of interest rates is … observed in almost all economies, being the central tool of monetary control by central banks around the world".

Specificity

18. In OTR, Commerce found that "policy lending" – which it defined as the provision of loans by SOCBs on a "preferential, non-commercial basis" – was *de jure* specific to producers in the tyre industry. Under Article 2.1(a), a subsidy is *de jure* specific if "the granting authority, or the

legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises …". The United States previously has recognized that a finding of *de jure* specificity must be based on "the actual words of the law" pursuant to which the subsidy is provided. China agrees.

19. In this case, the "legislation" that Commerce relied upon for its finding of *de jure* specificity was a series of national and provincial economic planning documents. The question under Article 2.1(a) is whether the "actual words" of these measures "explicitly limit access" to "preferential, non-commercial" loans by SOCBs to companies in the tyre industry, or at least to a "group of enterprises or industries" that includes the tyre industry.

20. However, the United States now *concedes* that producers in the tyre industry did *not* obtain loans from SOCBs at "preferential, non-commercial" rates of interest. The United States instead appears to contend that the mere fact that an industry is *mentioned* somewhere in an economic planning document gives it access to credit that it could not otherwise obtain, and that this alone is a "subsidy", even when the borrower pays the same interest rate as other borrowers. Even more remarkably, the United States now alleges that the hundreds of different industries referred to in the planning documents *collectively* constitute "certain enterprises" within the meaning of Article 2.1(a), and that the alleged subsidy (whatever it might be) is "explicitly limited" to these industries.

21. The United States has argued in DS353, the Boeing subsidies dispute, that programs available to "diverse industry sectors that cover a significant portion of the ... economy" are not *de jure* specific under Article 2.1(a). In light of this argument, it is hard to see how the United States can maintain in the present dispute that the "diverse industry sectors" referred to in China's economic planning documents, which likewise cover "a significant portion" of the Chinese economy, can collectively constitute "certain enterprises". Moreover, the *ex post* rationale advanced by the United States in support of a finding of *de jure* specificity no longer bears any relationship to the subsidy benefit that Commerce purported to measure, which was clearly premised on the notion that borrowers in the tyre industry received loans from SOCBs at preferential, non-commercial rates of interest.

22. Turning to land, I'll make two brief points about Commerce's finding in LWS that the alleged provision of land-use rights for less than adequate remuneration was "regionally specific" to the New Century Industrial Park in Huantai County, Shandong Province.

23. First, the United States maintains that, under Article 2.2, Commerce was not actually required to find that the alleged *subsidy* was limited to the "designated geographical region". Rather, it was sufficient for Commerce to find only that the *financial contribution* was limited to the designated geographical region. The United States blatantly disregards the text of Article 2.2, which clearly requires *the subsidy* to be limited to certain enterprises located within the designated geographical region. It is not adequate under Article 2.2 to find that something *other* than a "subsidy", as defined in Article 1, is limited to certain enterprises located within a designated geographical region.

24. Secondly, the United States does not dispute that companies paid the same amounts for land-use rights in Huantai County whether they were located inside or outside of the industrial park. However, the U.S. still seeks to defend Commerce's finding that the alleged subsidy was "limited to certain enterprises" *within* the industrial park. It would stand the notion of regional specificity on its head to conclude that a subsidy is regionally specific even though it is provided to enterprises located *outside* of the "designated geographical region".

Double Remedies

25. Contrary to what the United States claims in its first submission, China does not contend that the United States must "choose" between the use of countervailing duties and the use of an NME

methodology. Rather, China's contention is that *when* Commerce chooses to apply the two remedies simultaneously, it must do so in a manner that takes into account the fact that it offsets the same alleged subsidies through the manner in which it calculates anti-dumping duties.

26. Once this mischaracterization of China's argument is corrected, the United States has remarkably little to say on what China considers to be the fundamental issues in dispute. These issues are: (1) Whether the double remedy problem *exists*; (2) If so, what are the circumstances in which a double remedy would *arise*; (3) Whether the United States has a *legal obligation* under the covered agreements to avoid the imposition of double remedies in these circumstances; and (4) Whether Commerce has *authority* under U.S. law to avoid the imposition of a double remedy where one arises.

27. As to the existence of double remedies, there can be little room for disagreement. Commerce has explicitly acknowledged that "a possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from NME countries, and it proclaimed that it was "determined to prevent any double remedies from arising". Moreover, the double remedy problem has been the subject of extensive consideration by the U.S. Congress, the U.S. Government Accountability Office, and by Commerce itself.

28. With respect to the circumstances in which a double remedy would arise, the United States does not appear to dispute that subsidies are among the distortions that the use of an NME methodology is meant to address. The essence of the U.S. response is that the use of an NME methodology may "not constitute a *complete* remedy" for the subsidies, and that it will "not necessarily capture the *full amount*" of any subsidies. If it is solely a matter of *degree,* as the United States now seems to suggest, then it should explain what steps Commerce takes to determine the *extent* of the double remedy, and why it did not take these steps in the investigations at issue, where the problem of double remedies unquestionably arose.

29. This leads to the third question, namely, whether it is consistent with the covered agreements to offset the same subsidies through the application of two different duties. Article VI:3 of the GATT 1994 says, countervailing duties are "levied for the purpose of offsetting … any subsidy bestowed … upon the manufacture, production or export of … merchandise". In light of this purpose, it is hard to see what legal justification there could be for offsetting the same alleged subsidy twice. However, the United States does not take a position on whether it would have a legal obligation to prevent the imposition of a double remedy were one to occur in the case of NME imports.

30. The final question is whether Commerce has authority under U.S. law to avoid the imposition of a double remedy where one arises. Commerce has proclaimed that it lacks legal authority to address the problem of double remedies, and it is reasonable to infer that it is this absence of legal authority that explains Commerce's failure to avoid the imposition of double remedies in the investigations at issue in this dispute. But it is up to the United States to explain to the Panel whether Commerce possesses authority to avoid double remedies in NME investigations, what the nature of this authority is, and why Commerce did not apply this authority in the investigations at issue.

ANNEX D-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES – FIRST MEETING

(7 July 2009)

1. Instead of addressing all of the issues raised by China in its First Written Submission, we will focus this morning on China's arguments relating to Commerce's subsidy determinations and conclude with China's challenge to a Member's right to make full use of both the anti-dumping and countervailing duty remedies available under WTO rules.

2. At the outset, it is important to have a clear understanding of exactly what China is asking the Panel to do in this dispute. Unhappy with the rules it accepted when it acceded to the WTO in 2001, China now advances interpretations of those rules that have little connection with how those rules are properly understood in light of the customary rules of interpretation of public international law. The only solution for China's complaint, if it wants to avoid anti-dumping and countervailing duties, is to cease the dumping and subsidization that gave rise to the duties in the first place.

3. **Financial Contribution:** Commerce based its "public body" determinations in the challenged CVD investigations on a proper interpretation of the SCM Agreement. Instead of properly applying the rules of interpretation reflected in the Vienna Convention to interpret the term "public body", China seeks to graft onto the SCM Agreement certain provisions of the ILC Draft Articles, which are not covered agreements, not context, nor otherwise relevant to the interpretation of the term "public body". China ignores commitments it made in the Working Party Report on its accession to the WTO that confirm that Chinese state-owned enterprises, including banks, are public bodies. The Panel should reject China's effort to avoid the ordinary meaning of the term "public body", import provisions of the ILC Draft Articles into the SCM Agreement, and evade commitments it made as part of its accession to the WTO.

4. The Panel should find that the ordinary meaning of the term "public body", read in its context and in light of the object and purpose of the SCM Agreement, indicates that a public body is an entity that is owned or otherwise controlled by the government, but not necessarily one that is authorized to exercise, or is in fact exercising, government functions. There is no need to look to the Spanish version of the Agriculture Agreement to determine the meaning of the term "public body" in the SCM Agreement.

5. The adopted panel report in the *Korea – Commercial Vessels* dispute supports the U.S. interpretation and weighs against China's interpretation. The panel there concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)". Majority government ownership can demonstrate control.

6. No entrustment or direction analysis, which is relevant only when an investigating authority seeks to determine if a financial contribution has been provided by a private body, was required, including for transactions involving trading companies.

7. **Benchmark**: With respect to benchmarks, Commerce determined that interest rates for loans and domestic prices in China were distorted because of the predominate role of the Chinese government in these markets, rendering these interest rates and domestic prices unsuitable as

benchmarks. China nonetheless argues that only in-county benchmarks may be used. If this position were accepted, Members would never be able to measure the benefit of these financial contributions because, as the Appellate Body has previously explained, the government price for the loan or land would be compared to itself.[1] Such an outcome would be inconsistent with the flexible nature of Article 14 of the SCM Agreement, which China ignores.

8. China also ignores paragraph 15(b) of its Accession Protocol and paragraph 150 of the Working Party Report which confirm the permissibility of using out-of-country benchmarks to measure any benefit in CVD investigations concerning imports from China. Paragraph 15(b) expressly recognizes that "prevailing terms and conditions in China may not always be available as appropriate benchmarks". China argues that the United States may not make reference to its Accession Protocol and Working Party Report in this dispute, claiming that doing so constitutes an *ex post* rationalization. This contention is utterly without support.

9. In determining to use external benchmarks, Commerce did not apply a "*per se* rule" that only considered the degree of state ownership of the industries. Where the facts demonstrated that Chinese prices and interest rates were distorted by the government's predominant role in a market and unsuitable as commercial benchmarks, Commerce used market-derived prices from outside China. Commerce relied on benchmarks for inputs and land-use rights that reasonably reflected "prevailing market conditions" in China, and benchmarks for loans tailored to approximate a "comparable commercial loan which the firm could actually obtain on the market". China's assertion that Commerce did not "make any effort whatsoever to ensure that these benchmarks related to prevailing market conditions in China" is simply without foundation.

10. **Providing Credits in Benefit Calculations:** Commerce was not required to provide a credit in the subsidy benefit calculation for those instances in which China provided rubber to tire producers for adequate remuneration, that is, when China did not provide a subsidy. China does not suggest that its invented obligation to provide a credit can be located in Article 14, but instead argues that the use of the term "product" in other provisions of the SCM Agreement and the GATT 1994 requires a credit. Accepting China's argument would mean that the mere use of the term "product" in these other provisions overrides the "latitude" and "leeway" that panels and the Appellate Body have found in the guidelines set forth in Article 14 of the SCM Agreement, and would elevate context above the text.

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

12. The calculation of a subsidy benefit under Article 14 of the SCM Agreement is in no way related to "zeroing", and the invocation of the term "zeroing" in this dispute is merely a distraction. The Appellate Body's findings in the "zeroing" disputes are of no assistance to this Panel, as they concern a different type of calculation under a different agreement. There is no analytical connection between the calculation of a subsidy benefit and the calculation of margins of dumping that would justify extending the Appellate Body's reasoning.

13. If China's interpretation were accepted, it would necessarily apply to all of Article 14 and would require that credit be provided whenever an investigating authority found that a financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even different types of subsidies. China's interpretation would result in a benefit calculation that is artificially low, or even zero, preventing the United States from

[1] *US – Softwood Lumber CVD Final (AB)*, para. 93.

fully offsetting the effect of subsidies found to exist. It therefore fails to read Article 14 in light of the object and purpose of the SCM Agreement.

14. **Benefit Where Inputs Purchased from Trading Companies:** With respect to China's argument that, where production inputs were purchased from trading companies, Commerce was required to measure the benefit conferred upon trading companies in addition to the benefit conferred upon respondent producers, China has not identified any provision of the SCM Agreement or the GATT 1994 with which Commerce's benefit determinations are purportedly inconsistent. It was not necessary to measure any benefit that may have been received by the trading companies. The amount or portion of any benefit received by the trading companies is irrelevant for the purpose of determining the benefit conferred upon the subject merchandise producers.

15. **Specificity:** Contrary to China's claims, Commerce's specificity determinations were consistent with the SCM Agreement. China misreads the agreement. With respect to the specificity of policy lending, China asks the Panel to apply an approach not set forth in Article 2.1(a) of the SCM Agreement. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether: (i) the granting authority explicitly limits access to a subsidy to "certain enterprises"; or (ii) the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to "certain enterprises". Nothing in Article 2.1(a) requires Members to identify legislation that defines the "elements of a subsidy". The elements of a subsidy are the financial contribution and benefit, which are analyzed separately from specificity.

16. Central, provincial, and municipal policy documents clearly substantiate that the various levels of government in China guided lending to a *group* of industries, which included the OTR tire industry. Article 2.1 of the SCM Agreement defines "certain enterprises" to include a group of industries.

17. China's challenge of Commerce's land-use rights specificity determination relies on a misreading of Article 2.2 of the SCM Agreement. Pursuant to Article 2.2, a subsidy is specific if it is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. China argues that if a subsidy is available to *all* enterprises within a designated geographical region, it is not specific pursuant to Article 2.2 of the SCM Agreement. China's interpretation would render Article 2.2 redundant, contrary to the rules of treaty interpretation. China's interpretation of Article 2.2 is also contrary to Articles 8.1(b) and 8.2(b) of the SCM Agreement. China's argument cannot be accepted.

18. Commerce properly determined in the *LWS* CVD investigation that New Century Industry Park fits the ordinary meaning of a designated geographical region. As demonstrated in the record, the land-use rights subsidy at issue was used as an incentive to relocate producers to the industrial park and was tied to the level of investment within the park. Therefore, the subsidy is unique and only available to enterprises investing within the industrial park. The fact that Huantai County may have granted other types of land-use rights to other leaseholders outside of the industrial park is irrelevant. Article 2.2 does not require an investigating authority to determine that a benefit was unavailable to all enterprises outside of the designated geographical region before finding a subsidy geographically specific. China's interpretation could lead to circumvention of the subsidy disciplines, which is both illogical and inconsistent with the object and purpose of the SCM Agreement.

19. **Concurrent Application of CVD and AD Measures:** We turn now to China's claim that a Member is not permitted to avail itself of both anti-dumping and countervailing duty remedies in respect of imports from China when the anti-dumping duty is calculated on the basis of a non-market economy methodology.

20. In its Oral Statement, China said that it "does not contend that the United States must 'choose' between the use of countervailing duties and the use of an NME methodology", only that when applying both, "it must do so in a manner that takes into account the fact that it offsets the same alleged subsidies through the manner in which it calculates antidumping duties".[2] This is simply a distinction without a difference. The logic of China's theory, under which the so-called double remedy inheres in the concurrent application of NME anti-dumping duties and countervailing duties, necessarily suggests that the United States must *choose* between the use of countervailing duties and the use of an NME methodology.

21. That Members have long recognized the right to apply anti-dumping duties and countervailing duties concurrently to imports that are both dumped and subsidized is reflected in GATT Article VI:5, which provides the only limitation on that right, solely in the context of export subsidies. This right is confirmed by the fact that the Tokyo Round Subsidies Code required an express provision in order to impose a choice upon Code signatories between the anti-dumping and countervailing duty remedy in respect of imports from non-market economies. When drafting the SCM Agreement, however, Members chose not to maintain this limitation.

22. China's Accession Protocol was negotiated against this backdrop of the well-established right to apply both anti-dumping and countervailing duties concurrently. The Protocol affirms Members' right to apply NME anti-dumping duties to imports from China, and their right to apply countervailing duties to imports from China. Nowhere in the Protocol is there any limitation on the resort to either of these remedies.

23. Without textual support for its view that Members do not have this right, China resorts to quasi-economic theories, unsubstantiated by any facts, arguing that an NME anti-dumping margin captures domestic subsidies in their entirety, rendering any application of a countervailing duty a so-called "double remedy". Whatever the merits of China's quasi-economic theories – with which we have strong disagreements, as explained in the U.S. First Written Submission[3] – the text of the covered agreements, which is the only legally binding evidence of Members' intent, does not reflect those theories.

24. Even a cursory examination of China's three narrow claims reveals that China has failed to establish any violation. China's claims under Articles 19.3 and 19.4 of the SCM Agreement – provisions that limit the amount of *countervailing duties* that may be imposed – are premised on the most fundamental of errors, namely, that a portion of the NME anti-dumping duty should be understood to be a "countervailing duty" under the SCM Agreement. An NME anti-dumping duty, however, is not imposed "for the purpose of offsetting any subsidy".[4] In addition, the alleged discrimination underlying China's MFN claim stems from the fact that imports from China, unlike those form market economies, are subject to an NME methodology. This differential treatment, however, is necessitated by the nature of China's economy itself, as recognized in the explicit authority given under China's Protocol to employ such a methodology.

25. We continue to wonder exactly what China proposes that a Member do when faced with dumped and subsidized imports from China. Is a Member expected to forego the countervailing duty remedy, specifically provided for in China's Protocol, in favour of the exclusive application of an *anti-dumping duty* calculated under the non-market economy methodology? Or is a Member expected

[2] Opening Statement of China, para. 75.
[3] U.S. First Submission, paras. 445-462.
[4] Footnote 36 of the SCM Agreement.

to forego the non-market economy methodology, also specifically provided for in China's Protocol, in favour of the exclusive application of a *countervailing duty*? These questions go to the heart of what rights, under China's argument, Members retain in respect of their trade remedy disciplines.

ANNEX D-3

ORAL STATEMENT OF THE UNITED STATES REGARDING THE U.S. PRELIMINARY RULING REQUEST – FIRST MEETING

(7 July 2009)

1. We begin this morning with an examination of China's "as such" challenge. The purpose of the WTO dispute settlement system, in the words of the DSU, is "to secure a positive solution to a dispute". To this end, the DSU contemplates a series of events that generally must occur for a dispute to be properly brought to a WTO panel. This includes a Member (i) ascertaining what measure taken by another Member is impairing its benefits under the WTO agreements[1]; (ii) consulting on that measure with the responding Member, with a view to reaching an agreed solution; and (iii) absent such a solution, then requesting a panel to examine the complaint on that measure.

2. Rather than follow the proper path leading to the establishment of a panel, China has decided that it can chart its own course by neglecting the general requirement to consult on a measure before it can become the subject of a panel request and presenting for the first time in its panel request an "as such" challenge that identifies something that is not even a "measure" for purposes of WTO dispute settlement.

A. ALLEGED "FAILURE ... TO PROVIDE LEGAL AUTHORITY" IS NOT A "MEASURE"

3. The DSU recognizes the importance of the "prompt settlement of situations" in which a Member considers that its benefits under the covered agreements "are being impaired by *measures taken* by another Member".[2] China submits that the "failure of the United States to provide legal authority" is a "measure" for purposes of WTO dispute settlement by virtue of being an "omission".[3] China characterizes the "omission" in this dispute as "[t]he failure of a Member to enact legislation that would permit its investigating authority to avoid acting inconsistently with the covered agreements".[4]

4. Not every "failure ... to enact legislation", however, is subject to challenge as an "omission". Unlike a measure "taken" by a Member[5], an "omission" or "failure" presents a special case for purposes of WTO dispute settlement. An "omission" in its ordinary meaning would not be a "measure taken". Rather, an omission can only be considered a "measure taken" if there is an affirmative obligation on a Member to take the action that the Member is accused of not having taken. In order for an "omission" to be a "measure" subject to WTO dispute settlement proceedings, a complaining party must connect such "omission" to the relevant legal obligation that requires the particular action that the responding party is alleged to have failed to take.

5. In this light, China has not established that the "failure ... to provide legal authority" is an "omission" that constitutes a "measure". At no point in its consultations request, panel request, or

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[1] *See, e.g.,* DSU Article 3.3.

[2] Article 3.3 of the DSU. (Emphasis added)

[3] See Panel Request, WT/DS379/2, p. 3; China's Response to Request for Preliminary Rulings, para. 20.

[4] China's Response to Request for Preliminary Rulings, para. 20.

[5] *See e.g.,* DSU Article 3.3 and 4.2.

even its First Written Submission, has China pointed to any WTO rule requiring the enactment of legislation to provide Commerce with particular authority. Indeed, it cannot do so because no such rule exists. None of the provisions cited by China as the legal basis of its claims provide support for the existence of the separate and distinct obligation that the United States was required to enact particular legislation. In the absence of such provisions, the assertion that the United States did not enact that legislation, even if true, does not constitute an "omission" subject to challenge in WTO dispute settlement proceedings.

B. LACK OF CONSULTATIONS ON THE ALLEGED "FAILURE ... TO PROVIDE LEGAL AUTHORITY"

6. In the U.S. First Written Submission, the United States noted that China had identified the alleged "failure ... to provide legal authority" as an entirely new measure in its panel request, notwithstanding its failure to do so in its consultations request. China does not dispute this fact. Rather, China seeks to excuse its actions on the ground that the new "measure" in the panel request "relate[s] to essentially the same dispute", seeking to find support in the Appellate Body report in *US – Continued Zeroing*.[6]

7. Unfortunately for China, that Appellate Body report does not take China where it would like to go. The Appellate Body noted several specific features of the additional measures in the *US – Continued Zeroing* dispute that led it to conclude that the additional measures did not expand the scope of the dispute. First, the Appellate Body relied on the fact that the periodic reviews and sunset reviews added by the EC in its panel request in that dispute concerned the same antidumping duties at issue in the proceedings identified in the consultations request. The Appellate Body further relied on the fact that the proceedings listed in the panel request were "successive stages subsequent to the issuance of the same anti-dumping duty orders" as the proceedings listed in the consultations request.[7] Furthermore, the Appellate Body stated that all of the measures in *US – Continued Zeroing* "derive from the same underlying legal basis", namely the anti-dumping duty order established following the respective original investigation.[8]

8. In contrast, the measures listed in the consultations request and the new "measure" alleged by China are distinct and have fundamentally different legal bases. The first is a group of affirmative determinations by the Department of Commerce, an agency of the executive branch, in furtherance of its delegated regulatory authority. The second, however, is styled as an "omission", that is, an alleged failure of the Congress to exercise its legislative function to enact a statute. The latter is clearly not a "successive stage" of the former.

9. Moreover, the measures in *US – Continued Zeroing* all involved "as applied" challenges based on the same legal claims. China suggests that the fact that it is introducing an "as such" challenge for the first time in its panel request is "not relevant".[9] This ignores the plain effect of such a challenge on a dispute that, until that moment, was based purely on "as applied" claims. As the United States observed in its First Written Submission, the Appellate Body has clearly recognized the effect of "as such" challenges, noting that "the implications of such challenges are *obviously more far-*

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[6] China's Response to Request for Preliminary Rulings, para. 30 (quoting Appellate Body Report, *US – Continued Existence and Application of Zeroing Methodology* ("*US – Continued Zeroing*"), WT/DS350/AB/R, adopted 19 February 2009, para. 235).

[7] *US – Continued Zeroing*, para. 228.

[8] *US – Continued Zeroing*, para. 231.

[9] China's Response to Request for Preliminary Rulings, para. 36.

reaching than 'as applied' claims".[10] Given these "far-reaching" implications – which, in all likelihood, are precisely what motivated China to add its "as such" challenge in the panel request in the first place – China's attempts to downplay this sudden addition lack credibility.

10. Finally, and perhaps most significantly, China in this dispute completely ignores the importance of consultations. As discussed in the U.S. First Written Submission[11], consultations serve a critical role not only in providing the responding party with notice of the scope of the dispute, but also in allowing for the exchange of views on areas of disagreement or misunderstanding with a view to resolving the dispute, which is, after all, the objective of the dispute settlement system.

11. China has alleged that the "failure ... to provide legal authority" was "evident on the face of the determinations" it identified in the consultations request.[12] We disagree. As is evident from a closer reading of these determinations, Commerce did not make any broad pronouncement as to whether it had legal authority to adjust anti-dumping duties to avoid any so-called double remedy. Indeed, it is precisely because the Government of China and Chinese respondents made absolutely no attempt to offer any evidence of how a double remedy might occur in any of the investigations at issue that the Department has not yet been presented with a situation in which it must determine whether such legal authority exists.

12. In any event, if China finds this "failure ... to provide legal authority" to be "evident on the face of the determinations", it follows that the alleged existence of this "measure" was as evident to China at the time it read those determinations as China claims it should be to the Panel today. In other words, China appears to acknowledge that it was well aware of such a "failure ... to provide legal authority", and any consequent impairment of benefits, long before it requested consultations in this dispute. China neglected to include this "measure" in its consultations request but appears to have realized at some point that it wanted to include the "measure" within the scope of this dispute.

13. Under these circumstances, rather than simply add the new measure to its *panel* request, the correct response would have been for China to have filed a new or supplemental *consultations* request. Filing a new or supplemental consultations request is something with which China has first-hand knowledge. The United States has previously filed supplemental consultations requests in disputes with China.[13] In refusing to do so, notwithstanding these very concerns raised by the United States during two DSB meetings[14], China appears to have concluded that it would not devote

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[10] U.S. First Submission, para. 85 (quoting Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* ("*US – OCTG from Argentina*"), WT/DS268/AB/R, adopted 17 December 2004, para. 172). (Emphasis added)

[11] U.S. First Submission, paras. 82-83.

[12] China's Response to Request for Preliminary Rulings, footnote 28.

[13] See *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1/Add.1; *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1/Add.1.

[14] WT/DSB/M/261, p. 11 (minutes of 22 December 2008 DSB meeting); WT/DSB/M/263, p. 15 (minutes of 20 January 2009 DSB meeting).

time to consulting on the measure to seek a solution, but rather preferred to skip the consultations phase. China, however, is not free to choose the course it deems most convenient – the DSU *requires* Members to consult first before proceeding to a panel.

ANNEX D-4

CLOSING STATEMENT OF THE UNITED STATES – FIRST MEETING

(8 July 2009)

1. The United States has only a few brief closing comments. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted by joining the WTO. China seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement. At the same time, China seeks to avoid its own obligations to engage in consultations prior to initiating panel proceedings, and to have its exports subjected to the rules-based trade remedy disciplines of the AD and SCM Agreements.

2. In short, having agreed to join the WTO and submit itself to the rules and obligations of the covered agreements, subject to the terms and conditions of its Accession Protocol, China now asks this Panel to change the rules and obligations, and void the terms and conditions.

3. This Panel's charge, however, is to make an objective assessment of the matter before it and to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. At the beginning and at the end of the panel's analysis is the text of the covered agreements. The question before the Panel is: Is there an obligation in the text that requires what China contends the United States is obligated to do? For each claim China has made, the answer is no. China has failed to establish that the United States has acted inconsistently with any provision of any covered agreement. In numerous cases, as we have explained, China has failed on the most basic level to even identify the provisions of the covered agreements that it alleges the United States has violated. In other cases, when it has cited to various provisions, China has not explained how the United States has contravened them.

4. Indeed, rather than engage the Panel on the most relevant issues of substance with respect to each of its claims, China has presented nothing but distractions in an attempt to mask its failure to establish any WTO violations. A few examples from the past two days will suffice to make this point:

- Measure not consulted upon: In response to the direct question posed yesterday by Ms. Brown, China talked about everything *other than* why it refused to include in the consultations request its "as such" challenge, despite knowing full well when it requested consultations that this was an issue about which it had concerns. Nothing in the DSU authorizes such disregard for the prerequisites to initiating a dispute.

- *Ex post* rationalization: China has asserted several times that the United States is introducing *ex post* rationales in its arguments in this dispute. That is not the case. The United States stands by the findings and determinations made by Commerce, all of which were based on record evidence. Our discussion of those findings and determinations in relation to the text of the WTO agreements may involve different terminology but that does not change the underlying rationales on which the determinations were based. Additionally, China has introduced arguments based on WTO rules that were not raised during the administrative proceedings below, and the United States must now respond to these arguments for the first time.

- Subsidy Offsets: China exerts tremendous energy arguing about "zeroing", which we all know to be a concept related to the calculation of a *dumping* margin, and citing to Appellate Body decisions under the *Anti-Dumping Agreement*. China's claim in this dispute, of course, is about *countervailing duty* investigations under the *SCM Agreement*.

- Concurrent application of AD and CVD measures: China insists on seeking a definitive statement of Commerce's domestic legal authority, which we have already explained is not possible. This is simply a transparent attempt to shift the focus away from China's failure to substantiate its grand quasi-economic theories with any facts, either before Commerce or this Panel. We would imagine that if Commerce had made a downward adjustment to export price based solely on *theories* put forward by the U.S. industry, China would be here complaining of such an improper adjustment.

5. These and the other attempts by China to distract the Panel away from the real issues in this dispute naturally reflect the fact that, when the focus is properly placed on those real issues, the shortcomings of China's claims become readily apparent. The text of the covered agreements, from which China flees, is determinative of the issues in this dispute, and damning to China's case.

6. But, the United States recognizes that the Panel is only at the beginning of its work. We hope that our First Written Submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavour to provide responses that bring clarity and understanding to the myriad complex issues in this dispute. Ultimately, we seek to aid the Panel in arriving at the correct conclusions, based on proper interpretations of the covered agreements. We are confident that, if we are successful in that effort, the Panel will find in our favour and dismiss China's claims.

7. Once again, the United States thanks the Panel members for their time and attention to this matter.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF CHINA – SECOND MEETING

(23 November 2009)

Introduction

1. There are many different issues before the Panel at this stage of the proceedings. I will not review all of those issues here, but instead make a number of key points with respect to financial contribution, benefit, specificity, and the issue of double remedies.

Financial Contribution / Public Body

2. I do not intend to recount this morning all of the reasons why the United States' *per se* rule of majority government ownership cannot be reconciled with a proper interpretation of the term "public body" in Article 1.1 of the SCM Agreement. Instead, I would like to focus on one aspect of the "ordinary meaning" analysis, then turn to the relevance of the ILC Draft Articles and the Appellate Body's reliance on them in *US – DRAMS*. Finally, I will conclude with some observations concerning the systemic implications of the U.S. interpretation.

3. With respect to ordinary meaning, the United States myopically focuses on the English term "public body", without confronting the meaning of the French term "organisme public" and the Spanish term "organismo público". Yet all three of these terms are presumed to have the same meaning under Article 33(3) of the Vienna Convention. The official *OECD Economics Glossary* equates "organisme public" with the English term "government agency". The Spanish term "organismo público" is expressly equated to the English term "government agency" in the Agreement on Agriculture. Indeed, paragraph 97 of the Appellate Body's decision in *Canada – Dairy* establishes unequivocally that the Spanish and French terms at issue in Article 1.1 of the SCM Agreement have the same meaning as the English term "government agency".

4. A straightforward application of Article 33 requires the Panel to interpret the English terms "public body" and "government agency" as functional equivalents, just as they are treated in the French and Spanish languages. A government agency, as the Appellate Body has said, is *not* defined by its ownership structure, but rather by the *functions* it performs and the *authority* it possesses to perform them. Under Article 33, the same must therefore be true of a public body.

5. The U.S. Second Submission fares no better when trying to convince the Panel that "neither the [ILC] Draft Articles Nor the Appellate Body's Footnote Reference to Them in *US – DRAMS* Is Relevant to this Dispute". The U.S. has argued that the cases cited by China that refer to the Draft Articles are distinguishable on the grounds that they did not involve the interpretation of the term "public body". China, of course, cited these cases not for their interpretative guidance on the meaning of the term "public body", but for the *general proposition* that prior panels and the Appellate Body have considered the Draft Articles "relevant rules of international law" when interpreting the covered agreements. The United States' unwillingness to challenge that basic proposition means that it is now common ground that the Draft Articles may be relevant to the interpretation of the covered agreements, depending on the circumstances.

6. The question, then, is whether those circumstances include the interpretation of Article 1.1 of the SCM Agreement. We know that the Appellate Body certainly thought so when it cited to the Draft Articles in *US – DRAMS*, twice no less, in the section of its report entitled "The Meaning of the Terms 'Entrusts' and 'Directs'" under "Article 1.1(a)(1)(iv) of the SCM Agreement". If it was lawful for the Appellate Body to consider the Draft Articles relevant to the interpretation of one phrase within Article 1.1(a)(1) – and the United States is not prepared to claim otherwise – there is no obstacle to this Panel considering the Draft Articles relevant to the interpretation of another phrase *within the very same provision* of the SCM Agreement.

7. I'd like to turn now to some of the systemic implications of the United States' *per se* test. Recall that, under subparagraph (iv) of Article 1.1, "government ownership *in and of itself*, is not sufficient to establish entrustment or direction". Yet under the United States' interpretation of "public body", mere majority government ownership, by itself, *would be* sufficient to find the actions of government-owned entities to be financial contributions *in all cases*. There simply is no textual or contextual basis for the anomalous results that the U.S. interpretation would produce – that the same *per se* government ownership test could be legally impermissible under one provision of Article 1.1, but determinative under another. If the U.S. position is accepted, subparagraph (iv) henceforth will become a dead letter for entities with majority government ownership – a category of entities to which subparagraph (iv) was previously considered applicable by both panels and WTO Members alike.

Benefit / Article 14

8. The United States applies the same cavalier interpretative approach to the standards set forth in the SCM Agreement in its effort to justify Commerce's benefit determinations with respect to inputs, land, and loans under Article 14. The United States' defence of Commerce's adequate remuneration determinations is predicated on a direct challenge to the Appellate Body's interpretation of Article 14(d) in *US – Softwood Lumber IV*.

9. First, the U.S. asserts that "there is no obligation in Article 14 of the SCM Agreement for Members to perform a 'price distortion' analysis before resorting to an out-of-country benchmark" because price distortion exists, *per se*, whenever "the Department finds that the government provides the majority or a substantial portion of the market for a good or service". But this *per se* test was squarely rejected in *US – Softwood Lumber IV*. There, the Appellate Body stated "the fact that the government is a significant supplier of goods *does not, in itself*, establish that all prices for the goods are distorted" so as to justify rejection of private prices.

10. Second, with respect to land-use rights, Commerce not only relied upon its unlawful *per se* rule in rejecting private prices in China, but also its conclusion that "property rights remain poorly defined and weakly enforced" in China as a basis for doing so. The Appellate Body in *US – Softwood Lumber IV* emphasized that the term "prevailing market conditions in the country of provision" does not "refer to a 'pure' market" or "a market 'undistorted by government intervention'". The Appellate Body identified a *single situation* where private prices might be rejected: when the "government's role in *providing the financial contribution* is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods".

11. The United States asks you to jettison this reasoning as well, and allow investigating authorities to decide for themselves, unbound by any objective standards, that private prices are "unsuitable" because prevailing market conditions do not comport with their own subjective characterization of how any given market should operate. This is precisely the kind of second-guessing of the "purity" of market conditions in the country of provision that the Appellate Body expressly concluded was inconsistent with Article 14(d).

12. Third, the United States has conceded that Commerce did not make *a single adjustment* to the purported land "price" in Thailand that it used as a benchmark for measuring the adequacy of remuneration for land-use rights in China despite the fact that in *US – Softwood Lumber IV*, the Appellate Body made clear that investigating authorities had an obligation "to ensure" that "*all necessary adjustments are made to prices in one country* in order to develop a benchmark that relates or refers to, or is connected with, prevailing market conditions in another country".

13. With respect to loans, there is little more that China need say about the fictitious interest rate benchmark that Commerce derived from its multi-country regression model. The benefit standard under Article 14(b) requires investigating authorities to measure the difference between the interest rate on a government-provided loan, and the interest rate on a "comparable commercial loan which the firm could actually obtain on the market". The benchmark that Commerce concocted in these cases does not meet these criteria, and the United States' strained efforts to claim otherwise border on the frivolous.

14. Ironically, while ignoring the Appellate Body's reasoning in *Softwood Lumber IV* in the very instance where it applies – Article 14(d) – the United States simultaneously seeks to graft it onto Article 14(b), where it has no application whatsoever. As China has demonstrated, the predicate that the Appellate Body identified for rejecting private prices for goods as "distorted" simply does not apply in the case of interest rates.

15. At bottom, the United States finds it too inconvenient to comply with the requirements of Article 14 as written, and would prefer that the Panel do it the favour of sweeping these requirements away. The Panel should reject this attempt to rewrite Article 14.

Specificity

16. The parties' respective positions on the issue of specificity are now clearly defined. In China's view, it comes down to this: either the words of Article 2 matter, or they don't.

17. Article 2 requires the investigating authority to determine that a "subsidy" is specific. The term "subsidy" is defined in Article 1 as a financial contribution that confers a benefit. The United States, however, believes that it is sufficient for an investigating authority to find that a *financial contribution* is specific, without considering whether the subsidy is specific. The U.S. position is based entirely on its belief that it would be "cumbersome" for investigating authorities to have to determine that a "subsidy" is specific, and that this would make it "more difficult to … impose countervailing duties". Needless to say, there is no basis in the Vienna Convention for this results-oriented approach to treaty interpretation.

18. For this reason alone, the Panel must reject the U.S. defence of Commerce's specificity determinations concerning the alleged land-use rights and "policy lending" subsidies. With respect to land-use rights in the LWS investigation, it is undisputed that Commerce made no determination that the alleged provision of land-use rights for less than adequate remuneration – the "subsidy" that Commerce identified – was regionally specific under Article 2.2. Moreover, the U.S. defence of Commerce's specificity determination is based entirely on the notion that Commerce was free to disregard the undisputed evidence that Huantai County provided the same "subsidy" to companies located *outside* of the New Century Industrial Park.

19. As for "policy lending" in the OTR investigation, the United States has effectively conceded that borrowers obtained loans from SOCBs at "preferential, non-commercial" rates of interest – the "subsidy" that Commerce identified under its policy lending programme – *without regard* to whether the borrower was a beneficiary of that programme. Again, the U.S. argues that it is irrelevant that borrowers in other industries obtained the same alleged subsidy. But it is not irrelevant. It is

fundamental to whether Commerce clearly substantiated, on the basis of positive evidence, that the alleged subsidy was "explicitly limited" to "certain enterprises".

20. Finally, China considers that there is little left to be said about the U.S. "access to credit" theory. Even setting aside its *ex post* nature, the U.S. argument is based entirely on the notion that the 539 "encouraged" industries in 26 different industry sectors constitute "certain enterprises" within the meaning of Article 2. This argument is implausible on its face.

Double Remedy

21. Much has already been said and written on the topic of double remedies, but I want to focus this morning on two key areas: (1) the recent decision of the U.S. Court of International Trade (CIT) in *GPX International Tire v. United States*, which held that Commerce is obligated to avoid offsetting the same subsidies twice; and (2) the fundamental issue in this dispute – whether the U.S. has an obligation under the covered agreements to avoid these double remedies.

22. On 18 September, the Chief Judge of the CIT issued a decision in the *GPX* case holding that Commerce is legally obligated to avoid the imposition of double remedies when it uses its NME methodology in conjunction with countervailing duties. The CIT gave Commerce until 17 December to issue a new determination in which it "adopt[s] additional policies and procedures" to avoid double remedies. In the *GPX* litigation, the U.S. advanced all of the same arguments that it has made in these proceedings, and the CIT considered and rejected all of them.

23. The CIT recognized, correctly, that Commerce addresses subsidization of NME producers "through the NME AD methodology", that it is fundamentally incompatible with the purpose of the countervailing duty laws to offset the same subsidies twice, and that it is *Commerce's* obligation to investigate and avoid these double remedies. With the CIT's decision, all three branches of the U.S. Government have now recognized what Commerce *itself* recognized at the time of *CFS Paper* – that "a possibility of double counting results from simultaneous antidumping and CVD investigations" of imports from NME countries.

24. Which brings us to the matter at hand: whether the United States has the same obligation under the covered agreements that it has under U.S. law – namely, to ensure that it does not offset the same subsidies twice. The U.S. asserts, unequivocally, that the "WTO rules do not contemplate the existence of, or an adjustment for double remedies in the context of domestic subsidies". Under the U.S. position, an investigating authority can *knowingly* and *deliberately* offset the same subsidies twice, as long as they aren't export subsidies. Clearly, this is wrong.

25. As China has explained, the obligation of Members to avoid offsetting the same subsidies twice is evident in the key operative provisions of Part V of the SCM Agreement. It is evident in Article 19.4, which prohibits Members from imposing countervailing duties in excess of the amount of the total subsidy accruing to the imported product. It is evident in Article 19.3, which requires Members to impose countervailing duties in the "appropriate amounts". It is evident in Article 10 and in the very definition of a "countervailing duty".

26. The extreme U.S. position on the issue of double remedies is based on nothing less than a complete disregard for the object and purpose of the SCM Agreement. The Appellate Body has repeatedly observed 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". It is hard to conceive of anything more antithetical to the object and purpose of the SCM Agreement than to offset the same subsidies twice. Part V of the SCM Agreement is meant to impose *disciplines* on the use of countervailing measures. For a Member to obtain *twice* the remedy to which it is entitled is no discipline at all. If this is true in the case of prohibited export subsidies, which are considered the

most trade-distorting subsidies, then surely it must be true in the case of subsidies that are merely actionable.

27. For these reasons, the last bastion of the U.S. defence – that it has no legal obligation to address a problem that Commerce, the U.S. Congress, and the U.S. courts have all acknowledged – is entirely untenable. Commerce must ensure that it does not offset the same subsidies twice.

28. I'd like to address two final points on the issue of double remedies, both of which have been elucidated by the CIT's decision in *GPX*. The first is the U.S. contention that China is trying to force the United States to "choose" between its use of an NME methodology in AD proceedings and its application of countervailing duties to imports from China.

29. Let me be perfectly clear on this point: China has *never* maintained that the United States is prohibited from applying its NME anti-dumping methodology concurrently with the imposition of countervailing duties on the same products. Of course, the United States is free to return to its previous policy of applying countervailing duties only to industries that it designates as market-oriented industries, but the U.S. also has the option to apply the two remedies simultaneously to the same products if it ensures that its methodologies do not offset the same subsidies twice. This is exactly what the CIT held in *GPX*: Commerce may choose either to "forego the imposition of CVDs" on products to which it applies its NME methodology, or "**adopt additional policies and procedures to adapt its NME AD and CVD methodologies to account for the imposition of CVD** remedies on merchandise from the PRC". This is *not* a choice between applying the NME methodology or foregoing its use altogether.

30. Finally, we come to the question of whether Commerce has authority under U.S. law to take the necessary steps to avoid double remedies. The CIT expressly withheld judgment on this issue, but on 17 December Commerce will finally be forced to take a definitive position on whether it has authority under U.S. law to avoid the imposition of double remedies in NME investigations and, if so, what the nature of that authority is. In light of this impending deadline, the United States should simply identify to the Panel the legal authority, if any, that Commerce has to avoid double remedies in NME investigations. If the United States is able to identify any such authority, it can then explain to the Panel why Commerce did not apply that authority in the investigations at issue in this dispute.

31. That concludes China's opening statement. We look forward to answering the Panel's questions over the next two days.

ANNEX D-6

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF THE UNITED STATES – SECOND MEETING

(23 November 2009)

1. China has largely failed to articulate how the U.S. actions it challenges are inconsistent with any express obligations contained in the covered agreements. China has not provided a proper interpretive analysis of the provisions it has referenced. China's arguments do not provide a basis on which the Panel can sustain China's allegations that the United States has acted inconsistently with its WTO obligations, and China's claims must be rejected.

2. **Financial Contribution:** An analysis of the ordinary meaning of the term "any public body", in its context and in light of the object and purpose of the SCM Agreement, demonstrates that Commerce's financial contribution determinations were consistent with the SCM Agreement. The ordinary meaning of the term "public" includes the notion of belonging to the government or the nation. In addition, the term "public body" is modified by the term "any". Thus, there might be different *kinds* of public bodies. To interpret the term "public body" to refer to entities that "possess characteristics similar to those that define a government", as China does, would be to reduce the term "public body" to redundancy or inutility.

3. The use of the term "government" in place of "a government or any public body" in the SCM Agreement is merely a shorthand drafting technique used for convenience. China erroneously finds significance in the use of this technique and attempts to impart a meaning that is simply not supported by the text.

4. Contrary to China's argument an entrustment or direction analysis involves the *actions* of a government or public body and the *actions* of a private body or bodies. A public body analysis, on the other hand, involves an analysis of the *nature* of the entity or entities at issue.

5. The *Korea – Commercial Vessels* panel rejected the arguments China makes here with respect to the ILC Draft Articles and the GATS Annex on Financial Services. As that panel reasoned, "[i]n all cases, ... public body status can be determined on the basis of government (or other public body) control".[1] This Panel should follow a similar approach.

6. China's arguments related to the Spanish and French texts of the Agreement on Agriculture are unavailing. The issue here is the interpretation of the SCM Agreement. There is no discrepancy between the English, Spanish, and French texts of the SCM Agreement, and there is no need to look to the Agreement on Agriculture to determine the meaning of the term "public body". Additionally, the text of the Agriculture Agreement does not support China's arguments as the relevant text in the Agriculture Agreement is different than in the SCM Agreement.

7. 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, which is consistent with the object and purpose of the SCM Agreement.

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

8. Whether or not China now concedes that it made a commitment in paragraph 172 of the Working Party Report that allows Members to treat China's state-owned enterprises and banks as government actors for purposes of Article 1.1(a) of the SCM Agreement, at the very least, China indicated in that paragraph its own recognition that its SOEs and SOCBs are "public bodies".

9. China incorrectly argues that the ILC Draft Articles are relevant rules of international law that should be used to interpret the term "public body". The Draft Articles are *not* relevant and *not* applicable within the meaning of Article 31(3)(c) of the Vienna Convention, and the Panel is *not* permitted to take them into account in interpreting the relevant SCM Agreement text. The scope of the Draft Articles is limited to secondary rules of international law and explicitly excludes primary rules of international law. Moreover, the detailed distinctions in those articles are not "applicable in the relations between the parties", as there is no consensus that the ILC provisions have attained the status of customary international law.

10. With respect to sales through trading companies, Commerce properly applied the SCM Agreement. No entrustment or direction analysis was required, and China has not substantiated its claim that Commerce's analysis was improper.

11. **Benchmarks:** Commerce based its determinations to use benchmarks other than prices or interest rates available in China on findings that the predominant role of the Chinese government in various markets distorted prices and interest rates in China. Commerce made each benchmark determination on a case-by-case basis, based on the facts of each investigation. Commerce's determinations were consistent with Article 14 of the SCM Agreement, as interpreted by the Appellate Body in *US – Softwood Lumber CVD Final*.

12. Contrary to China's argument, neither the text of Article 14 nor the Appellate Body report in *US – Softwood Lumber CVD Final* requires a separate price distortion analysis before a Member may rely upon an out-of-country benchmark. The Appellate Body's analysis reflects the economic theory commonly referred to as the "Dominant Firm Model". 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.

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

14. In the markets for lending and land-use rights, in addition to the market distortion inherent in the fact that the government was the predominant supplier of loans and land, Commerce also found evidence of direct government intervention in those markets that would further impact prices, rendering those prices inappropriate for determining the amount of the benefit. Contrary to China's argument, the Appellate Body in *US – Softwood Lumber CVD Final* did not address and, consequently, did not exclude the possibility that other types of government intervention would also distort the market and render prices unreliable.

15. **Providing Credits in Benefit Calculations:** China has not shown that Commerce was required to provide a credit in the subsidy calculation for <u>non-subsidized</u> transactions. China has

entirely changed its argument and now asks this Panel to find that the use of the term "good" in Article 14(d) establishes several obligations on WTO Members and limits the application of those obligations to situations under Article 14(d). China's argument is not credible.

16. The context of the SCM Agreement supports analyzing the benefit to the recipient on a disaggregated basis. Article 1 of the SCM Agreement defines a subsidy in the singular form, supporting the conclusion that investigating authorities have the option of analyzing each subsidy on a transaction by transaction basis. When a Member analyzes multiple subsidies, there is no obligation to provide a credit in that analysis for non-subsidized transactions.

17. 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, and 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.

18. Because China has failed to establish any violation of Article 14(d), it is not necessary for the Panel to address China's other consequential claims under Article VI:3 of the GATT 1994, and Articles 10, 19.1, 19.4, and 32.1 of the SCM Agreement.

19. **Specificity:** Commerce's specificity determinations for the policy lending subsidy and land-use rights subsidy were substantiated by positive evidence and otherwise in accordance with the covered agreements. Contrary to China's arguments, neither Article 2.1(a) nor Article 2.2 requires an investigating authority to revisit the benefit determination to determine specificity.

20. Article 2.1(a) of the SCM Agreement requires an investigating authority to determine whether legislation explicitly limits access to the subsidy to certain enterprises. Here, national, provincial, and municipal legislation and policy documents, viewed as a whole, explicitly limited access to the policy lending subsidy to a group of industries, including the tire industry.

21. China's interpretation of Article 2.2 of the SCM Agreement would require that, in order for a subsidy to be specific under Article 2.2, it would also have to be specific under Article 2.1, that is, it would have to be limited to certain enterprises. China's interpretation renders Article 2.2 redundant with Article 2.1, contrary to customary rules of treaty interpretation.

22. **Concurrent Application of CVD and AD Measures:** The import of China's argument before this panel, although China denies it, is that Members may not apply CVDs and NME AD duties concurrently to the same merchandise, under any circumstances, because doing so automatically results in a so-called double remedy. Indeed, China is unable to identify any concrete circumstances, under China's theory, when the concurrent application of AD duties and CVDs would be permitted. In this respect, China's reliance on the court's opinion in *GPX v. United States* is unavailing.

23. The covered agreements fully reflect Members' consideration of what limits, if any, should be placed on concurrent application of AD duties and CVDs. GATT Contracting Parties identified *one instance* in which the AD and CVD regimes intersect – in the limited circumstance of export subsidization set out in GATT Article VI:5. Furthermore, China's Protocol explicitly reflects the right of Members to apply the NME AD methodology as well as the right to apply CVDs, with no conditions placed on concurrent application. Finally, China cannot avoid the significance of the fact that, during the Uruguay Round, Members decided *not* to carry Article 15 of the Tokyo Round Subsidies Code forward into the SCM Agreement. The agreements, therefore, are not silent, or, in other words, contain no gap that can be filled by reading a prohibition on concurrent application into WTO provisions addressing other specific issues.

24. Turning to China's claims under Article 19.3 and 19.4 of the SCM Agreement, the United States notes, first, that both provisions impose obligations in respect of the *levying* of CVDs, yet it is undisputed that the CVDs in the investigations at issue were not levied at the time of panel establishment. In respect of Article 19.3, China does not allege, much less demonstrate, that the CVDs levied exceed the subsidization rate calculated for each "source[] found to be subsidized and causing injury". Similarly, in respect of Article 19.4, China does not allege, much less demonstrate, that the CVDs levied exceed the amounts of the subsidies actually found by Commerce. Therefore, China has not established any inconsistency with Article 19.3 or 19.4.

25. Turning to China's claims under Article 12.1 and 12.8 of the SCM Agreement, the United States notes that, even if a double remedy could be shown to exist (a premise the United States strongly contests), Commerce's actions were not inconsistent with either provision. First, contrary to China's suggestion, at no point has Commerce ever agreed that a double remedy would likely arise from the concurrent application of CVDs and NME AD duties. Rather, Commerce signalled that it would keep an open mind to allow parties with a concrete interest to present their views supported by facts from particular investigations. Commerce itself saw no basis *ex ante* to believe that double remedies would be a problem. Under these circumstances, it was for interested parties who sought an adjustment from the normal application of CVDs and AD duties to explain, *with supporting evidence*, why their proposed course of action was appropriate. Neither Chinese respondents nor the Government of China did so.

26. China has failed to demonstrate the existence of a "double remedy", much less where that "double remedy" is found in Commerce's separate calculations of dumping margins and subsidy rates. First, China advances its argument as to the existence of a double remedy solely by reference to the *normal value* obtained under the NME methodology and its alleged relationship to subsidization. However, examination of only *one* of the elements of the AD remedy without the other (i.e., export price) does not inform the inquiry as to the existence of a double remedy.

27. Second, China's theory – premised on the extraordinary proposition that an NME *anti-dumping* methodology, by its very nature, offsets *subsidization* – reflects an understanding of the NME methodology that has no basis in, and is contradicted by, the text of the covered agreements and the operation of the NME methodology under U.S. law. China has not cited, and indeed cannot cite, any provision of the GATT 1994, Anti-Dumping Agreement or SCM Agreement that would support its proposition. Furthermore, accepting the view that the NME methodology is designed to offset subsidization would render any AD duty calculated under that methodology a CVD within the meaning of footnote 36 to the SCM Agreement. As a result, that AD duty, as required by Article 10 of the SCM Agreement, could "only be imposed pursuant to [an] investigation[] initiated and conducted in accordance with [the SCM Agreement]". In the absence of such an investigation, any NME AD duty, under China's theory, would appear to be inconsistent with Article 10 of the SCM Agreement.

28. China's view that the NME methodology counteracts subsidization also finds no support in the text of the U.S. law governing the NME methodology. U.S. law identifies an exporting country as an "NME" based on an examination of multiple statutory factors, none of which references subsidization. U.S. legislative history also confirms the exclusive focus of the NME methodology on making a price comparison for the purpose of calculating the *dumping* margin. There is thus no basis to contend, as China does, that subsidization is one of the "'distortions' in the market that the NME construct was designed to address" when it is not even a factor examined when considering whether a country constitutes an NME.

29. With respect to China's challenge based on a so-called "absence of legal authority", the United States recalls that Commerce has not been presented with the concrete factual circumstances in which it was *required* to make a determination as to the scope of its legal authority. This follows

directly from the failure of Chinese respondents and the Government of China to adduce any evidence relating to double remedy in the investigations at issue. China's statement this morning about the relevance of the *GPX* opinion to the issue of Commerce's legal authority reflects China's misunderstanding of the implications under U.S. law of that decision.

30. Finally, the United States submits that the *GPX* opinion should have no bearing on the Panel's consideration of this dispute for four reasons: (1) the *GPX* opinion is not instructive for this dispute because it is an opinion of a U.S. court interpreting U.S. law, whereas this dispute concerns the interpretation of the WTO agreements; (2) the *GPX* opinion is not the final judgment of the U.S. courts; (3) the *GPX* opinion is in error; and (4) even on its own terms, the decision does not support the position taken by China here – that, where a WTO Member is applying AD duties determined under a NME methodology to Chinese goods, it may not apply any CVDs to those same imports.

31. **Requests for Information Following the Original Questionnaire:** With respect to China's claim under Article 12.1.1 of the SCM Agreement, the United States notes that China now appears to agree with the proper interpretation of that provision as set out by the United States in these proceedings. In the context of an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, China has issued one new subsidy allegation questionnaire and five supplemental questionnaires for the U.S. Government. For *none* of these six questionnaires did China provide an initial period of 30 days to respond, as it would have done if acting consistently with the understanding of Article 12.1.1 it urges upon this Panel.

ANNEX D-7

CLOSING STATEMENT OF CHINA – SECOND MEETING

(12 November 2009)

On behalf of the delegation of China, I would like to thank you for your service on this Panel. I would also like to thank the Secretariat for its hard work assisting in these proceedings.

All of the issues that have been raised by the parties during these proceedings deserve your careful consideration. This dispute concerns the first group of anti-dumping and countervailing duty investigations conducted by the United States on imports from China, but there have been dozens of subsequent anti-dumping and countervailing duty investigations on Chinese imports following those at issue here. The same issues that China has identified with respect to the challenged investigations have arisen in many of the subsequent investigations as well. There is a large amount of trade at stake – I understand more than US$6 billion. The resolution of these issues is of great importance to China.

What is equally, or perhaps more significant than the trade interests at stake in this dispute, is the impact that the Panel's findings will have on the subsidy disciplines set forth in the SCM Agreement. The aim of the dispute settlement system is to ensure a positive resolution of disputes between Members. China believes it has demonstrated that the measures at issue in this dispute are inconsistent in many respects with the SCM Agreement and other covered agreements. China asks the Panel to examine the issues in this dispute very carefully to ensure that the rules negotiated by the Members are upheld. The proper interpretation of these rules is essential to upholding the security and predictability of the multilateral trading system. In the present economic environment, it is more important than ever to ensure that the disciplines on trade remedies are correctly interpreted and applied by Members.

In closing, China would like to thank the Panel again for its hard work during these proceedings, and China looks forward to responding to the Panel's written questions.