

NOTES

CHINESE STATE-OWNED ENTERPRISES AND WTO'S ANTI-SUBSIDY REGIME

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ABSTRACT

The size and significance of Chinese state-owned enterprises (SOEs) present major challenges for the international trading system. One issue is whether an SOE is a “public body” subject to the World Trade Organization’s (WTO) anti-subsidy regime. This Note uses forty-five U.S. countervailing duty (CVD) orders against China to illustrate the unique role of SOEs in the Chinese economy. Functioning as policy instruments, Chinese SOEs and state-owned banks are directed by the Chinese government to provide raw materials and loans in order to foster the development of key industries. Under the governmental authority standard and the facts available mechanism, SOEs can be determined to be public bodies even if the government refuses to provide any necessary information. This Note thus argues that the CVD law is a feasible tool to counteract the subsidies that China provides indirectly through its state-owned sector.

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I. INTRODUCTION

State-owned enterprises (“SOEs”) are the driving forces behind the Chinese economy and key actors in the international market. According to the National Bureau of Statistics of China, while Chinese SOEs represented only 5 percent of total Chinese industrial enterprises in 2015, they controlled 38.8 percent of total assets and accounted for 17.2 percent of total profits and 18.2 percent of employment.¹ In the past fifteen years, the number of Chinese SOEs listed on the Fortune Global 500 has also grown from 11 to 109 in 2017.²

Chinese SOEs present major challenges to the multilateral trading system, as their rise was largely unforeseen when the World Trade Organization agreements were negotiated. Because the WTO agreements were based on the assumption that Members would be free-market economies,³ today’s multilateral trading rules remain neutral with respect to property ownership and do not prevent Members from maintaining or establishing SOEs.⁴

While WTO law does not prevent governments from owning enterprises, its anti-subsidy regime does regulate government measures that provide financial advantages to SOEs and measures that direct SOEs to provide such advantages to other producers. Specifically, the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”)⁵ permits Members to impose countervailing duties (“CVDs”) to offset the benefits received by producers through subsidies in the exporting country. If a Member finds that a foreign country subsidizes certain product, it can

1. National Bureau of Statistics of China, China Statistical Yearbook 2016, <http://www.stats.gov.cn/tjsj/ndsj/2016/indexeh.htm> (follow “Source: 13-2 Main Indicators of Industrial Enterprises above Designated Size by Industrial Sector (2015)” hyperlink and “13-4 Main Indicators of State-holding Industrial Enterprises by Industrial Sector (2015)” hyperlink).

2. See *Global 500 2002*, FORTUNE, <http://fortune.com/global500/2002/> (last visited Mar. 24, 2018); *Global 500 2017*, FORTUNE, <http://fortune.com/global500/list/filtered?hqcountry=China> (last visited Mar. 24, 2018).

3. John H. Jackson, *State Trading and Nonmarket Economies*, 23 INT’L LAW. 891, 891 (1989); see Agreement on Subsidies and Countervailing Measures art. 29.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement] (permitting the use of subsidies that are necessary for a “transformation from a centrally-planned into a market, free-enterprise economy”).

4. See Ming Du, *China’s State Capitalism and World Trade Law*, 63 INT’L & COMP. L.Q. 409, 427-28 (2014).

5. SCM Agreement, *supra* note 3.

charge an import duty on that product in an amount equal to the subsidy margin.⁶ The use of this trade remedy has grown in popularity as the Chinese government has continued to support SOEs and to use them to allocate resources in recent years.

A contentious issue arises, however, as to whether a Chinese SOE constitutes a “public body” such that CVDs can be imposed under the SCM Agreement. A subsidy subject to the SCM provisions exists if: 1) there is a financial contribution; 2) by a government or any *public body* within the territory of a Member; and 3) a benefit is thereby conferred.⁷ Thus, if a Chinese SOE is determined to be a public body, its transactions with other entities will be subject to the scrutiny of the anti-subsidy rules and may be considered subsidies subject to CVD imposition if such transactions are not made at market prices.

This Note aims to assess whether the WTO’s anti-subsidy regime can deal effectively with Chinese SOEs. As a starting point, it sets out a general picture of Chinese SOEs. This Note then summarizes the current state of CVD investigations against China, particularly those initiated by the United States, the world’s most frequent user of countervailing actions.⁸ The study on forty-five CVD orders imposed by the U.S. Department of Commerce (USDOC) between 2008 and June 2017 illustrates the unique characteristics of Chinese economy, where the central government often distributes raw materials and electricity through upstream SOEs to downstream producers and allocates funds through state-owned banks to producers in strategic industries.⁹

This Note argues that the SCM Agreement provides nations a certain degree of flexibility in responding to the issues raised by Chinese SOEs. First, the governmental-authority standard developed in *US—Anti-Dumping and Countervailing Duties (China)*¹⁰ establishes a sophisticated approach for determining whether an SOE is a public body. Second, even if in some cases the Chinese government and SOEs may be reluctant to provide information related to the public-body analysis, their non-cooperation does not prevent investigating authorities from determining that the SOEs at issue are public bodies. This is because,

6. *Id.* art. 19.

7. *Id.* art. 1.1.

8. See WORLD TRADE ORG., COUNTERVAILING INITIATIONS: REPORTING MEMBER VS. EXPORTER 01/01/1995-31/12/2016 (2016), https://www.wto.org/english/tratop_e/scm_e/CV_InitiationsRepMemVsExpCty.pdf [hereinafter WTO COUNTERVAILING INITIATIONS].

9. See *infra* Part III.B.

10. Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011) [hereinafter Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*].

based on the facts-available (FA) mechanism discussed in *US—Carbon Steel (India)*,¹¹ the investigating authorities can draw inferences from other evidence on the record to make CVD determinations.

This Note is arranged as follows. Part II provides a brief history of Chinese SOE reform and explains the role of SOEs in the Chinese economy. Part III introduces the WTO Members' CVD investigations against China, particularly the practices of the United States. Part IV argues that the WTO's anti-subsidy regime provides a feasible tool to address the role of Chinese SOEs as a vehicle to distribute subsidies. A close look at relevant WTO jurisprudence suggests that the dispute settlement system has so far produced satisfying results with regard to Chinese SOEs.

II. AN OVERVIEW OF CHINESE SOES

The Chinese government's unique way of involvement in its economy is difficult to describe in simple words. The Communist Party of China first introduced the term "socialist market economy"¹² in 1992, while analysts often refer to this mechanism as "state capitalism"¹³ or "centrally managed capitalism"¹⁴ where "government directs and controls key productive forces yet follows capitalist principles."¹⁵ Other scholars use "China, Inc."¹⁶ to distinguish China from other state capitalists such as Russia or Brazil. No matter which label is used to describe

11. Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Steel Flat Products from India*, WTO Doc. WT/DS436/AB/R (adopted Dec. 8, 2014) [hereinafter Appellate Body Report, *US—Carbon Steel (India)*].

12. Jiang Zemin, Report at 14th Party Congress, Oct. 26, 1992, BEIJING REV., http://www.bjreview.com.cn/document/txt/2011-03/29/content_363504_2.htm (last updated Mar. 29, 2011) (EN).

13. See, e.g., IAN BREMMER, *THE END OF THE FREE MARKET* 4-5 (1st ed. 2010) ("In this system, governments use various kinds of state-owned companies to manage the exploitation of resources that they consider the state's crown jewels and to create and maintain large numbers of jobs. They use select privately owned companies to dominate certain economic sectors. They use so-called sovereign wealth funds to invest their extra cash in ways that maximize the state's profits. In all three cases, the state is using markets to create wealth that can be directed as political officials see fit. And in all three cases, the ultimate motive is not economic (maximizing growth) but *political* (maximizing the state's power and the leadership's chances of survival). This is a form of capitalism but one in which the state acts as the dominant economic player and uses markets primarily for political gain."); *The Rise of State Capitalism*, THE ECONOMIST (Jan. 21, 2012), <http://www.economist.com/node/21543160>.

14. See Nan Lin, *Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future*, 7 MGMT. & ORG. REV. 63 (2010).

15. Christopher A. McNally, *Refurbishing State Capitalism: A Policy Analysis of Efforts to Rebalance China's Political Economy*, 42 J. CURRENT CHINESE AFF. 45, 49 (2013).

16. See Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261 (2016).

the Chinese economy,¹⁷ each recognizes one essential feature: the dominance of the state-owned sector and its role as a policy instrument to achieve certain goals set by the government.

A. *History of Chinese SOE Reform*

As early as 1978, China had started the transition from a planned economy to a market economy after the new leader Deng Xiaoping took office.¹⁸ One of the central tasks of the transition is to reform Chinese enterprises which were mostly owned and managed by the state before 1978.¹⁹ While the private sector has contributed considerably to China's economic growth throughout the reforms, the Chinese government insists upon the dominant role of SOEs as "the leading force in the national economy."²⁰

Chinese SOE reform is driven by the belief that competition, rather than privatization, can improve efficiency. Basic welfare economics suggests that perfect competition leads to a Pareto-optimal allocation of resources²¹ and that the driving force behind such allocation is the profit-maximizing goal of the firms. In a perfectly competitive market, a profit-maximizing firm produces at a level of output where price equals marginal cost.²² Based on this theory, some economists argue that in a socialist economy, it does not matter whether the firms are publicly or privately owned, as long as these firms (especially SOEs) are competing

17. As Ferguson warns, "it is an unhelpful oversimplification to divide the world into 'market capitalist' and 'state capitalist' camps. The reality is that most countries are arranged along a spectrum where both the intent and the extent of state intervention in the economy vary The real contest of our time is not between a state-capitalist China and a market-capitalist America, with Europe somewhere in the middle. It is a contest that goes on within all three regions as we all struggle to strike the right balance between the economic institutions that generate wealth and the political institutions that regulate and redistribute it." Niall Ferguson, *We're All State Capitalists Now*, FOREIGN POL'Y (Feb. 9, 2012), <https://foreignpolicy.com/2012/02/09/were-all-state-capitalists-now/>.

18. Communiqué of the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China, Dec. 22, 1978, BEIJING REV., http://www.bjreview.com/nation/txt/2009-05/26/content_197538.htm (last updated May 26, 2009) (EN).

19. *Id.*

20. XIANFA art. 7 (1982) (China) ("The State-owned economy, namely, the socialist economy under ownership by the whole people, is the leading force in the national economy. The State ensures the consolidation and growth of the State-owned economy.").

21. ANDREU MAS-COLELL, MICHAEL D. WHINSTON & JERRY R. GREEN, MICROECONOMIC THEORY 549-50 (1995).

22. *Id.* at 141.

with each other and are driven by the goal of profit maximization.²³ Thus, the reform should focus on creating a fair competitive environment and granting autonomy to SOEs, rather than privatizing them.²⁴

The four phases of SOE reform prove that this competition theory has directed the Chinese government since 1978.²⁵ In the first phase of reform (1978-1982), the government aimed to share the profits and managerial power which were previously retained by the government with SOEs.²⁶ Key measures included raising wages, providing bonuses based on economic performance, and retaining profits within SOEs so as to stimulate efficiency.²⁷

The second phase (1983-1986) was aimed at clarifying the financial obligations between SOEs and the government and exposing SOEs to market influences.²⁸ Major reforms in this phase included reducing plan quota obligations, allowing SOEs to control corporate funds and set prices, replacing profit remittance with corporate tax, and substituting fiscal appropriation with bank loans.²⁹ In addition, the introduction of a dual track system allowed SOEs to sell products in excess of plan

23. JOSEPH E. STIGLITZ, *WHITHER SOCIALISM?* 80-81 (1994) (arguing that in a competitive market, the incentives of SOE managers to pursue economic efficiency do not differ from those of private firms; therefore, “[i]t is not so much ownership that is crucial but the existence of competition”); Justin Yifu Lin et al., *Competition, Policy Burdens, and State-Owned Enterprise Reform*, 88 AM. ECON. REV. 422, 426 (1998) (arguing that the key for Chinese SOE reform is to eliminate policy burdens and to ensure fair competition between SOEs and non-state sectors). The advices of Justin Lin, one of the most influential economists in China and former chief economist of the World Bank, have profound impact on China’s economic reform.

24. JUSTIN YIFU LIN ET AL., *STATE-OWNED ENTERPRISES REFORM IN CHINA* 155-56 (2001).

25. BARRY NAUGHTON, *GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM, 1978-1993*, 10 (1995).

26. STOYAN TENEV & CHUNLIN ZHANG, *CORPORATE GOVERNANCE AND ENTERPRISE REFORM IN CHINA: BUILDING THE INSTITUTIONS OF MODERN MARKETS* 11 (2002).

27. See Guanyu Kuoda Guoying Gongye Qiye Jingying Guanli Zizhuquan de Ruogan Guiding [Provisions on Enlarging the Decision-Making Power for Operation and Management of State-Run Industrial Enterprises] (promulgated by the St. Council, July 13, 1979; repealed 2001), http://www.law-lib.com/law/law_view.asp?id=313095 (China).

28. Justin Yifu Lin, *The Current State of China’s Economic Reforms, in CHINA IN THE NEW MILLENNIUM: MARKET REFORMS AND SOCIAL DEVELOPMENT* 39, 50 (James A. Dorn ed., 1998).

29. See Guoying Qiye Dierbu Li Gai Shui Shixing Banfa [Provisional Measure concerning the Second Stage of Tax-for-Profit Reform for State-Run Enterprises], Guo Fa [1984] No. 124 (promulgated by the St. Council, Sept. 18, 1984; repealed 2001), CLI.2.30937 (China); Guanyu Guojia Yusuan Nei Jiben Jianshe Touzi Quanbu You Bokuan Gaiwei Daikuan de Zanzing Guiding [Provisional Regulations concerning National Budget: Infrastructure Finance Will Be Provided by Loans rather than State Funds] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 14, 1984), <http://cpc.people.com.cn/GB/64184/64186/66696/4495082.html> (China).

quotas at market prices.³⁰

The third phase (1987-1992) focused on further clarification of SOEs' authority and responsibilities.³¹ The implementation of a contract responsibility system that proved to be successful in the agricultural sector gave SOEs greater control over operations, as long as they fulfilled the profit targets specified in the contracts.³²

The fourth phase (1993-present) emphasizes the importance of the modern enterprise system, including a shareholding system and corporate governance, to improve the autonomy of SOE management.³³ At the same time, the Chinese government started to consolidate its control over major SOEs while privatizing small ones.³⁴ By establishing the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) in 2003, China has cautiously experimented with the "mixed ownership" structure, under which it sells some SOE shares but remains the controlling shareholder.³⁵

B. Chinese SOEs As a Policy Tool

In each phase of the reform, Chinese SOEs are given more autonomy to operate their businesses, as compared to their pre-reform state,³⁶ but the government does not intend to fully give up its ownership interests in major SOEs. This is because SOEs are considered essential policy

30. See Guanyu Jinyibu Kuoda Guoying Gongye Qiye Zizhuquan de Zanxing Guiding [Provisional Regulations on Greater Decision-Making Power of State-Run Industrial Enterprises] (promulgated by the St. Council, May 10, 1984), <http://cpc.people.com.cn/GB/64184/64186/66678/4493872.html> (China).

31. LIN ET AL., *supra* note 24, at 50.

32. See Guowuyuan guanyu Shenhua Qiye Gaige Zengqiang Qiye Huoli de Ruogan [Guiding Provisions of the State Council on Deepening the Enterprises Reform and Enhancing the Vitality of Enterprises] (promulgated by the St. Council, Dec. 5, 1986), <http://cpc.people.com.cn/GB/64184/64186/66680/4493975.html> (China).

33. Decision of the CPC Central Committee on Some Issues Concerning the Establishment of a Socialist Market Economic Structure, Nov. 22, 1993, BEIJING REV., http://www.bjreview.com.cn/special/2013-10/23/content_574000.htm (last updated Oct. 23, 2013) (EN).

34. Li Peng, *Report on the Outline of the Ninth Five-Year Plan (1996-2000) for National Economic and Social Development and the Long-Range Objectives to the Year 2010 (Excerpts)*, <http://www.china.org.cn/95e/95-english1/2.htm> (last visited Mar. 19, 2018); Guanyu Guoyou Qiye Gaige he Fazhan Ruogan Zhongda Wenti de Jueding [The Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises] (promulgated by the Cent. Comm. Communist Party of China, Sept. 22, 1999), CLI. 5.23496(EN) (Lawinfochina).

35. Gabriel Wildau, *China's State-Owned Zombie Economy*, FIN. TIMES (Feb. 29, 2016), <https://www.ft.com/content/253d7eb0-ca6c-11e5-84df-70594b99fc47>.

36. LIN ET AL., *supra* note 24, at 50.

instruments to foster the economic growth and the development of strategic industries.³⁷ The Chinese government exerts influence over the country's production activities through SOEs in two main ways. First, by controlling the major SOEs in the upstream industries, the Chinese government can effectively determine the production of raw materials and thus influence the business decisions of non-SOEs in the downstream industries.³⁸ Second, the Chinese government can promote the development of certain industries through the provision of credits.³⁹ As the government holds significant control over state-owned commercial banks ("SOCBs")⁴⁰ and policy banks,⁴¹ loans can be easily directed to those targeted industries.

The use of SOEs and SOCBs as a public policy tool has serious consequences. One major concern in the field of international trade is that the excess supply that the Chinese government artificially generates has led to price drops in a number of products, particularly steel.⁴² As President Juncker stated at the 2016 EU-China Summit, steel overcapacity is "a very serious problem for Europe."⁴³ The United States has also pointed out that excess capacity in the Chinese manufacturing sector, such as in the manufacturing of steel and aluminum, distorts global

37. Li Rongrong, *Aggressively Advance SOE Reform and Development Enhance China's Sustainable Economic Development and Overall Social Progress*, SASAC (Nov. 7, 2003), <http://en.sasac.gov.cn/n1461859/c1463723/content.html>.

38. Mark Wu, *China's Export Restrictions and the Limits of WTO Law*, 16 WORLD TRADE REV. 673, 685-86 (2017).

39. See JUSTIN YIFU LIN, FANG CAI & ZHOU LI, THE CHINA MIRACLE: DEVELOPMENT STRATEGY AND ECONOMIC REFORM 221-22 (2003).

40. Central Huijin, the government's main holding firm for financial companies, holds controlling shares in four largest SOCBs in China, i.e., the Industrial and Commercial Bank of China, the Bank of China, the China Construction Bank, and the Agricultural Bank of China. See Central Huijin Investment Ltd., *Investments*, <http://www.huijin-inv.cn> (click "English"; then choose "Investments" from the top bar) (last updated Dec. 31, 2016).

41. Three policy banks in China, i.e., the Agricultural Development Bank of China, the China Development Bank, and the Export-Import Bank of China, are under the direct jurisdiction of the State Council. See Guowuyuan guanyu Jinrong Tizhi Gaige de Jueding [Decision of the State Council on Reform of the Financial System] (promulgated by the St. Council, Dec 25, 1993), CLI.2.8996(EN) (Lawinfochina).

42. Foreign Ministry for Econ. Aff. & Energy (BMWi), *G20 Germany 2017, Global Forum on Steel Excess Capacity: Report*, at 12-14 (Nov. 30, 2017), <http://www.bmwi.de/Redaktion/EN/Downloads/global-forum-on-steel-excess-capacity-report.pdf>.

43. Jean-Claude Juncker, President, European Comm'n, Remarks at the Joint Press Conference with Donald Tusk, European Council President, in Beijing, China (July 13, 2016), http://europa.eu/rapid/press-release_SPEECH-16-2523_en.htm.

markets and hurts U.S. producers and workers.⁴⁴

In response to these consequences brought about by Chinese SOEs, countries have increasingly relied on the use of trade remedies, including the imposition of anti-dumping and countervailing duties against products imported from China. As this Note focuses on the WTO's anti-subsidy regime, Members' (especially the United States') CVD practices are introduced immediately below before diving into the legal issues regarding what constitutes a "public body" under the SCM Agreement.

III. COUNTERVAILING DUTY INVESTIGATIONS AGAINST CHINA

The SCM Agreement allows WTO Members to impose countervailing duties to offset the injurious subsidies provided by other Members.⁴⁵ In recent years, China's trading partners have applied a growing number of CVD measures against imports from China, as they found that a number of subsidies had been provided directly by the Chinese government and indirectly by the government through the SOEs to certain producers or industries.

A. WTO Members' Practices

China has been the world's most frequent target of CVD investigations. As shown in [Table I](#), through December 2016, a total number of 119 investigations had been initiated against Chinese exporters, 60 of which were by the United States.⁴⁶ The United States started its first investigation against the coated free sheet paper imported from China on November 27, 2006,⁴⁷ which represents a dramatic shift in its long-standing policy (existing since 1986) of not applying the CVD law on non-market economies ("NMEs").⁴⁸ While that case ended up with the

44. OFFICE OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFFICE OF THE PRESIDENT, NAT'L TRADE ESTIMATE REP. ON FOR. TRADE BARRIERS 82-83 (Mar. 2017).

45. SCM Agreement, *supra* note 3, art. 19.

46. WTO COUNTERVAILING INITIATIONS, *supra* note 8.

47. Coated Free Sheet Paper from the People's Republic of China, Indonesia, and the Republic of Korea, 71 Fed. Reg. 68,546 (U.S. Dep't of Commerce Nov. 27, 2006) (notice of initiation of countervailing duty investigations).

48. *See* *Georgetown Steel Co. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) (finding that the CVD provisions in section 303 of the Tariff Act of 1930, as amended by 19 U.S.C. § 1303 (1982), did not apply to NMEs). This holding led to a few unsuccessful legislative proposals in the 2000s requiring the application of CVD law to NMEs. *See, e.g.*, Stopping Overseas Subsidies Act of 2005, S. 593, 109th Cong. § 2 (2005); H.R. 1216, 109th Cong. § 1 (2005); United States Trade Rights Enforcement Act, H.R. 3283, 109th Cong. § 3(a) (2005); *see also* Memorandum from Shauna Lee-Alaia and Lawrence Norton, Office of Pol'y, Import Admin. to David M. Spooner, Assistant Sec'y

U.S. International Trade Commission's ("USITC") negative finding on material injury,⁴⁹ it opened up a new era in the U.S. CVD history. On July 22, 2008, the first CVD measure against China was levied on the imports of steel pipe product.⁵⁰ Ever since, the United States has become the heaviest user of CVD law against China, with an average of 4.3 orders per year.⁵¹

Canada has also frequently brought CVD actions against China. Canada was the first country that initiated CVD actions against China and imposed CVDs on Chinese producers, as early as in 2004 and 2005 respectively.⁵² Since 2007, Canada has adopted at least one (up to three) CVD measure(s) against China each year.⁵³ Canada has so far enacted twenty-three investigations and nineteen measures against Chinese subsidies, second only to the United States.⁵⁴

Australia is the third heaviest user of the CVD law against China. Since 2010, Australia has adopted a total of twelve CVD measures, nine of which were imposed on Chinese imports, including seven on steel products and two on aluminum products.⁵⁵ Australia's recent frequent use of CVDs against China may be due to the fact that, after Australia

for Import Admin.: Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China—Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy, Inv. No. C-570-907 (Mar. 29, 2007), <http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf>. For detailed discussion on the U.S. history of CVD actions against NMEs, see Dukgeun Ahn & Jieun Lee, *Countervailing Duty Against China: Opening a Pandora's Box in the WTO System?*, 14 J. INT'L ECON. L. 329, 332 (2011).

49. Coated Free Sheet Paper from China, Indonesia, and Korea, 72 Fed. Reg. 70,892 (Dec. 13, 2007) (notice).

50. Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, 73 Fed. Reg. 42,545 (July 22, 2008) (notice of countervailing duty order).

51. Author's calculation based on TABLE I.

52. The first CVD case initiated against China's outdoor barbeques was terminated without duty because the amount of subsidy was below the 2% threshold specified under Article 27.10 of the SCM Agreement. Canada Border Services Agency, *Outdoor Barbeques Originating in or Exported from the People's Republic of China* (Dec. 3, 2004), <https://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1318/ad1318tsor-eng.html>. The first CVD measure was adopted against China's certain fasteners in 2005 after the Tribunal issued a positive finding of injury. Canadian International Trade Tribunal, *The Dumping of Certain Fasteners Originating in or Exported from the People's Republic of China and Chinese Taipei and the Subsidizing of Such Products Originating in or Exported from the People's Republic of China* (Feb. 10, 2005), http://www.citt-tcce.gc.ca/dumping/inquiries/findings/archive_nq2e005_e.

53. See TABLE I.

54. See TABLE I.

55. Committee on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement: Australia*, WTO Doc. G/SCM/N/313/AUS (Mar. 1, 2017).

TABLE I: WTO MEMBERS' COUNTERVAILING DUTY INVESTIGATIONS AGAINST CHINA

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Initiations	2	1	1	8	11	13	6	8	11	15	13	10	20	119
U.S.	-	-	1	7	5	10	3	4	3	6	7	5	9	60
Canada	2	1	-	1	3	1	1	1	4	4	1	2	2	23
Australia	-	-	-	-	2	1	-	2	1	2	2	2	4	16
EU	-	-	-	-	-	-	2	-	3	3	1	-	1	10
India	-	-	-	-	-	1	-	-	-	-	1	-	1	3
Egypt	-	-	-	-	-	-	-	-	-	-	1	-	1	2
South Africa*	-	-	-	-	1	-	-	-	-	-	-	-	-	1
Mexico	-	-	-	-	-	-	-	1	-	-	-	-	-	1
Turkey	-	-	-	-	-	-	-	-	-	-	-	1	-	1
Brazil	-	-	-	-	-	-	-	-	-	-	-	-	1	1
New Zealand	-	-	-	-	-	-	-	-	-	-	-	-	1	1
Measures	-	2	-	1	9	7	9	5	7	9	6	10	8	73
U.S.	-	-	-	-	6	6	7	3	2	2	3	5	5	39
Canada	-	2	-	1	3	1	1	1	3	2	1	2	2	19
Australia	-	-	-	-	-	-	1	-	2	3	-	2	1	9
EU	-	-	-	-	-	-	-	1	-	2	2	-	-	5
India	-	-	-	-	-	-	-	-	-	-	-	1	-	1

* Actions operate at the level of the Southern African Customs Union, which also include Botswana, Lesotho, Namibia, and Swaziland. Source: U.S. Dep't of Commerce, *Antidumping and Countervailing Duty Investigations Initiated After January 01, 2000*, <http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html> (last updated Aug. 17, 2016); Canada Border Servs. Agency, *Historical Listing*, <https://www.cbsa-asfc.gc.ca/sima-hmsi/hist-eng.html> (last visited Jan. 23, 2018); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (Australia)* WTO Doc. G/SCM/N/313/AUS (Mar. 1, 2017); European Commission, *Investigations*, <http://trade.ec.europa.eu/tidi/completed.cfm> (last visited Feb. 11, 2018) (follow search criteria: "Country: People's Republic of China" and "Type of proceeding: Anti-subsidy"); Directorate Gen. of Anti-Dumping and Allied Duties, *Countervailing Duty Investigation*, <http://www.dgtr-gov.in/countervailing-duty-investigation> (last visited Feb. 11, 2018) (India); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (Egypt)*, WTO Doc. G/SCM/N/281/EGY (Jan. 28, 2015); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (Egypt)*, WTO Doc. G/SCM/N/328/EGY (Jan. 17, 2018); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (South Africa)*, WTO Doc. G/SCM/N/195/ZAF (Aug. 5, 2009); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (Mexico)*, WTO Doc. G/SCM/N/235/MEX (Mar. 12, 2012); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (Turkey)*, WTO Doc. G/SCM/N/289/TUR (July 23, 2015); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (Brazil)*, WTO Doc. G/SCM/N/313/BRA (Feb. 28, 2017); Comm. on Subsidies and Countervailing Measures, *Semi-Annual Report under Article 25.11 of the Agreement (New Zealand)*, WTO Doc. G/SCM/N/313/NZL (Mar. 1, 2017).

recognized the full market economy status of China in 2005,⁵⁶ it could no longer resort to Paragraph 15 of China's Accession Protocol to apply non-market economy methodology in anti-dumping investigations.⁵⁷

Surprisingly, the first EU investigation against Chinese subsidies was not initiated until April 17, 2010,⁵⁸ which was relatively late given that it has been China's largest trading partner since 2004.⁵⁹ In that case, the anti-subsidy proceeding was initiated with regard to coated fine paper.⁶⁰ The EU found that Chinese government was issuing low-interest rate loans, granting preferential tax incentives, and providing cheap land to the paper industry, and, as a result, determined the definitive CVD rates to be four percent and twelve percent.⁶¹

While a vast majority of these investigations have been brought by developed countries, a recent trend shows that more and more developing countries are interested in adopting countervailing measures as well. WTO Members like Egypt, Turkey, South Africa, Mexico, and Brazil have initiated CVD investigations against China.⁶² One investigation by India consequently led to the actual imposition of CVDs.⁶³ It is also noted that other major trading partners of China, including Japan,

56. Memorandum of Understanding Between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement Between Australia and the People's Republic of China (Apr. 18, 2005), <http://dfat.gov.au/trade/agreements/in-force/chafta/official-documents/Documents/chafta-agreement-text.pdf> (last visited Mar. 9, 2018).

57. Paragraph 15 of China's Accession Protocol allows WTO Members to use "a methodology that is not based on a strict comparison with domestic prices or costs in China" (i.e., non-market economy methodology) in the determination of normal value if Chinese producers are not able to show that market economy conditions prevail. Protocol on the Accession of the People's Republic of China, pt. I, ¶ 15(a), WTO Doc. WT/L/432 (Nov. 10, 2001).

58. Notice of Initiation of an Anti-Subsidy Proceeding Concerning Imports of Coated Fine Paper Originating in the People's Republic of China, 2010 O.J. (C 99) 30 (EC).

59. *EU Becomes China's Largest Trade Partner*, CHINA DAILY (Jan. 7, 2005), http://www.chinadaily.com.cn/english/doc/2005-01/07/content_406961.htm.

60. Council Implementing Regulation 452/2011 of May 6, 2011, Imposing a Definitive Anti-Subsidy Duty on Imports of Coated Fine Paper Originating in the People's Republic of China, 2011 O.J. (L 128) 18 (EU).

61. *Id.* at 75.

62. See TABLE I.

63. Anti-subsidy/Countervailing Duty investigation concerning imports of Castings for Wind Operated Electricity Generators, whether or not machined, in raw, finished or sub-assembled form, or as a part of a sub-assembly, or as a part of an equipment/component meant for wind-operated electricity generators, originating in or exported from China PR, Ministry of Commerce & Industry (Nov. 27, 2015), http://www.dgtr.gov.in/sites/default/files/adfin_Countervailing_Duty_Castings_Wind_Operated_Electricity_Generators_ChinaPR_0.pdf.

South Korea, and Taiwan, have never initiated CVD proceedings against Chinese products.

About half of these countervailing measures targeted Chinese base metal industries; 15 percent of them were imposed on machinery and electrical equipment; and 13 percent fixed on chemical products.⁶⁴ Not surprisingly, these sectors, including steel, aluminum, solar panels, power generation equipment, are suffering from overcapacity problems, with capacity utilization rates lower than 70 percent.⁶⁵

B. U.S. Practices

As shown in Annex I, the United States had forty-three CVD orders in force against China, and two other orders were revoked as of June 28, 2017. These forty-five orders can be classified by the Harmonized Tariff Schedule of the United States (“HTSUS”) as follows: twenty orders on Section XV,⁶⁶ eight on Section VI,⁶⁷ five on Section XVI,⁶⁸ four on Section VII,⁶⁹ three on Section X,⁷⁰ two on Section XI,⁷¹ two on Section XIII,⁷² and one on Section IX.⁷³ While a wide range of products are subject to CVDs, the steel industry is the most targeted sector in China, followed by the chemical and machinery industries.

With regard to the CVD rates found in the orders, the numbers can vary significantly, even for producers under the same investigation. The dominant factor is whether the Chinese producers and government cooperate with the investigating authority by providing necessary

64. WTO, *Countervailing Sectoral Distribution of Initiations: By Exporting Country 01/01/1995-31/12/2016*, https://www.wto.org/english/tratop_e/scm_e/CV_Sectoral_InitiationsByExpCty.pdf (last visited Mar. 9, 2018).

65. Shuaihua Wallace Cheng, *Overcapacity a Time Bomb for China's Economy*, SOUTH CHINA MORNING POST (Sept. 28, 2015), <http://www.scmp.com/comment/insight-opinion/article/1862024/overcapacity-time-bomb-chinas-economy>.

66. U.S. INT'L TRADE COMM'N, Pub. No. 4762, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES (2018) REVISION 1, § XV: base metals and articles of base metal.

67. *Id.* § VI: products of the chemical or allied industries.

68. *Id.* § XVI: machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.

69. *Id.* § VII: plastics and articles thereof; rubber and articles thereof.

70. *Id.* § X: pulp of wood or other fibrous cellulosic material; recovered (waste and scrap) paper or paperboard; paper and paperboard and articles thereof.

71. *Id.* § XI: textile and textile articles.

72. *Id.* § XIII: articles of stone, plaster, cement, asbestos, mica or similar materials; ceramic products; glass and glassware.

73. *Id.* § IX: wood and articles of wood; wood charcoal; cork and articles of cork; manufacturers of straw, of esparto or of other plaiting materials; basketware and wickerwork.

information in accordance with Section 776 of the Tariff Act.⁷⁴ As shown in Annex I, companies that were selected as mandatory respondents but failed to respond to the information requests were subject to much higher CVD rates, compared to the cooperating companies in the same investigation. For example, in *Circular Welded Carbon Quality Steel Pipe* case, the adverse facts available (“AFA”) doctrine was applied to Shuangjie, who withdrew from the investigation.⁷⁵ Thus, it is adversely inferred that Shuangjie had participated in all subsidy programs identified in that case, unless Shuangjie was not located in the provinces where the provincial subsidies were given, resulting in a final CVD rate of 616.83 percent.⁷⁶ East Pipe and Kingland, who answered questionnaires and permitted verification, were imposed much lower CVD rates of 29.6 percent and 44.9 percent.⁷⁷ As explained by the Federal Circuit, this AFA mechanism “is designed ‘to provide respondents with an incentive to cooperate’” with the USDOC’s investigations.⁷⁸

Notably, the government of the exporting country also plays a role in CVD investigations.⁷⁹ In *Seamless Pipe*, the Chinese government failed to provide state ownership information of steel rounds suppliers.⁸⁰ Relying on AFA, the USDOC thus treated all non-crossed-

74. 19 U.S.C. § 1677(e) (2016).

75. Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 31,966, 31,968 (June 5, 2008) (amended by final countervailing order, 73 Fed. Reg. 42,545) [hereinafter *Circular Welded Carbon Quality Steel Pipe I*].

76. Circular Welded Carbon Quality Steel Pipe from the People’s Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 73 Fed. Reg. 42,545 (July 22, 2008).

77. Circular Welded Carbon Quality Steel Pipe I, Fed. Reg. at 31,969.

78. *KYD, Inc. v. United States*, 607 F.3d 760, 767 (Fed. Cir. 2010) (quoting *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

79. *See Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014) (“Although it is unfortunate that cooperating respondents may be subject to collateral effects due to the adverse inferences applied when a government fails to respond to Commerce’s question, this result is not contrary to the statute or its purposes, nor is it inconsistent with this court’s precedent.”).

80. Issues and Decision Memorandum from Susan H. Kuhbach, Acting Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations to Paul Piquado, Acting Deputy Assistant Sec’y for Import Admin.: Final Determination in the Countervailing Duty Investigation of Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe (“Seamless Pipe”) from the People’s Republic of China 2-4, Inv. No. C-570-957 (Sept. 10, 2010), <http://enforcement.trade.gov/frn/summary/prc/2010-23547-1.pdf> [hereinafter *Seamless Pipe*].

owned suppliers as part of the government (*i.e.*, “authorities”⁸¹) who provided steel rounds to the producers under investigation.⁸² As a result, the CVD rates of 4.77 percent for TPCO and 2.51 percent for Hengyang were calculated for government provision of goods.⁸³

During the investigation, China argued that state ownership is not a reasonable basis to treat input suppliers as government authorities because SOEs may well act in a commercial manner.⁸⁴ However, the USDOC rejected China’s argument, noting that a rebuttable presumption was established in *Kitchen Appliance Shelving and Racks* that majority-state-owned companies are “authorities” under Section 771(5)(B) of the Tariff Act.⁸⁵ As explained in that case, when government-owned firms provide goods or services at commercial prices, there is no “benefit” conferred upon the receiver of the good or service,⁸⁶ but such good or service is still being provided by an “authority” and thus constitutes a financial contribution.⁸⁷

With respect to China’s subsidy programs determined to be subjectable to CVDs, the most popular type used by the central government is the provision of goods for less than adequate remuneration (“LTAR”).⁸⁸ As shown in Annex II, eighty percent of cases (28 out of 35 cases) involve SOE provision of low-cost raw materials, such as hot-rolled steel, polysilicon and chemicals. In addition, about seventy percent of cases include government provision of electricity.

Most CVD rates for the provision of raw materials LTAR are determined by AFA and are usually higher than those imposed on other

81. “[T]he term ‘authority’ means a government of a country or any public entity within the territory of the country.” 19 U.S.C. § 1677(5)(B)(iii) (2016).

82. *Id.* For a subsidy to be countervailed, it must be provided by a “government or any public body” (*i.e.*, “authorities” within the meaning of the U.S. AD law) or a private body entrusted or directed by a government. *See* SCM Agreement, *supra* note 3, art. 1.1(a)(1).

83. *Seamless Pipe*, *supra* note 80, at 18.

84. *Id.* at Comment 7 (Government Ownership Should Not be the Dispositive Factor in Determining Whether a Financial Contribution Has Occurred).

85. *Id.* at 64 n.257 (citing to Comment 4 of Certain Kitchen Shelving and Racks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 74 Fed. Reg. 37,012 (July 27, 2009) (KASR from the PRC), which adopts the Issues and Decisions Memorandum (IDM) from John M. Andersen, Acting Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations to Ronald K. Lorentzen, Acting Assistant Sec’y for Import Admin. on the Final Determination in the Countervailing Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People’s Republic of China (July 20, 2009)).

86. *Id.* at 64-65. According to Section 771(5)(E) of the Tariff Act, the provision of goods or services confers a benefit when such goods or services are provided for less than adequate remuneration (LTAR). Tariff Act of 1930 § 771(5)(E), 19 U.S.C. § 1677(5)(E) (2016).

87. *Seamless Pipe*, *supra* note 80, at 64-65.

88. *See infra* ANNEX II.

subsidy programs.⁸⁹ This reflects the fact that the Chinese government may be reluctant to provide information regarding whether the SOEs are “authorities.” For example, in *Stainless Steel Sheet and Strip*, the USDOC found that the Chinese government withheld necessary information and therefore decided to apply AFA to determine that the producers of various inputs are authorities, that the provision of inputs is specific, and that the input industries are distorted in the benefit analysis.⁹⁰ The AFA are also commonly used in finding the provision of electricity for LTAR, leading to the countervailable subsidy rates between 0.04 percent to 5.62 percent.

The second most popular type of national-level program is income tax reduction and exemption, most of which are documented in the Chinese Enterprise Income Tax Law (EITL)⁹¹ and one of its predecessors, the Foreign Invested Enterprise Income Tax Law (FIEITL).⁹² In particular, under Article 7 of the FIEITL, productive FIEs located in the designated economic zones pay income tax at a reduced rate of 15 or 24 percent, depending on their locations. Article 8 of the FIEITL, also known as “Two Free, Three Half” program, provides that productive FIEs scheduled to operate for at least ten years are exempted from income tax in the first two years of profitability and pay income tax at half the normal rate in the next three years. In about two-thirds of the cases listed in Annex II, Chinese producers were found to benefit from Article 7 or Article 8.⁹³

While the FIEITL was terminated in 2008 due to Mexico’s complaint under the WTO,⁹⁴ Chapter IV of the EITL continues to provide preferential income tax treatment. Specifically, Article 28.2 of the EITL

89. See *infra* ANNEX II.

90. Memorandum from Christian Marsh, Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations to Ronald K. Lorentzen, Acting Assistant Sec’y for Enforcement and Compliance, Decision Memorandum for the Preliminary Affirmative Determination: Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People’s Republic of China 16-23, Inv. No. C-570-043 (July 11, 2016), <http://enforcement.trade.gov/frn/summary/prc/2016-16947-1.pdf>.

91. *Qiyue Suodeshui Fa* (企业所得税法) [Enterprise Income Tax Law] (promulgated by the Nat’l People’s Cong., Mar. 16, 2007, effective Jan. 1, 2008), http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471133.htm (China).

92. *Waishang Touzi Qiyue he Waiguo Qiyue Suodeshui Fa* (外商投资企业和外国企业所得税法) [Income Tax Law of the People’s Republic of China for Enterprises with Foreign Investment and Foreign Enterprises] (promulgated by the Nat’l People’s Cong., Apr. 9, 1991, effective July 1, 1991; repealed Mar. 16, 2007), https://www.wto.org/english/thewto_e/acc_e/chn_e/WTACCCHN46_LEG_5.pdf (China).

93. See *infra* ANNEX II.

94. The dispute did not go to the panel as China reached an agreement with Mexico to terminate a number of its preferential tax programs. See Communication from China and Mexico,

reduces the income tax rate to 15 percent from the standard 25 percent if the firm is recognized as a new, high-technology enterprise that needs state support.⁹⁵ Chemical and machinery industries are the top beneficiaries of this provision because they fall into the “High and New Tech Fields under the Key Support of the State.”⁹⁶ Other provisions include Article 30.1, which allows R&D expenses to be deducted from taxable incomes, and Article 33, which provides that the incomes generated in line with industrial policies for comprehensive utilization of resources may be deducted from taxable incomes.⁹⁷ Aside from income tax, the central Chinese government has also adopted exemption and rebates programs on value-added taxes (“VAT”) and import tariffs to encourage the import of advanced foreign equipment⁹⁸ and the purchase of domestically produced equipment.⁹⁹

The third most popular type of program is the preferential loans provided by SOCBs, such as the Big Four, and policy banks, such as the Export-Import Bank of China. This type of subsidy usually has one of

China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, WTO Doc. WT/DS359/14 (Feb. 13, 2008).

95. *Qiyē Suodeshui Fa* (企业所得税法) [Enterprise Income Tax Law], *supra* note 91, art. 28.2.

96. Eight fields are recognized as high and new tech fields under the Circular 32: 1) electronic information, 2) biology and new medicine, 3) aerospace, 4) new materials, 5) high-tech services, 6) new energy and energy saving, 7) resources and environment, and 8) advanced manufacturing and automation. See *Kejibu Caizhengbu Guojia Shuiwu Zongju guanyu Xiuding Yinfā Gaoxin Jishu Qiyē Rendīng Guanli Banfa de Tongzhi* [Circular of the Ministry of Science and Technology, the Ministry of Finance and the State Administration of Taxation on Revising and Issuing the Administrative Measures for the Accreditation of High-tech Enterprises], *Guo Ke Fa Huo* [2016] No. 32 (Feb. 4, 2016), http://www.most.gov.cn/tztg/201602/t20160204_123994.htm.

97. *Qiyē Suodeshui Fa* (企业所得税法) [Enterprise Income Tax Law], *supra* note 91, arts. 30.1, 33.

98. See, e.g., *Guowuyuan guanyu Diaozheng Jinkou Shebei Shuishou Zhengce de Tongzhi* [Circular of the State Council Concerning the Adjustment in the Taxation Policy of Import Equipment], *Guo Fa* [1997] No. 37 (promulgated by the St. Council, Dec. 29, 1997), http://www.fdi.gov.cn/1800000121_39_2849_0_7.html (China); *Caizhengbu Guojia Fazhan Gaige Wei Gongye he Xinxihua Bu Haiguan Zongshu Guojia Shuiwu Zongju Guojia Nengyuan Ju guanyu Diaozheng Zhongda Jishu Zhuangbei Jinkou Shuishou Zhengce youguan Mulu ji Guiding de Tongzhi* [Notice on Adjusting the Catalogue and Provisions of the Import Taxation Policies Concerning Major Technical Equipment (2015 Revision)], *Cai Guan Shui* [2015] No. 51 (Dec. 1, 2015), <http://tax.mofcom.gov.cn/tax/taxfront/en/article.jsp?c=30111&tn=1&id=4cb28a7b5bb847ca9cbb3fac9aac8a70> (China).

99. See, e.g., *Guojia Shuiwu Zongju guanyu Yinfā Waishang Touzi Qiyē Caigou Guochan Shebei Tuishui Guanli Shixing Banfa de Tongzhi* [Notice of the State Administration of Taxation Concerning the Proposed Management Methods for Tax Refund to Foreign-funded Enterprises for Their Domestic Equipment Purchases], *Guo Shui Fa* [1999] No. 171 (promulgated by the St. Admin. of Tax’n, Sept. 20, 1999; repealed 2008), CLI.4.23801 (EN) (Chinalawinfo).

two main functions: to encourage the development of strategic industries or to assist the buyers and sellers in financing their import and export of Chinese products, technology, and services.¹⁰⁰ Loans having the former function are called policy loans, and the latter are known as export buyer's/seller's credits.¹⁰¹ Over 60 percent of the cases listed in Annex II involve policy or export loans, with the non-AFA rates between 0.08 percent to 4.45 percent.

In determining whether a loan confers a benefit to the recipient, the USDOC has consistently relied on external benchmarks constructed by the interest rates of other countries that fall within the same income category as China.¹⁰² This is because the banking sector in China has been found to involve significant government control and thus does not reflect interest rates that would be found in a functioning market as required by Section 771(5)(E)(ii) of the Tariff Act.¹⁰³

Different from the central government, the most common form of subsidy used by the local governments in China is grants.¹⁰⁴ About sixty percent of the cases listed in Annex II include at least one sub-national grant.¹⁰⁵ While the grants were given to a broad range of sectors, most of them were calculated at rates of less than 0.1 percent.¹⁰⁶ Each grant

100. Wenyan Yang, *Domestic Banking Under Financial Liberalization: Lessons for China as a Member of the WTO*, in CHINA'S ECONOMIC GLOBALIZATION THROUGH THE WTO 35, 38-42 (Ding Lu et al. eds., 2003).

101. *Id.*

102. See, e.g., Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y for Import Admin., to David M. Spooner, Assistant Sec'y for Import Admin.: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet from the People's Republic of China 5-7, Inv. No. C-570-907 (Oct. 17, 2007), <https://enforcement.trade.gov/frn/summary/prc/E7-21046-1.pdf>; Memorandum from Stephen J. Claeys, Deputy Assistant Sec'y for Import Admin., to David M. Spooner, Assistant Sec'y for Import Admin.: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Lightweight Thermal Paper from the People's Republic of China 8-10, Inv. No. C-570-921 (Sept. 25, 2008), <https://enforcement.trade.gov/frn/summary/prc/E8-23271-1.pdf>; Memorandum from Cristian Marsh, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Deputy Assistant Sec'y for Import Admin.: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Aluminum Extrusions from the People's Republic of China 7-8, Inv. No. C-570-968 (Mar. 28, 2011), <https://enforcement.trade.gov/frn/summary/prc/2011-7926-1.pdf>.

103. Section 771(5)(E)(ii) of the Tariff Act explains that the benefit conferred by loans is the "difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market." Tariff Act of 1930 § 771(5)(E)(ii), 19 U.S.C. § 1677(5)(E)(ii).

104. See *infra* ANNEX II.

105. See *infra* ANNEX II.

106. See *infra* ANNEX II.

has its own eligibility criteria, such as export performance, technological innovation, energy savings, and environmental protection, depending on its ultimate purpose.¹⁰⁷ For instance, in *Drawn Stainless Steel Sinks*, the producers reported a number of grants provided by the provincial and city governments, including funds for SMEs to expand international markets, grants for overseas professional exhibition, funds to support adoption of e-commerce by foreign trade enterprises, and a reduction in land transfer fees.¹⁰⁸

In sum, the above study of U.S. anti-subsidy practices shows the unique characteristics of the Chinese economy. Its uniqueness is illustrated by the evidence that the Chinese government has used SOEs and SOCBs as a vehicle to distribute cheap raw materials and preferential loans for the purpose of promoting the development of key industries designated by the government. However, as this Note discusses below, an important issue in these CVD investigations is whether Chinese SOEs or SOCBs fall within the definition of “authority” (“a government or public body” in the words of the SCM Agreement) whose provision of goods or loans may thus be subject to countervailing duties.¹⁰⁹

IV. PUBLIC BODY DETERMINATIONS ANALYZED

For a measure to constitute a subsidy and thus be subject to the disciplines of the WTO’s anti-subsidy regime, three elements must be satisfied. First, it is a financial contribution or an income or price support.¹¹⁰ Second, it is made by a government, public body, or private body entrusted with responsibility or directed by the government or a public body.¹¹¹ Third, a benefit is thereby conferred.¹¹²

While the anti-subsidy law provides a useful remedy to offset the effect of Chinese imports, serious doubt remains as to whether it can properly address concerns about Chinese SOEs. The doubt arises

107. See *infra* ANNEX II.

108. Memorandum from Shane Subler and Austin Redington, Int’l Trade Compliance Analysts, to Paul Piquado, Assistant Sec’y for Import Admin.: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Drawn Stainless Steel Sinks from the People’s Republic of China 26-29, Inv. No. C-570-984 (Feb. 19, 2013), <http://enforcement.trade.gov/frn/summary/prc/2013-04280-1.pdf>.

109. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶ 339 n.259 (The United States explained that the term “authority” includes the term “public entity” under its domestic law, and the term “public entity” means “public body” in Article 1.1(a) (1) of the SCM Agreement.).

110. SCM Agreement, *supra* note 3, art. 1.1(a).

111. *Id.* art. 1.1(a)(1).

112. *Id.* art. 1.1(b).

mainly from the question as to whether Chinese SOEs constitute “public bodies” under the SCM Agreement. It is therefore necessary to analyze the public body determination based on the Appellate Body’s and Panel’s findings in previous cases.

A. Governmental Authority Standard

An essential element in Article 1.1(a)(1) of the SCM Agreement is that a financial contribution must be attributable to “a government.” The term “government” includes a government itself or a “public body.” Article 1.1 states in a parenthetical phrase that, for the purpose of the SCM Agreement, “government” refers collectively to “a government or any public body.”¹¹³ This indicates that a public body must share a sufficient degree of essential characteristics with a government for one of its measures to be subject to the WTO’s anti-subsidy regime.¹¹⁴

Article 1.1(a)(1) then distinguishes between governments (including public bodies) and private bodies.¹¹⁵ Subparagraph (iv) provides that whether an entity carries out “functions . . . which would normally be vested in the government” may be relevant to determining whether the entity is a public body.¹¹⁶ Without further explanation of these terms, the question remains open as to exactly what characteristics are relevant in the determination of a “public body.” Traditionally, the USDOC relied on ownership and, as noted in Part III, established a rebuttable presumption that enterprises with majority state ownership are government authorities.¹¹⁷ Many Chinese SOEs would fall within this simple definition.¹¹⁸ This approach’s coverage may be too broad, as it would

113. *Id.* art. 1.1(a)(1).

114. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶¶ 282, 284.

115. *Id.* ¶¶ 280, 287.

116. *Id.* ¶ 293.

117. Memorandum from John M. Andersen, Acting Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Sec’y for Import Admin.: Issues and Decision Memorandum (IDM) for the Final Determination in the Countervailing Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People’s Republic of China, Comment 4 (July 20, 2009), <https://enforcement.trade.gov/fm/summary/prc/E9-17717-1.pdf>.

118. In the Report of the Working Party on the Accession of China, members of the Working Party and the representative of China appear to acknowledge that Chinese SOEs may provide financial contributions as government actors in view of the special characteristics of China’s economy. General Council, *Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, ¶ 172 (Oct. 1, 2001). Also, SOEs may be the recipients of subsidies. *See* World Trade Organization, Protocol on the Accession of the People’s Republic of China, Decision of 10 November 2001,

allow nations to engage in protectionism by imposing CVDs on potentially all SOEs' products,¹¹⁹ and at the same time, too narrow, as governments may exercise systematic control over private entities through means other than shareholder rights.¹²⁰

In the landmark case *US—Anti-Dumping and Countervailing Duties (China)*, WTO Members expressed two different approaches for determining whether an entity is a public body.¹²¹ One, advocated by the United States and supported by the Panel, is called the “government control” approach and holds that an entity is a public body if the majority of its shares are owned by the government.¹²² This approach was challenged by China on appeal. China argued for the “government function” approach, under which an entity is a public body if it exercises delegated powers to perform functions of a governmental character.¹²³ The major problem with this approach is that the blurry line between governmental functions and private functions makes it impracticable to apply, especially under the growing trend of public-private partnerships.¹²⁴

Neither approach was endorsed by the Appellate Body. Instead, it established the “governmental authority” approach, which combines some features of the two approaches above.¹²⁵ In the Appellate Body's words, a public body is an entity that “possesses, exercises or is vested with governmental authority.”¹²⁶ The mere fact that a government is the majority shareholder of an entity may not be sufficient to establish

WTO Doc. WT/L/432, ¶ 10.2 (Nov. 23, 2001) (“For purposes of applying Articles 1.2 and 2 of the SCM Agreement, subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.”).

119. Ru Ding, “Public Body” or Not: *Chinese State-Owned Enterprise*, 48 J. WORLD TRADE 167, 176 (2014).

120. For example, Chinese government may exercise certain control over private entities through the networking of corporate groups, industrial associations, and local chambers of commerce, as well as through the oversights of 800,000 Communist Party committees within the corporations. See Wu, *supra* note 16, at 277-83; Gongsì Fa (公司法) [Company Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2013, effective March 1, 2014), art. 19, http://www.fdi.gov.cn/1800000121_39_4814_0_7.html (China).

121. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶¶ 277-80.

122. *Id.* ¶¶ 277-78.

123. *Id.* ¶ 279.

124. Ding, *supra* note 119, at 177.

125. *Id.* at 179.

126. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶ 313.

that the entity is a public body.¹²⁷ The precise characteristics of a public body and the types of evidence may vary from entity to entity, state to state, and case to case.¹²⁸ For example, it may be straightforward to find that an entity is a public body when a statute or other legal instrument expressly vests authority in that entity.¹²⁹ When there is no such express delegation of authority, however, evidence that an entity is exercising governmental functions, especially when it points to a sustained and systematic practice, may prove that it possesses or is vested with governmental authority.¹³⁰ In addition, evidence that a government exercises meaningful control over an entity and its conduct may provide an inference that the entity is exercising governmental authority, particularly when “the formal indicia of government control are manifold, and . . . such control has been exercised in a meaningful way.”¹³¹

The Appellate Body then proceeded to analyze the two main issues raised by China: whether the USDOC’s determinations that the provision of inputs by SOEs¹³² and the provision of loans by SOCBs in China were financial contributions by “public bodies” were inconsistent with the Appellate Body’s interpretation of the term under the governmental-authority approach. With respect to the SOEs, the Appellate Body found that the determinations were inconsistent with Article 1.1(a)(1) because the USDOC relied principally on their ownership information and failed to comply with its obligation to seek out other relevant information that is necessary to conduct an objective determination.¹³³

With respect to the SOCBs, the Appellate Body noted that the USDOC’s determination was based on four considerations: 1) near 100 percent state ownership of the Chinese banking sector; 2) Article 34 of the Commercial Banking Law which requires the banks to “carry out their loan business upon the needs of the national economy and the social development and under the guidance of State industrial policies”; 3) SOCBs’ lack of adequate risk management and analytical skills; and 4) the fact that the USDOC did not receive necessary information with regard to the process by which loans were requested, granted and

127. *Id.*

128. *Id.* ¶¶ 313-14.

129. *Id.* ¶ 314.

130. *Id.*

131. *Id.*

132. It is noted that the SOEs were producers of steel, rubber, and petrochemical inputs, which then sold to the producers/exporters under investigations or to trading companies. *Id.* ¶ 339.

133. *Id.* ¶ 342.

evaluated.¹³⁴

In support of its second consideration, the USDOC referred to documents from the Bank of China, Tianjin Government, and International Monetary Fund, showing that SOCBs in China are required to support relevant industrial policies.¹³⁵ It also considered a report from the Organization for Economic Co-operation and Development, which states that the chief executives of the SOCBs were government-appointed and the Communist Party retained significant influence in their choice.¹³⁶ The Appellate Body concluded that this evidence sufficiently supported the USDOC's determination that the SOCBs exercised governmental functions on behalf of the Chinese government.¹³⁷

In a later case, *US—Carbon Steel (India)*, the Appellate Body encountered a similar issue—whether the USDOC's determination that the National Mineral Development Corporation (“NMDC”) was a public body was inconsistent with Article 1.1(a)(1) of the SCM Agreement.¹³⁸ In this case, the United States submitted, and the Panel agreed, that a public body is an entity that is “meaningfully controlled” by the government and that such control can be established by a combination of government ownership plus other factors indicative of control.¹³⁹

Based on the evidence that 98 percent of NMDC's shares were held by the Indian government and that the Indian government had appointed two directors and had approval power over an additional seven out of thirteen total directors, the Panel upheld the USDOC's determination.¹⁴⁰ On appeal, India contended that the Panel erred in its interpretation because a public body must “have the power to regulate, control, or supervise individuals or otherwise restrain their conduct” and must also “be able to entrust or direct a private body—i.e. give responsibility to, or exercise authority over a private body.”¹⁴¹

134. *Id.* ¶ 345.

135. *Id.* ¶¶ 346-47.

136. *Id.* ¶ 346.

137. *Id.* ¶ 351.

138. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.31.

139. *Id.* ¶ 4.32 (citing Panel Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from (India)*, ¶ 7.81, WTO Doc. WT/DS436/R (adopted Apr. 11, 2014)).

140. *Id.* ¶ 4.33 (citing Panel Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from (India)*, ¶¶ 7.81-82, WTO Doc. WT/DS436/R (adopted Apr. 11, 2014)).

141. *Id.* ¶¶ 2.16, 4.11. A similar interpretation has been advocated for by China in a case processing in parallel, *US—Countervailing Measures (China)*, in which the Panel found that the USDOC's longstanding rebuttable presumption that an entity with majority government ownership is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement. *See* Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, ¶ 7.67, WTO

Again, the Appellate Body did not accept either of these arguments. Following the reasoning in *US—Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clarified that a public body does not necessarily have to possess the power to regulate or to entrust or direct private bodies.¹⁴² Also, the Appellate Body found that the Panel’s “meaningful control” approach erred in two aspects. First, the Appellate Body stated that the Panel confused the *substantive standard* (i.e., an entity that possesses, exercises or is vested with governmental authority) with the *evidentiary standard* (i.e., a government exercises meaningful control over an entity) because it only assessed whether NMDC is meaningfully controlled by the government.¹⁴³ Second, the Appellate Body ruled that the Panel blurred the line between the *existence* of government control and “meaningful control” because it failed to assess whether the Indian government “in fact exercised control over the NMDC and its conduct.”¹⁴⁴ For the Appellate Body, evidence of ownership and government involvement in the selection of directors merely shows “formal indicia of control” and thus alone cannot suffice to establish that an entity is a public body.¹⁴⁵

After reversing the Panel’s finding, the Appellate Body completed the analysis by finding that the USDOC’s failure to consider other relevant evidence regarding the relationship between the NMDC and the government within the Indian legal order and the extent to which the government in fact exercised meaningful control over the NMDC was inconsistent with Article 1.1(a)(1) of the SCM Agreement.¹⁴⁶

Doc. WT/DS437/R (adopted July 14, 2014) [hereinafter Panel Report, *US—Countervailing Measures (China)*].

142. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶¶ 4.17-18. The Panel in *US—Countervailing Measures (China)* reached the same conclusion, reasoning that the range of governmental functions includes “not only regulation of the economy but also the provision of goods and services,” depending on how the State actually operates. Panel Report, *US—Countervailing Measures (China)*, *supra* note 141, ¶ 7.69.

143. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.37.

144. *Id.*

145. *Id.* ¶ 4.43. In this regard, the Appellate Body disagreed with India that the power to appoint directors is nothing more than a corollary of shareholding, noting that the government power to appoint directors and the independence of those directors are distinct factors. *Id.* ¶ 4.45.

146. *Id.* ¶ 4.54. In making this finding, the Appellate Body noted that the Indian government explained in the CVD investigation that the NMDC was given enhanced autonomy with regard to investment decision and personnel matters, operating in a commercial, market-driven, deregulated environment and conducting its operations and businesses on commercial principles. *See id.* ¶¶ 4.40-41.

B. *Facts Available Mechanism*

The simplest way to obtain information to determine whether government control exists is through questionnaires delivered to the exporting government and SOEs under investigation. However, they may be reluctant to provide investigating authorities with necessary information, particularly when such information would lead to a positive finding that the SOE is a public body. In such a situation, it would be difficult to figure out whether a government has exercised control over the entity through communications behind closed doors.

Indeed, in many CVD cases, the Chinese government was found to have withheld information that was necessary for public body determinations. For instance, in *Biaxial Integral Geogrid Products*,¹⁴⁷ the USDOC requested a variety of information from the Chinese government to assess its relationship with the identified input producers.¹⁴⁸ However, the Chinese government only provided the business registration and basic shareholder information and did not provide other requested information, such as company by-laws, articles of incorporation, licenses, and information about the owners, members of the board of directors, or managers of the producers who were also government or Chinese Communist Party officials or representatives.¹⁴⁹ Instead, it argued that the provided information was sufficient to demonstrate that those producers were not public bodies and that being a Communist Party member would not make one subject to any government intervention.¹⁵⁰

Drafters of the WTO agreements predicted this situation and incorporated certain provisions addressing it. Specifically, Article 12.7 of the SCM Agreement provides that “[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.”¹⁵¹ Based on this Article, the United States has established the

147. Certain Biaxial Integral Geogrid Products from the People’s Republic of China, 82 Fed. Reg. 12,437 (U.S. Dep’t of Commerce Mar. 3, 2017) (notice of countervailing duty order).

148. Memorandum from Christian Marsh, Deputy Assistant Sec’y for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Sec’y for Enforcement & Compliance: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People’s Republic of China 17, Inv. No. C-570-037 (June 17, 2016), <http://enforcement.trade.gov/frn/summary/prc/2016-15007-1.pdf> [hereinafter Decision Memorandum, *Biaxial Integral Geogrid Products*].

149. *Id.* at 18.

150. *Id.*

151. SCM Agreement, *supra* note 3, art. 12.7.

rules of facts available (“FA”) and adverse facts available (“AFA”) under Section 776 of the Tariff Act.¹⁵²

With respect to FA, Section 776(a) requires the administering authority to “use the facts otherwise available in reaching the applicable determination” if 1) necessary information is not available on the record, 2) an interested party or any other person withholds or fails to provide requested information or significantly impedes a proceeding, or 3) the administering authority cannot verify the submitted information.¹⁵³

With respect to AFA, Section 776(b) states that the administering authority “may use an inference that is adverse to the interests of an interested party in selecting from among the facts otherwise available” if that party has “failed to cooperate by acting to the best of its ability to comply with a request for information.”¹⁵⁴ Such adverse inferences may include reliance on information derived from the petition, a final determination, any previous administrative review or determination, or any other information on the record.¹⁵⁵

As noted in Part III, the use of AFA generally results in a higher-margin CVD rate because it is designed to provide the interested parties with an incentive to cooperate. However, an important question arises as to whether such a rule is consistent with the WTO agreements.¹⁵⁶ In the appellate review of *US—Carbon Steel (India)*, India contended that this AFA provision is “as such” inconsistent with Article 12.7 of the SCM Agreement because it allows the investigating authority to draw an inference solely because that inference is adverse to non-cooperating

152. 19 U.S.C. § 1677e (2016).

153. *Id.* § 1677e(a).

154. *Id.* § 1677e(b)(1). As relevant context, paragraph 5 of Annex II of the AD Agreement states that “[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.” Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex IA, 1868 U.N.T.S. 201 [hereinafter Anti-Dumping (AD) Agreement]. This provision suggests that the level of cooperation required is a high one. See Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 100, WTO Doc. WT/DS184/AB/R (adopted July 24, 2001) [hereinafter Appellate Body Report, *US—Hot-Rolled Steel*].

155. 19 U.S.C. § 1677e(b)(2) (2016).

156. In another case, the USDOC’s use of AFA under the AD Agreement was challenged by China. While the Appellate Body found that the AFA mechanism is “a rule or norm of general and prospective application that can be challenged ‘as such’ in WTO dispute settlement”, it could not complete the analysis of whether such norm is inconsistent with the AD Agreement. Appellate Body Report, *United States—Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, ¶¶ 5.164, 5.179, WTO Doc. WT/DS471/AB/R (adopted May 11, 2017).

parties, not because it is the most accurate information available.¹⁵⁷

The Appellate Body began its analysis by interpreting the text and context of Article 12.7. First, it observed that an investigating authority must use the facts available that “‘reasonably replace the [necessary] information that an interested party failed to provide’, with a view to arriving at an accurate determination.”¹⁵⁸ To ascertain which facts available are reasonable replacements, an investigating authority is required to engage in “a process of reasoning and evaluation”¹⁵⁹ where “all substantiated facts on the record must be taken into account.”¹⁶⁰

Second, although the determinations must be based on “facts” and not on non-factual assumptions or speculation,¹⁶¹ an investigating authority may draw inferences from the evidence before it in order to reach a conclusion.¹⁶² Such inferences may be drawn from “the manner or procedural circumstances in which information is missing.”¹⁶³ In particular, an investigating authority should take “due account of any difficulties experienced by interested parties,” including “the nature and availability of the evidence being sought, the adequacy of protection accorded by an investigating authority to the confidentiality of information, the time period provided in which to respond, and the extent or number of opportunities to respond.”¹⁶⁴

Third, the Appellate Body stated that non-cooperation of a party is not itself the basis for using the facts available.¹⁶⁵ Instead, an investigating authority can resort to the facts available only when the necessary information is missing from the record, regardless of whether a party cooperates or not.¹⁶⁶

157. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.458. India also brought an “as applied” claim against the AFA practices but failed to make a *prima facie* case. *Id.* ¶ 4.6.4.

158. *Id.* ¶ 4.416 (quoting Appellate Body Report, *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*, ¶¶ 293-94, WTO Doc. WT/DS295/AB/R (adopted Nov. 29, 2005)).

159. *Id.* ¶ 4.418.

160. *Id.* ¶ 4.419 (citing Appellate Body Report, *Mexico—Definitive Anti-Dumping Measures on Beef and Rice*, ¶ 294, WTO Doc. WT/DS295/AB/R (adopted Nov. 29, 2005)).

161. *Id.* ¶ 4.417.

162. *Id.* ¶ 4.420.

163. *Id.* ¶ 4.422.

164. *Id.* (quoting SCM Agreement, *supra* note 3, art. 12.11).

165. *Id.* ¶ 4.426; *see also* Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 154, ¶ 99 (finding that “investigating authorities should not arrive at a ‘less favourable’ outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has ‘cooperated’ with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*”).

166. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.416.

Fourth, while non-cooperation of a party can be taken into account as part of the procedural circumstances in inferring which of the facts available may constitute reasonable replacements, it may not alone form the basis for such a determination pursuant to Article 12.7 of the SCM Agreement.¹⁶⁷ In addition, the facts available mechanism should not be used to punish non-cooperation by selecting adverse facts, because it would lead to an inaccurate determination that violates Article 12.7.¹⁶⁸

The Appellate Body ultimately found that Section 776(b) of the U.S. Tariff Act does not require the investigating authority to act inconsistently with Article 12.7, thereby rejecting India's claim.¹⁶⁹ First, the provision required that inferences must be based on facts, such as the information from the petition and previous determinations.¹⁷⁰ Second, Section 776(b) merely authorizes, not mandates, the investigating authority to use an inference that is adverse to the interests of a non-cooperating party.¹⁷¹ It states that the investigating authority "may use an inference that is adverse to the interests of that party."¹⁷² This permissive term allows the investigating authority to use adverse inferences in accordance with Article 12.7 of the SCM Agreement. Third, the permissive and discretionary nature of that provision is further supported by the USDOC's determinations and relevant judicial decisions.¹⁷³

To sum up, the FA mechanism under Article 12.7 of the SCM Agreement provides an effective rule to address the situation where a government or a SOE fails to submit information that is necessary to make a CVD determination. Together with the Appellate Body's governmental authority standard, they establish a sophisticated framework for determining whether the SOE concerned is a public body.

C. *Implications for Chinese SOEs*

The discussions above have important implications for CVD actions against China, where the state sector continues to dominate the national economy. Specifically, they shed light on the question of whether the provision of goods, services, and loans by Chinese SOEs are transactions by public bodies.

167. *Id.* ¶ 4.468.

168. *Id.*

169. *Id.* ¶ 4.483.

170. *Id.* ¶ 4.467.

171. *Id.* ¶ 4.469.

172. 19 U.S.C. § 1677e(b)(1) (2016).

173. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.473-82.

First, SOEs that are explicitly vested with governmental authority in statutes or other legal instruments are likely to fall within the definition of public bodies.¹⁷⁴ For example, China's Commercial Banking Law expressly mandates that the SOCBs to provide loans in accordance with the needs of economic and social development as determined by the Chinese government.¹⁷⁵ In addition, enterprises established pursuant to China's Industrial Enterprises Owned by the Whole People Law are required to produce commodities in line with state plans.¹⁷⁶ Despite the efforts to transform the Chinese economy into a modern enterprise system, 69 out of 101 central SOEs under the supervision of the SASAC were still governed by this law at the end of 2016, amounting to total assets of CNY7.97 trillion.¹⁷⁷ These SOEs may well be public bodies providing financial contributions when they sell products (typically raw materials, such as hot-rolled steel) or services to other private entities in the domestic market.

Second, even as China's economic reform progresses and many SOEs are incorporated under the company law or listed on the domestic exchanges,¹⁷⁸ they may still be considered public bodies. In cases where no express delegation of governmental authority exists, the investigating authorities can look at evidence that the entity is performing governmental functions. The exact scope and content of governmental functions would depend on the core features of the investigated entity, its relationship with the government, and the legal and economic environment prevailing in the country.¹⁷⁹

In this regard, the phrase "which would normally be vested in the government" in Article 1.1 (a) (1) (iv) of the SCM Agreement is of particular relevance. It suggests that how the legal order of the relevant Member ordinarily classifies the functions or conduct of an entity is

174. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶ 314.

175. Shangye Yinhang Fa (商业银行法) [Commercial Banking Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 10, 1995, effective July 1, 1995, amended Aug. 29, 2015), art. 34 (China).

176. This law, enacted in 1988, was the first enterprise law in China. Quanmin Suoyouzhi Gongye Qiye Fa (全民所有制工业企业法) [Law on Industrial Enterprises Owned by the Whole People] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 13, 1998, effective Aug. 1, 1988; amended Aug. 27, 2009), arts. 3, 55 (China).

177. Wang Xi & Tan Moxiao, *69 Central Enterprises Are Still State-owned Group? Before the End of the Year All Changed to Company System!*, XINHUANET (July 26, 2017), http://news.xinhuanet.com/fortune/2017-07/26/c_1121384547.htm.

178. OECD, *OECD REVIEWS OF REGULATORY REFORM: CHINA 58* (2009), <https://www.oecd.org/china/42390089.pdf>.

179. See Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.29.

indicative of whether that entity is a public body.¹⁸⁰ Such classifications may be revealed in the laws and notices of the Member, published or internal documents of the entity at issue, or even third-party reports.¹⁸¹

Notably, the range of governmental functions is “quite broad” and includes not only regulation of the economy, but also the provisions of public goods and services,¹⁸² such as transport, communication, water, energy, healthcare, education, and environmental and social protection.¹⁸³ Therefore, entities that are established, owned, controlled, managed, run, or funded by a government, including SOEs, banks, universities, scientific centers, hospitals, museums, and sports organizations, may be found to exercise governmental functions.¹⁸⁴

Third, if it is unclear whether the functions and activities of the entity are of a governmental character, evidence that a government is exercising meaningful control over an entity may serve to establish that the entity is a public body.¹⁸⁵ More precisely, evidence must show multiple indications of government control plus the exercise of such control.¹⁸⁶ This evidentiary standard is arguably the most common way by which the United States demonstrates the existence of a public body, as it is closer to the “government control” approach conventionally used by the USDOC.¹⁸⁷

It should be emphasized that the above framework for determining that an entity is a public body goes beyond considering only state ownership.¹⁸⁸ While majority ownership of a state is certainly evidence of government control, other evidence, such as the power to appoint or evaluate high-level management, the right to make or approve business decisions, and the relations between the management team and the government, are also required to establish the *existence* of government control.¹⁸⁹

In the context of China, the appointment and evaluation of central SOEs’ executives by the Organizational Department of the Central Party Committee (“ODCPC”) and the SASAC is still a major instrument

180. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶ 297.

181. *See id.* ¶ 503.

182. Panel Report, *US—Countervailing Measures (China)*, *supra* note 141, ¶ 7.69.

183. *See* U.N. Statistics Division, Classification of the Functions of Government (COFOG), <https://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=4>.

184. Panel Report, *US—Countervailing Measures (China)*, *supra* note 141, ¶ 7.69.

185. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶ 318.

186. *Id.*

187. *See id.* ¶¶ 277-78.

188. *See* Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 685-88 (2015) (arguing that the distinctions based on corporate ownership do not apply in the context of China’s state capitalism because the state can exert significant control over private firms through extra-legal means).

189. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.43.

to maintain government control.¹⁹⁰ Personnel assignments in local SOEs are also made by local branches of the ODCPC and the SASAC.¹⁹¹ Given that the Appellate Body has recognized that government ownership and other shareholder rights (e.g., the right to vote for directors) are distinct evidence of government control,¹⁹² it is likely to find manifold indicia of government control.

Furthermore, the investigating authorities must also provide evidence that the government has actually exercised such control to influence the entity and its conduct.¹⁹³ This element is particularly troublesome, for it may be difficult for countries to uncover evidence of actual exercise of control. The United States expressed its concern, for example, in *US—Anti-Dumping and Countervailing Duties (China)* that “a government would be able to hide behind its ownership interest in an entity and engage in entrustment or direction behind closed doors.”¹⁹⁴ With the increasing autonomy of Chinese SOEs through the reforms, it would be more difficult for investigating authorities to prove that they are indeed affected by the government.

In this regard, the Appellate Body’s discussion of the AFA provision also has implications on public-body determinations when governments fail to provide information. When a government has control over an entity, it has no incentive to provide information about its control because the information may lead to a positive determination that the entity is a public body. In this situation, Article 12.7 permits the investigating authorities to use inferences based on facts available on the record and procedural circumstances to reach a conclusion.¹⁹⁵ This FA mechanism largely removes the difficulties that the investigating

190. Jenny Fu, *State Capitalism and Corporate Law*, in ROUTLEDGE HANDBOOK OF CORPORATE LAW 145, 157 (Roman Tomasic ed., 2017); see Qiye Guoyou Zichan Fa (企业国有资产法) [Law on the State-Owned Assets of Enterprises] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2008, effective May 1, 2009), arts. 22, 27 (China).

191. Fu, *supra* note 190, at 157.

192. Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 11, ¶ 4.45.

193. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶ 318.

194. Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 10, ¶ 326. This U.S. statement also explains why it is reluctant to regard Chinese SOEs as private bodies directed or entrusted by the government because such direction or entrustment might be practically impossible to identify. Also, it is noted that the United States did not choose to argue that Chinese government subsidizes upstream SOEs which produce key inputs because such argument requires investigating authorities to conduct a troublesome “pass-through” analysis of benefit between upstream and downstream producers. See Sherzod Shadikhodjaev, *How to Pass a Pass-Through Test: The Case of Input Subsidies*, 15 J. INT’L ECON. L. 621 (2012).

195. SCM Agreement, *supra* note 3, art. 12.7.

authorities may encounter in obtaining evidence regarding the existence and exercise of governmental control.

Consider the *Biaxial Integral Geogrid Products* case noted above. When the Chinese government refused to provide information regarding the specific input suppliers' company by-laws, business licenses, and relations between their managers and the government/Party,¹⁹⁶ the USDOC applied AFA to determine that the suppliers are public bodies. In that case, three procedural circumstances were taken into account to draw adverse inferences.¹⁹⁷ First, the Chinese government did not indicate that it had attempted to contact the Communist Party or consulted any other sources.¹⁹⁸ Second, the Chinese government's responses in prior CVD cases show that it was, in fact, able to access information similar to what the USDOC requested in this case.¹⁹⁹ Third, if the government could not provide any information, it should have explained what attempts it undertook to obtain the information and proposed alternative forms of providing the information.²⁰⁰ These circumstances suggest that the government possessed the information but simply refused to provide it. Coupled with the fact that 68.13 percent of the input at issue was produced by SOEs, the USDOC determined that the input producers from which the mandatory respondents made purchases were public bodies.²⁰¹

This case provides a concrete example of how the procedural circumstances are used in the reasoning and evaluating process of FA mechanism. When drawing inferences, the investigating authorities are also required to provide reasons and evaluations based on all substantiated

196. As explained in other CVD cases including *Amorphous Silica Fabric*, the USDOC considers information regarding the Communist Party's involvement in China's economic and political structure to be relevant because public information suggests that the Party exerts significant control over activities in the country. See Memorandum from Gary Taverman, Assoc. Deputy Assistant Sec'y for Antidumping & Countervailing Duty Operations, to Paul Piquado, Assistant Sec'y for Enforcement and Compliance: Issues and Decision Memorandum for the Affirmative Final Determination in the Antidumping Duty Investigation of Certain Amorphous Silica Fabric from the People's Republic of China, Comment 5, Inv. No. A-570-038 (Jan. 17, 2017).

197. Decision Memorandum, *Biaxial Integral Geogrid Products*, *supra* note 148, at 17-18.

198. *Id.* at 18.

199. *Id.*

200. *Id.*; see also 19 U.S.C. § 1677m(c)(1) (2016) ("If an interested party . . . notifies the administering authority or the Commission that such party is unable to submit the information requested . . . together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission shall consider the ability of the interested party . . . and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.").

201. Decision Memorandum, *Biaxial Integral Geogrid Products*, *supra* note 148, at 34.

facts on the record in order to reach an accurate determination, which can then be assessed by the Panel if any dispute occurs.²⁰²

In short, the SCM Agreement provides WTO Members with a certain degree of flexibility in responding to the issues brought by Chinese SOEs. The above analysis suggests that, while the precise characteristics of a public body may vary from case to case, the investigating authorities can rely on both the governmental authority standard and the FA mechanism to reach accurate public-body determinations. It is particularly true for the investigations against China, where the government often exerts control over SOEs and may thus be reluctant to provide any information concerning their relations.

V. CONCLUSION

Many concerns about the rise of China are related to the fact that the Chinese government plays a dominant role in its economy. One notable way it exerts control is through the operations of the state-owned sector. As the study of U.S. CVD practices illustrates, the Chinese government often provides raw materials at non-commercial prices through SOEs and gives loans at low interests through SOCBs and policy banks. This Note offers thorough research on the issue of whether these state-affiliated entities are public bodies whose transactions can therefore be countervailed under the SCM Agreement. Based on WTO case law, it appears that the governmental authority standard and FA mechanism enable WTO Members to achieve reasoned and adequate determinations. To be clear, this Note does not argue that the anti-subsidy regime can address all issues concerning Chinese SOEs. It certainly requires other reforms, including privatization and direct disciplines on SOE behaviors, to resolve the problems arising from the SOEs. But because China is not ready to embrace privatization fully, and WTO Members are unlikely to reach agreements on this issue any time soon, the WTO's anti-subsidy regime is an available trade remedy in response to the rise of the Chinese economy. With such a tool in hand, the injurious effect brought by Chinese SOEs can be effectively eliminated.

202. Appellate Body Report, *US—Carbon Steel (India)*, supra note 11, ¶¶ 4.418-21.

APPENDIX I: U.S. CVD ORDERS AGAINST CHINA BY SECTORS AND RATES

Case	Product	Sector	Producer/Exporter	Prelim.	Final	CVD Rate
C-570-911	Circular Welded Carbon Quality Steel Pipe	XV	East Pipe	0	29.57	29.62
			Kingland	16.59	44.86	44.93
			Shuangjie**	264.98	615.92	616.83
			All others	16.59	37.22	37.28
C-570-915	Light-Walled Rectangular Pipe and Tube	XV	(Lets Win)	0.27	2.17	2.17
			ZZ Pipe	2.99	15.28	15.28
			Qingdao**	77.85	200.58	200.58
			All others	2.99	15.28	15.28
C-570-917	Laminated Woven Sacks	XI	Han Shing Chemical**	57.14	223.74	223.74
			Ningbo**	57.14	223.74	223.74
			Qilu**	57.14	304.40	304.40
			SSJ/SLP**	2.57	352.82	352.82
			(Aifudi)	11.59	29.54	29.54
			All others	2.57	226.85	226.85
C-570-926	Sodium Nitrite	VI	Shanxi Jiaocheng**	93.56	169.01	169.01
			Tianjin Soda Plant**	93.56	169.01	169.01
			All others	93.56	169.01	169.01
C-570-913	New Pneumatic Off-The-Road Tires	VII	Guizhou Tire	3.13	2.45	2.45
			Starbright	2.38	14.00	14.00
			TUTRIC*	6.59	6.85	6.85
			All others	4.44	5.62	5.62
C-570-923	Raw Flexible Magnets	XVI	Cixi**	70.41	109.95	109.95
			Polyflex**	70.41	109.95	109.95
			All others	70.41	109.95	109.95
C-570-921	Lightweight Thermal Paper	X	Guangdong Guanhao	5.68	13.17	13.63
			Hanhong	0.57	0.57	0.57
			Shenzhen Yuanming**	59.50	137.25	138.53
			MDCN**	59.50	123.65	124.93
			Xiamen Anne**	-	123.65	124.93
			All others	5.68	13.17	13.63
C-570-936	Circular Welded Carbon Quality Steel Line Pipe	XV	Northern Steel*	31.65	40.05	40.05
			Huludao*	18.89	35.63	35.63
			All others	25.27	37.84	37.84
C-570-931	Circular Welded Austenitic Stainless Pressure Pipe	XV	Winner	1.47	1.10	1.10
			Froch**	106.85	299.16	299.16
			All others	1.47	1.10	1.10

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(CONT'D)

Case	Product	Sector	Producer/Exporter	Prelim.	Final	CVD Rate
C-570-938	Citric Acid and Certain Citrate	VI	TTCA*	1.41	12.68	12.68
			Yixing Union	3.92	3.60	3.60
			Anhui BBKA**	97.72	118.95	118.95
			All others	2.67	8.14	8.14
C-570-940	Tow Behind Lawn Groomer	XVI	Princeway	0.95	0.56	0.56
			Superpower*	2.77	13.30	13.30
			Non-cooperative (5)**	254.52	264.98	264.98
			All others	2.77	13.30	13.30
C-570-942	Kitchen Appliance Shelving and Racks	XVI	Wire King	13.22	13.30	13.30
			Asber**	197.14	170.82	170.82
			Non-cooperative (5)**	162.87	149.91	149.91
			All others	13.22	13.30	13.30
C-570-944	Oil Country Tubular Goods	XV	Changbao*	24.33	11.98	12.46
			TPCO*	10.90	10.36	10.49
			WSP*	24.92	14.61	14.95
			Jianli*	30.69	15.78	15.78
			All others	21.33	13.20	13.41
C-570-946	Prestressed Concrete Steel Wire Strand	XV	Fasten*	7.53	8.85	9.42
			Xinhua*	12.06	45.85	45.85
			All others	9.80	27.35	27.64
C-570-963	Potassium Phosphate Salts	VI	Lianyungang**	109.11	109.11	109.11
			Mianyang**	109.11	109.11	109.11
			Shifang**	109.11	109.11	109.11
			All others	109.11	109.11	109.11
C-570-948	Steel Grating	XV	Ningbo Jiulong*	7.44	62.46	62.46
			All others	7.44	62.46	62.46
C-570-953	Narrow Woven Ribbons with Woven Selvedge	XI	Yama*	0.29	1.56	1.56
			Changtai**	118.68	117.95	117.95
			All others	59.49	1.56	1.56
C-570-955	Magnesia Carbon Bricks	XIII	RHI*	<i>de minimis</i>	24.24	24.24
			Mayerton**	<i>de minimis</i>	253.87	253.87
			All others	<i>de minimis</i>	24.24	24.24
C-570-957	Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe	XV	TPCO*	11.06	13.66	13.66
			Hengyang*	12.97	53.65	56.67
			All others	12.02	33.66	35.17
C-570-959	Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses	X	Gold	12.83	17.64	19.46
			Sun Paper**	3.92	178.03	202.84
			All others	8.38	17.64	19.46

(CONT'D)

Case	Product	Sector	Producer/Exporter	Prelim.	Final	CVD Rate
C-570-966	Drill Pipe	XV	DP Master*	15.72	18.18	18.18
			All others	15.72	18.18	18.18
C-570-968	Aluminum Extrusions	XV	(Guang Ya)	6.18	9.94	9.94
			(Zhongya)	10.37	8.02	8.02
			Dragonlux**	137.65	374.15	374.15
			Miland**	137.65	374.15	374.15
			Zhongwang**	137.65	374.15	374.15
			All others	137.65	374.15	374.15
C-570-971	Multilayered Wood Flooring	IX	Fine Furniture	2.25	1.50	1.50
			Layo	0	0.33	0
			Yuhua	0	0.47	0
			Non-cooperative (124)**	27.01	26.73	26.73
			All others	2.25	1.50	1.50
C-570-978	High Pressure Steel Cylinders	XV	Tianhai	22.34	15.81	15.81
			All others	22.34	15.81	15.81
C-570-980	Crystalline Silicon Photovoltaic Cells	XVI	Trina Solar*	4.73	15.97	15.97
			Wuxi Suntech*	2.90	14.78	14.78
			All others	3.61	15.24	15.24
C-570-982	Utility Scale Wind Towers	XV	CS Wind*	13.74	21.86	21.86
			Titan*	26.00	34.81	34.81
			All others	19.87	28.34	28.34
C-570-984	Drawn Stainless Steel Sinks	XV	Yinggao	2.12	4.80	4.80
			Superte*	13.94	12.21	12.21
			Zhaoshun	13.94	12.26	12.26
			All others	8.03	8.51	8.51
C-570-991	Chlorinated Isocyanurates	VI	Jiheng*	18.57	20.06	20.06
			Kangtai	1.55	1.55	1.55
			All others	10.06	10.81	10.81
C-570-997	Non-Oriented Electrical Steel	XV	Baoshan**	125.83	158.88	158.88
			All others	125.83	158.88	158.88
C-570-013	Carbon and Certain Alloy Steel Wire	XV	Benxi**	10.30	193.31	193.31
			Hebei**	81.36	178.46	178.46
			All others	10.30	185.89	185.89
C-570-009	Calcium Hypochlorite	VI	Hubei Dinglong**	71.72	65.85	65.85
			W&W Marketing**	71.72	65.85	65.85
			Tianjin Jinbin**	71.72	65.85	65.85
			All others	71.72	65.85	65.85
C-570-011	Crystalline Silicon Photovoltaic Products	XVI	Wuxi Suntech*	35.21	27.64	27.64
			Trina Solar*	18.56	49.79	49.21
			All others	26.89	38.72	38.43

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(CONT'D)

Case	Product	Sector	Producer/Exporter	Prelim.	Final	CVD Rate
C-570-017	Passenger Vehicle and Light Truck Tires	VII	GITI Fujian*	17.69	37.20	36.79
			Cooper*	12.50	20.73	20.73
			Yongsheng**	81.29	100.77	116.33
			All others	15.69	30.87	30.61
C-570-019	Boltless Steel Shelving Units Prepackaged for Sale	XV	ETDZ	12.21	12.40	12.40
			Topsun	14.53	15.05	15.05
			Non-cooperative (13)**	55.75	80.45	80.39
			All others	13.37	13.73	13.73
C-570-021	Melamine	VI	Far-Reaching Chemical**	147.62	154.00	154.00
			M&A Chemicals**	147.62	154.00	154.00
			Qingdao Unichem**	147.62	154.00	154.00
			Shandong Liaherd**	150.52	156.90	156.90
			Zhongyuan Dahua**	147.62	154.00	154.00
			All others	148.20	154.58	154.58
C-570-023	Uncoated Paper	X	Asia Symbol	5.82	7.23	7.23
			Sun Paper**	126.42	176.75	176.75
			UPM**	126.42	176.75	176.75
			All others	5.82	7.23	7.23
C-570-025	Polyethylene Terephthalate Resin	VII	Xingyu*	4.27	6.83	7.53
			Dragon*	18.88	47.56	47.56
			All others	11.58	27.20	27.55
C-570-030	Cold-Rolled Steel Flat Products	XV	Angang Kong** Hong	227.29	256.44	256.44
			Benxi**	227.29	256.44	256.44
			Qian'an Point** Golden	227.29	256.44	256.44
			All others	227.29	256.44	256.44
C-570-027	Corrosion-Resistant Steel Products	XV	Yieh Phui	26.26	39.05	39.05
			Angang Kong** Hong	235.66	241.07	241.07
			Baoshan**	235.66	241.07	241.07
			Duferco**	235.66	241.07	241.07
			Everbright**	235.66	241.07	241.07
			Handan**	235.66	241.07	241.07
			All others	26.26	39.05	39.05
C-570-037	Biaxial Integral Geogrid Products	VII	BOSTD	16.60	15.61	15.61
			Taian Modern Plastic	30.65	56.24	56.24
			Non-cooperative (25)**	128.27	152.50	152.50
			All others	23.63	35.93	35.93
C-570-050	Ammonium Sulfate	VI	Wuzhoufeng AST**	206.72	206.72	206.72
			Yantai Jiahe AMP**	206.72	206.72	206.72
			All others	206.72	206.72	206.72

(CONT'D)

Case	Product	Sector	Producer/Exporter	Prelim.	Final	CVD Rate
C-570-039	Amorphous Silica Fabric	XIII	ACIT*	4.36	48.94	48.94
			Nanjing Tianyuan*	28.25	79.90	79.90
			Non-cooperative (48)**	104.10	165.39	165.39
			All others	4.36	64.42	64.42
C-570-048	Carbon and Alloy Steel Cut-to-Length Plate	XV	Jiangyin Xingcheng**	210.50	251.00	251.00
			Hunan Valin**	210.50	251.00	251.00
			Viewer**	210.50	251.00	251.00
			All others	210.50	251.00	251.00
C-570-043	Stainless Steel Sheet and Strip	XV	Taigang	57.30	75.60	75.60
			Ningbo Baoxin**	193.12	190.71	190.71
			Daming**	193.12	190.71	190.71
			All others	57.30	75.60	75.60
C-570-046	1-Hydroxyethyliden e-1, 1-Diphosphonic Acid (HEDP)	VI	Wujin Water*	1.04	0.75	0.75
			Taihe*	2.37	2.40	2.40
			Non-cooperative (7)**	36.33	54.11	54.11
			All others	1.71	2.40	2.40

Note: "Sector" of the product is determined based on HTSUS. "Prelim." denotes the CVD rates in the preliminary determination; "Final" denotes those in the final determination; "CVD Rate" is the actual countervailable subsidy margin imposed on the producers. Under the column "Producer/Exporter", parenthesized firms represent the voluntary respondents; asterisked firms means that part of the subsidy determination were based on adverse fact available (AFA), including the finding of specificity due to Chinese government's non-cooperation; firms with two asterisks mean that their rates were based on total AFA; and parenthesized numbers after "Non-cooperative" represent the numbers of firms that did not cooperate with the U.S. investigating authority. Italicized CVD rates are zero or *de minimis* rates. "ITC Neg." stands for cases in which USITC made a negative determination on material injury by the imports.

Source: U.S. Dep't of Commerce, *Federal Register Notices with Unpublished Decision Memoranda: People's Republic of China*, <https://enforcement.trade.gov/frn/summary/prc/prc-fr.htm> (last visited Feb. 11, 2018); U.S. Dep't of Commerce, *Antidumping and Countervailing Duty Investigations Initiated After January 01, 2000*, <http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html> (last updated Aug. 17, 2016).

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APPENDIX II: CHINA'S SUBSIDY PROGRAMS DETERMINED TO BE COUNTERVAILABLE IN U.S. CVD ORDERS

Section		XV (Base Metals)																VI (Chemicals)		
National Programs (C-570-No.)	Case No.	911	915	931	936	944	946	948	957	966	968	978	982	984	019	027	043	938	991	046
Provision of Goods and Services for I.TAR																				
Raw materials (e.g. steel)		36.10*	8.540.36*	33.59*	10.65*	10.75*	60.22*	9.15*	7.27*	3.84*	14.3*	15.89*	4.81*	13.23*	8.69*	20.42*				
Energy (electricity, coal)					0.58*	0.29*	0.06*	2.88*	0.16*			1.10*	0.41*	0.89*	0.42*	0.58*	5.62*	10.81*	0.60*	
Land-use rights and lease of land		0.10		0.78	2.55			2.67					1.44			2.15	2.09			
Export restraints on raw materials								2.75*												
Grants																				
Export-related funds (e.g. credit insurance)							0.04				0.25*			0.04	0.02*	0.01	0.58*	0.05		
Technology reform and R&D funds					0.04	0.03		0.04				0.01*								
Energy savings funds																	0.58*	0.61*		
SME-specific funds											0.06									
Fixed asset investment funds																				
Other grants (including unreported subsidies)							0.52*	0.26*	0.03*			0.02	0.02*				19.72*		0.76*	
Loans																				
Policy loans					0.16	0.69*	1.25*		1.45	0.65	1.14		0.15			0.86	4.45			
Export loans					1.06	0.08			0.57				10.54*			10.54*	11.34*	1.76*	0.87	
Other loans (e.g. lease transaction, for SOEs)								0.01				0.32*								
Income Tax Reduction and Exemption																				
Two Free/Three Half Program (Art. 8 FIEITL)					4.11	0.20	0.03		0.09	9.24	0.53	0.01	0.77	0.29	0.18			0.35		
For certain FIEs (e.g. Art. 7 FIEITL)		0.27	0.04		1.44	0.10					0.15	0.01	0.09				2.16			
Tax offsets for R&D expenses (Art. 30.1 EITL)											0.04		0.24				0.31			
For high-tech enterprises (Art. 28.2 EITL)																		0.68	1.20	
Accelerated Depreciation Program					0.51			0.58												
For comprehensive utilization (Art. 33 EITL)																		0.14		
Other Tax Reduction and Exemption																				
FIEs Exempt from city and education taxes										0.58	0.04									
Deed tax exemption for restructuring SOEs								0.02									9.71*			
Stamp tax exemption on share transfers																				
Exemption from land-use taxes and fees																				
Income Tax Credit and Refund																				
Credits for domestic equipment				0.38	0.14	0.41	1.68	0.34										0.11		
Rebates for export-oriented FIEs																				
Indirect Tax and Import Tariff Program																				
VAT & Tariff Exemption on Imported Equip.			0.70			0.61*		0.25	0.14	0.27	0.01	0.14				0.56	0.14	0.23		
VAT Rebates on Domestic Equipment																		0.24		
VAT refunds for certain industry and region				0.10				0.31												
VAT rebates for comprehensive utilization																		0.06*		
Debt Forgiveness		1.08				0.14		0.31												

(CONT'D)

Section	XVI (Machinery)				VII (Plastics; Rubber)				X (Paper)			XI (Textile)		XIII (Stone; Glass)		IX (Wood)	SUM
National Programs Case (C-570-No.) No.	940	942	980	011	913	017	025	037	921	959	023	917	953	955	039	971	
Provision of Goods and Services for LTAR																	
Raw materials (e.g. steel)	10.50*	11.76	0.72*	12.90*	0.13	9.35*	3.52*	31.44*	0.80*	2.09*	16.12*			68.08*			28
Energy (electricity, coal)		0.04*	0.51*	1.05*		0.67*	1.53*	0.93*	0.08*	0.98				2.12*	0.93	0.26*	24
Land-use rights and lease of land			0.41*	0.10*				3.06*				13.36*					11
Export restraints on raw materials														21.24*			2
Grants																	
Export-related funds (e.g. credit insurance)				0.03		0.24*	0.04*									0.23	10
Technology reform and R&D funds					0.15		0.02*										6
Energy savings funds							0.04*			0.02*							4
SME-specific funds												0.39				0.06	3
Fixed asset investment funds			0.09	0.10		0.02*											3
Other grants (including unreported subsidies)			26.13*			0.19	0.05*										10
Loans																	
Policy loans			1.95	0.42	1.22	0.74	5.99*	1.29	4.098.89*	0.58	0.06*				3.43*		20
Export loans			10.54*	10.54*		14.79*	5.90*	10.54*							10.54*		14
Other loans (e.g. lease transaction, for SOEs)																	2
Income Tax Reduction and Exemption																	
Two Free/Three Half Program (Art. 8 FIEITL)	0.89		0.13			0.41			0.08	1.07		0.71				0.15	18
For certain FIEs (e.g. Art. 7 FIEITL)		0.30			0.19				0.02	1.32				0.34		0.09	14
Tax offsets for R&D expenses (Art. 30.1 EITL)			0.10	0.07		0.08		0.20	0.01								8
For high-tech enterprises (Art. 28.2 EITL)			0.80	0.48			0.00	1.00		0.56							7
Accelerated Depreciation Program																	2
For comprehensive utilization (Art. 33 EITL)										0.09							2
Other Tax Reduction and Exemption																	
FIEs Exempt from city and education taxes		0.03								0.34							4
Deed tax exemption for restructuring SOEs																	2
Stamp tax exemption on share transfers					0.01				0.02								2
Exemption from land-use taxes and fees									0.09								1
Income Tax Credit and Refund																	
Credits for domestic equipment																	6
Rebates for export-oriented FIEs	0.47	0.94															2
Indirect Tax and Import Tariff Program																	
VAT & Tariff Exemption on Imported Equip.	0.10		0.33		0.35	9.71*	5.15*		0.64	3.46	3.13					0.56	19
VAT Rebates on Domestic Equipment			0.01	0.00			9.71*		0.20	0.07				0.51			7
VAT refunds for certain industry and region																	2
VAT rebates for comprehensive utilization																	1
Debt Forgiveness					6.03*				0.83								5

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(CONT'D)

Section		XV (Base Metals)																	VI (Chemicals)		
Sub-National Programs	Case No. (C-570-No.)	911	915	931	936	944	946	948	957	966	968	978	982	984	019	027	043	938	991	046	
Provision of Goods and Services for LTAR																					
Land-use rights and lease of land							0.01				3.39					0.36		0.08			
Electricity																					
Grants																					
Export-related funds		0.02			0.07		0.13							0.05	0.01*			0.03			
Technology reform and R&D Fund							0.01			0.08	0.2*			0.01	0.07*				0.02		
Energy savings and environment protection											0.06*				0.05			0.2*			
Development funds						0.30					0.08		0.02*								
SME-specific Fund										0.06				0.04							
Loan discount											0.04*			0.09*							
Fixed asset investment funds													0.55*								
Award for good performance in paying taxes													0.02								
Award to support public listing of enterprises													0.06								
Land transfer fee reductions														0.09							
Overseas investment discount																					
Other grants (including unreported subsidies)							0.07*	0.24						0.07*		0.02*					
Loans																					
Policy loans		1.14*												0.76*				8.31*	0.13		
Export loans					0.43																
Income Tax Reduction and Exemption																					
For certain FIEs (e.g. Art. 9 FIEITL)						0.16	0.01		0.02									0.49			
For high-tech enterprises																					
Reduced local tax																					
Indirect Tax and Import Tariff Program																					
VAT refunds																					
Land-use tax refunds											0.13										

(CONT'D)

Section		XVI (Machinery)				VII (Plastics; Rubber)				X (Paper)			XI (Textile)		XIII (Stone; Glass)		IX (Wood)	SUM
Sub-National Programs	Case No. (C-570-No.)	940	942	980	011	913	017	025	037	921	959	023	917	953	955	039	971	
Provision of Goods and Services for LTAR																		
Land-use rights and lease of land						0.90	0.59			0.17	0.85*							8
Electricity										0.07								1
Grants																		
Export-related funds		0.02*						0.03*	0.08*	0.13	0.13*						0.16	12
Technology reform and R&D Fund		0.01*						0.01*	0.13*				0.39*					10
Energy savings and environment protection						0.01	0.05*			0.05	0.55*							7
Development funds									0.11*						0.35*			4
SME-specific Fund																		3
Loan discount																		2
Fixed asset investment funds									0.11									2
Award for good performance in paying taxes						0.04												2
Award to support public listing of enterprises																		1
Land transfer fee reductions																		1
Overseas investment discount								0.06*										1
Other grants (including unreported subsidies)				0.44*			0.08*				0.01							7
Loans																		
Policy loans																		4
Export loans																		1
Income Tax Reduction and Exemption																		
For certain FIEs (e.g. Art. 9 FIEITL)		0.66	0.23							0.01	0.25		0.07	0.03				10
For high-tech enterprises										0.75								1
Reduced local tax										0.39								1
Indirect Tax and Import Tariff Program																		
VAT refunds							0.01*											2
Land-use tax refunds										0.37								1

Note: Cases based entirely on AFA are excluded from the table. CVD rates with asterisk presents the use of facts available (FA) or adverse facts available (AFA) in the determination of subsidy programs. CVD rates are simple averages when there are more than one producer under the same countervailable subsidy program.

Source: U.S. Dep't of Commerce, *Federal Register Notices with Unpublished Decision Memoranda: People's Republic of China*, <https://enforcement.trade.gov/fr/summary/prc/prc-fr.htm> (last visited Feb. 11, 2018).