

Confidential Version

**Preliminary Observations of the Government of the People's
Republic of China**

**on the initiation by the Trade Remedies Authority of the United Kingdom of a transition
review of countervailing measures on
certain pneumatic tyres used for buses or lorries exported from China
(TS0036)**

Submitted by
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on behalf of
the Government of the People's Republic of China

November 10, 2023

To:

Trade Remedies Authority

**Subject: Case TS0036- Certain pneumatic tyres used for buses or lorries
exported from the People’s Republic of China**
GOC PRELIMINARY OBSERVATIONS

1. INTRODUCTION

- [1] The present submission sets out the preliminary Observations of the Government of the People’s Republic of China (“GOC”) on the initiation by the Trade Remedies Authority of the United Kingdom (“the TRA”) of a Transition Review of Countervailing Measures - Case No. TS0036 “certain pneumatic tyres used for buses or lorries (“the product concerned”) exported from the People’s Republic of China”) (“the Transition CVD Review Investigation” or “TS0036”) on 3 May 2023.¹
- [2] The currently applicable UK countervailing measure in the form of *ad valorem* import duties (“CVD”) that is the subject of TS0036 is set out in the UK Secretary of State for International Trade’s [Taxation Notice No. 2020/23](#) which gives effect to the European Union (“EU”) trade remedies measures specified in the [Notice of Determination 2020/23](#). The CVD measures concerned have been imposed by European Commission Implementing Regulation (EU) (EU) 2018/1690 of 9 November 2018 (“the EU CVD Regulation”)²
- [3] The GOC intends to fully cooperate in TS0036. The present preliminary Observations form part of the GOC’s completed TRA anti subsidy (“AS”) questionnaire. The GOC reserves the right to submit further comments to the TRA in the course of TS0036.
- [4] The GOC respectfully submits that, in the present case, the requirements for the initiation of the Transition Review CVD investigation as set out in the WTO Agreement on Subsidies and Countervailing Measures (“ASCM”), the UK Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 (“UK Regulations”) and Schedule 4 to the UK Taxation (Cross-Border

¹ See: <https://www.trade-remedies.service.gov.uk/public/case/TS0036/submission/ddd10d89-381f-481a-8cf9-8f1bd5cb3393/>

² European Commission Implementing Regulation (EU) (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People’s Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People’s Republic of China and repealing Implementing Regulation (EU) 2018/163, EO OJ No. L 283 of 12.11.2018 at page 1 et seq.

Trade) Act 2018 (“TCBA”) are not met. As a result, the TS0036 should be terminated, and the UK CVD measures concerned withdrawn with immediate effect.

- [5] The GOC will first provide Observations on procedural aspects of the initiation of TS0036. The GOC will then provide Observations on the absence of any injurious subsidies benefitting specifically the PRC exporting producers of the product concerned in accordance with the ASCM during the Period of Investigation covered by TS0036 (“POI”). The findings set out in the EU CVD Regulation upon which the presently applicable UK CVD measure is based are vitiated by manifest errors in the assessment of the relevant facts and the application of the law; and do not justify the initiation and continuation of the Transition Review CVD investigation.

2. PROCEDURAL OBSERVATIONS

- [6] The GOC respectfully submits that the initiation of the present Transition Review CVD Investigation is devoid of a legal basis under the ASCM. The TRA is not the WTO Member Authority that originally investigated alleged injurious subsidization by the GOC of the exporting producers of the product concerned. Rather, it was the European Commission that investigated the alleged injurious PRC subsidy measures and imposed EU-wide CVD measures on the products concerned by TS0036.
- [7] Following the UK’s exit from the EU, the UK adopted a sovereign decision to maintain these CVD measures in force in the UK. The lawfulness of the continuing application in the UK of the CVD measures subject to TS0036 post-UK exit from the EU under WTO rules and, in particular, Articles I, II, III, XXIII and XXIV GATT 1994 is highly questionable as the UK infringed the WTO’s Most-Favoured Nation and Non-Discrimination principles thereby nullifying and impairing PRC’s UK market access rights for the product concerned. The GOC reserves the right to submit further Observations to the TRA on these matters as appropriate. The present Submission focuses on the initiation and conduct of the Transition Review CVD investigation under the ASCM.
- [8] For valid reasons, Article 21 ASCM does not provide for the possibility of a WTO Member Authority to review CVD measures adopted by another investigating authority.
- [9] In the case at issue, the European Commission investigation related to imports of the product concerned into the EU and injury caused by the product concerned to the EU industry producing the like product.
- [10] The European Commission has never conducted a regional CVD investigation limited only to the UK customs territory and the UK like product industry.
- [11] The findings of the European Commission regarding the measures subject to TS0036 have been adopted taking into account the injurious effects of the alleged PRC subsidies on the EU like product industry as a whole. It is noted that there is no producer in the UK manufacturing new tyres for use in busses and lorries.

- [12] The TRA has never investigated whether; or established that exports of allegedly subsidized PRC-origin tyres for use in buses and lorries have caused material injury to the UK like product industry.
- [13] According to Article 21.3 ASCM, a review investigation is warranted where the *investigation authority* decides, following an application by interested parties or ex officio, that the expiry of the CVD measures would be likely to lead to continuation or recurrence of subsidization and injury. This provision refers to the European Commission and not the TRA.
- [14] In TS0036, the TRA has not received any application from any interested party for the initiation of a review of the CVD measures at issue.
- [15] In other words, the TRA has no legal basis to review CVD measures adopted by reference to factual circumstances and legal considerations applicable to a customs territory and like product industry that are distinct from the UK customs territory and industry.
- [16] The Transition Review CVD Investigation must therefore be terminated immediately as it is devoid of a legal basis and the UK CVD measures under review must be withdrawn forthwith.
- [17] The TRA initiated the Review CVD investigation without providing the GOC with a reasonable opportunity for the conduct of meaningful consultations. As a result, the GOC was deprived from its ASCM-guaranteed right to be placed by investigating authority in a position enabling it to clarify the situation on all matters arising by the initiation of the Review CVD investigation. As Article 21 ASCM is not applicable in the TS0036, this GOC right is properly derived from Article 13.1 ASCM.
- [18] Indeed, Article 13.1 ASCM empowers the exporting WTO Member to exercise its rights of defence and find an amicable solution. In addition, Article 13.1 ASCM serves to avoid *ultra vires* investigations, as is presently the case with TS0036; as well as incorrect claims of injurious subsidization. The views of the PRC are therefore both relevant and required in properly determining whether the initiation of the investigation would be legally justified.
- [19] It is recalled that the WTO Panel held in *China – GOES* that “Article 13.1 of the SCM Agreement also suggests that an investigating authority is required to weigh the evidence submitted prior to initiation by an exporting Member, as a part of the process of ‘clarifying the situation’ as to the matters in Article 11.2 of the SCM Agreement.”³
- [20] By not inviting the GOC to consultations, the TRA deprived the GOC of its rights under Article 13.1 ASCM. The GOC was not given any opportunity to clarify the situation and reach a mutually agreed solution within the meaning of Article 13.1 ASCM.
- [21] To conclude, the initiation of the Transition Review CVD Investigation is (1) devoid of legal basis and (2) has taken place in breach of Article 13.1 ASCM, a procedural infringement which may not be cured *ex post*.⁴ The Review CVD investigation I TS 0036 must therefore be terminated forthwith and the measures subject to the review be allowed to expire immediately.

³ WTO Panel Report, *China – GOES*, footnote 74.

⁴ WTO Panel Report, *Mexico – Olive Oil*, para. 7:35.

3. SUBSIDIZATION

[22] The GOC respectfully submits that all allegations on PRC-Government subsidies benefitting exporting producers of the product concerned identified in the EU CVD Regulation and now subject of TS0036 are both legally and factually unfounded and do not even remotely reflect the PRC legal, economic and regulatory framework relevant to the exporting producers of the product concerned.

3.1 General Observations

[23] As (1) Article 21 ASCM cannot serve as a legal basis for TS0036; and (2) this is the first time the TRA investigates imports of the product concerned into the UK under the UK AS rules and the ASCM; the GOC respectfully submits that that the proper legal basis for TS0036 is Article 11 ASCM on new investigations.

[24] According to Article 11.6 ASCM, “If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of the existence of a subsidy, injury and causal link, as described in paragraph 2, to justify the initiation of an investigation.”

[25] Article 11.2 ASCM sets out the evidentiary standard that must be available to WTO Member investigating authorities prior to initiating AS investigations. According to Article 11.2 ASCM:

“An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

[...] (iii) evidence with regard to the existence, amount and nature of the subsidy in question; [...].”

[26] According to WTO Panel Report in *US – Supercalendered Paper*, the obligation of WTO Members in relation to the assessment of the sufficiency of evidence in an application finds expression in Article 11.3 ASCM and must be read together with Article 11.2 ASCM, with the result that “if an investigating authority initiates an investigation without sufficient evidence, it acts inconsistently with Article 11.3 of the SCM Agreement.”⁵

[27] In *China – GOES*, the WTO Panel clarified that, in accordance with Article 11.3 ASCM, the investigating authority’s affirmative decision on the existence of “sufficient evidence” justifying the initiation of an investigation must include an “assessment of the accuracy and adequacy of the evidence furnished.”⁶ In this respect, the WTO Panel laid down certain criteria for

⁵ Panel Report, *US – Supercalendered Paper*, para. 7.145.

⁶ Panel Report, *China – GOES*, para. 7.52.

determining whether the initiation of an AS investigation is justified on the basis of the available evidence. Accordingly, the WTO Member investigating authority must dispose of sufficient evidence on the existence and the nature of a subsidy.⁷ Evidence of the “existence of a subsidy” requires evidence of a financial contribution by a government or public body and a benefit to the recipient.⁸ The Panel further clarified that there must be evidence of the existence of a present subsidy, including the existence of a benefit during the investigation period.⁹ The evidence of the “nature of the subsidy” includes evidence on whether the subsidy is specific.¹⁰ Accordingly, it is not sufficient to adduce evidence of only one of the three elements of a countervailable subsidy, notably, financial contribution by a public body, benefit, or specificity. The WTO Panel clarified that “sufficient evidence” regarding the existence, amount and nature of the alleged subsidies implies that “adequate evidence, tending to prove or indicating the existence of these elements, is required”¹¹

[28] These legal standards on determining the sufficiency of the evidence were confirmed by the Panel in *US – Countervailing Duties (China)*.¹²

[29] According to WTO Panel and Appellate Body Reports, certain types of statements and assertions are inadequate to meet these legal standards including, among others, the following:

- (i) simple assertions unsubstantiated by relevant evidence under Article 11.2 ASCM;
- (ii) “[g]eneral information about government policy, with no direct connection to the subsidy programme at issue, is not ‘sufficient evidence’ of specificity.”¹³
- (iii) the fact that a company is the user of a program is not evidence that it is the sole or one of the limited users of the program thereby demonstrating specificity;¹⁴ and
- (iv) in the absence of information on the allocation of the benefit of the subsidy to the proposed investigation period, the requirement to demonstrate the existence of a benefit in the expected investigation period is not met.¹⁵

[30] Furthermore, according to Article 2.1(b) ASCM, specificity does not exist if the granting authority – or the legislation pursuant to which the granting authority operates – establishes objective criteria or conditions governing the eligibility for and the amount of the subsidy, provided that (i) eligibility is automatic, (ii) such criteria or conditions are strictly adhered to, and (iii) such criteria or conditions are clearly spelt out in laws, regulations or other official documents, so as to be capable of verification.

[31] Following the relevant ASCM provisions as interpreted by WTO Panels and the Appellate Body, all the findings of the European Commission supporting the imposition of the CVD measures

⁷ Panel Report, *China – GOES*, paras. 7.51-7.54.

⁸ Panel Report, *China – GOES*, para. 7.58.

⁹ Panel Report, *China – GOES*, paras. 7.71 – 7.72. In addition, this WTO Panel clarified that the existence of subsidy refers to a present and not historical subsidies granted to exporting producers, see para. 7.96.

¹⁰ Panel Report, *China – GOES*, paras. 7.60-7.61.

¹¹ Panel Report, *China – GOES*, para. 7.55.

¹² Panel Report, *US – Countervailing Duties (China)*, para. 7.146.

¹³ Panel Report, *China – GOES*, para. 7.66.

¹⁴ *ibid*, para. 7.107.

¹⁵ *ibid*, para. 7.74.

subject to TS0036 regarding subsidization do not meet the required evidentiary standards and are inadequate for the initiation of TS036.

3.2 The PRC exporting producers of the product concerned are not an “encouraged” industry

- [32] Under reference to Article 11.2 SCM, the GOC respectfully submits that the European Commission affirmative subsidy findings set out in the EU CVD Regulation are fundamentally predicated on the erroneous assumption that the PRC exporting producers of the product concerned are an “encouraged industry” in the PRC.¹⁶
- [33] As set out on the GOC completed questionnaire in TS0036, the PRC tyre industry is not included in the in the list of encouraged sectors of the current PRC 14th 5-year plan that applies as from 1 January 2021 and remain in place until 31 December 2025.
- [34] Therefore, any alleged PRC subsidy measures set out in the EU CVD Regulation are not specific within the meaning of Article 2 ASCM. It is noted that according to consistent decisional practice of WTO panels and the Appellate Body., Article 2 ASCM relates to measures in force during the period of investigation and not measures that may historically have existed in the past.¹⁷
- [35] For completeness and strictly without prejudice to the immediately preceding Observation, the European Commission had, during the original investigation in 2017 and 2018, considered certain terms and references of a *political guidance nature and not legally binding* set out in various documents related to, *inter alia*, the now expired 13th PRC 5-year plan, in an effort to show that the GOC allegedly promotes the industry producing the product concerned. However, a thorough review of these documents would have shown that the European Commission findings were not supported by evidence in accordance with WTO evidentiary requirements set out above. The European Commission’s considerations at the time do not constitute “positive evidence.”
- [36] It is recalled that the Legislation Law of China provides that only the Constitution, laws, administrative regulations, and local regulations and rules constitute general legislation in China. The difference between these types of binding measures and other non-mandatory plans is also clear from the fact that the plans do not contain actual legal provisions, sanctions or rules on applicability.
- [37] Therefore, the European Commission should not have relied on these plans in its analysis of the alleged subsidization by the GOC of the PRC exporting producers of the product concerned. The European Commission findings were based on a misconception of the PRC legal order and the general PRC government policies. As a result, they do not constitute positive evidence of compelling, if any, probative value.

¹⁶ See, indicatively, paras 122, 125, 197, 329, 377,445, 491, 548.559 and561 of the EU CVD Regulation.

¹⁷ Panel Report, *China – GOES*, para. 7.96.

[38] As the 13th PRC 5-year plan expired on 31 December 2020, prior to the POI in TS 0036; and the 14th PRC 5-year plan does not refer to the PRC tyre sector (or the upstream sectors) as an encouraged industry; following the European Commission's own logic, there is no legal basis for the continued subsidization of the exporting producers of the product concerned in the PRC.

[39] TS0036 must therefore be terminated and the CVD measures subject to TS0036 withdrawn forthwith.

3.3 Absence of Countervailable Subsidies

[40] The following Sections set out the GOC's preliminary Observations on certain types of alleged injurious PRC subsidies benefitting exporting producers of the product concerned, *quod non*.

3.3.1 Alleged transfer of funds via grants

[41] The European Commission failed to provide in the EU CVD Regulations any evidence with respect to the existence, amount, and nature of any alleged GOC grants specifically to the PRC tyre industry. In this respect, the WTO Panel in *China – GOES* clarified that concrete evidence on *all* these three elements of subsidization must necessarily be provided in relation to each subsidy even if there is a "... *pervasive government support to the [...] industry.*"¹⁸

[42] Yet, the EU CVD Regulation relied on generic information, such as the "Famous Brand Program", which does not contain all the necessary information and data allowing the conclusion that the Chinese tyres exporting producers received *company specific* subsidies from the GOC during the POI covered by the EU CVD Regulation.

[43] The GOC categorically denies the existence of any company specific grants during the POI covered by TS0036.

[44] It is also recalled that the identification of a grant and the granting authority are essential elements of the selectivity assessment of any alleged grant / subsidy. The TRA cannot act in the absence of any evidence and base itself merely on the classification of subsidy types erroneously found to exist by the European Commission, a different investigating authority, and set out in the EU CVD Regulation.

[45] The TRA must ensure that it disposes of positive evidence with probative value supporting the conclusion that the alleged grants are specific to certain industries, notably the PRC tyre industry, which is in any event not an encouraged industry contrary to the erroneous findings of the European Commission in the EU CVD Regulation.

[46] Talking into account the preceding Observations, the GOC respectfully submits that, in the present case, the ASCM-mandated standard of positive evidence with probative value on the nature, amount and existence of the alleged grants has not been met. The European Commission assessment set out in the EU CVD Regulation is (1) based to large extent on facts available; (2) and the erroneous assumption that the exporting producers of the product

¹⁸ Panel Report, *China – GOES*, para. 7.107.

concerned are encouraged by the GOC. Thus, the investigation into the grants and their possible countervailable nature by the TRA is WTO-inconsistent.

3.3.2 Government revenue forgone or not collected.

[47] The GOC notes that the EU CVD Regulation does not provide any evidence whatsoever on the existence of a benefit accrued by the PRC exporting producers of the product concerned during the POI deriving from any *company-specific* bestowment of the alleged subsidies set out below.

3.3.2.1 Enterprise Income Tax and High and New Technology Enterprises

[48] The Enterprise Income Tax (“EIT”) privileges and benefits for High and New Technology Enterprises are not countervailable subsidies. This alleged subsidy program is not specific, as the relevant PRC legislation sets out objective criteria and the amount of the tax reduction; eligibility is automatic, and the qualification criteria and conditions are strictly adhered to.

[49] Indeed, Article 2.1(b) ASCM provides that specificity shall not exist if the granting authority establishes objective criteria or conditions governing the eligibility for and the amount of the subsidy, provided that (i) eligibility is automatic, (ii) such criteria or conditions are strictly adhered to and (iii) such criteria or conditions are clearly spelt out in laws, regulations or other official documents, so as to be capable of verification. This is the case of the alleged EIT privileges erroneously found by the European Commission exist in the EU CVD Regulation.

[50] According to footnote 2 ASCM, eligibility criteria are considered objective if they are neutral, do not favour certain enterprises over others, are economic in nature, and are horizontal in their application, as in the present case. Access to the specific tax rate is open to all PRC undertakings and not only the exporting producers of the product concerned.

3.3.2.2 Tax Set-Off of R&D Expenses

[51] Similarly, the tax deduction of research and development (“R&D”) expenses incurred in the development of new technologies are not countervailable subsidies.

[52] The tax offset for R&D is available to all PRC companies based on objective criteria. The PRC State Taxation Administration has no discretion in implementing these off-sets. This measure is therefore not company specific.

3.3.3 Preferential financing

3.3.3.1 Preferential loans by state-owned commercial banks

[53] In the EU CVD Regulation, the European Commission erroneously held that allegedly preferential lending by Chinese state-owned banks constitutes a countervailable subsidy.¹⁹

¹⁹ See, Section 3.4 of the EU CVD Regulation.

[54] The GOC respectfully submits that the European Commission misrepresented the relationship between state-owned commercial banks and the GOC to claim that state-owned commercial banks are “public bodies”,

[55] The Appellate Body in *US – Carbon Steel (India)*, clearly established the following criteria that go beyond the existence of state ownership and government control for assessing, on a case-by-case basis, the existence of a “public body”:

“4.37. As noted above, the Appellate Body has explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means “an entity that possesses, exercises or is vested with governmental authority.” The substantive legal question to be answered is therefore whether one or more of these characteristics exist in a particular case. This substantive standard should not be confused with the evidentiary standard required to establish that an entity is a public body within the meaning of the SCM Agreement. Although the Panel quoted extensively from the Appellate Body report in US – Anti-Dumping and Countervailing Duties (China), it appears to have blurred the distinction drawn by the Appellate Body in that report between the existence of control by a government over an entity, on the one hand, and “meaningful control”, on the other hand. Thus, the Panel did not analyse, in our view, the question of whether the GOI in fact excised control over the NMDC and its conduct. Nor did the Panel assess whether the USDOC had properly established that the NMDC “possesses, exercises or is vested with governmental authority”, and is therefore a public body.”²⁰

[56] Furthermore, according to the Appellate Body,

“... the question of whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. The Panel failed to evaluate whether the USDOC had properly considered the relationship between the NMDC and the GOI within the Indian legal order, or the extent to which the GOI in fact “exercised” meaningful control over the NMDC as an entity and over its conduct. Instead, the Panel examined evidence that would, in our view, more properly be seen as evidence of mere “formal indicia of control”, such as the GOI’s ownership interest in the NMDC, the GOI’s power to appoint and nominate directors, and the reference on the NMDC’s website indicating that the NMDC is under “administrative control” of the GOI. Those indicia, insofar as they were discussed by the USDOC in its determinations, are certainly relevant to the question at issue. Yet, without further evidence and analysis, they do not provide a sufficient basis for a finding that the NMDC is a public body.”²¹

[57] Therefore, according to the Appellate Body:

²⁰

Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.36-4.37.

²¹ *ibid*, para. 4.43.

- (i) The substantive legal standard for the qualification of an entity as a “public body” is met where an entity possesses, exercises or is vested with governmental authority.
- (ii) The relevant evidentiary standard cannot be complied with by mere assertions, conjecture or general statements.
- (iii) The existence of meaningful control over a state-owned entity by a government *may not* be sufficient for qualifying such an entity as a “public body.” A government’s ability to exercise control and administrative supervision over an entity as a result of the entity’s shareholding structure, Articles of Association, nature of the entity’s regulated activities etc. is not determinative of whether such entity may be qualified as a “public body”.
- (iv) The affirmative “public body” determination must be made *on a case-by-case basis* and take into account the legal, regulatory and economic environment prevailing in the country of its establishment.

[58] The GOC, therefore, respectfully submits that the European Commission in the EU CVD Regulation failed to satisfy the applicable substantive legal and evidentiary standards when determining without following the case-by-case assessment approach and using “facts available”, that PRC financial institutions constitute “public bodies”.

[59] By unjustifiably availing itself of the “facts available” approach, the European Commission:

- (i) Failed to properly identify any specific state-owned commercial bank as a “public body” that provided financial resources to the exporting producers of the product concerned. A ‘general’ country-wide assumption whereby all banks constitute public bodies runs counter to WTO law; and
- (ii) Failed to evaluate (1) the relationship between the state-owned commercial banks allegedly lending to the exporting producers of the product concerned and the GOC under Chinese law; and (2) the GOC’s meaningful control over each of the state-owned commercial banks and their respective business conduct in concluding that such banks are public bodies under Article 1.1(a)(1) ASCM.

[60] In addition, the European Commission’s reliance on Article 34 of the Law of the People’s Republic of China on Commercial Banks (“Chinese Commercial Banks Law”), is insufficient to support a conclusion whereby state-owned commercial banks are public bodies and provide preferential loans to the exporting producers of the product concerned in China.

[61] In any event, the European Commission refers to Article 34 of the Chinese Commercial Banks Law without considering its proper context. Indeed, Article 4 of the Chinese Commercial Banks Law provides that “[c]ommercial banks shall follow the principles of safety, liquidity and efficiency with full autonomy and assume sole responsibility for their own risks, profits and losses. Commercial banks shall carry out business in accordance with laws, free from any interference by entities or individuals”. Article 5 further clarifies that there shall be no interference by local governments and government departments at various levels, public organisations, or individuals in the business operations of the commercial banks. In addition, Article 7 states that “[c]ommercial banks shall, in ordering loans, make examination strictly on the credibility of the borrower and provide loans on guarantee to ensure timely recovery of the loan.”

[62] It readily transpires that the European Commission referred selectively in the EU CVD Regulation to Article 34 of the Chinese Commercial Banks Law. Such reference is not

determinative in concluding that state-owned commercial banks in China perform governmental functions and are vested with governmental authority.

[63] The European Commission also relied on Article 15 of the General Rules on Loans.²² However, this provision not mandatory and thus insufficient as a basis of meaningful control by the GOC over PRC commercial banks.

[64] Moreover, the European Commission failed to provide any evidence with probative value (as opposed to general and unsubstantiated “indicia”) during the original EU CVD investigation in 2017-2018 proving to the requisite legal evidentiary standard that the exporting producers of the product concerned were the recipients of any preferential loans from any bank in China.

[65] As noted by the WTO Panel in *EC and certain member States – Large Civil Aircraft*, “... a finding of specificity under Article 2.1(a) requires the establishment of the existence of a limitation that expressly and unambiguously restricts the availability of a subsidy to ‘certain enterprises’, and thereby does not make the subsidy ‘sufficiently broadly available throughout an economy’.”²³ Furthermore, as noted by the Appellate Body in *US – Aircraft (Second Complaint)*, the specificity analysis should be focused not only on “[...] whether the subsidy was provided to the particular recipients identified in the complaint, but [...] also on all enterprises or industries eligible to receive that same subsidy. Thus, even where a complaining Member has focused its complaint on the grant of a subsidy to one or more enterprises or industries, the inquiry may have to extend beyond the complaint to determine what other enterprises or industries also have access to that same subsidy under that subsidy scheme.”²⁴

[66] The GOC wishes to emphasize that all loans provided by Chinese state-owned commercial banks are on commercial terms agreed upon between the parties. The interest rates charged are based on market rates and the loans are disbursed based on the risk / creditworthiness profiles of the borrowers according to lending criteria prevailing worldwide.

[67] PRC state-owned commercial banks are publicly listed and must pursue their activities for profit generating value for their public and private investors and shareholders on an annual basis under their respective Articles of Association and other constitutive documents; the PRC Civil Code; and the applicable Stock Exchange / Capital Markets Regulations on, *inter alia*, corporate transparency and disclosure. The management bodies of all these commercial banks report at least on an annual basis to the General Shareholders Meetings of these banks who have the right to appoint them; and would be liable to civil and criminal “abuse of trust” type of charges if they were to conduct the business activities of such banks for purposes other than for profit.

[68] Therefore, taking into account the applicable PRC legal and regulatory governance framework for financial institutions, there is no scope for government intervention compelling the management bodies of such financial institutions to pursue government objectives in conflict with these financial institutions’ own interests. The European Commission’s findings to the

²² See, for example, paragraph 188 of the EU CVD Regulation.

²³ Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.919.

²⁴ Appellate Body Report, *US – Aircraft (Second Complaint)*, para. 753.

contrary are erroneous and unfounded in law and fact; and should not be investigated further by the TRA in TS0036.

3.3.3.2 Allegedly preferential credit lines

[69] The European Commission determined in the EU CVD Regulation that Chinese exporting producers of the product concerned benefitted from the opening of allegedly large and economically unjustified credit lines that in fact disguise *their indebtedness*.²⁵ The GOC disagrees with this assertion as the EU CVD Regulation does not contain any evidence of provision of preferential credit lines to the exporting producers of the product concerned.

[70] The EU CVD Regulation contains no evidence of financial contribution to exporting producers of the product concerned by “public bodies.” General statements about the existence of credit lines in China are irrelevant and may not constitute evidence of subsidization of the exporting producers concerned.

[71] Credit lines are opened by commercial banks everywhere in the world and do not *per se* amount to a direct transfer of funds. The WTO Panel in *EC and certain member States – Large Civil Aircraft* held that, when determining “whether a transaction involves a ‘potential direct transfer [...] of funds’, the focus should be on the existence of a government practice that involves an obligation to make a direct transfer of funds which, in and of itself, is claimed and capable of conferring a benefit on the recipient that is separate and independent to the benefit that might be conferred from any future transfer of funds.”²⁶

[72] Credit lines establish only a borrowing limit that a company can use with no financial contribution. Moreover, there are no worldwide accepted standards regarding the opening of a credit line or its operation. The amounts and conditions of credit lines are customer specific.

[73] The Appellate Body confirmed in *EC and certain member States – Large Civil Aircraft* that a “benefit” only exists if the financial contribution at issue makes the recipient better off than it would otherwise have been, absent that contribution.²⁷ Furthermore, the marketplace provides an appropriate benchmark for this comparison to be made²⁸ and for a benefit to exist, the recipient must have received a financial contribution on terms more favourable than those available on the market.²⁹

[74] In *EC and certain member States – Large Civil Aircraft*, the WTO Panel held that the complainant “adduced no evidence nor advanced any particular argument to identify and explain the alleged benefit of the promise to obtain liquidity on favourable terms for EADS. We are not convinced that simply showing that a credit line has been granted on beneficial terms is enough to establish that it has placed its recipient in a better position than it otherwise would have been in absent

²⁵ See, Section 3.4.4.7 of the EU CVD Regulation.

²⁶ Panel Report, *EC and certain member States – Large Civil Aircraft* paras. 7.304 and 7.735.

²⁷ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 973.

²⁸ *ibid.* See also: Appellate Body Report, *US – Large Civil Aircraft*, para. 635; and Appellate Body Report, *Canada – Aircraft*, para. 157.

²⁹ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 973; Appellate Body Report, *US – Large Civil Aircraft*, para. 635; and Appellate Body Report, *Canada – Aircraft*, para. 158.

availability of the particular credit line. In our view, something more is required to demonstrate that a promise to provide 'cheap' financing, in and of itself, confers a benefit."³⁰

[75] Finally, no evidence of specificity has been provided by the European Commission in the EU CVD Regulation. The exporting producers of product concerned are not an encouraged industry and none of the documents referred to by the European Commission in this respect shows that the credit lines provided to the exporting producers of the product concerned in the PRC are specific within the meaning of Article 2 ASCM. General statements cannot constitute sufficient evidence of specificity under the ASCM.³¹

[76] In fact, in China, access to credit lines on non-preferential terms is not *explicitly limited* to the exporting producers of the product concerned. The GOC wishes to emphasize that all Chinese undertakings are equally eligible for obtaining credit lines and may negotiate individual borrowing limits from their respective commercial banks depending on their respective financial performance data, financial requirements, and risk / creditworthiness profiles.

[77] The European Commission failed to adduce any positive evidence with probative value on the existence of subsidies in the form of preferential financing through credit lines and, as a result, the initiation and conduct of TS0036 is unjustified and WTO-inconsistent.

3.3.3.3 Preferential financing through corporate bonds and convertible corporate bonds

[78] According to the EU CVD Regulation, corporate bonds ("CBs") and convertible corporate bonds ("CCBs") issued by Chinese exporting producers of the product concerned are countervailable subsidies.³²

[79] The GOC objects to these European Commission findings based on the following considerations:

[80] The Appellate Body in *US – CVD*, held that, as a first step, in determining whether a financial contribution exists, "*an investigating authority must inquire into the nature of the financial contribution at issue and determine whether such contribution was provided by the 'government', by 'any public body within the territory of a Member', or by a 'private body' entrusted or directed by the government.*"³³ The assessment of the nature of the financial contribution informs the identification of the jurisdiction of the granting authority, which is then the starting point for the specificity analysis.

[81] The European Commission failed to provide any information on the alleged financial contribution as well as the nature of the financial contribution. General statements on the purpose of CBs and CCBs; and how they are issued in China are both irrelevant and insufficient to satisfy the requisite legal and evidentiary standards under the ASCM.

³⁰ Panel Report, *EC and certain member States – Larg Civil Aircraft*, para. 7.884.

³¹ Panel Report, *China – GOES*, para. 7.66.

³² See, Section 3.3.3.3 of the EU CVD Regulation.

³³ Appellate Body Report, *US – CVD*, para. 4.167.

[82] There is no evidence of specificity in this analysis of the European Commission other than the generic and erroneous reference to the exporting product of the product concerned being an encouraged sector.

[83] On the other hand, the issuance of CBs and CCBs is an ordinary commercial practice all over the world including in the EU and the UK.

[84] To conclude, CBs and CCBs may not be the subject of TS0036 pursuant to Article 11.3 ASCM.

3.3.4 Alleged provision of goods and services at less than adequate remuneration (“LTAR”)

3.3.4.1 *Alleged Provision of Land-use rights at LTAR*

[85] According to the EU CVD Regulation, Chinese exporting producers of the product concerned received subsidies through the provision of land-use rights (“LURs”) by the GOC at LTAR.³⁴ The alleged absence of a functioning market for land in China requires the use of a benchmark to calculate the alleged benefit amount.³⁵ The GOC respectfully submits that the provision of LURs does not constitute a subsidy and that, in any case, resort to a benchmark in Taiwan, province of China, is legally unjustified.

[86] Indeed, Article 2 of the PRC Land Administration Law does not *enable the GOC to provide land at LTAR to promoted industries, including producers of the goods concerned*. As a matter of undisputed fact, LURs are transferred by public bidding, quotation, or auction in accordance with Land Administration Law. Indeed, pursuant to Article 347 of the PRC Civil Code:

“[W]here land is used for industrial, commercial, tourist or entertaining purposes, as commodity residence, or for other profit-making purposes, or there are two or more persons who are willing to use the same piece of land, the right to the use of construction shall be assigned through bid invitation, auction or other open bidding. The price of the land is established through market competition.”

[87] In addition, Article 3 of the Interim Regulations of the PRC Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in Urban provides that:

“[a]ny company, enterprise, other organization and individual within or outside the People's Republic of China may, unless otherwise provided by law, obtain the right to the use of the land and engage in land development, utilization and management in accordance with the provisions of these Regulations.”

[88] It readily transpires from the preceding PRC legislative provisions that any legal person or individual in Mainland China can acquire and use LURs through fair competition and a public bidding process.

³⁴ See, Section 3.9.6 of the EU CVD Regulation.

³⁵ *Ibid*, paragraph 494.

- [89] The European Commission also failed to adduce any evidence in support of the allegation that the provision of LURs at LTAR is specific for the exporting producers of the product concerned.
- [90] Finally, regarding the existence of a benefit, the EU CVD Regulation has not provided any company specific benefit calculation. The European Commission used the land price in Taiwan province China as the benchmark to establish the benefit contrary to the ASCM and based on the erroneous and unproven assumption that there is allegedly no functioning land market in Mainland China.
- [91] It is recalled that, as noted by the Appellate Body in *US – Carbon Steel (India)*, Article 14(d) ASCM does not establish any “legal presumption that local prices from any particular source can be discarded in a benchmark analysis” and “a determination of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of any potential local prices, including government-related prices other than the financial contribution at issue.”
- [92] The Appellate Body in that case disagreed with the Panel’s conclusion that “Article 14(d) does not require the consideration of government-related prices simply because governments may set prices in pursuit of public policy objectives.”³⁶ Furthermore, the Appellate Body in *US – Carbon Steel (India)* unequivocally held that “[p]roper benchmark prices would normally emanate from the market for the good in question in the country of provision” and such local prices “necessarily have the requisite connection with the prevailing market conditions ... that is prescribed by the second sentence of Article 14(d).”³⁷ Thus, the “primary” benchmark, and “therefore the starting point of the analysis” for determining a benchmark, rests in the local benchmarks.³⁸
- [93] Moreover, the Appellate Body held in *US – Carbon Steel (India)* and *US – Softwood Lumber IV*, as well as by the WTO Panel in *US – AD and CVD (China)*, that the use of other benchmarks is “exceptional” and, if resorted to, must relate or refer to, or be connected with, the prevailing market conditions in that site of provision and must reflect price, quality, and availability and other conditions of purchase or sales pursuant to Article 14(d) ASCM.³⁹
- [94] In the present case, the land prices in Mainland China are adequate because *inter alia*, private companies are active in sub-letting or transferring LURs. The GOC is not the only market participant regarding LURs. The land prices in mainland should, therefore, be used as a benchmark in the present case. With respect to producers that have gone through bidding for their LURs, this prices constitute an appropriate benchmark because, according to the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, “...a benchmark may also be found in price-discovery mechanisms such as competitive bidding or negotiated prices”, as this ensures that the price paid reflects adequate remuneration. Consequently, the fact that prices are determined through competitive bidding and negotiation, ensures that they are not distorted but instead reflect an adequate market price.

³⁶ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.170.

³⁷ *ibid*, para. 4.151.

³⁸ *ibid*, para. 4.154.

³⁹ Appellate Body Report *US – Softwood Lumber IV*, para. 106; Panel Report, *US – AD and CVD (China)*, para. 10.187; Appellate Body Report *US – Carbon Steel (India)*, para.4.158.

[95] The European Commission's decision to use Taiwan province's LUR prices is not justifiable and the LUR prices in Mainland China should be used instead to review whether or not the alleged remuneration is on an LTAR basis thereby specifically conferring a benefit to the exporting producers of the product concerned.

[96] To conclude, the EU CVD Regulation provides no evidence on any benefit specifically conferred on the exporting producers of the product concerned. Therefore, any investigation of this alleged program is inconsistent with Articles 11.2 and 11.3 ASCM.

3.3.4.2 *Alleged Provision of Raw Materials at LTAR*

[97] The European Commission following investigation concluded in the EU CVD Regulation that the upstream products used by the exporting producers of the product concerned, notably, natural and synthetic rubber, nylon cords and carbon black, are not benefiting from subsidies in the PRC. ⁴⁰The GOC agrees with this finding and notes that the European Commission's findings also support the conclusion that there is no Particular Market Situation in the PRC regarding the product concerned under the UK's antidumping regulations.

3.3.4.3 *Alleged Provision of Electricity at LTAR*

[98] According to Section 3.9.5 the EU CVD Regulation, the provision of electricity at reduced rates to the exporting producers of the product concerned qualifies as a countervailable subsidy. The GOC categorically objects to this conclusion.

[99] The European Commission effectively considered the possibility under PRCV law of exporting producers to conclude bilateral agreements with electricity suppliers as a specific subsidy. However, this possibility is identical to the EUs "target model" for electricity markets that introduced a separate market operating in parallel to the generally applicable grid electricity price as a viable alternative to large industrial electricity consumers willing to conclude bilateral contracts with electricity suppliers.

[100] Such bilateral electricity supply agreements take into account specific industrial users' large electricity requirements as well as their stale electricity consumption profiles. Electricity suppliers are naturally prepared to offer prices to such industrial customers that are lower than the generally available ones as they obtain the commitment of large industrial consumers to purchase electricity from the electricity suppliers concerned over longer periods of time.

[101] It is recalled that electricity may not be stored and such long-term commitments for large electricity quantities confer a benefit to electricity suppliers in terms of production planning and capacity utilization. Lower prices granted to the exporting producers of the product concerned under such bilateral agreements are therefore not subsidies conferring a benefit to such producers within the meaning of Article 2 ASCM.

⁴⁰ See, Section 3.2.1 of the EU VCBVD Regulation.

- [102] The European Commission has entirely failed to adduce *sufficient evidence* as to the existence and nature of preferential LTAR provision of electricity to exporting producers of the product concerned.
- [103] In summary, the GOC respectfully submits that the European Commission failed to provide sufficient evidence for its allegation that the Chinese exporting producers of the product concerned are subsidized within the meaning of the ASCM.
- [104] On the contrary, it readily transpires from the preceding Observations that the PRC measures reviewed by the European Commission in 2017-2018 may not properly be qualified as injurious subsidies in accordance with the ASCM. The TRA is therefore respectfully requested not to investigate these measures in the framework of TS0036 and to terminate the Transition CVD Review Investigation as well as withdraw the CVD measures concerned with immediate effect.