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WTO Appellate Body Report (WT/DS379/AB/R)

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Appellate Body Report
United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China
(WT/DS379/AB/R)

Participants
Appellant: China
Appellee: US
Third Participants: Argentina, Australia, Bahrain, Brazil, Canada, Chinese Taipei, EC, India, Japan, Kuwait, Mexico, Norway, Saudi Arabia, Turkey

Appellate Body Division
Ramírez Hernández (Presiding Member), Bautista, Van den Bossche

Timeline of Dispute
Panel Request: December 9, 2008
Panel Established: January 20, 2009
Panel Composed: March 4, 2009
Interim Report Issued: June 11, 2010
Final Report Issued: July 23, 2010
Final Report Circulated: October 22, 2010
Notice of Appeal: December 1, 2010
AB Report Circulated: March 11, 2011
Adoption: March 25, 2011

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Key Findings

- Reversed Panel's interpretation that the term "public body" in SCM Agreement Article 1.1(a)(1) means "any entity controlled by a government"; found that DOC acted inconsistently with Article 1.1(a)(1) by determining, in the four investigations at issue, that SOE input suppliers constituted public bodies; however, found that China did not establish that DOC acted inconsistently with Article 1.1(a)(1) by determining in the OTR investigation that SOCBs constituted public bodies.
- Upheld Panel's finding that China did not establish that DOC acted inconsistently with SCM Agreement Article 2.1(a) when it determined in the OTR investigation that SOCB lending was specific to the tyre industry; upheld Panel's findings related to regional specificity under Article 2.2.
- Upheld Panel's finding that China did not establish that DOC acted inconsistently with SCM Agreement Article 14(d) when it rejected in-country private prices in China as benchmarks. Upheld Panel's finding that China did not establish that DOC's decision not to rely on interest rates in China as benchmarks for SOCB loans denominated in RMB was inconsistent with Article 14(b); with regard to the proxy interest rate used, found that the Panel "failed to make an objective assessment of the matter before it as required by Article 11 of the DSU," but could not complete the analysis on this issue.
- Reversed Panel's interpretation of SCM Agreement Article 19.3, finding instead that "the imposition of double remedies, that is, the offsetting of the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties, is inconsistent with Article 19.3"; concluded that "in the circumstances of the four sets of anti-dumping and countervailing duty investigations at issue," by virtue of DOC's imposition of anti-dumping duties calculated on the basis of an NME methodology, concurrently with the imposition of countervailing duties on the same products, without having assessed whether double remedies arose from such concurrent duties, the United States acted inconsistently with Article 19.3

BACKGROUND

This dispute concerns duties imposed by the United States on certain Chinese products, on the basis of four anti-dumping and four countervailing duty investigations. Both types of investigations were carried out with respect to each of the following products:

- Circular Welded Carbon Quality Steel Pipe ("CWP")
- Certain New Pneumatic Off-the-Road Tires ("OTR")
- Light-Walled Rectangular Pipe and Tube ("LWR")
- Laminated Woven Sacks ("LWS")

As set out in more detail in the discussion of substantive issues below, China argued that the following measures were inconsistent with various WTO obligations: the final U.S. Department of Commerce ("DOC") determinations that led to the imposition of the duties in the investigations noted; the orders imposing the duties themselves; and certain aspects of the conduct of the underlying investigations.

One key claim was China's challenge to an alleged imposition by the United States of "double remedies," resulting from the application, for each product, of anti-dumping duties calculated under the non-market economy ("NME") methodology *simultaneously* with countervailing duties on the same products.

(Panel report, paras. 2.1-18; AB report, paras. 271-272)

The Panel rejected many of China's claims. Of these rejected claims, the following findings by the Panel were subject to appeal:

- China failed to establish that the DOC acted inconsistently with SCM Agreement Article 1.1(a)(1) in determining that the state-owned enterprise (SOE) input producers and the state owned commercial banks (SOCBs) were "public bodies."
- China failed to establish that the DOC's determination in the OTR investigation that lending by SOCBs to the tire industry was *de jure* specific was inconsistent with SCM Agreement Article 2.1(a)
- China did not establish that the DOC acted inconsistently with SCM Agreement Article 14(d) when it rejected in-country private prices in China as benchmarks for certain inputs; China did not establish that the DOC's decision not to rely on Chinese interest rates as benchmarks for SOCB loans denominated in RMB was inconsistent with Article 14(b), and China did not establish that the benchmark actually used by the DOC to calculate the benefit from RMB-denominated SOCB loans was inconsistent with Article 14(b).
- With regard to "double remedies," because the Panel concluded that China did not establish that the imposition of "double remedies" is inconsistent with SCM Agreement Articles 10, 19.3, 19.4 and 32.1, GATT Article VI:3 and GATT Article I:1, the Panel said it need not examine further "the extent to which the concurrent imposition" of antidumping duties (under the NME methodology) and of countervailing duties resulted in the imposition of "double remedies" in the four investigations at issue; therefore, the Panel did not decide "whether China has conclusively established that, in the investigations at issue, double remedies resulted from the concurrent

imposition of anti-dumping duties calculated under the U.S. NME methodology and of countervailing duties."

China appealed various issues related to Article 1.1(a)(1), Article 2.1(a), benchmarks under Article 14(d) and Article 14(b), and "double remedies."

The Panel also found several violations. In this appeal, the only such finding at issue was the following:

- The Panel found that the DOC's determination of regional specificity in respect of the provision of land-use rights is inconsistent with SCM Agreement Article 2.2.

Even though it had succeeded on its claim, China appealed certain aspects of the finding under Article 2.2.

SUMMARY OF APPELLATE BODY'S FINDINGS

PROCEDURAL AND SYSTEMIC ISSUES

Amicus Submission

The Appellate Body received an unsolicited amicus curiae brief. After giving the participants and the third participants an opportunity to express their views, the Division hearing the appeal "did not find it necessary to rely on this amicus curiae brief in rendering its decision." (Para. 18)

Late Filing of Submissions

The Appellate Body noted that the Appellate Body Secretariat received the executive summary of Argentina's third participant's submission after December 22, 2010, the deadline for filing a third participant's submission, and thus the executive summary would not be accepted. The Appellate Body also noted that Turkey's third participant's submission was not received before the 17:00 deadline specified in Rule 18(1) of the Working Procedures. It said that although "this is the first appeal filed following recent amendments to the Working Procedures, including to Rule 18(1)," it "nevertheless wish[ed] to emphasize strongly the importance of timely filing of documents in appeals." (Para. 17)

SUBSTANTIVE ISSUES

SCM Agreement Article 1.1(a)(1) - "Public Body"

In all four investigations at issue, the DOC determined that the relevant State Owned Enterprises ("SOEs") were "public bodies." The DOC based these determinations on a "rule of majority ownership," in that the determinations were "principally' based on the fact that the SOEs are majority government owned." Moreover, in the OTR investigation, the DOC also determined that State Owned Commercial Banks ("SOCBs") were public bodies, based on the DOC's analysis of this same issue in an earlier case. (Para. 277)

In examining China's claims against the DOC determinations, the Panel had interpreted the term "public body" in SCM Agreement Article 1.1(a)(1) to mean "any entity controlled by a government." Finding "government ownership to be highly relevant and potentially dispositive evidence of government

control," the Panel had found the DOC's determinations in the investigations at issue that the SOEs and SOCBs constituted public bodies to be consistent with Article 1.1(a)(1). (Para. 278)

On appeal, China alleged that "the Panel erred in interpreting the term 'public body' in Article 1.1(a)(1) ... to mean any government-controlled entity and that this mistaken interpretation of the term 'public body' rendered erroneous the Panel's findings upholding the USDOC's determinations." In this regard, China argued that "government ownership or control is insufficient to establish that an entity is a public body," asserting that, "the defining characteristic of a public body is that it exercises authority vested in it by the government for the purpose of performing functions of a governmental character." China therefore requested that the Appellate Body reverse the Panel's interpretation in this regard, as well as its finding that China failed to establish that the United States acted inconsistently with Article 1.1(a)(1). In addition, China requested that the Appellate Body find that the challenged measures are inconsistent with SCM Agreement Articles 10 and 32.1. (Para. 279)

Interpretation of "Public Body" in Article 1.1(a)(1)

The Appellate Body first considered the meaning of the term "public body" in SCM Agreement Article 1.1. That provision states, in relevant part, as follows:

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") ... and
>
> ...
>
> (b) a benefit is thereby conferred.

The Appellate Body explained that "[t]his appeal raises the question of the correct interpretation of the term 'public body'." Considering the ordinary meaning of this term and examining dictionary definitions of both words, the Appellate Body found that "[t]he composite term 'public body' could ... refer to a number of different concepts, depending on the combination of the different definitional elements" and that "dictionary definitions suggest a rather broad range of potential meanings of the term ..., which encompasses a variety of entities, including both entities that are vested with or exercise governmental authority and entities belonging to the community or nation." (Para. 285)

Next, examining the term "government" in Article 1.1(a)(1), the Appellate Body noted two uses of the term. First, it is used "in the narrow sense" within the phrase "a government or any public body", and second, it is used in a parenthetical in "the collective sense" by referring "collectively to 'a government or any public body.'" The Appellate Body considered that the juxtaposition of these two uses of the term "suggests certain commonalities in the meaning of the term 'government' in the narrow sense and the term 'public body' and a nexus between these two concepts." It explained, "[w]hen Article 1.1(a)(1) stipulates that 'a government' and 'any public body' are referred to in the *SCM Agreement* as 'government,' the collective term 'government' is used as a superordinate, including, *inter alia*, 'any public body' as one hyponym" and that "[j]oining together the two terms under the collective term 'government' thus implies a sufficient degree of commonality or overlap in their essential characteristics that the entity in question is properly understood as one that is governmental in nature and whose conduct will, when it falls within the categories listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv), constitute a 'financial contribution' for purposes of the *SCM Agreement*." It therefore "disagree[d] with the Panel's reasoning that the use of the collective term 'government' has no meaning besides facilitating the drafting of the Agreement" and it warned that such an approach "ignores that the structure and the wording of the treaty is significant in determining the common intention of the parties." (Paras 286-289)

The Appellate Body then considered "the question of what essential characteristics an entity must share with government in the narrow sense in order to be a public body and, thus, part of government in the collective sense." In this regard, it noted that in Canada – Dairy, it found that "the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority," a meaning which was "derived, in part, from the functions performed by a government and, in part, from the government having the powers and authority to perform those functions." In the Appellate Body's view, "these defining elements of the word 'government' inform the meaning of the term 'public body,'" suggesting that "the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body." (Para 290)

Next, the Appellate Body considered the context provided by Article 1.1(a)(1)(iv), which introduces the concept of "private body" and contains the phrase "which would normally be vested in the government." It also examined the term "public body" in the light of the object and purpose of the SCM Agreement (Paras 291-301) As to the latter, the Appellate Body stated that "considerations of object and purpose are of limited use in delimiting the scope of the term 'public body' ... because the question of whether an entity constitutes a public body is *not* tantamount to the question of whether measures taken by that entity fall within the ambit of the *SCM Agreement*." Here, it found that the Panel's object and purpose analysis did not take full account of the SCM Agreement disciplines, cautioning that the Panel was concerned with the implications of a too narrow interpretation, but that too broad of an interpretation of the term "public body" could equally risk upsetting the delicate balance embodied in the Agreement. It pointed out, in this regard, that simply because an entity is found not to be a "public body" does not mean that such entities' measures are excluded from the scope of the SCM Agreement, as, for example, the entity may be considered a private entity that is entrusted or directed by a government or public body under another sub-provision of Article 1.1. (Paras 302-303)

The Appellate Body then examined, in accordance with VCLT Article 31(3)(c), "any relevant rules of international law applicable in the relations between the parties." In this regard, China pointed to the rules of attribution reflected in the ILC's Articles on Responsibility of States for Internationally Wrongful Acts ("the ILC Articles"), namely Article 4 (Conduct of organs of a State), Article 5 (Conduct of persons or entities exercising elements of governmental authority) and Article 8 (Conduct directed or controlled by a State). China contended that these Articles "reflect customary rules of international law or general principles of law," such that they fall under Article 31(3)(c) and are relevant to the interpretation of Article 1.1(a)(1). In addition, it asserted that "because Article 5 stipulates that conduct of non-State organs may be attributable to the State only where such organs exercise elements of governmental authority, the term 'public body' in Article 1.1(a)(1) must ... be interpreted to mean an entity that exercises authority vested in it by a government for the purpose of performing functions of a governmental character." (Paras 304-305) In considering this issue, the Appellate Body first noted that Article 31(3)(c) "contains three elements": (1) it refers to "rules of international law"; (2) the rules must be "relevant"; and (3) the rules must be "applicable in the relations between the parties." It said that it would address these three elements in turn. (Para. 307)

On the first, the Appellate Body noted that "the reference to 'rules of international law' corresponds to the sources of international law in Article 38(1) of the Statute of the International Court of Justice and thus includes customary rules of international law as well as general principles of law." As to the second requirement, it explained, "in order to be relevant, such rules must concern the same subject matter as the treaty terms being interpreted." With respect to the third requirement, the Appellate Body considered that "the question is whether the ILC Articles are 'applicable in the relations between the

parties,'" and it "observe[d] that Articles 4, 5, and 8 of the ILC Articles are not binding *by virtue of* being part of an international treaty," but that "insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties." (Para 308)

The Appellate Body said that before it would address "whether the attribution rules reflected in the ILC Articles, in particular Article 5, constitute customary international law or general principles of law, [it would] consider to what extent these rules provide guidance for the interpretation of the term 'public body' in Article 1.1(a)(1)." While first observing differences between the two sets of rules, namely that the ILC Articles stipulate the conditions in which *conduct* shall be attributed to a State while the SCM Agreement provision focuses on both the conduct and the type of entity, the Appellate Body nonetheless noted that, despite these differences, "our above interpretation of the term 'public body' coincides with the essence of Article 5." Emphasizing that it could see "similarities in the core principles and functions of the respective provisions," the Appellate Body noted that its consideration of Article 5 of the ILC Articles "does not contradict our analysis of Article 1.1(a)(1) above," and it "lends further support to that analysis." Nonetheless, because the outcome of its analysis "does not turn on Article 5," the Appellate Body found it unnecessary for it to "resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law." (Paras 309-311)

The Appellate Body also noted that "China takes issue with the Panel's finding that the ILC Articles need not be taken into account because, *inter alia*, they are not 'relevant' to the interpretation of Article 1.1." In response, the Appellate Body stated that "the Panel misconstrued the role of the ILC Articles when it set out to analyze 'whether [the ILC Articles] would override [the Panel's] analysis and conclusions based on the text of the SCM Agreement itself.'" It explained, "[t]he question is not whether intermediate results of one element of the interpretative exercise 'override' the results of another." Rather, "[r]ules of international law within the meaning of Article 31(3)(c) are one of several means to ascertain the common intention of the parties to a particular agreement reflected in Article 31 of the *Vienna Convention*." In addition, the Appellate Body was "puzzled by the Panel's statement that the ILC Articles have been cited by panels and the Appellate Body 'as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements.'" Instead, it stated that, "[i]f, as the Panel states, certain ILC Articles have been 'cited as containing similar provisions to those in certain areas of the WTO Agreement' or 'cited by way of contrast with the provisions of the WTO Agreement,' this evinces that these ILC Articles have been 'taken into account' in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases." (Paras 312-313)

Finally, the Appellate Body "briefly address[ed] the participants' arguments relating to the Panel's statement that Articles 4, 5, and 8 of the ILC Articles would, in any event, be superseded by Article 1.1(a)(1) of the *SCM Agreement* as *lex specialis* regarding attribution pursuant to Article 55 of the ILC Articles." Article 55 provides:

Lex specialis

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

According to the Appellate Body, "Article 55 addresses the question of which rule to *apply* where there are multiple rules addressing the same subject matter." However, it pointed out that "[t]he question in the present case ... is not whether certain of the ILC Articles are to be *applied*, that is, whether attribution of conduct of the SOEs and SOCBs at issue to the Government of China is to be assessed pursuant to the

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ILC Articles instead of Article 1.1(a)(1) of the *SCM Agreement*." Rather, "the question is, whether, when interpreting the terms of Article 1.1(a)(1), the relevant provisions of the ILC Articles may be taken into account as one among several interpretative elements," and it noted that Article 55 "does not speak to the issue of how the latter should be done." (Paras. 314-316)

The Appellate Body then set forth the following conclusions: "We see the concept of 'public body' as sharing certain attributes with the concept of 'government'"; "A public body within the meaning of Article 1.1(a)(1) of the *SCM Agreement* must be an entity that possesses, exercises or is vested with governmental authority"; however, "just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case"; "Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense." In this regard, it added that while this determination may be straightforward when a statute or other legal instrument expressly vests authority in the entity concerned, such a determination may be more complex in other cases where the picture is "more mixed." For example, it explained that it does not "consider that the absence of an express statutory delegation of authority necessarily precludes a determination that a particular entity is a public body." Rather, "[w]hat matters is *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved." It continued, "[i]t follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions." It stressed, however, that "apart from an express delegation of authority in a legal instrument, the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority." (Paras. 317-318) In this regard, it stated that "[i]n all instances, panels and investigating authorities are called upon to engage in a careful evaluation of the entity in question and to identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government." (Para. 319)

Here, the Appellate Body recalled that "the Panel interpreted the term 'public body' in Article 1.1(a)(1) of the *SCM Agreement* to mean 'any entity controlled by a government,'" but that the Panel never clarified its notion of control. The Appellate Body said that its interpretation above "indicates that control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body," and it therefore disagreed with the Panel's interpretation. (Para. 320) Given the Panel's approach to this issue, the Appellate Body took the view that the Panel failed to consider whether any criteria other than those relied upon by the parties "could potentially be relevant to the enquiry." Also, it did not "sufficiently analyze the interpretative elements that served as the basis for its finding that State ownership or control is in itself sufficient to establish that an entity constitutes a public body." (Paras. 320-321)

For all of the above reasons, the Appellate Body concluded that "the Panel's interpretation of 'public body' lacks a proper legal basis," and it therefore reversed the Panel's finding that the term "public body" in SCM Agreement Article 1.1(a)(1) means 'any entity controlled by a government.'" (Para. 322)

Further Allegations of Error

Next, the Appellate Body addressed "a number of additional allegations of error made by China relating to the Panel's analysis of Article 1.1(a)(1)," as follows:

- China argued that "the Panel improperly considered as 'context' definitions of terms not found in Article 1.1, namely, 'private enterprise' and 'public sector.'" In response, the Appellate Body observed that "neither the term 'private enterprise' nor the term 'public sector' are used in [SCM Agreement] Article 1.1," and it found that "[d]ictionary definitions of these terms are thus of limited relevance, if any, for determining the meaning of the term 'public body.'" (Para. 324);

- China contended that the Panel incorrectly examined a concern expressed by a previous panel regarding what the Panel considered to be a similar issue to the one in the present case, as part of its "contextual analysis" of Article 1.1(a)(1). In response, the Appellate Body emphasized that "Panel reports in previous disputes do not form part of the context of a term or provision" in the sense of VCLT Article 31(2), but, rather, "the legal interpretation embodied in adopted panel and Appellate Body reports become part and parcel of the WTO *acquis* and have to be taken into account as such." (Para. 325);

- China objected to the Panel's statement that "if the term 'public body' is understood as being limited to entities vested with governmental authority, governments could easily hide behind the presumptively 'private' nature of an entity, even while running such entity 'so as deliberately to provide trade-distorting subsidies.'" In response, the Appellate Body cautioned that according to VCLT Article 31 "a treaty is to be interpreted in good faith," such that "terms of a treaty are not to be interpreted based on the assumption that one party is seeking to evade its obligations and will exercise its rights so as to cause injury to the other party." It noted the inappropriateness of the Panel's approach in light of the fact that "the treaty itself contains a specific provision seeking to ensure that governments do not evade their obligations under the *SCM Agreement* by using private bodies to take actions that would otherwise fall within the scope of Article 1.1(a)(1), were they to be taken by the government itself." (Paras. 326-327);

- The Appellate Body considered that the Panel failed to properly address the substance of China's argument regarding the need for a "harmonious interpretation" of the term "organismo público" in the Spanish text of the SCM Agreement and in the Agreement on Agriculture. (Paras. 328-332); and

- China argued that the Panel erred by "relying on municipal law usages to interpret the *SCM Agreement*, and ... in concluding that these usages supported its finding that government control, without more, is the single criterion" that defines the term at issue as it appears in all three languages -- a "public body," "*organismo público*," or "*organisme public*." In response, the Appellate Body expressed some "reservations relating to the way in which the Panel had recourse to usages of the term 'public body' or similar terms in the municipal law of a number of jurisdictions in this dispute" (in this regard, "the Panel did not clearly explain why it considered that an examination of the understanding of the concept of a public body in municipal law would assist in answering the particular interpretative question with which it was confronted"; and "while the Panel refers to the definition of 'public body'" or similar terms in four different jurisdictions, it is not clear whether the Panel assessed the usage of the relevant terms only in these four jurisdictions or whether the Panel surveyed other jurisdictions as well.") In any event, the Appellate Body said it would not address this argument further, based on its view that the Panel's "excursion" into municipal law "was not vital" to its finding regarding the ordinary meaning of the term "public body." (Paras. 333-336)

As to China's argument that the Panel's reliance on municipal law was inconsistent with DSU Articles 3.2 and 11, noting that China did not present any arguments in support of this allegation, the Appellate Body recalled its past precedent that a DSU Article 11 challenge "must stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement." Here, it said, this is "not the case" and it therefore rejected China's challenge under DSU Article 11. (Para 337)

Application of SCM Agreement Article 1.1(a)(1)

China argued that, "because they are based on an erroneous finding that majority ownership by the government is sufficient on its own to establish that an entity is a public body," the Panel's conclusions on the DOC's public body findings are "equally erroneous." In light of its conclusion above that the Panel erred in interpreting the term "public body" in Article 1.1(a)(1), the Appellate Body said that it must also reverse the Panel's ultimate conclusion that China did not establish that the DOC acted inconsistently with Article 1.1(a)(1) in determining, in the investigations at issue, that the relevant SOEs and SOCBs constituted public bodies. (Paras. 339-340)

China requested that the Appellate Body complete the analysis and find that the DOC's "determinations that the provision of inputs by SOEs and the provision of loans by SOCBs were financial contributions by public bodies were inconsistent with the proper interpretation of the term 'public body.'" The Appellate Body noted that to do this it must "examine the USDOC's public body determinations and ascertain whether these determinations are consistent with the requirements of Article 1.1(a)(1), properly interpreted." It added that it was "mindful" that it "may only complete the analysis to the extent that there are sufficient factual findings by the Panel or undisputed facts on the Panel record." It said that it would "first address the question of whether a reasonable and objective investigating authority could, based on the evidence before the USDOC, have determined that the SOEs at issue are public bodies," and thereafter, it would "turn to the question of whether a reasonable and objective investigating authority could have made the same determination in respect of the SOCBs at issue." (Paras 341-342)

With respect to SOEs, the Appellate Body recalled the Panel's findings that the DOC determined, in all of the investigations at issue, that the relevant SOEs were public bodies "based on the fact that the Government of China held the majority ownership of the shares in the respective companies." In this regard, it recalled that China had argued before the DOC that to determine whether the relevant entities were public bodies, the DOC should conduct a five-factor test that it had applied in prior investigations (Para. 343)

In considering this issue, the Appellate Body explained that "investigating authorities have a duty to seek out relevant information and to evaluate it in an objective manner" and "[t]he reasoning of the authority must be coherent and internally consistent, and the conclusions reached and the inferences drawn by the authority must be based on positive evidence." Thus, it said that in the case at hand, the DOC "was under an obligation to actively seek out information relevant to the analysis of whether a financial contribution had been made," including "information relevant to the potential characterization of SOEs as public bodies." Noting that during questioning at the oral hearing, the United States acknowledged that the DOC asked for ownership information but not other information relating to the five-factor test, the Appellate body considered that this "indicates that the USDOC did not comply with its duty to seek out relevant information and to evaluate it in an objective manner in order to ensure that its determinations were based on a sufficient factual basis." The Appellate Body considered the fact that the DOC relied "principally" on information about ownership to be "not sufficient . . because evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function." Such evidence, alone, it said, "cannot support a finding that an entity is a public body." (Paras. 344-346) Thus, it concluded that the DOC's approach was "inconsistent with a proper understanding of the term 'public body'" in Article 1.1(a)(1), and it therefore found that the

DOC's public body determinations in respect of SOEs in the four investigations at issue are inconsistent with Article 1.1(a)(1). (Para 347)

Next, the Appellate Body examined the DOC's determination in the OTR investigation that the relevant SOCBs were public bodies, in which the DOC reached its decision on the same basis as its previous determination in the CFS Paper case. In that case, the DOC had relied on four considerations in reaching its determination that the SOCBs at issue constituted public bodies. Here, the Appellate Body said that the DOC's analysis in the OTR investigation, as elaborated in the earlier CFS Paper determination, "is broader than [the DOC's] analysis regarding the SOEs," and it noted the evidence considered and analysis given in this regard. (Paras 348-351)

The Appellate Body then turned to the question of whether the DOC "provided a reasoned and adequate explanation of the basis for its determination that the SOCBs were public bodies in the OTR investigation." It said that while mere incorporation of findings from one determination into another determination "will normally not suffice as a reasoned and adequate explanation," "where there is close temporal and substantive overlap between the two investigations, such cross reference may, exceptionally, suffice." In this regard, it pointed out, "substantive overlap" between the CFS Paper and OTR investigations, as both dealt with the "nature of SOCBs in China", that there is only one year's difference between the periods of investigation in the two investigations; and that China did not challenge, either before the Panel or the DOC, the DOC's reliance on its findings in CFS Paper. On this basis, the Appellate Body concluded that the DOC's reliance on its finding in CFS Paper was not inconsistent with the obligation to base the "public body" determination on "positive evidence" and to "provide a reasoned and adequate explanation of how the evidence on the record supported that determination." It explained further that regardless of whether it would have reached the same conclusion, the DOC did, in fact, in CFS Paper, consider and discuss evidence indicating that SOCBs are government controlled and effectively exercise certain governmental functions, analysis which was incorporated by reference in the OTR investigation. And, in addition, in the OTR investigation the DOC also referred to additional evidence. These considerations "taken together," the Appellate Body said, "demonstrate that the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government." (Paras. 353-355)

On this basis, the Appellate Body concluded that China has not established that the DOC's public body determination in respect of SOCBs in the OTR investigation is inconsistent with Article 1.1(a)(1). (Para. 356)

China also requested the Appellate Body to find that "as a consequence of the fact" that the DOC's determinations are inconsistent with Article 1.1(a)(1), the United States is also in violation of Articles 10 and 32.1. The Appellate Body recalled that in the past it has treated claims under Articles 10 and 32.1 as "consequential claims in the sense that, where it has not been established that the essential elements of the subsidy definition in Article 1 are present, the right to impose a countervailing duty has not been established and this, as a consequence, means that the countervailing duties imposed are inconsistent with Articles 10 and 32.1." As a result, it stated that "China was not required to advance further arguments to establish a consequential violation of Articles 10 and 32.1," and it therefore found that the DOC's "public body determinations with respect to SOEs in the four investigations at issue are also inconsistent with" Articles 10 and 32.1. (Paras. 357-358)

Conclusion

The Appellate Body explained its conclusions as follows: It reversed the Panel's finding that the term "public body" in Article 1.1(a)(1) means "any entity controlled by a government"; it also reversed the Panel's finding that China did not establish that the DOC acted inconsistently with Article 1.1(a)(1) in determining in the relevant investigations that the SOEs and SOCBs constituted "public bodies"; and, in completing the analysis, it found: (1) that the DOC acted inconsistently with Articles 1.1(a)(1), 10 and 32.1 by determining, in the four investigations at issue, that the SOE input suppliers constituted public bodies; and (2) that China did not establish that the DOC acted inconsistently with Article 1.1(a)(1) by determining in the OTR investigation that the SOCBs constituted public bodies. (Para. 359)

SCM Agreement Article 2.1(a) (Specificity) - Explicit Limitation to Certain Enterprises

The Panel had found that China did not establish that the DOC acted inconsistently with SCM Agreement Article 2.1(a) in its determination in the OTR investigation "that lending by SOCBs to the OTR tire industry was *de jure* specific." China appealed this finding, in relation to both the Panel's interpretation and application of Article 2.1(a). (Paras. 361-362) The Appellate Body considered each issue in turn.

Interpretation of Article 2.1 (a)

Article 2.1 states:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

The Appellate Body began its analysis with a general discussion of Article 2.1. It explained that the use of the term "principles"—instead of, for instance, "rules"— in the Article 2.1 chapeau suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle. Consequently, it said, "the application of one of the

subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific." (Para. 366) It then observed that Articles 2.1(a) and (b) "identify certain common elements in the analysis of the specificity of a subsidy." For instance, "these principles direct scrutiny to the eligibility requirements imposed by 'the granting authority, or the legislation pursuant to which the granting authority operates.'" It said this "is a critical feature of both provisions as it situates the analysis for assessing any limitations on eligibility in the particular legal instrument or government conduct effecting such limitations." (Para. 368) The Appellate Body also stated that "a proper understanding of specificity under Article 2.1 must allow for the concurrent application of these principles to the various legal and factual aspects of a subsidy in any given case." At the same time, it recognized that "there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary." (Para. 371)

Turning to China's appeal, the Appellate Body noted that this appeal focuses on the "proper interpretation" of Article 2.1(a). Explaining this provision, the Appellate Body noted that the word "explicitly" qualifies the phrase "limits access to a subsidy to certain enterprises" and signifies "[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; unambiguous; clear." Moreover, "express" is a synonym for "explicit." Therefore, the Appellate Body considered that a subsidy is specific under Article 2.1(a) if the limitation on access to the subsidy to certain enterprises is "express, unambiguous, or clear from the content of the relevant instrument, and not merely 'implied' or 'suggested'." In addition, the Appellate Body said, the term "certain enterprises" "refers to a single enterprise or industry or a class of enterprises or industries that are known and particularized." (Para. 372-373)

The Appellate Body further explained that China's appeal relates to the Panel's interpretation of Article 2.1(a) and to its finding that there is "no requirement that the limitation on access necessarily be set forth explicitly with respect to both the financial contribution and the benefit in order for a subsidy to be specific under that provision." In this regard, China maintained that the relevant inquiry under Article 2.1(a) is "whether the actual words of the legislation limit access to the particular financial contribution *and* its associated benefit that the investigating authority has found to satisfy the two-part definition of a 'subsidy' under Article 1 of the SCM Agreement." (Para. 374) According to the Appellate Body, the interpretative question here is "whether a subsidy is specific in the sense of Article 2.1(a) only if the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access *both* to the financial contribution *and* to its corresponding benefit, as China suggests, or whether, as the Panel found, an explicit limitation on access *either* to the financial contribution *or* to the benefit may prove sufficient for a subsidy to be specific under Article 2.1(a)." (Para. 376)

In addressing this issue, the Appellate Body said it disagreed with China that "the use of the word 'subsidy' in the chapeau of Article 2.1 ... means that each of the definitional elements of a subsidy bears upon the question of whether a subsidy is specific under Article 2.1(a)." Rather, "what must be made explicit under Article 2.1(a) is the *limitation on access* to the subsidy to certain enterprises, regardless of how this explicit limitation is established." In this respect, the Appellate Body said that "generally, a legal instrument explicitly limiting access to a financial contribution to certain enterprises, but remaining silent on access to the benefit, would nevertheless constitute an explicit limitation on access to that subsidy." It agreed with the Panel that "there are many ways in which access to a subsidy could be explicitly limited," and that it is not the case "that both the financial contribution and the benefit necessarily would have to be set forth explicitly to effect such a limitation." (Para. 377) On this basis, the Appellate Body disagreed with China that the relevant inquiry under Article 2.1(a) is "whether the actual words of the legislation limit access to both the particular financial contribution and its associated benefit." (Para. 378)

Application of Article 2.1(a)

China appealed two aspects of the Panel's application of Article 2.1(a) to the DOC's specificity determination in respect of SOCB lending in the OTR investigation. First, China raised a conditional appeal in the event that the Appellate Body disagreed with China's proposed interpretation of Article 2.1(a). Second, China appealed the Panel's application of the term "certain enterprises" in Article 2.1(a) to the relevant facts in the OTR investigation. (Para. 379)

Before addressing these specific points of appeal, the Appellate Body recalled that the standard of review applicable to a WTO panel reviewing a countervailing duty determination precludes a panel from engaging in a *de novo* review of the facts of the case "or substitut[ing] its judgement for that of the competent authorities." At the same time, a panel is required to "undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it," and such examination "must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report." (Para. 379)

The Appellate Body considered each point of appeal in turn.

Whether the Panel erred in finding that the DOC identified an explicit limitation on access to the subsidy

Under China's conditional appeal, even assuming that it is sufficient, under Article 2.1(a), for the explicit limitation to restrict access to the financial contribution alone, China argued that the measures relied upon by the DOC "did not contain any such limitation, and the Panel erred in finding otherwise." (Para. 380) China's argument focused on whether access to SOCB loans "was limited to the industries in the 'encouraged' category or whether, on the contrary, the 'permitted' industries were also beneficiaries of such loans." (Para. 384) On this issue, the Appellate Body said that in arguing that "[i]t is undisputed that SOCBs also provided loans to the *permitted* category of industries," China seeks to attribute to the Panel a "finding" regarding the permitted category that the Panel did not make. The Appellate Body concluded that the Panel did not err in considering that the policy lending provided for in China's central level planning documents was explicitly limited to the "encouraged" projects/industries, and therefore it rejected China's conditional ground of appeal. (Para. 385)

Whether the Panel erred in finding that the DOC had a sufficient basis on which to determine that the subsidy was limited to "certain enterprises"

The Appellate Body said it understood China to appeal the Panel's application of the term "certain enterprises" to the particular facts in this dispute. In this regard, China alleged that the Panel erred in finding that the "encouraged" industries are "described in very specific and narrowly-circumscribed terms," since, in China's view, many of these industries, individually, "represent[] a broad segment of economic activity." China also contended that the Panel "erroneously relied on the 'restricted' and 'eliminated' categories in reaching its conclusion that the 'encouraged' industries, taken as a whole, collectively constituted 'certain enterprises' within the meaning of Article 2.1(a)." (Para. 386)

After setting out how the Panel conducted its analysis, the Appellate Body explained that China focused on the alleged finding by the Panel that the GOC Catalogue explicitly identified "certain enterprises" in the sense of Article 2.1(a) "for encouragement and development," including the tyre

industry. In evaluating this ground of appeal, the Appellate Body first considered "whether the Panel in fact made such a finding," and then addressed the substance of China's arguments. (Para. 391)

On this issue, the Appellate Body said it saw "tension between certain statements made by the Panel, which emphasize that the GOC Catalogue is key to, and dispositive of, a finding of specificity, and which are the focus of China's appeal, and other statements made by the Panel, along with its overall approach, which suggest that the GOC Catalogue played a lesser, non-determinative role in the specificity analysis." It said it was "uncertain whether the Panel made the finding, challenged by China on appeal, that the entirety of the 'encouraged' category constitutes 'certain enterprises' within the meaning of Article 2.1(a)." It did not see that the Panel needed to make a finding as to whether the entirety of the "encouraged" category constituted "certain enterprises" in the sense of Article 2.1(a). Accordingly, the Appellate Body considered it unnecessary to examine whether that category as a whole, or entries in that category other than "[p]roduction of advanced belt tyre radial, its supporting materials and equipment production," are described in "very specific, narrowly-circumscribed" terms. (Paras. 394-395)

Finally, China challenged the Panel's reliance on the "restricted" and "eliminated" categories, as well as the Panel's alleged failure to take proper account of the significance of the "permitted" category in its analysis. In response, the Appellate Body recalled that certain aspects of the Panel's approach departed from that of the DOC to the extent that they implied that the specificity analysis in respect of SOCB lending in the OTR investigation had to be ascertained at the central-government level, and that the GOC Catalogue was the crucial document in the DOC's specificity determination. Because it had found above that the Panel's review of the DOC's specificity determinations "was properly based on documents at all levels of government," the Appellate Body considered it unnecessary to examine further the Panel's evaluation of the significance of the "restricted," "eliminated," and "permitted" categories in the GOC Catalogue. (Paras. 396-397)

The Appellate Body then stated, "[s]ince we consider that certain elements of the Panel's reasoning do not parallel the rationale employed by the USDOC in its specificity determination, the question becomes whether this means that we must reverse the Panel's ultimate finding that China has not established that the USDOC's specificity determination in respect of SOCB lending in the OTR investigation was inconsistent with Article 2.1(a)." The Appellate Body said this is not the case. In this regard, the Appellate Body explained that the Panel's analysis, viewed in its entirety, reveals that the DOC "found that the OTR industry was explicitly identified in the planning documents at all government levels as a target for development and that all financial institutions were instructed to provide financing to that industry." Thus, despite the Panel's apparent understanding that central-government documents were the relevant basis for the DOC's specificity determination, ultimately the Panel conducted "a proper factual analysis based on the totality of evidence, at all levels of government, on which the USDOC supported its specificity determination." The Appellate Body therefore concluded that the Panel's ultimate finding – that China has failed to establish that the DOC's determination in the OTR investigation, which was that lending by SOCBs to the OTR tire industry (in particular to GTC and Starbright) was *de jure* specific, was inconsistent with Article 2.1(a) – does not amount to legal error. (Paras. 398-400)

On this basis, the Appellate Body upheld the Panel's finding that China did not establish that the DOC acted inconsistently with Article 2.1(a) when it determined in the OTR investigation that SOCB lending was specific to the tyre industry. (Para. 401)

SCM Agreement Article 2.2 - Regional Specificity

The Panel had found that the DOC acted inconsistently with Article 2.2 when it determined that the government provision of land-use rights, in the LWS investigation, was regionally-specific. Although China did not disagree with the Panel's conclusion, it appealed this finding "because it disagrees with the basis on which the Panel reached it, and is concerned about certain systemic implications that may flow from the Panel's reasoning." (Paras. 402-403)

Article 2.2 provides in relevant part:

> A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. ...

In its appeal, China requested that the Appellate Body: (i) find that the Panel erred in interpreting Article 2.2 to permit a finding of specificity based solely on a finding that the financial contribution—rather than the *subsidy*—was geographically limited; and (ii) reverse the Panel's finding that the existence of a "distinct regime" is relevant to a determination of specificity under Article 2.2. The Appellate Body considered each of these issues in turn. (Para. 407)

The Panel's Interpretation of the Term "Subsidy" in Article 2.2

Noting that China's appeal on this point consists essentially of the same arguments as those advanced in respect of its appeal under Article 2.1(a), the Appellate Body said it was not persuaded by China's arguments here. Like the Panel, the Appellate Body considered that its reasoning under Article 2.1(a) is sufficient to dispose of this claim under Article 2.2. Under Article 2.2, as under Article 2.1(a), "a limitation on access to a financial contribution will also limit access to any resulting benefit, since only those obtaining the financial contribution can be beneficiaries of that subsidy." (Paras. 411-413) On this basis, the Appellate Body found that the Panel did not err in its interpretation of the term "subsidy" in Article 2.2, or in finding that the DOC committed no legal error in basing "its determination of regional specificity on the element of the financial contribution, i.e., on the provision of land-use rights by Huantai County." (Para. 414)

The Panel's Statements Regarding a "Distinct Regime"

As to "certain statements" by the Panel that, according to China, suggest that a subsidy would be regionally specific if it were provided as part of a "distinct regime" even if the identical subsidy were also available elsewhere, the Appellate Body said that whether or not these statements by the Panel can be characterized as "findings" on issues of law or legal interpretations, "they were very much focused on the particular facts of the LWS investigation, and it is clear that they were *obiter* in nature." In addition, it was not clear, the Appellate Body stated, that these statements meant that the Panel considered that the mere existence of a "distinct" regime would enable a subsidy to be found to be specific to a designated geographical region, even where the identical subsidy was also available to enterprises outside that designated geographical region. Nor did the Appellate Body think that the statements suggest that "the Panel would have found the alleged land-use rights subsidy to be regionally specific if it had been provided as part of a 'distinct regime,' even if the identical subsidy was available elsewhere in Huantai County." If anything, it said, "several elements of the Panel's reasoning appear to suggest the opposite." (Paras. 415-422)

Accordingly, the Appellate Body did not accept "the premise upon which the second part of China's appeal under Article 2.2 of the *SCM Agreement* is founded," and it found it unnecessary to consider the issue further. (Para. 424)

On this basis, the Appellate Body found that China has not established any relevant error in the Panel's interpretation of the term "subsidy" in Article 2.2, and it thus rejected China's

allegations of error in respect of the Panel's statement concerning a "distinct regime" in the context of the LWS investigation. (Para. 424)

SCM Agreement Article 14(d) - Calculation of Benefit: Benchmarks for Input Prices

As explained by the Appellate Body, in the CWP and LWR investigations the DOC "rejected private prices of HRS [hot-rolled steel] in China as benchmarks for measuring the existence and amount of benefit conferred by SOE[state-owned enterprise]-provided inputs of HRS." In this regard, the DOC had determined that, "because China's SOEs accounted for the 'overwhelming' majority of the production and sale of HRS (96.1 per cent), private prices of HRS in China were not suitable as subsidy benchmarks." Having rejected private prices of HRS in China, the DOC "selected external prices as subsidy benchmarks, based on world market prices for HRS as reported in 'Steel Benchmarker,' an international steel industry publication." (Para. 429)

The Panel had concluded that China failed to establish that the DOC acted inconsistently with SCM Agreement Article 14(d) when it rejected in-country private prices in China as benchmarks for HRS in the CWP and LWR investigations. China appealed this conclusion, arguing that: (1) the Panel erred in interpreting Article 14(d) to permit investigating authorities to reject in-country private prices as a benchmark "based solely on evidence that the government is the predominant supplier of the good in question"; (2) the Appellate Body should reverse the Panel's finding that China did not establish that the DOC acted inconsistently with Article 14(d) by rejecting private prices in China as benchmarks; and (3) the Appellate Body should find that the Panel acted inconsistently with DSU Article 11 by attributing to the DOC "a rationale for its finding of distortion other than the rationale that appears in its published determinations." (Paras. 426-427) The Appellate Body addressed each issue in turn.

Interpretation of Article 14(d)

The Panel had framed the "central legal question" before it as whether, given the findings of the Appellate Body in US – Softwood Lumber IV, "evidence that the government was the predominant supplier of a good can be sufficient, on its own, to establish market distortion such that rejection of in-country private prices as benchmarks would be permissible under Article 14(d) of the SCM Agreement, or whether, alternatively, some evidence in addition to the government's share of the market for the good in question would always be required before in-country private prices could be rejected." (Para. 431) China asserted that, in *US – Softwood Lumber IV*, the Appellate Body concluded that evidence of "significant" or "predominant" government market share is insufficient, on its own, to demonstrate the distortion of private prices. The Panel's reasoning, in contrast, implied that an investigating authority's finding that the government is a "predominant," rather than a "significant," supplier would be legally sufficient, on its own, to reject private market prices as a benchmark under Article 14(d). (Para. 433)

Article 14(d) provides in relevant part:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> ...
>
> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is

> made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to *prevailing market conditions for the good or service in question in the country of provision or purchase* (including price, quality, availability, marketability, transportation and other conditions of purchase or sale). (emphasis added)

In addressing China's appeal, the Appellate Body began by discussing the *Softwood Lumber* report. In that case, the Appellate Body found that Article 14(d) "permits investigating authorities to use a benchmark other than private prices in the country of provision for determining if goods have been provided by a government for less than adequate remuneration ... albeit subject to a number of qualifications." Addressing the question of "when investigating authorities may use a benchmark other than private prices in the country of provision," the Appellate Body emphasized that such circumstances are "very limited" and found that "an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." China argued that these findings "stand for the proposition that an investigating authority is always required to analyze factors other than the government's market share as evidence that private prices are distorted in the market." (Paras. 438-440)

On this issue, the Appellate Body said that it read the *Softwood Lumber* report "as indicating that, if the government is a *significant* supplier, this fact alone cannot justify a finding that prices are distorted." However, "where the government is the *predominant* supplier, it is likely that private prices will be distorted, but a case-by-case analysis is still required." The Appellate Body further stated that the *Lumber* reasoning "excludes the application of a per se rule, according to which an investigating authority could properly conclude in every case, and regardless of any other evidence, that the fact that the government is the predominant supplier means that private prices are distorted." At the same time, the Appellate Body considered that in cases in which the government is the "predominant" supplier, an investigating authority would not be required to conduct the same type of analysis as in cases where the government is only a "significant" supplier. (Paras. 441-443)

Turning to the Panel report in this case, the Panel had stated that "nothing in [the *US - Softwood Lumber IV*] report ... would prohibit, a priori, a finding of market distortion, and a decision to depart from in-country private prices, where the only relevant evidence was that the government is the predominant supplier of the good." The Appellate Body said that it did "not read this statement by the Panel as endorsing a per se rule based on the government's role as the predominant supplier of the good ... according to which an investigating authority can reject private prices based only on a finding that the government is the predominant supplier in the market." (Para. 445)

The Appellate Body then said it was of the view that "an investigating authority may reject in-country private prices if it reaches the conclusion that these are too distorted due to the predominant participation of the government as a supplier in the market, thus rendering the comparison required under Article 14(d) of the SCM Agreement circular." Thus, it is "price distortion" that "would allow an investigating authority to reject in-country private prices, not the fact that the government is the predominant supplier per se." However, it noted, there may be cases "where the government's role as a provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight." At the same time, it emphasized that "price distortion must be established on a case-by-case basis and that an investigating authority cannot, based simply on a finding that the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share." (Para. 446)

On this basis, the Appellate Body said it did not consider that the Panel interpreted Article 14(d) as permitting the rejection of in-country private prices as benchmarks through the application of a per se rule based on the role of the government as the predominant supplier of the goods. Rather, the Panel "correctly interpreted" Article 14(d) as "requiring that the issue of whether in-country private prices are distorted such that they cannot meaningfully be used as benchmarks is one that must be determined on a case-by-case basis, having considered evidence relating to other factors, even in situations where the government is the predominant supplier in the market." (Para. 447)

Panel's Assessment under Article 14(d)

Turning to the Panel's application of Article 14(d), the Appellate Body examined the Panel's assessment of the DOC's decision to reject Chinese in-country private prices for HRS inputs in the CWP and LWR investigations. In this regard, the Panel had disagreed with China that, in the investigations at issue, the DOC applied a "per se" rule based on the government's predominant role as a supplier of the goods. The Panel considered that, "given the extensive summaries and discussion contained in the determinations," it is clear that the DOC "received from parties on both sides of the investigation, and considered, arguments and evidence relevant to the role of the government in the Chinese HRS market." On appeal, China claimed that the DOC's rejection of Chinese market prices as benchmarks "was predicated exclusively on evidence relating to the market share of SOE suppliers of HRS," despite evidence on the record of the CWP and LWR investigations concerning the actual nature and structure of the Chinese HRS industry which "demonstrated that, in spite of government market share, the market was functioning and prices were not distorted." (Paras. 448-450)

In addressing this issue, the Appellate Body recalled its earlier finding that "even in cases in which the government is the predominant supplier, an investigating authority may not establish distortion of prices without considering evidence of other factors that have been presented to the authority as evidence." Instead, "an investigating authority should always consider all evidence regarding other factors on the record, but the extent to which such evidence carries weight depends on how predominant the government's role is and on the relevance of other factors." Here, the Appellate Body noted, the DOC's consideration of any evidence other than government market share "appears to have been somewhat cursory and largely limited to the conclusion that such evidence was either irrelevant or insufficient to override the distortion caused by the government's overwhelming involvement in the market." Nonetheless, the Appellate Body explained that "with 96.1 per cent market share, the position of the government in the market is much closer to a situation where the government is the sole supplier of the goods than to the situation where it is merely a significant supplier of the goods." This makes it "likely that the government as the predominant supplier has the market power to affect through its own pricing strategy the pricing by private providers for the same goods, and induce them to align with government prices." In such a situation, the Appellate Body stated, "evidence of factors other than government market share will have less weight in the determination of price distortion than in a situation where the government has only a 'significant' presence in the market." Thus, while it is true that the DOC's consideration of factors other than government market share in the CWP and LWR investigations "was somewhat cursory," this must be contrasted with the DOC's finding that "with 96.1 per cent market share, the government had an 'overwhelming' involvement in the HRS market." (Paras. 453-455)

The Appellate Body concluded that, "given the evidence regarding the government's predominant role as the supplier of the goods, that is, the 96.1 per cent market share, and having considered evidence of other factors," the Panel properly found that the DOC could, consistently with Article 14(d), "determine that private prices were distorted and could not be used as benchmarks for assessing the adequacy of remuneration." (Para. 456)

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On this basis, the Appellate Body found that the Panel did not commit legal error in applying its interpretation of Article 14(d) to the DOC's determinations in the CWP and LWR investigations. The Appellate Body therefore upheld the Panel's finding that China did not establish that the DOC acted inconsistently with Article 14(d) by rejecting in-country private prices in China as benchmarks for HRS in the CWP and LWR investigations. (Para. 458)

DSU Article 11

China claimed that the Panel attributed to the DOC a rationale that the DOC did not adopt in relation to the benchmark issue. In this regard, China contended that the "rationale or explanation" provided by the DOC in its determinations was "based exclusively on government market share," and it was "solely on this basis that the Panel could examine the consistency of these determinations with the covered agreements." Thus, in China's view, to the extent that the Panel attributed to the DOC an implicit "consideration" of other factors and evidence, this was inconsistent with the Panel's obligation under DSU Article 11 to limit its examination to the DOC's stated rationale. (Para. 459)

According to the Appellate Body, the question here is whether the Panel attributed to the DOC "a rationale that was not set out in the CWP and LWR determinations," rather than analyzing the rationale that the DOC set out in those determinations. (Para. 461) On this issue, the Appellate Body said that the review of the reasons reflected in the DOC determinations "demonstrates that there was an express basis in those determinations" that supports the Panel's statement that the DOC "received and considered" evidence pertaining to factors other than government market share. It noted that the DOC "reproduced the respondents' arguments relating to these factors, considered them, albeit in a cursory fashion, and then found that they either were not relevant to the question of price distortion or did not mitigate the fact that the government was the predominant supplier, accounting for 96.1 per cent of HRS production." In the Appellate Body's view, this is sufficient to conclude that the DOC "received and considered" evidence, and ultimately reached the conclusion that this evidence was not relevant. Therefore, the Appellate Body did not consider that the Panel attributed to the DOC a rationale that was not contained in the DOC's determinations. (Para. 463) **It thus found that the Panel did not act inconsistently with DSU Article 11.** (Para. 464)

SCM Agreement Article 14(b) - Calculation of Benefit: Benchmarks for Loans

The Appellate Body explained that in the CWP, LWS, and OTR countervailing duty investigations, the DOC rejected interest rates from all sources of loans in China as benchmarks for measuring the existence and amount of benefit conferred by SOCB-provided loans, "because of pervasive government intervention in the banking sector, which created significant distortions, restricting and influencing even foreign banks within China." Having rejected interest rates in China as benchmarks, the DOC "resorted to an external benchmark." Specifically, the DOC "constructed, using a regression-based methodology, an interest rate benchmark based on inflation-adjusted interest rates of a group of countries with a gross national income ('GNI') similar to that of China" (the "proxy benchmark"). Relying on its previous findings in the CFS Paper case, the DOC justified this approach on the basis of a "broad inverse relationship" between income levels and real interest rates. (Para. 470)

Interpreting SCM Agreement Article 14(b), the Panel considered that "inherent in Article 14(b), as in Article 14(d), is sufficient flexibility to permit the use of a proxy in place of observed rates in the country in question where no 'commercial' benchmark can be found." With respect to the DOC's rejection of interest rates in China, the Panel had found that China did not establish that the DOC's decision not to rely on Chinese interest rates as benchmarks for SOCB loans denominated in RMB was inconsistent with Article 14(b). Similarly, with respect to the use by the DOC of a proxy benchmark to calculate the benefit under Article 14(b), the Panel had found that China did not establish that the benchmark actually

used by the DOC to calculate the benefit from RMB-denominated SOCB loans was inconsistent with Article 14(b). (Paras. 465-467)

China appealed these findings and requested that the Appellate Body: (i) reverse the Panel's finding that China did not establish that the United States acted inconsistently with Article 14(b) by rejecting interest rates in China as benchmarks to calculate the benefit conferred by RMB-denominated loans; (ii) reverse the Panel's finding that China did not establish that the benefit benchmark that the DOC actually used was inconsistent with Article 14(b), and (iii) find that the Panel acted inconsistently with DSU Article 11 by failing to assess the conformity of the benchmark used by the DOC with Article 14(b). (Para. 468) The Appellate Body addressed each issue in turn.

Interpretation of Article 14(b): Rejection of In-Country Interest Rates

According to the Panel, the "central question of legal interpretation ... is whether, and if so under what circumstances, Article 14(b) of the SCM Agreement permits the rejection of in-country interest rates as benchmarks for government-provided loans." The Panel had viewed the situation under Article 14(b) "as analogous to that analyzed by the Appellate Body in <u>US - Softwood Lumber IV</u> (government predominance as a supplier of a good)," and it had concluded that "in Article 14(b), as in Article 14(d), [there] is sufficient flexibility to permit the use of a proxy in place of observed rates in the country in question where no 'commercial' benchmark can be found." China appealed the Panel's interpretation. (Paras. 471-472)

Article 14(b) reads in relevant part:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> ...
>
> (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts

The Appellate Body explained that Article 14(b) provides that, in calculating the amount of the benefit resulting from a financial contribution in the form of a loan, the benchmark to be used is "a comparable commercial loan which the firm could actually obtain on the market." (Paras. 473-474)

In examining this provision, the Appellate Body considered the constituent elements of a benchmark loan under Article 14(b), focusing on the following terms: "comparable," "commercial," and a "loan which the firm could actually obtain on the market." The Appellate Body said that something can be considered "comparable" "when there are sufficient similarities between the things that are compared as to make that comparison worthy or meaningful." Thus, "a benchmark loan under Article 14(b) should have as many elements as possible in common with the investigated loan to be comparable." The Appellate Body agreed with the Panel that, "ideally, an investigating authority should use as a benchmark

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a loan to the same borrower that has been established around the same time, has the same structure as, and similar maturity to, the government loan, is about the same size, and is denominated in the same currency," and that, "in practice, the existence of such an ideal benchmark loan would be extremely rare, and that a comparison should also be possible with other loans that present a lesser degree of similarity." (Paras. 475-476)

The Appellate Body further explained that "it would not be correct to conclude that any loan made by the government (or by private lenders in a market dominated by the government) would *ipso facto* not be 'commercial'." Therefore, "the mere fact that loans are supplied by a government is not in itself sufficient to establish that such loans are not 'commercial' and thus incapable of being used as benchmarks under Article 14(b)." Instead, an investigating authority "would have to establish that the government presence or influence in the market causes distortions that render interest rates unusable as benchmarks." (Para. 479)

The Appellate Body then noted that a benchmark loan under Article 14(b) must be a "loan which the firm could actually obtain on the market." The use of the conditional tense, "could," suggests that a benchmark loan under Article 14(b) "need not in every case be a loan that exists or that can in fact be obtained in the market." Thus, Article 14(b) "does not preclude the possibility of using as benchmarks interest rates on commercial loans that are not actually available in the market where the firm is located, such as, for instance, loans in other markets or constructed proxies." (Para. 480)

In addition, the Appellate Body explained that "the relevant question under Article 14(b)" is "to what extent Article 14(b) requires strict and formalistic compliance with all of the conditions specified therein, even when doing so would frustrate the purpose of that provision and prevent any calculation of the benefit." Thus, the relevant question is "whether there is enough flexibility in Article 14(b), as the Appellate Body found that there is in Article 14(d), to allow for the use of a benchmark other than one that is always, and in every respect, 'a comparable commercial loan which the firm could actually obtain on the market.'" While the use of an out-of-country benchmark may be permissible in a given case, it would nevertheless have to "approximate the conditions" specified in Article 14(d). (Para. 482-483) In the Appellate Body's view, reading Article 14(b) as always requiring a comparison with loans denominated in the same currency as the investigated loans, even in circumstances where all loans in the same currency are distorted by government intervention, "would lead to a comparison with government distorted loans, thus frustrating the purpose of Article 14(b)." If loans in a given market and in a given currency are distorted by government intervention, "an investigating authority should be permitted, in certain circumstances ... under Article 14(b), to use a benchmark other than 'a comparable commercial loan which the firm could actually obtain on the market.'" However, such a benchmark would have to approximate "a comparable commercial loan which the firm could actually obtain on the market." (Para. 484)

The Appellate Body then stated that "selecting a benchmark under Article 14(b) involves a progressive search for a comparable commercial loan, starting with the commercial loan that is closest to the investigated loan (a loan to the same borrower that is nearly identical to the investigated loan in terms of timing, structure, maturity, size and currency) and moving to less similar commercial loans while adjusting them to ensure comparability with the investigated loan." At the same time, it saw "no inherent limitations in Article 14(b) that would prevent an investigating authority from using as benchmarks interest rates on loans denominated in currencies other than the currency of the investigated loan, or from using proxies instead of observed interest rates, in situations where the interest rates on loans in the currency of the investigated loan are distorted and thus cannot be used as benchmarks." It also considered that "the further away an investigating authority moves from the ideal benchmark of the identical or nearly identical loan, the more adjustments will be necessary to ensure that the benchmark loan

approximates the "comparable commercial loan which the firm could actually obtain on the market" specified in Article 14(b). (Para. 486-488)

Summing up, the Appellate Body said that "in spite of the different formulations used in Article 14(b) and (d), some of the reasoning of the Appellate Body in *US – Softwood Lumber IV* concerning the use of out-of-country benchmarks and proxies under Article 14(d) is equally applicable under Article 14(b)." In particular, "a certain degree of flexibility also applies under Article 14(b) in the selection of benchmarks, so that such selection can ensure a meaningful comparison for the determination of benefit." At the same time, when an investigating authority "resorts to a benchmark loan in another currency or to a proxy," it must ensure that such benchmark is adjusted so that it approximates the "comparable commercial loan." (Para. 489)

On this basis, the Appellate Body considered that the Panel did not commit an error in the interpretation of Article 14(b) when it found that "inherent in Article 14(b), as in Article 14(d), is sufficient flexibility to permit the use of a proxy in place of observed rates in the country in question where no 'commercial' benchmark can be found." (Para. 490)

Application of Article 14(b) / DSU Article 11

The Appellate Body then turned to China's claim that the Panel erred in the application of Article 14(b) to the facts of this dispute. In this regard, China claimed that the Panel erred in finding that China had not established that the DOC's determinations in the CWP, LWS, and OTR investigations not to rely on interest rates in China as benchmarks for SOCB loans denominated in RMB were inconsistent with Article 14(b). (Para. 491)

The Appellate Body explained that in the three investigations at issue, the DOC relied on its previous finding in the CFS Paper investigation that the Chinese Government's intervention in the lending market distorted that market. (Para. 492)

At the outset, the Appellate Body noted that in establishing whether a lending market is distorted, and thus cannot provide a benchmark for the purpose of Article 14(b), the Panel had considered that a clear distinction should be drawn "between, on the one hand, the government as the setter and implementer of the general monetary policy of a country; and, on the other hand, the government participating as a lender and/or otherwise intervening in the lending market as such, in a way and to an extent that effectively it is the government, and not the market, that establishes the lending rates." In the Panel's view, it is the second type of government intervention that may justify a decision to reject interest rates in a given market as benchmarks under Article 14(b). China claimed that the Panel erred in finding that there was a clear distinction of this type. On this issue, the Appellate Body said that it did "not consider that the Panel was wrong in drawing such a distinction between a government's role in implementing monetary policy, on the one hand, and market distortions that may result from governmental participation and intervention in the commercial lending market, on the other hand." While the first is "a necessary element of all commercial lending markets," the second "may turn a competitive commercial loan market into a distorted one, whose interest rates cannot be used as benchmarks under Article 14(b) of the SCM Agreement." According to the Appellate Body, "the government's role in implementing monetary policy does not, in and of itself, eliminate the scope for a competitive lending market." (Paras. 494-499) It further stated, "the mere fact that central banks establish discount rates does not in itself eliminate competition among lenders and thus make commercial rates distorted." Therefore, "while it is true that governments, through their central banks, may effectively establish discount rates, by this fact alone governments do not establish the interest rates available to individual borrowers, which are, rather, determined by market forces." (Paras. 500-501)

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On this basis, the Appellate Body said that "the central issue in applying Article 14(b) is not whether a 'clear distinction' exists in the roles of government, but rather, whether there is evidence and reasoning demonstrating that the Chinese Government, by participating in the RMB-lending market and by intervening in that market (beyond its monetary policy role), is able to and does in fact distort interest rates." (Para. 501)

Turning to the DOC's analysis of the RMB-lending market, the Appellate Body noted that the DOC's analysis in the three investigations at issue is "very brief," but that the DOC incorporates by reference its determination in an earlier investigation, CFS Paper, where it had already analyzed the Chinese lending market. In this regard, the Appellate Body observed that: "there was only one year's difference between the period of investigation in CWP, LWS, and OTR and the period of investigation in CFS Paper"; and in CFS Paper, the DOC expressly acknowledged that "banking reforms in China may be starting to take effect" and that "the scope and extent of government control over SOCBs was changing." Had a longer period of time elapsed between CFS Paper and the investigations at issue, the Appellate Body said it might not have been "appropriate or sufficient" for the DOC to simply incorporate by reference its earlier determination in CFS Paper, without explaining why, despite the passage of time, such determination remained valid. (Paras. 502-504)

China argued that, for a benchmark interest rate to be rejected under Article 14(b), "an investigating authority must have explained, on the basis of positive evidence, how government intervention causes interest rates to be artificially low." In response, the Appellate Body said that in *US – Softwood Lumber IV*, the Appellate Body did not establish, under Article 14(d), a specific requirement that, to reject in-country prices, investigating authorities must show that government prices "are artificially low." Similarly, under Article 14(b), the Appellate Body explained that a comparison would not be meaningful if the investigated loans are compared to other loans, whether private or from the government, that are distorted due to government intervention in the market. (Paras. 505-507)

For these reasons, the Appellate Body said that the DOC and the Panel were not required to determine whether factors such as the government's predominant role as a lender, government regulation of interest rates, evidence of undifferentiated interest rates, and government influence over SOCB-lending decisions, "each resulted in interest rates that were lower than they otherwise would have been." Rather, it was sufficient for the DOC to establish that "all of these factors taken together distorted the commercial lending market such that comparing the interest rates of the investigated loans with observed interest rates in the same market would not be meaningful for the purpose of Article 14(b)." (Para. 508) On this basis, the Appellate Body concluded that the Panel did not err in finding that the DOC's decision not to rely on interest rates in China as benchmarks "was reasoned and adequate, and one that a reasonable and objective investigating authority could reach based on the record before it." **Therefore, it upheld the Panel's finding that China did not establish that the DOC's decision not to rely on interest rates in China as benchmarks for SOCB loans denominated in RMB in the CWP, LWS, and OTR investigations was inconsistent with Article 14(b).** (Para. 509)

With regard to the proxy interest rate actually used in the CWP, LWS, and OTR investigations, the DOC incorporated by reference some of its findings in the CFS Paper investigation in constructing a proxy to serve as the benchmark for calculating the benefit associated with the RMB-denominated loans from SOCBs. This proxy was based on "a regression analysis of inflation-adjusted interest rates in 33 lower-middle-income countries," on the basis of a "broad inverse relationship" that the DOC found between income levels and lending rates. The DOC found, based on its findings in CFS Paper, that countries with lower per capita GNI tend to have higher interest rates than countries with higher per capita GNI. In addition, and as it did in CFS Paper, the DOC made certain adjustments to ensure the "comparability" of the proxy benchmark, relating to "institutional qualities (political stability, government effectiveness, and rule of law) and inflation." (Para. 510)

China claimed that the Panel erred in finding that the proxy benchmark actually used by the DOC in the CWP, LWS, and OTR investigations was a "comparable commercial loan which the firm could actually obtain on the market" within the meaning of Article 14(b). China also claimed that, in assessing the conformity of the DOC's proxy benchmark with Article 14(b), the Panel failed to make an objective assessment of the matter, and thus acted inconsistently with DSU Article 11. According to China, there was no basis on which the Panel could properly have considered that the proxy used by the DOC—namely, a multi-currency regression model based on per capita GNI and institutional quality—was a "comparable commercial loan which the firm could actually obtain on the market." For China, the fundamental flaws in the DOC's loan benchmark were that "it was not comparable and was not one that the respondent borrowers could actually obtain on the market." (Paras. 511-512)

Starting with the DSU Article 11 Claim, China argued that the Panel failed to fulfil its duties under DSU Article 11 because, in finding that the DOC's benchmark was not unreasonable, it simply accepted the DOC's conclusions "without demanding any meaningful explanation," rather than undertaking an in-depth examination of whether the DOC's benchmark was supported by positive evidence. (Para. 514)

As explained by the Appellate Body, the Panel considered that its task in reviewing the DOC's proxy benchmark was limited to "evaluat[ing] the internal logic of the methodology employed, and the soundness and appropriateness of the data relied upon by the USDOC, in constructing the proxy." On this issue, the Appellate Body stated, "we do not see how the Panel could have fulfilled its duties under Article 11 of the DSU through an approach that involved only an evaluation of 'the internal logic of the methodology employed, and the soundness and appropriateness of the data relied upon by the USDOC, in constructing the proxy.'" Instead, it explained, to make an objective assessment of the matter, the Panel was also required to "test the reasonableness of the methodology employed, including in the light of alternative plausible explanations." The Panel should have verified whether the DOC "provided a reasonable explanation as to how the proxy benchmark approximated a 'comparable commercial loan which the firm could actually obtain on the market'" within the meaning of Article 14(b). Furthermore, the Appellate Body said, "[v]irtually the entirety of the Panel's reasoning regarding the consistency of the USDOC's proxy benchmark with Article 14(b) of the *SCM Agreement* is contained in paragraph 10.207 of its Report." In this paragraph, the Panel had "conducted a cursory review of the USDOC's proxy benchmark and the adjustments made by the USDOC to conclude that the methodology used by the USDOC was 'not unreasonable' under the circumstances of the three investigations at issue." (Paras. 518-520)

Furthermore, with regard to the Panel's statement that China's "argument is that no such proxy methodology based on other countries' interest rates is permissible as a matter of law," the Appellate Body said it disagreed with this statement by the Panel on two levels. First, "the Panel was obliged to engage in a critical and searching review of whether the reasons put forth by the USDOC justified the proxy that it constructed, including in the light of other plausible alternatives." And second, it was not clear to the Appellate Body that China made "no arguments as to specific flaws in the USDOC's methodology that could and should have been corrected." (Paras. 522-524)

Summing up, the Appellate Body said that the Panel "appears to have simply accepted the USDOC's determinations and relevant supporting evidence without engaging in a critical and searching analysis, or testing the adequacy and reasonableness of the USDOC's determinations in the light of other plausible alternative explanations." Therefore, it concluded that the Panel "did not conduct a sufficiently rigorous review of the USDOC's construction of its proxy benchmark." Instead, it "rather passively accepted the reasons provided by the USDOC for its determinations, without engaging in a critical and searching analysis and without considering the USDOC's determinations in the light of plausible alternative explanations." (Paras. 525-526)

On this basis, the Appellate Body found that the Panel "failed to make an objective assessment of the matter before it as required by Article 11 of the DSU." It therefore reversed the Panel's finding that China did not establish that the benchmark actually used by the DOC to calculate the benefit from RMB-denominated SOCB loans in the CWP, LWS, and OTR investigations was inconsistent with Article 14(b) (Para 527)

Having reversed the Panel's finding, the Appellate Body then considered whether it could complete the legal analysis and rule on China's claim that the benchmark used is inconsistent with Article 14(b). It noted that when the factual findings of the panel and the undisputed facts in the panel record provide the Appellate Body with a sufficient basis for its own analysis, the Appellate Body may complete the analysis with a view to facilitating the prompt settlement of the dispute. Here, it observed that "there are no factual findings by the Panel that could assist us in completing the analysis of this issue." The Panel had simply restated the DOC's reasoning and determinations without engaging in a critical and searching review. It made "no findings regarding the basis for or the soundness of the elements used to construct the benchmark, nor as to how these elements reasonably approximated a comparable commercial loan that a firm could actually obtain on the market." Thus, the Panel made no relevant findings that would assist in completing the analysis (Paras 528-529)

Turning to the Panel record to see whether it contains any undisputed facts that would allow completion of the analysis, the Appellate Body considered that this record reveals that China not only questioned the DOC's entitlement to resort to an external benchmark, but also challenged the methodology adopted by the DOC in constructing the proxy benchmark and suggested several changes to improve the comparability of the proxy benchmark. Therefore, contrary to the Panel's observation, China not only rejected the use of a proxy methodology based on other countries' interest rates "as a matter of law," but it also specifically challenged the methodology used by the DOC in constructing the proxy benchmark by pointing to what it considered to be flaws and by suggesting changes to improve comparability. The Appellate Body thus considered that "there are important facts on the record regarding the USDOC's proxy benchmark, which the Panel did not address and which remain disputed between the parties." (Paras 534-536)

On this basis, the Appellate Body found that "there are insufficient undisputed facts on the Panel record" regarding the DOC's proxy benchmark to enable it to complete the legal analysis and ascertain the consistency of the proxy benchmark with Article 14(b). (Para. 537)

SCM Agreement Articles 19.3, 10 and 32.1 - "Double Remedies" (AD/CVD and the NME Methodology)

The Panel had found that China failed to establish that the United States acted inconsistently with SCM Agreement Articles 10, 19.3, 19.4 and 32.1 and GATT Article VI:3 by reason of the DOC's "use of its NME methodology in the four anti-dumping investigations at issue and the imposition of anti-dumping duties on that basis concurrently with the imposition of countervailing duties on the same products in the four countervailing duty investigations at issue" (*i.e.*, imposing "double remedies"). (Para. 539) China appealed this finding and requested that the Appellate Body: (1) find that the Panel erred in its interpretation and application of SCM Agreement Articles 10, 19.3, 19.4 and 32.1 and GATT Article VI:3; (2) reverse the panel's finding that China did not establish that the United States acted inconsistently with its obligations; and (3) complete the analysis and conclude that the DOC acted inconsistently with

these provisions, in all of the investigations at issue, "by failing to take steps to avoid offsetting the same subsidies twice." (Para 540)

At the outset, the Appellate Body found it "useful to outline the concept of 'double remedies' at issue in this dispute." It explained that the issue "may arise when both countervailing duties and anti-dumping duties are imposed on the same imported products." It observed that the term does not refer "simply to the fact that both an anti-dumping and a countervailing duty are imposed on the same product." Rather, "double remedies,' also referred to as 'double counting,' refers to circumstances in which the simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice." It noted that "[d]ouble remedies' are 'likely' to occur in cases where an NME methodology is used to calculate the margin of dumping," on the following basis When a dumping margin is calculated for a product from an NME, investigating authorities "compare the export price to a normal value that is calculated based on surrogate costs or prices from a third country." In the dumping margin calculation, "investigating authorities compare the product's constructed normal value (not reflecting the amount of any subsidy received by the producer) with the product's actual export price (which, when subsidies have been received by the producer, is presumably lower than it would otherwise have been)." The resulting dumping margin is "thus based on an asymmetric comparison and is generally higher than would otherwise be the case." The dumping margin calculated under an NME methodology "reflects not only price discrimination by the investigated producer between the domestic and export markets ('dumping'),' but also 'economic distortions that affect the producer's costs of production,' including specific subsidies to the investigated producer of the relevant product in respect of that product." The Appellate Body explained that, as a result, "[a]n anti-dumping duty calculated based on an NME methodology may, therefore, 'remedy' or 'offset' a domestic subsidy, to the extent that such subsidy has contributed to a lowering of the export price." Put another way, "the subsidization is 'counted' within the overall dumping margin." (Paras 541-543)

Interpretation of SCM Agreement Article 19.3

On appeal, China argued that "the Panel erred in its interpretation of the relevant provisions of the *SCM Agreement* and the GATT 1994, and in reasoning that, because these provisions do not *expressly* prohibit a Member from offsetting the same domestic subsidies through the imposition of two different duties, it was the intention of the drafters to *authorize* such actions." In this regard, China asserted that "an importing Member is under an affirmative legal obligation to ensure that it does not impose countervailing duties to offset a subsidy that is simultaneously offset through the manner in which it calculates anti-dumping duties in respect of the same imported product." It contended that such an obligation arises from: "(i) Article 19.3 of the *SCM Agreement*, which requires investigating authorities to impose countervailing duties in the 'appropriate' amounts; (ii) Article 19.4 of the *SCM Agreement* and Article VI:3 of the GATT 1994, which prohibit Members from levying countervailing duties in excess of the amount of the subsidy found to exist; (iii) Article 10 of the *SCM Agreement*, which requires Members to '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 [the SCM] Agreement,', and (iv) Article 32.1 of the *SCM Agreement*, which prohibits Members from taking 'specific action against a subsidy of another Member .. except in accordance with the provisions of [the] GATT 1994, as interpreted by [the SCM] Agreement.'" (Para. 545)

The Appellate Body began its analysis with SCM Agreement Article 19.3, which provides in relevant part:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each

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> case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

In its analysis of this provision, the Panel had found that "(i) countervailing duties are collected 'in the appropriate amounts' insofar as the amount collected does not exceed the amount of subsidy 'found to exist,' (ii) 'the imposition of anti-dumping duties calculated under an NME methodology has no impact on whether the amount of the concurrent countervailing duty collected is 'appropriate' or not', and (iii) 'it was not the intention of the drafters [of] the SCM Agreement to address the question of double remedies in Article 19.3.'" On this basis, the Panel had concluded that China failed to establish that the DOC's "use of its NME methodology in the anti-dumping determinations at issue in this dispute, concurrently with its determination of subsidization and the imposition of countervailing duties on the same products in the four countervailing duty determinations at issue, was inconsistent with Article 19.3." (Para. 547)

In addressing these issues, the Appellate Body explained that "the main interpretative question before us concerns the meaning of the phrase 'in the appropriate amounts in each case' in Article 19.3 of the *SCM Agreement* and whether, as China contends, it would *not* be appropriate, within the meaning of that provision, to levy countervailing duties that result in, or are likely to result in, the imposition of double remedies." Examining dictionary definitions of the term "appropriate," the Appellate Body found them to suggest that the term "is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else." It continued, "[t]hey suggest some core norm - 'proper,' 'fitting,' 'suitable' -- and at the same time adaptation to particular circumstances." (Paras. 550-552)

Turning to the context of the term "appropriate amounts," the Appellate Body observed that the Panel "appears to have ascribed great significance to" Article 19.4, which provides that "[n]o countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product." The Appellate Body noted that the Panel's finding "points to Article 19.4 as the key determinant of what is an 'appropriate' amount, for purposes of Article 19.3." While the Appellate Body shared the Panel's view that Article 19.4 provides relevant context, it said that it was not as persuaded as the Panel seems to have been that "Article 19.4, alone, defines when the amount of duty is 'appropriate.'" It explained, "[i]ndeed, if any amount of countervailing duty that does not exceed the amount of the subsidy is an 'appropriate' amount within the meaning of Article 19.3, then the requirement in Article 19.3 would be rendered redundant, as Article 19.4 already prescribes that duties not be levied in excess of the amount of the subsidy found to exist." (Paras. 554-555)

Rather, the Appellate Body considered Article 19.2 to be more relevant to this question. While leaving discretion to the investigating authorities as to whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, this provision "nevertheless states that it is 'desirable' that 'the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury.'" Article 19.2 thus encourages "authorities to link the actual amount of the countervailing duty to the injury to be removed." Moreover, the Appellate Body pointed out, "once a causal link between the subsidized imports and injury has been demonstrated, the imposition and levying of countervailing duties are not hermetically isolated from any consideration related to injury." It found the link between the amount of the countervailing duty and the injury that the subsidized imports are found to be causing to be "reflected in Article 19.3 itself, which provides that a 'countervailing duty shall be levied, in the appropriate amounts in each case ... on imports of such product ... found to be subsidized

and *causing injury*.'" (Emphasis added by Appellate Body) The Appellate Body found additional contextual support in Articles 10, 19.1, 21.1 and 32.1. (Paras. 557-563)

Next, it turned to GATT Article VI, which provides additional context. It noted that the provision most pertinent to the issue at hand is Article VI:5, which states "No product of the territory of any WTO Member imported into the territory of any other WTO Member shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization." The Panel had considered that because the prohibition in Article VI:5 is explicitly limited to potential double remedies in respect of "export subsidies," Members could not have intended to prohibit the imposition of double remedies in respect of domestic subsidies pursuant to SCM Agreement Articles 19.3 and 19.4, as these provisions are, on their face, silent on the issue. (Paras. 565-566) The Appellate Body disagreed with the Panel's approach, however, describing it as a "rather mechanistic, *a contrario* reasoning," noting instead that "Article VI:5 prohibits the concurrent application of anti-dumping and countervailing duties to compensate for the *same situation* of dumping or export subsidization." In its view, "the term 'same situation' is central to an understanding of the rationale underpinning the prohibition contained in Article VI:5, which in turn sheds light on the reason why, in the case of domestic subsidies, an express prohibition is absent." In this regard, it recalled that "in principle, an export subsidy will result in a pro rata reduction in the export price of a product, but will not affect the price of domestic sales of that product," while, "[b]y comparison, domestic subsidies will, in principle, affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent." As a result, in the case of domestic subsidies, any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, such that the overall margin will not be affected by the subsidization. Thus, the concurrent application of duties in such circumstances would not compensate for the same situation, "because no part of the dumping margin would be attributable to the subsidization." As a result, it said, the limitation of the "same situation" prohibition in Article VI to *export* subsidization "appears logical -- at least when normal value is calculated on the basis of domestic sales prices." Nonetheless, it noted that under GATT Article VI 1(b), exceptional methods for the calculation of normal value, not based on actual domestic prices, are authorized, and the second *Ad* Note to Article VI provides the legal basis for the use of surrogate values for NMEs in anti-dumping investigations and authorizes recourse to exceptional methods for the calculation of normal value in investigations of imports from NMEs. (Paras. 567-569)

The Appellate Body then explained that, in its view, "the references to Article VI ... in Articles 10 and 32.1 of the *SCM Agreement*, Article VI itself, and the many parallels between the obligations that apply to Members imposing anti-dumping duties and those imposing countervailing duties, suggest that any interpretation of 'the appropriate amounts' of countervailing duties within the meaning of Article 19.3 ... must not be based on a refusal to take account of the context offered both by Article VI ... and by the provisions of the *Anti-Dumping Agreement*." While it agreed with the Panel that SCM Agreement Articles 19.3 and 19.4 are concerned with countervailing duties and not with anti-dumping duties, it was "not persuaded that it necessarily follows that these provisions are, as the Panel noted, 'oblivious to any potential concurrent imposition of anti-dumping duties.'" "Such an interpretative approach," it stated, "is difficult to reconcile with the notion that the provisions in the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously," and it noted that "Members have entered into cumulative obligations under the covered agreements and should thus be mindful of their actions under one agreement when taking action under another." According to the Appellate Body, it follows therefore that "a proper understanding of the 'appropriate amounts' of countervailing duties in Article 19.3 of the *SCM Agreement* cannot be achieved without due regard to relevant provisions of the *Anti-Dumping Agreement* and recognition of the way in which the two legal regimes that these agreements set out, and the remedies which they authorize Members to impose, operate." To the Appellate Body, "the requirement that any amounts be 'appropriate' means, at a minimum, that investigating authorities may not, in fixing the appropriate amount of

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countervailing duties, simply ignore that anti-dumping duties have been imposed to offset the same subsidization." It explained that "[o]nly if these provisions are read in wilful isolation from each other can it be maintained that the respective rules on the imposition and levying of duties are complied with when double remedies are imposed," while, by contrast, "reading the two agreements together suggests that the imposition of double remedies would circumvent the standard of appropriateness that the two agreements separately establish for their respective remedies." That is, "considering that each agreement sets forth a standard of appropriateness of the amount and establishes a ceiling for the respective duties, it should not be possible to circumvent the rules in each agreement by taking measures under both agreements to counteract the same subsidization." It concluded, "[i]t is counterintuitive to suggest that, while each agreement sets forth rules on the amounts of anti-dumping duties and countervailing duties that can be levied, there is no obstacle to the levying of a total amount of anti-dumping and countervailing duties which, if added together, would not be appropriate and would exceed the combined amounts of dumping and subsidization found." (Paras 570-572)

Next, the Appellate Body considered whether the object and purpose of the SCM Agreement "sheds light on the meaning of Article 19.3." In short, it considered that the object and purpose reveals that "Members intended to allow for the use of countervailing duties to offset injurious subsidization under certain circumstances and subject to specific limitations." In this regard, the Appellate Body did not see that the object and purpose "provides clear indications as to the intentions of the drafters of the *SCM Agreement* in respect of double remedies in case of domestic subsidization." It noted that "[t]o the extent that the object and purpose of the *SCM Agreement* links the application of countervailing duties to their purpose -- to offset injurious subsidization -- this supports an interpretation of Article 19.3 that would render 'inappropriate' the application of countervailing duties that, together with anti-dumping duties, exceed the full amount of the subsidy." However, it emphasized that it was "not suggesting that the object and purpose of the *SCM Agreement* encompasses the imposition of disciplines on the use of anti-dumping duties." Rather, it explained, "we simply consider that the object and purpose of the *SCM Agreement* is not inconsistent with an approach that would accept that, in fixing the amount of countervailing duties that will be imposed, it is appropriate to take account of anti-dumping duties that are being levied on the same products and that offset the same subsidization." (Paras 573-574)

Finally, the Appellate Body addressed two additional elements examined by the Panel. First, it agreed with an argument by China, based on the interpretation of AD Agreement Article 9.2 by the *EC - Salmon* panel, at para 14.128. Applying the reasoning of that panel, the Appellate Body explained that "an appropriate amount of countervailing duty should be an amount that results in offsetting subsidization, with due regard being had to the concurrent application of anti-dumping duties on the same product that offset the same subsidization." (Para 575) In addition, it considered the Panel's finding that the fact that Article 15 of the Tokyo Round Subsidies Code was not carried forward in the SCM Agreement lends contextual support to an interpretation that SCM Agreement Articles 19.3 and 19.4 do not address or encompass the question of the permissibility of double remedies. Specifically, Article 15 "imposed upon an importing signatory a choice between the use of anti-dumping duties and the use of countervailing duties against imports from NMEs," thus prohibiting "the concurrent application of the two types of duties, regardless of whether this in fact resulted in the imposition of double remedies." The Appellate Body rejected the Panel's approach to this issue, stating that, because VCLT Article 31 does not refer to a predecessor agreement as context or as an element that must be taken into account together with context, Article 15 of the Tokyo Round Subsidies Code cannot be considered as context within the meaning of VCLT Article 31. Rather, it explained, a predecessor agreement may, at most, form part of the circumstances of the conclusion of a treaty under VCLT Article 32. Here, having reviewed Article 19.3 and its relevant context, the Appellate Body did not consider it necessary to confirm the interpretation of Article 19.3 by relying on supplementary means of interpretation. Nonetheless, the Appellate Body was "not persuaded that the existence in a predecessor agreement of a provision prohibiting the concurrent imposition of anti-dumping and countervailing duties to imports from NMEs

allows an interpreter to conclude, *a contrario*, that, in the *SCM Agreement*, Members intended to allow double remedies." In this regard, it cautioned that omissions may have different meanings in different contexts, and in this case, it noted that Article 15 of the Subsidies Code "does more than merely prohibit double remedies, in that it prohibits the concurrent application of anti-dumping and countervailing duties, regardless of whether they offset the same situation of subsidization." (Paras 576-581)

Based on the above reasons, the Appellate Body found that "the Panel erred in its interpretation of Article 19.3 of the *SCM Agreement* and failed to give meaning and effect to all the terms of that provision." It explained, "[t]he amount of a countervailing duty cannot be 'appropriate' in situations where that duty represents the full amount of the subsidy and where anti-dumping duties, calculated at least to some extent on the basis of the same subsidization, are imposed concurrently to remove the same injury to the domestic industry." It therefore reversed the Panel's interpretation of Article 19.3, and its findings pursuant to that interpretation, and found instead that "the imposition of double remedies, that is, the offsetting of the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties, is inconsistent with Article 19.3." (Paras 582-583)

SCM Agreement Article 19.4 and GATT Article VI:3

The Panel had found that SCM Agreement Article 19.4 "is 'oblivious to any potential concurrent imposition of anti-dumping duties,' and, therefore, 'the narrowly-crafted discipline contained in Article 19.4 of the *SCM Agreement* does not address situations of 'double remedies'." China challenged this finding on appeal. Recalling its interpretation of Article 19.3, and in particular its explanation that the provisions of the AD and SCM Agreements "should be interpreted together in a coherent and consistent manner, so as to avoid any possible circumvention of the rules governing, and ceilings on, anti-dumping and countervailing duties that are set forth in the respective provisions in the two agreements," the Appellate Body disagreed with the Panel's statement that "Article 19.4 of the SCM Agreement is oblivious to any potential concurrent imposition of anti-dumping duties." Nonetheless, since it had already found that the imposition of double remedies is inconsistent with Article 19.3, it said that it need not continue its analysis and address China's appeal on this point. In this regard, the Appellate Body stated, **"a ruling on the interpretation of Article 19.4 of the *SCM Agreement* or Article VI:3 of the GATT 1994 is unnecessary for purposes of resolving this dispute," and it concluded that, "[t]he Panel's interpretation of these provisions is ... moot and of no legal effect."** (Paras. 584-590)

Conclusion

Summing up its conclusions, the Appellate Body stated that it reversed the Panel's interpretation of SCM Agreement Article 19.3, and, in turn, because it was based on an erroneous interpretation of Article 19.3, it also reversed the Panel's ultimate finding that China failed to establish that the United States acted inconsistently with SCM Agreement Articles 19.3, 10, or 32.1. (Para 591)

SCM Agreement Articles 19.3, 10 and 32.1 - Completing the Analysis

Having reversed the Panel's findings under SCM Agreement Article 19.3, the Appellate Body considered China's request that it complete the analysis and find the DOC's "concurrent imposition of anti-dumping duties calculated on the basis of its NME methodology, and countervailing duties on the same products in the four countervailing duty determinations at issue to be inconsistent with Article 19.3 of the *SCM Agreement*." (Para. 592)

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At the outset, the Appellate body recalled that "the Panel had 'no difficulty' accepting the general proposition that double remedies would 'likely' arise from the concurrent application of anti-dumping duties calculated based on an NME methodology, and of countervailing duties." However, in light of its interpretation of Article 19.3, the Panel "did not decide on whether China had 'conclusively established that, in the investigations at issue, double remedies resulted from the concurrent imposition of anti-dumping duties calculated under the [United States'] NME methodology and of countervailing duties'." In addition, it recognized the Panel's observation that the DOC's treatment of the issue of double remedies in the investigations at issue was not in debate," noting the Panel's statement that the parties agreed that where interested parties raised "double remedy" arguments in the investigations at issue, the DOC "rejected them and ... did not take into consideration the anti-dumping duties imposed on the same products when it imposed countervailing duties." The Appellate Body then recalled past precedent holding that "if the factual findings of the panel and the undisputed facts in the panel record provide the Appellate Body with a sufficient basis for its own analysis, the Appellate Body may complete the analysis with a view to facilitating the prompt settlement of the dispute." Here, it said that it did not accept China's contention that a finding of inconsistency must directly follow from its reversal of the Panel's interpretation of Article 19.3. In particular, it was not convinced that double remedies *necessarily* result in every instance of the concurrent application of duties in the NME context. Rather, such a finding would depend "on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation." (Paras. 596-599)

The Appellate Body then recalled its statement in *U.S. - Countervailing Measures on Certain EC Products*, at para. 139, that "under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation." It considered that "a parallel can be drawn between the obligation of an investigating authority under Article VI:3 of the GATT 1994 to determine the precise amount of the subsidy, on the one hand, and the analogous obligations that an investigating authority has under Articles 19.3 and 19.4 of the *SCM Agreement*, on the other hand, to determine and levy countervailing duties in amounts that are appropriate in each case and that do not exceed the amount of the subsidy found to exist." The Article 19.3 obligation, it explained, "encompasses a requirement to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record." In this regard, it recalled its finding above that, "among the factors to be taken into account by an investigating authority, in establishing the 'appropriate' amount of countervailing duty to be imposed, is evidence of whether and to what degree the same subsidies are being offset twice when anti-dumping and countervailing duties are simultaneously imposed on the same imported products." Here, it noted, the DOC "made no attempt to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties." That is, the DOC "did not initiate any examination of whether double remedies would arise in the four investigations at issue and refused outright to afford any consideration to the issue or to the submissions pertaining to the issue that were presented to it." (Paras. 601-604)

According to the Appellate Body, "by declining to address China's claims concerning double remedies in the four countervailing duty investigations at issue," the DOC "failed to fulfil its obligation to determine the 'appropriate' amount of countervailing duties within the meaning of Article 19.3." On this basis, the Appellate Body concluded that "in the circumstances of the four sets of anti-dumping and countervailing duty investigations at issue," by virtue of the DOC's imposition of anti-dumping duties calculated on the basis of an NME methodology, concurrently with the imposition of countervailing duties on the same products, without having assessed whether double remedies arose from such concurrent duties, the United States acted inconsistently with Article 19.3. (Paras. 605-606)

Having reversed the Panel's findings regarding double remedies, including the finding that China failed to establish a violation of SCM Agreement Articles 10 or 32.1, the Appellate Body then said that "when a Member's measures do not satisfy the express conditions for the imposition of a countervailing duty set out in relevant provisions of the *SCM Agreement*," such measures are also, "as a consequence," inconsistent with Articles 10 and 32.1. Thus, having found the DOC's concurrent imposition of duties to be inconsistent with Article 19.3, it concluded that "this is also inconsistent with" Articles 10 and 32.1. (Paras. 607-610)

COMMENTARY

The Issue of "Double Remedies" In Relation to Concurrent Anti-Dumping and Countervailing Duties

Anti-dumping and countervailing duties are often discussed together, as two similar mechanisms designed to address "unfair" trade. GATT Article VI, which was the original multilateral trade provision authorizing their use, is titled "Anti-Dumping and Countervailing Duties," thus covering both of these kinds of "trade remedies." In relation to both domestic law and multilateral oversight for both types of duties, many of the procedures are the same, and in terms of the substance both contain an "injury" requirement.

However, despite some close links, the two remedies are different in many ways, and are to a great extent separated in WTO rules. Although GATT Article VI deals with both types of remedies, it often does so in different provisions. Paragraphs 1 and 2 are key provisions addressing anti-dumping duties, while paragraph 3 is an important provision addressing countervailing duties. In addition, there are now separate WTO agreements addressing each: the AD Agreement and the SCM Agreement. Thus, while there is some overlap in a number of the issues related to both, they are, to some degree, formally separate. Of great importance is the fact that the activity they target is very different: dumping versus subsidization. Dumping deals with the pricing practices of private firms, whereas subsidies are financial support provided by governments.

In most instances, anti-dumping and countervailing duty cases are not brought against the same product simultaneously. Generally, it is one type of case or the other. However, it is possible to bring allegations of both dumping and subsidization for the same product, and on a number of occasions this has occurred, resulting in concurrent investigations. Where this happens, it has been suggested that an affirmative determination on both kinds of remedies (that is, a determination that both dumping and subsidization exist) could, in certain instances, lead to "double remedies" being imposed, meaning that two remedies are imposed for what is essentially the same action.

In this comment, we discuss two aspects of the issue of double remedies. First, we discuss the distinction between *export* and *domestic* subsidies for the purpose of the double remedies issue. On this issue, both the Panel and the Appellate Body seemed to want to preserve this distinction, which is established in GATT Article VI:5. Second, we talk about how the issue of double remedies arises through adjustments made to costs (or prices) used for normal value, such as with the treatment of the non-market economies (NMEs) at issue in this case, in a way that allegedly provides a remedy for subsidies through the dumping calculation. In this context, we discuss the prospects for implementation of the Appellate Body's findings that the approach taken by the Department of Commerce here is inconsistent with WTO rules. These findings are likely to be controversial in the United States, and the U.S. government will therefore have to tread very carefully to balance the views of key interest groups with its intention to comply with its international obligations.

Domestic/export subsidies and lower export prices

While many WTO provisions make anti-dumping and countervailing duties seem completely separate, as noted above, there are a few provisions that indicate a bit of overlap. In the context of "double remedies," a key provision is GATT Article VI, paragraph 5, which states: "No product of the territory of any WTO Member imported into the territory of any other WTO Member shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization." Implicit in the prohibition on "double remedies" in these circumstances seems to be an assumption that export subsidies lead to lower priced exports. In essence, some or all of the subsidy can be "passed through" to the export price, allowing that export price to be reduced. In a fairly simple example, involving a comparison of home market prices to export prices, an exporter may use subsidies to finance lower priced export sales, and these lower export prices may lead to a finding of dumping. In this situation, it has been argued, a remedy against the export subsidies would also address any resulting dumping, as both arise from the same source. Thus, concurrent remedies against both the dumping and the subsidies would constitute a "double remedy."

The extent to which this "pass through" happens in practice is unclear. Subsidies can be used in a number of ways, some of which affect prices and some of which do not. And the way subsidies may affect prices may not always be direct and obvious. It can depend on the type of subsidy and the business strategy of the subsidy recipient. Nevertheless, at least in theory, it is possible for subsidies to result in lower export prices, and thus lead to a finding that dumping exists. Article VI:5 seems to reflect this possibility in the context of export subsidies, and attempts to preclude any double remedies that might result. U.S. and EU domestic law also recognize this, and provide for deductions of those countervailing duties taken in response to export subsidies as part of the dumping margin calculation.

While there is a presumption that *export* subsidies lead to lower export prices, it could be argued that lower export prices can occur regardless of whether the subsidy in question is classified as an "export subsidy." In reality, the divide between export subsidies and domestic subsidies may not be as clear as suggested by Article VI:5. Export subsidies could be used to lower prices on export sales, but might not always be used in this way; and domestic subsidies themselves could be used for this purpose. Thus, rather than this explicit separation of export subsidies and domestic subsidies, if there is a concern about double remedies where subsidies lead to lower export prices, another approach to the issue might be to eliminate this blanket rule in the case of export subsidies, and instead investigate each instance of subsidization where a concurrent remedy is sought, to determine if the subsidies were used to lower export prices. The burden could be placed either on the investigating authority to make a finding on this issue in all such cases, or on the respondent to prove that a concurrent remedy is not appropriate because the subsidies were the cause of the dumping. In practice, making a determination on how the subsidies were used could be extremely difficult, though. It may not be possible to come up with definitive answers to how a particular subsidy was used.

The Panel and Appellate Body both discussed this issue, but they did not question the export versus domestic subsidy distinction. The Panel talked about this issue in paras. 14.71-72, and in particular fn 972. There, the Panel said:

> Certain statements of the USDOC in market economy anti-dumping investigations illustrate why a similar "double remedy" arises in the context of export subsidies, and why it generally does not in the context of domestic subsidies granted by market economies: in *Cold-Rolled Corrosion-Resistant Carbon Steel Flat Products from Korea* (quoted in *LEU from France*), the USDOC wrote that "domestic subsidies presumably lower the price of the subject merchandise both in the home and the U.S. markets, and therefore have no effect on the measurement of any dumping that might also occur." The USDOC contrasted this situation with that of export subsidies, which, "benefit only exported merchandise" and therefore brings about 'the potential for double remedies."

The Appellate Body seemed to agree, citing the Panel's statements on the issue, and then saying:

> We recall that, in principle, an export subsidy will result in a pro rata reduction in the export price of a product, but will not affect the price of domestic sales of that product. By comparison, domestic subsidies will, in principle, affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by the subsidization.

(*See* para. 568)

It is worth noting two additional points about the domestic versus export subsidies distinction. First, in the context of discussing the NME situation at issue here, the Appellate Body made clear that domestic subsidies could lead to lower export prices:

> we agree with the statement by the Panel that double remedies would *likely* result from the concurrent application of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties, but we are not convinced that double remedies *necessarily* result in every instance of such concurrent application of duties. This depends, rather, on whether and to what extent domestic subsidies have lowered the export price of a product, and on whether the investigating authority has taken the necessary corrective steps to adjust its methodology to take account of this factual situation.

(*See* para. 599) The Appellate Body's statements were restricted to the NME situation, but there may also be situations with market economies where third country surrogate data is used. As a result, the same logic would apply there, and thus domestic subsidies may lead to the same problem with double remedies, even outside the NME context. On this issue, the Panel noted the following in fn 972: "While the question is not before us, it would seem that a double remedy could arise in investigations involving market economy imports, depending on the costs that are used to calculate the normal value: A double remedy may arise when the normal value of a market economy producer is constructed using costs that do not reflect the subsidies that this producer received."

Second, more generally, while the distinction has its difficulties, it seems to be fairly well enshrined in WTO and domestic law. Thus, even though the case for a complete separation in the treatment of domestic versus export subsidies -- with export subsidies presumed always to lead to double remedies and domestic subsidies presumed never to do so -- may seem flawed, it may be difficult to overcome these assumptions in any future litigation. In an ideal world, it might be desirable to measure the precise extent to which all export/domestic subsidies pass through and result in lower prices, but this will be difficult to achieve in practice.

Adjustments in the dumping calculation which take subsidies into account: The NME calculation

A second area where the double remedy issue arises is with adjustments made to costs (or prices) in determining normal value in the dumping calculation, in a way that takes subsidies into account. As noted, the present case deals with the special situation of a non-market economy (NME). In this context, the normal value side of the dumping margin calculation is considered unreliable because of government distortions in the domestic market, and it is therefore replaced by surrogate values from a market-based third country. By using the third country figures, the costs now reflect unsubsidized amounts. When these unsubsidized costs are compared to the producer's export price (which is not adjusted and thus reflects the subsidies), the resulting dumping margin reflects both any price discrimination (*i.e.*, dumping) *and* the extent to which the producer benefited from subsidies. Thus, it is argued, the anti-dumping remedy, in effect, counteracts the subsidy as well as the dumping. As a result, a countervailing duty imposed in this situation would constitute a "double remedy."

In the case at hand, the Panel considered that a "double remedy" was a real possibility in this situation:

> It follows from this description of NME methodologies that, conceptually, the dumping margin calculated under an NME methodology - i.e., the difference between the constructed normal value and the export price - reflects not only price discrimination by the investigated producer between the domestic and export markets ("dumping"), but also, in addition, the economic distortions that affect the producer's costs of production. Specific domestic subsidies granted to the producer of the good in question, in respect of that good - i.e., the same subsidies which are countervailed in the context of a countervailing duty investigation - are one of these economic distortions that are "captured" in the NME dumping margin calculation. Expressed differently, the dumping margin calculated under an NME methodology generally is higher than would be the case otherwise because it results from a comparison of the export price to market-determined, and hence *unsubsidized*, costs of production, rather than to the producer's actual, subsidized (or distorted) costs of production.

(*See* para. 14.69) As the Panel put it in paragraph 14.70, there is the "potential" for a double remedy here.

It is worth noting that, unlike with the treatment of export subsidies under Article VI:5, a double remedy may exist in the NME context regardless of a price effect from the subsidies. The price effect may lead to a greater amount of double remedy than otherwise, by pushing the export price down. But even without any such effect on export prices, the NME calculation can lead to a double remedy.

Despite indicating that there is a potential problem with double remedies, when turning to the specific claims, the Panel concluded that the GATT and SCM Agreement provisions cited by China do not address the issue. It therefore did not examine "the extent to which the concurrent imposition of antidumping duties determined under the USDOC's NME methodology and of countervailing duties resulted in the imposition of 'double remedies' in the four investigations at issue." (*See* para. 14.76)

On appeal, the Appellate Body agreed with the Panel that double remedies were a problem, but it disagreed that the cited SCM Agreement provisions do not address it. As described in the summary above, the Appellate Body found a violation of SCM Agreement Article 19.3 due to the DOC's failure "to establish whether or to what degree it would offset the same subsidies twice by imposing anti-dumping duties calculated under its NME methodology, concurrently with countervailing duties." (*See* para. 604)

The Appellate Body's finding on this issue is likely to be criticized by those who accuse the Appellate Body of "overreaching," as occurred with many of the Appellate Body's findings on "zeroing." There are a number of reasons for this criticism. First, the Panel had found there to be no violation, which indicates that three very knowledgeable trade experts took a different view than did the Appellate Body.

Second, the provision relied on by the Appellate Body does not address the issue explicitly. Whether the term "appropriate amounts" places constraints on the use of double remedies is not very clear from the text. And third, an examination of the third parties' views on this issue (*see, e.g.*, paras. 14.60-66 of the panel report), seems to indicate some disagreement on the issue among WTO Members. As a result, the Appellate Body's decision to find a violation is likely to come under attack from various groups.

Regardless of any criticism of the decision, though, the United States will now have to implement the Appellate Body's ruling on double remedies in the investigations at issue, and more generally some WTO Members may have to adjust their practices in this regard. This may not be an easy task. As the Panel noted:

> ... the arguments put forward by the United States reinforce the idea that ascertaining the precise extent of double remedy in specific investigations would be a complex task, a fact which is highlighted by both the GAO, in its 2005 Report, and by the CIT in *GPX*.

(*See* para. 14.75) The challenge of identifying the specific degree to which subsidies contribute to a finding of dumping will no doubt be very high. What is not clear at this point is exactly how detailed an analysis the Appellate Body expects, and what its components should be. For example, do export prices need to be related to the subsidies at issue, to see how much, if at all, prices were lowered due to the subsidies? Clearly, some type of examination of the issue is required. But what exactly is required may only be known after a couple rounds of trying to come up with a test, and then having it challenged in WTO dispute settlement.

As a final point, with regard to the more general policy issue of putting constraints on double remedies, it is worth noting that there is a counter argument to all of these suggestions of a double remedy problem, either based on NME-type calculations or effects on export prices. Opponents of restrictions on double remedies might say that there is, in fact, no issue that needs to be addressed. In this regard, it could be argued that anti-dumping and countervailing duties address different issues, and thus there is no need reconcile them or worry about an overlap. In this view, a countervailing duty is designed to provide a remedy for the use of an injurious subsidy, regardless of any price effects. And anti-dumping duties are designed to provide a remedy for injurious dumping, regardless of the cause. Therefore, the fact that subsidies may cause dumping is completely irrelevant, due to the nature of each remedy. To some extent, this view is undermined by the existence of Article VI:5. Clearly, the mid-20th century drafters of this provision were worried about this overlap. As a result, proponents of the view that double remedies should be allowed can either argue that Article VI:5 is wrong and should be eliminated or limited in some way, or, at the least, that its erroneous approach should not be spread any further.

In addition, it could be argued, as noted above, that the task of identifying how particular subsidies were used is a nearly impossible one. Money is fungible, and as a result tracing its various uses will be enormously difficult, even with a large investigative team looking into it. If the burden is placed on respondents, they will be unable to prove that the money was not used to lower the export price; and if the burden is placed on the investigating authorities, they will not be able to prove that it was used to lower the export price. Thus, the entire process would be of little use.

The Appellate Body has, in effect, rejected these counterarguments in the context of the specific double remedies issue in this case. However, they may still play a role in the discussions over implementation of this case and the possible extension of the reasoning to other areas.

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