UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA
(DS437)

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS TO THE PARTIES

May 17, 2013

TABLE OF REPORTS

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Brazil – Aircraft (AB)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999
Canada – Dairy (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999
Canada – Wheat Exports and Grain Imports (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
China — Taxes	*China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments* (WT/DS358/1 and WT/DS358/1/Add.1).
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012, as modified by Appellate Body Report, WT/DS414/AB/R
China – Various Restrictions on Raw Materials	Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, adopted 22 February 2012, as modified by Appellate Body Report, WT/DS394/AB/R
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC and certain member States – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011

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EC and certain member States – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
EC – Tariff Preferences (AB)	*European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
Japan – Agricultural Products II (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Continued Zeroing (AB)	Appellate Body Report, *US – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Customs Bond Directive (India) (AB)	Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, adopted 16 July 2008
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001

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US – FSC (Article 21.5 - EC) (AB)	Appellate Body Report, *United States – Tax Treatment for Foreign Sales Corporations* – Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW, adopted 29 January 2002
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Large Civil Aircraft (2nd complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Large Civil Aircraft (2nd complaint) (Panel)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R
US – Softwood Lumber IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Stainless Steel (Mexico) (AB)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1
US – Zeroing (Japan) (AB)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, adopted 23 January 2007

TABLE OF EXHIBITS

Exhibit No.	Description	Short Title
USA-88	*The New Shorter Oxford English Dictionary* at 2317 (1993).	

1. TERMS OF REFERENCE: ARTICLES 4, 6 AND 7 OF THE DSU

a. Questions to both parties

1. Does the inclusion of claims relating to the preliminary determinations in Wind Towers and Steel Sinks expand the scope of this dispute in a way contrary to the relevant DSU provisions?

1. China's attempt to include the preliminary determinations in *Wind Towers* and *Steel Sinks* – two measures that were not the subject of consultations – in the "matter" referred to the DSB is contrary to the relevant provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

2. Under Article 4 of the DSU, a complaining Member must first request consultations with respect to a measure (and observe the relevant period of time) before that complaining Member may request a panel with respect to that measure. China did not do so here with respect to the preliminary determinations in *Wind Towers* and *Steel Sinks*. Instead, China requested consultations with respect to the initiation of the investigations in *Wind Towers* and *Steel Sinks*. Indeed, China could not have included the preliminary determinations in *Wind Towers* and *Steel Sinks* in its request for consultations since they did not exist at the time that China made its consultations request.

3. The initiation of investigations and the preliminary determinations are distinct. Initiation is only the start of "an investigation to determine the existence, degree and effect of any alleged subsidy."[1] The notice of initiation addresses only decisions related to the initiation of the investigation, and does not contain any further substantive determinations regarding the elements of a subsidy. Preliminary determinations, on the other hand, are determinations, based on the best information available at the time, of "the existence and amount of the subsidy."[2] Thus, initiations and preliminary determinations are distinct from each other, and the failure to include in the request for consultations the preliminary determinations means that China did not request consultations with respect to the preliminary determinations. China was required to request consultations before these measures could be referred to the DSB and included within the terms of reference of the Panel.[3] Because China did not request consultations on the preliminary determinations, they cannot be within the Panel's terms of reference.

4. In the past, when complaining Members wished to add measures to a dispute, including disputes where China was the responding party, complaining Members filed an additional or supplemental consultations request.[4] China was free to have done so here, but apparently seeks to circumvent the requirements of the DSU instead.

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[1] Agreement on Subsidies and Countervailing Measures, Article 11.1 ("SCM Agreement").
[2] SCM Agreement, Article 19.1.
[3] *Brazil – Aircraft (AB)*, para. 131 (consultations must be requested on a matter and consultations must be held before a matter may be referred to the DSB) (discussed *infra* in response to question 2).
[4] *See, e.g., China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments* (WT/DS358/1 and WT/DS358/1/Add.1).

5. Although it is not relevant to the question of whether the preliminary determinations are within the Panel's terms of reference (since for the reasons discussed above these preliminary determinations are not within the Panel's terms of reference), China also erred in asserting at the hearing that the inclusion of the preliminary determinations would not lead to the expansion of China's legal claims. In China's consultations request, the only claims related to the *Wind Towers* and *Steel Sinks* investigations were limited to the initiation of the investigations.[5] However, in the panel request China made additional legal claims related to public body, facts available, benchmarks, and specificity determinations. These claims, which are based on different WTO provisions, further expanded the scope of the dispute.

2. The Panel in EC–Large Civil Aircraft (para. 7.126) emphasized the difference between Article 4.4 and Article 6.2, observing that: "Article 4.4 of the DSU requires only that the request for consultations must identify 'the measures at issue', as opposed to the 'specific measures at issue' as required by Article 6.2 of the DSU." How do the parties understand this statement and how do they think it may relate to the US' claim challenging preliminary determinations?

6. The statement by the panel in *EC and certain member States – Large Civil Aircraft* was made in the context of determining "whether there is a sufficient degree of identity between the measures that were the subject of consultations and the specific measures identified in the request for the establishment of the panel to warrant a conclusion that the challenged measures were subject to consultations as required by Article 4 of the DSU."[6] In other words, the panel affirmed the requirement that a complaining Member must first request consultations with respect to a measure before seeking the establishment of a panel to review that measure.

7. In the context of this dispute, as discussed above in response to question one, the initiation of an investigation and a preliminary determination are distinct. They lack the "sufficient degree of identity" that the panel in *EC and certain member States – Large Civil Aircraft* identified as a key factor in its analysis.

8. In addition, there is the fact that the preliminary determinations did not exist at the time China requested consultations. Accordingly, it is not a matter of the identification of the measures in the consultations request being somewhat less specific than the identification in the panel request due to the difference between Article 4.4 and Article 6.2 of the DSU. China was unable to identify the preliminary determinations in its consultations request nor could China have requested consultations on them because they did not exist.

9. China's addition of new measures and legal claims in the panel request denied the United States the opportunity to consult on the measure, an important element of the dispute settlement system. Indeed, the negotiators found it so important that they made consultations a condition of being able to proceed to a panel in the first instance. A failure to include a measure in a consultations request deprives the parties of an opportunity to clarify the measure and the facts surrounding it as well as the opportunity to resolve any concerns over the measure. For these reasons, consultations are an important precondition to requesting a panel.

[5] *See* China's Request for Consultations, footnotes 3-7.
[6] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.127.

10. The Appellate Body has made clear that a consultations request serves an important function of informing the responding Member of what it can reasonably expect to be the scope of the particular dispute.[7]

2. CHALLENGING PRELIMINARY DETERMINATIONS

a. Questions to both parties

3. The United States contends in footnote 11 of its first written submission that China has failed to establish a proper legal foundation for challenging preliminary determinations as compared to final determinations.

(i) Does the Panel need to make a finding on whether the inclusion of these preliminary determinations is "premature"?

11. Even aside from the fact that the *Wind Towers* and *Steel Sinks* preliminary determinations are not within the terms of reference of this panel proceeding, it would be China's burden to set out the legal theory and claims for how, given the nature of preliminary determinations, the two preliminary determinations by the investigating authority cited by China could result in the alleged breaches of the provisions of the covered agreements relied upon by China. China has not done so. Moreover, it should be clear that the Panel cannot make any findings on the final determinations for these two investigations because they were not in the consultations or panel requests.

12. In its panel request and written submission, China treats the preliminary determinations in *Wind Towers* and *Steel Sinks* as though they are of the same legal character as the final determinations at issue in this dispute. This is legal error. Under the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement), preliminary determinations and final determinations are different legal instruments, and they are subject to different obligations. Final determinations, of course, may result in the imposition of countervailing duties. And, under Article 10 of the SCM Agreement, countervailing duties may only be imposed in accordance with the provisions of the SCM Agreement. In contrast, preliminary determinations are just that – preliminary – and subject to revision.

13. The Appellate Body report in *US – Continued Zeroing* is instructive on the differences between preliminary and final determinations. In *US – Continued Zeroing*, the Appellate Body considered that "the analysis could not be completed" for two preliminary results in a sunset review because to do so would be "premature." In making this finding, the Appellate Body stated that it would not do so because "preliminary results could be modified by the final results."[8]

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[7] *US – Customs Bond Directive (India) (AB)*, para. 293 ("A responding Member would not be in a position to anticipate reasonably the scope of a dispute if, by reason only of the inclusion of a specific measure in a consultations request, any legal instrument providing a general authority or legal basis for the specific measure would be deemed to be part of a panel's terms of reference.").

[8] *US – Continued Zeroing (AB)*, para 210.

14. To be clear, the United States does not contend that no aspect of a preliminary countervailing duty determination can be challenged under the SCM Agreement. For example, Article 22.3 of the SCM Agreement requires that public notice be given of any preliminary determination. Article 22.3 further provides that the public notice of a preliminary determination shall set forth (or otherwise make available), in sufficient detail, findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.

15. But here, China does not claim a breach of Article 22.3 with respect to the *Wind Towers* and *Steel Sinks* preliminary determinations. Nor has China explained why, in light of their preliminary nature, it would be appropriate to find the preliminary determinations to be inconsistent with each particular provision of the SCM Agreement that China has cited.

16. Accordingly, the question is not so much one of a formal finding that the inclusion of the *Wind Towers* and *Steel Sinks* preliminary determinations is "premature", as it is of the lack of explanation by China as to why, in light of the language of a particular provision and the preliminary nature of the determinations, it would be appropriate to make a finding under that provision with respect to a preliminary determination that is subject to change.

> ***(ii) What is the relevance of the preliminary nature of these determinations to the Panel's recommendation in its Report, particularly given that by the time the Report is issued the preliminary determinations may have been superseded by the next administrative step of the USDOC's countervailing duty investigations?***

17. The preliminary nature of these determinations means that they may be replaced by the next step in the investigation because the conclusions in the preliminary determinations are subject to review and revision. As noted above, China has not brought a claim under one of the provisions expressly relating to preliminary determinations. Accordingly, it is appropriate to take the preliminary nature of the determinations into account in analyzing what findings would assist the parties in resolving the dispute.[9]

3. PRIMA FACIE CASE

a. Questions to both parties

4. China has only provided some references to the facts of each investigation in its Exhibit 1. If the fact patterns are similar across each investigation at issue, does China need to do more than this in order to establish a* prima facie *case?

18. Yes, China must do more than provide references in Exhibit CHI-1. Whether the facts are "similar" across all investigations is a point that China, if it wishes to have the Panel make such a finding,[10] would need to establish – but has not done so. But even were China able to demonstrate that generally certain facts are "similar" across each investigation, to make out its

[9] Moreover, it should be clear that the Panel cannot make any findings on the final determinations for these two investigations because they are not within the consultations or panel requests.

[10] *See US – Wool Shirts and Blouses (AB)*, para. 335 ("[I]t is a generally-accepted canon of evidence in civil law, common law, and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of the particular claim or defence.").

prima facie case for each particular investigation, China would still need to demonstrate and discuss the facts of each particular investigation.

19. As an initial matter, Exhibit CHI-1 fails to indicate clearly how many and which determinations are at issue. Further, the Appellate Body has been clear that it is "incumbent upon" the complaining party to identify the "relevance" of the measures, *i.e.*, the evidence "on which it relies to support its arguments".[11] It is not sufficient simply to submit copies of the measures at issue and "expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position."[12] China cannot expect the Panel to do China's work for it, nor can China meet its burden to establish a *prima facie* case for its almost 100 "as applied" claims by alleging that Commerce "has applied a series of legal standards" with respect to the investigations.[13]

20. It is important to recall that almost all of China's claims do not assert that Commerce relied upon a measure of general applicability, such as a law or regulation but, instead, are as applied claims with respect to numerous individual decisions Commerce made in each of the challenged investigations. Accordingly, China must first demonstrate what Commerce decided in each investigation at issue and then put forth adequate legal argument and any additional facts necessary to support its claim. The question then is whether, in light of those facts and circumstances for a given investigation, Commerce's determinations were consistent with the cited provision of the SCM Agreement. China's attempts to avoid a factual examination of its claims[14] reveal the weakness of those claims, because once the facts are examined, they show that Commerce's determinations were consistent with U.S. WTO obligations.

5. What specific evidence should China present in order to fulfil its prima facie case for each claim?

21. The burden is on China, as the complaining party, to adduce evidence and arguments sufficient to raise a presumption that its claims are true.[15] The relevant evidence and arguments will vary for each claim, but the arguments serve to explain with specificity why the evidence demonstrates that a measure is inconsistent with a particular obligation of the covered agreements.

22. To take an example, with respect to its benefit claims, China must present specific evidence and arguments that each of the 14 challenged determinations is inconsistent with Articles 1.1(b)[16] and 14(d) of the SCM Agreement. As stated above, it is important for the Panel to recall that China's benefit claims do not assert that Commerce relied on a measure of general

[11] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.
[12] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.
[13] China Opening Statement at First Panel Meeting ("China First Opening Statement"), para. 3.
[14] China First Opening Statement, para. 5 (stating that [i]f an investigating authority has applied an incorrect legal standard, it is immaterial what facts the investigating authority did or did not take into account in its application of that incorrect legal standard).
[15] *See US – Wool Shirts and Blouses (AB)*, para.14.
[16] With respect to Article 1.1(b) of the SCM Agreement, China would not be able to establish a breach of this provision alone since Article 1.1(b) does not itself contain an obligation – it is part of a definition of a term defined for purposes of that term's use in the SCM Agreement. *See US – FSC (Article 21.5 - EC) (AB)*, para. 85; *see also US – Zeroing (Japan) (AB)*, para. 140.

applicability such as a law or regulation. Thus, China must put forth sufficient evidence to demonstrate what Commerce actually did or found in each investigation, and it must explain the relevance of Commerce's findings in each investigation to its claims. It is insufficient for China to make general allegations that in "each of" the determinations, Commerce "applied the same framework" for determining whether the Chinese market was distorted such that the use of out-of-country benchmarks was necessary.[17] Rather, China must present specific evidence, with respect to each determination, that Commerce's finding of distortion breached Article 14(d) of the SCM Agreement.

23. To take another example, with respect to its specificity claims, China must present specific evidence that each of the 14 challenged determinations is inconsistent with Article 2[18] of the SCM Agreement. China must put forth sufficient evidence to demonstrate what Commerce actually did or found in each investigation, and it must explain the relevance of Commerce's findings in each investigation to its claims. It is insufficient for China simply to present three examples of Commerce's specificity determinations and assert that these are representative of each challenged specificity determination across the 14 investigations.[19] Rather, China must present specific evidence, with respect to each specificity finding in each determination, that Commerce's finding that the subsidy in question was used by a limited number of "certain enterprises" breached some provision of the SCM Agreement.

24. In other words, China must explain what determinations Commerce made with respect to each claim, and why those determinations are alleged to be inconsistent with the SCM Agreement and present any additional facts necessary to support its claims. It is not the role of the United States or the Panel to present the evidence regarding each of China's claims, or even to instruct China on what evidence it needs to present. China must make its own case.

b. Questions to the United States

6. In paragraph 7 of China's oral statement, China asserts that there is "no concept of a* prima facie *case with respect to issues of legal interpretation". How does the United States respond?

25. China's assertion, in paragraph 7 of its oral statement, that "[t]here is no concept of a *prima facie* case with respect to issues of legal interpretation – these are issues for the Panel to resolve," is incorrect. For instance, China is responsible for explaining how each measure at issue would be inconsistent with the SCM Agreement or the "relevance"[20] of the facts to the legal provisions at issue.

26. As a preliminary matter, China relies on a statement by the Appellate Body relating to the general proposition that it is the ultimate responsibility of the Appellate Body to provide the

[17] *See* China First Written Submission, para. 69.
[18] As with Article 1.1(b), China would not be able to establish a breach of this provision alone since Article 2 does not itself contain an obligation – it is part of a definition of a term defined for purposes of that term's use in the SCM Agreement. *See US – FSC (Article 21.5 - EC) (AB)*, para. 85; *see also US – Zeroing (Japan) (AB)*, para. 140.
[19] *See* China First Written Submission, para. 91.
[20] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

legal interpretation applicable to a dispute.[21] Despite the fact that it is the role of the Appellate Body (or here the Panel) to decide the issues of legal interpretation, which in a given dispute may differ from the interpretations presented by *either* party, the complaining party must provide sufficient legal arguments as to why the facts demonstrate an inconsistency with respect to the obligation at issue. For example, the Appellate Body in *EC – Tariff Preferences*, quoted by China in its oral statement, also states that "the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause."[22] Thus, the EC had the burden of adducing evidence with respect to the requirements of the Enabling Clause, which would necessarily include a legal interpretation of the content of those requirements.

27. The fact that a *prima facie* case involves both evidence and legal argument (which includes the interpretation of the relevant provision) is affirmed in many statements of the Appellate Body, for example in *Chile – Price Band System (Article 21.5 – Argentina)*,[23] *EC – Hormones*,[24] *US – Gambling*,[25] and *Canada – Wheat Exports and Grain Imports*.[26] Even if a panel or the Appellate Body has the ultimate responsibility to decide matters of legal interpretation of the SCM Agreement, the complaining party has the obligation to submit the necessary legal arguments, including the meaning of the provision of the covered agreement at issue, as to why the challenged measures breached the responding Member's obligations.

28. China has failed to make out a *prima facie* case in this dispute, because it has failed to demonstrate what Commerce did or did not do in each of the challenged investigations and has not explained how each of the almost 100 claims at issue constitute an alleged breach of the U.S. obligations under the SCM Agreement. If China were correct that there is no obligation on a complaining party to make a *prima facie* case with respect to legal interpretations, it would be sufficient for that party to adduce evidence, including the relevant measures, and merely identify the legal claims (provisions at issue), and rest its case because it would then be for the panel to make a legal interpretation and assess whether the facts demonstrate a breach of that legal interpretation. Such an approach is plainly inconsistent with GATT and WTO practice, in which it is for the complaining party to make out a *prima facie* case of breach of an obligation.

4. PUBLIC BODY: ARTICLE 1.1 (A)(1) OF THE SCM AGREEMENT

a. Question to both parties

[21] China First Written Submission, para. 7 (citing *EC – Tariff Preferences (AB)*, para. 105).
[22] *EC – Tariff Preferences (AB)*, para. 105.
[23] "A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence. . . . Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it." *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.
[24] A "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case." *EC – Hormones (AB)*, para. 104.
[25] When a panel makes findings on a claim "in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU." *US – Gambling (AB)*, para. 281.
[26] "It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position." *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

8. Please comment on paragraphs 4-9 of Japan's oral statement, in which Japan suggests an approach to the term "public body" that differs to the definitions advanced by the parties to this dispute.

29. As explained in the U.S. first written submission, when interpreted in accordance with the customary rules of interpretation, a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement is an entity controlled by the government such that the government can use the entity's resources as its own. The term "public body" is broad and may include a wide range of entities, including corporations in which a government owns a controlling stake. Whether any given entity is a "public body" must be determined on a case-by-case basis, taking into consideration all facts and evidence before an investigating authority or a panel.

30. In paragraphs 4-9 of Japan's oral statement, Japan sets forth a particular, hypothetical factual situation in which a government owns a majority of the shares of a corporation and there is evidence that the corporation has "continue[d] making losses for a sustained period of time," evidencing, in Japan's view, that "a government has provided it with a financial basis for the ability."[27] Japan proposes that "[t]his may be suggestive that the entity is seeking something other than profits (presumably to advance public policy goals set by the government) and is not acting on market considerations."[28]

31. The United States does not understand that Japan is proposing an alternative to the definitions of "public body" advanced by the United States and China. Rather, Japan indicates that the "examination" it describes "may often be a useful, albeit not decisive, tool."[29] Such a factual situation might warrant further examination – *e.g.*, it could be indicative that the corporation itself is the recipient of government subsidies and is passing those subsidies through to its customers. However, there may also be situations where below-cost selling would not be relevant at all – *e.g.*, in a situation where the relevant financial contribution is a simple transfer of funds from an entity not engaged in selling goods. Investigating authorities and panels have broad flexibility under the SCM Agreement to undertake case-by-case analyses and public body determinations should, in Japan's words, be "based on various factors."[30]

9. Are China's "as applied" claims regarding the definition of the term public body better characterised as an "as such" claim? Is there really a relevant distinction between the "as such" and "as applied" claims?

32. There are important distinctions between "as such" and "as applied claims." In an "as such" claim, a Member asserts that there is a measure of general applicability (*e.g.*, a law), that necessarily results in a breach of a covered agreement. In order to succeed in an "as such" claim, a complaining Member needs to identify the measure of general applicability and explain how the measure is necessarily WTO-inconsistent. The complaining Member may also provide a few examples of the application of the measure to illustrate further how the measure is necessarily WTO-inconsistent.

[27] Japan Third Party Oral Statement, para. 5.
[28] Japan Third Party Oral Statement, para. 5.
[29] Japan Third Party Oral Statement, para. 7.
[30] Japan Third Party Oral Statement, para. 8.

33. In contrast, in an "as applied" claim, the complaining Member asserts that an application of a measure results in a breach of a covered agreement. The complaining Member need not establish that the measure necessarily results in a breach; rather the complaining Member only needs to establish that the particular application at issue results in a breach.

34. In the first instance, it is up to the complaining Member to formulate the matter referred to a panel. Here, China has indicated it is challenging 14 determinations "as applied." As an initial point, China has not brought these claims as "as such" claims. Accordingly, there is no "as such" claim within the Panel's terms of reference in this regard.[31] And to be accurate, the description "as applied" does not appear apt. China has not identified a measure that is being "applied" that results in the breaches alleged. Rather, China appears to be claiming that each of the 14 determinations is WTO inconsistent.

10. Does USDOC's statement in Kitchen Shelving about the rebuttable presumption constitute a measure that could be challenged "as such"?

35. As a general matter, for a measure to be appropriately subject to an "as such" claim, two conditions must be fulfilled. First, the alleged measure must be a "measure" within the meaning of the DSU. Second, the claim must be that the measure necessarily results in an inconsistency with a particular provision of the covered agreements.

36. China alleges that the language related to analyzing whether a firm is an "authority" under U.S. law in the *Kitchen Shelving* issues and decision memorandum is a measure within the meaning of the DSU. However, China's allegation is incorrect. This discussion cannot be considered to be a measure for purposes of the DSU because the discussion in *Kitchen Shelving* is descriptive of past actions, and not prescriptive of future ones.

37. In *US – Steel*, India argued that U.S. facts available practices in antidumping investigations amounted to a challengeable measure. The panel rejected India's arguments, stating that the repetition of an action does not transform it into a measure.[32] It found this because such actions by an agency "can be changed by the administering agency, and thus the practice would not be mandatory."[33]

38. The analysis in *US – Export Restraints* is also instructive. In that case, Canada challenged the "practice" of finding export restraints to be financial contributions. In determining that this "practice" was not challengeable, the panel determined that the "practice" did not have an "independent operational status" in the sense of *doing* something or *requiring* some particular action."[34]

39. Here, the *Kitchen Shelving* discussion does not set forth a rule or norm that is intended to have general and prospective application, but rather describes what has been done in the past. This means that it has no independent operational status beyond the descriptions of other,

[31] China's panel request identifies only one "as such" claim, and that is identified as distinct from the "as applied" claims specified in the panel request.
[32] *US – Steel Plate*, para. 7.22.
[33] *US – Steel Plate*, para. 7.20.
[34] *US – Export Restraints*, para. 8.126.

individual actions, i.e. the public body determinations. That Commerce references this practice in its other determinations also does not establish it as a measure. As the *US – Export Restraints* panel stated, "[n]or do we see how the DOC's references in its determinations to its practice gives 'legal effect' to that 'practice' as determinative of the interpretations and methodologies it applies."[35]

11. ***In* US – Gambling Services (Article 21.5)*, the Appellate Body stated that an Appellate Body Report that has been adopted by the DSB must be unconditionally accepted by the parties to the dispute. What are the views of the parties on this statement? Does it indicate that USDOC was required to accept the Appellate Body's approach to the term "public body" in investigations conducted after the Appellate Body's ruling in DS379?***

40. Article 17.14 of the DSU provides that:

> An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report.

41. Accordingly, there can be no question that the parties to a dispute must unconditionally accept, for purposes of that dispute, the findings in an Appellate Body report adopted by the DSB.

42. Of course, as Article 3.7 of the DSU establishes, "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute," and panel and Appellate Body findings adopted by the DSB are limited in their applicability to that particular dispute. Panels and the Appellate Body are not authorized to adopt binding interpretations of the covered agreements. Per Article IX:2 of the WTO Agreement, "[t]he Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of [the WTO] Agreement and of the Multilateral Trade Agreements." The DSU confirms that the dispute settlement mechanism, including adoption of reports by negative consensus, is without prejudice to the exclusive authority of the Ministerial Conference to adopt interpretations. To read Article 17.14 of the DSU as making a panel or Appellate Body report binding outside the context of the specific dispute would be to read Articles IX:2 and Article 3.7 out of the WTO Agreement.

43. With respect to the obligations of the United States following the adoption of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, we recall that the Appellate Body made certain adverse findings with respect to "public body" determinations that Commerce made in four countervailing duty investigations challenged in connection with that dispute. Through proceedings undertaken pursuant to section 129 of the U.S. Uruguay Round Agreements Act, the United States brought the measures subject to adverse DSB rulings and recommendations into conformity with U.S. WTO obligations. Those section 129 determinations are not under review here. Since the Appellate Body made no "as such" findings related to "public body" in *US – Anti-Dumping and Countervailing Duties (China)*, the United

[35] *US – Export Restraints*, para. 8.126, (quoting the Second Written Submission of Canada, para. 40).

States has no implementation obligations with respect to other countervailing duty investigations conducted by Commerce.

12. In interpreting the SCM Agreement, what is the significance of statements made by Members regarding an adopted Appellate Body Report at a meeting of the DSB?

44. Article 17.14 of the DSU expressly refers to "the right of Members to express their views on an Appellate Body report." In practice, Members routinely express their views on Appellate Body reports adopted by the DSB. In the context of a subsequent dispute, where a party to the dispute refers the panel to such statements as being of potential use – because the panel may find the statements informative or may find the reasoning expressed in the Member statements persuasive – the panel should take such statements into account as it considers whether it finds the reasoning in the Appellate Body report persuasive and relevant to its own interpretative analysis pursuant to the customary rules of interpretation of public international law.

45. Here, the United States commends to the Panel's attention various statements made by Members at the time of the adoption of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*.[36] We believe the Panel may find those statements informative, as they elucidate various concerns with the reasoning and analysis set forth in that Appellate Body report.

13. Do paragraphs 171-174 of China's Working Party Report mean that China acknowledged at the time of accession that SOEs are "public bodies"?

46. Paragraphs 171-174 of the Working Party Report on China's Accession to the WTO ("the Working Party Report") are identified in paragraph 342 of the Working Party Report as among "commitments given by China in relation to certain specific matters" that are "incorporated in paragraph 1.2 of the Draft Protocol" on China's Accession. Article 1.2 of China's Accession Protocol provides that the "Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." Accordingly, paragraphs 171-174 of the Working Party Report are, at the very least, context for the interpretation of Article 1.1(a)(1) of the SCM Agreement.

47. On their face, paragraphs 171-174 of the Working Party Report, and in particular paragraph 172, reflect China's acknowledgement that its state-owned enterprises are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Members specifically "sought to clarify that when state owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement."[37] China's representative responded that "such financial contributions [by state owned enterprises] would not necessarily give rise to a benefit within the meaning of Article 1.1(b) of the SCM Agreement."[38] China's agreement that the actions of its state owned enterprises would be "financial contributions" supports the view that there was agreement that the entities would be treated as "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

[36] *See* WT/DSB/M/294, paras. 103-127.
[37] Working Party Report, para. 172.
[38] Working Party Report, para. 172 (emphasis added).

b. Questions to the United States

22. In paragraph 10 of its oral statement, China notes that legal interpretations embodied in Appellate Body reports "create legitimate expectations among WTO Members". What is the United States' view of the notion of "legitimate expectations" in relation to panel and Appellate Body reports?

48. The most important and relevant legitimate expectations among Members are that the dispute settlement mechanism will serve to uphold and adhere to the agreements reached among Members. Members have legitimate expectations that panel and Appellate Body reports will apply the interpretive and procedural rules of the DSU so that interpretations developed in those reports will be in accordance with the provisions of the covered agreements. Members have legitimate expectations that panel and Appellate Body reports will "preserve the rights and obligations of Members under the covered agreements, and . . . clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Members have legitimate expectations that such reports will not "add to or diminish the rights and obligations provided in the covered agreements."[39] Members have legitimate expectations that each panel will "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements,"[40] and that appeals from panel reports will be "limited to issues of law covered in the panel report and legal interpretations developed by the panel."[41]

49. Members also have legitimate expectations that the dispute settlement mechanism established in the DSU will not infringe on the exclusive authority reserved to the Ministerial Conference and the General Council under Article IX.2 of the WTO Agreement to adopt authoritative interpretations of the covered agreements. As provided in Article IX.2:

> The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.

The distinction between the dispute settlement mechanism and authoritative interpretations of the covered agreements is confirmed by Article 3.9 of the DSU, which provides that:

> The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

[39] DSU, Article 3.2; *see also* DSU, Article 19.2.
[40] DSU, Article 11.
[41] DSU, Article 17.6.

50. As the Appellate Body explained early in the history of WTO dispute settlement:

> Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.[42]

51. Nothing in the DSU suggests that panel and Appellate Body reports adopted by the DSB are to be treated any differently. Indeed, the Appellate Body has confirmed that "[i]t is well established that Appellate Body reports are not binding except with respect to resolving the particular dispute between the parties."[43] Accordingly, the most that Members can legitimately expect in terms of the legal status and character of adopted panel and Appellate Body reports is that they will be taken into account by subsequent panels and the Appellate Body, just as they can legitimately expect that a panel or the Appellate Body may also consider unadopted reports and find useful guidance in them.[44] However, subsequent panels and the Appellate Body are not bound by earlier adopted reports. Rather, any panel, and the Appellate Body, is obligated above all to ensure that any interpretation it seeks to apply in a given situation is in accordance with the customary rules of interpretation of public international law.

23. In its first written submission (para. 39-40) the United States contends that the term public means "belonging to / pertaining to the community as a whole" (dictionary definition), and consequently that the "community can make decisions for, or control, that entity" (US conclusion). Would the United States agree that a community could create and own an entity but leave it up to that entity's management to make decisions freely on how it would operate and use its resources?

52. Yes, the hypothetical factual situation described in the question is conceivable. Of course, China has not pointed to the presence of such hypothetical factual scenarios in any of the challenged investigations. In any event, the determination of whether an entity is a "public body" must be made on a case-by-case basis, taking into account all facts and evidence before the investigating authority or panel. As explained in the U.S. first written submission, where the evidence supports the conclusion that an entity is controlled by the government such that the

[42] *Japan – Alcoholic Beverages II (AB)*, p. 14 (pdf version on WTO website).
[43] *US – Stainless Steel (Mexico) (AB)*, para. 158.
[44] *Japan – Alcoholic Beverages II (AB)*, pp. 14-15 (pdf version on WTO website).

government can use the entity's resources as its own, it is appropriate under Article 1.1(a)(1) of the SCM Agreement to consider that entity a "public body."

24. We refer to paragraph 50 of the United States' first written submission. In relying on the Appellate Body Report in* Canada – Dairy*, is the United States suggesting that the interpretation of the term "government" under the Agreement on Agriculture applies in the context of the SCM Agreement?

53. Paragraph 50 of the U.S. first written submission, in citing to the Appellate Body report in *Canada – Dairy*, is citing to the Appellate Body's discussion of the "ordinary meaning" of the word "government."[45] Under the customary rules of interpretation, an international agreement must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[46] There is no reason to believe that the ordinary meaning of the word government differs between Article 9.1 of the Agreement on Agriculture and Article 1.1(a)(1) of the SCM Agreement.

54. Indeed, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body articulated its understanding of the meaning of the term "government" in Article 1.1(a)(1) of the SCM Agreement by referring to a dictionary definition of the word "government" and by recalling its consideration of the term "government" in *Canada – Dairy*.[47] Specifically, the Appellate Body explained that "the term 'government' is defined as the 'continuous exercise of authority over subjects; authoritative direction or regulation and control'" and reiterated its view that "the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."[48] So, the Appellate Body has interpreted the term "government" similarly when the term is used in Article 9.1 of the Agreement on Agriculture and Article 1.1(a)(1) of the SCM Agreement.

55. While the United States does not disagree with the elements that the Appellate Body included in its discussions of the meaning of the term "government," those discussions are not comprehensive. While the Appellate Body's interpretations focus on regulating, controlling, supervising, or restraining individuals or private citizens, they omit many other functions that a government might perform. Indeed, organs of government might perform many other functions that do not involve the regulation, control, supervision, or restraint of individuals, or do so only in the broad sense of trying to control the conditions of society and the economy. These could include, for example, the provision of "public goods" that private individuals otherwise would not likely provide, or would not be able to provide efficiently, conducting international relations, gathering and disseminating statistical information, providing public schools and libraries, administering social benefit programs, managing public lands, and providing for the national defense. The subsidization of economic actors, which is the focus of the SCM Agreement, may also be a government function. Providing grants, loans, equity infusions, or goods or services, or foregoing revenue, does not involve regulating, controlling, supervising, or restraining individuals or private citizens. Yet clearly these may be "government" functions. In that sense,

[45] *See Canada – Dairy (AB)*, para. 97.
[46] Vienna Convention, Article 31(1).
[47] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.
[48] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.

the Appellate Body's previous elaborations of the meaning of the term "government" are incomplete, or too narrow.

56. China attempts to enshrine the narrowness of the Appellate Body's discussions of the meaning of the term "government" by advocating that the Panel interpret the term "public body" as necessarily embodying only the narrow "essence" of "government" identified by the Appellate Body. However, it simply is not necessary that every "public body" have the effective power to regulate, control, or supervise individuals or private citizens, or otherwise restrain their conduct. Even if this "effective power" was the sole and complete function of "government" – which does not appear to be the case – it would not follow that a "public body" must also have this "effective power" as its sole and complete function in order to provide financial contributions attributable to a Member.

25. How does the United States respond to paragraph 15 of China's oral statement, in which China alleges that the United States is not advancing any "new" arguments in comparison to those it advanced in DS379?

***26. Could the United States explain how its submissions regarding the interpretation of "public body" are more refined in this case compared to those advanced in* US – Anti-Dumping and Countervailing Duties (China).**

57. The United States is responding to questions 25 and 26 together.

58. China is incorrect. In addition to raising new contextual arguments that were not presented during the course of the proceedings in *US – Anti-Dumping and Countervailing Duties (China)*, the United States has presented to the Panel a more refined interpretation of the term "public body" than advanced previously. The United States, after further reflection, and taking into account the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)*, considers that the term "public body" is better understood as an entity controlled by the government *such that the government can use the entity's resources as its own*. This interpretation, in our view, is similar to the "meaningful control" discussed by the Appellate Body in the context of its analysis in *US – Anti-Dumping and Countervailing Duties (China)*, and it accords with the ordinary meaning of the term "public body" read in context and in light of the object and purpose of the SCM Agreement.

27. Has the practice of USDOC evolved since the Appellate Body's ruling in US - Anti-Dumping and Countervailing Duties? If so, where in the challenged USDOC's determinations can evidence of this evolution be found?

59. The Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* did not address a Commerce "practice." Rather, they involved four distinct countervailing duty final determinations. The United States complied with the DSB recommendations and rulings concerning those determinations in August 2012, including by applying the approach articulated by the Appellate Body for determining whether an entity is a public body.[49] Each of the

[49] *See Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China*, 77 Fed. Reg. 52,683 (Aug. 30, 2012).

determinations challenged by China here was made prior to the August 2012 implementation in *US – Anti-Dumping and Countervailing Duties (China)*.

28. In relation to China's "as such" claim, at paragraph 14 of its oral statement, the United States indicates that the Kitchen Shelving discussion is merely a discussion of "past practice" and is not a measure. In several of its FTAs, the United States has accepted a definition of "measure" that includes "practice". However, in the context of this dispute, the United States is not accepting such a definition of measure. Is there any difference between the meaning of a "measure" in FTAs and in WTO dispute settlement?

60. The United States would first recall that, under the customary rules of interpretation reflected in Article 31(2)(c) of the Vienna Convention, only rules of international law that are applicable *between the parties* to a treaty may be taken into account in the interpretation of that treaty. The definition of "measure" contained in the U.S. free trade agreements, which are bilateral or regional instruments between the United States and other nations, and to which not all WTO Members are party, are not relevant for the purposes of interpreting the text of the DSU.

61. However, regardless of China's parsing of the *Kitchen Shelving* discussion as articulating or establishing a "practice" or "policy," it is the terms and context of the *Kitchen Shelving* memorandum that should be analyzed. When using the term "past practice" as it was used in reference to the *Kitchen Shelving* discussion, "practice" is used in the sense of "[t]he action of doing something; performance, operation; method of action or working."[50] It is describing the past application of other regulations and statutes, rather than creating policy or actions in and of itself, thus it has no "independent operational existence."[51] In other words, the discussion is descriptive, not prescriptive.

62. This is in contrast to the term used in the FTAs, when the term practice is being used in the sense of something more formal and discreet: "an established method of legal procedure."[52] This would be when a country is engaging in a practice that is tantamount to a binding rule or legal process. There the practice has independent operational existence, since it is not in reference to other measures, but becomes the course of action of that government.

29. From the perspective of USDOC, is there any difference between a "practice" and a "policy"? Who adopts the policies applied by USDOC? How would such a policy be adopted? Is there a process for modifying or abandoning such policies?

63. In the context of U.S. countervailing duty law, Commerce uses the term "practice" to refer collectively to its past determinations. "Practice" has neither a functional life of its own nor operates independently of any other instruments, because the term only refers to individual applications of the U.S. statute and regulations. It does not bind Commerce to any future action. As explained in the U.S. first written submission, Commerce can act contrary to a "practice" at

[50] The New Shorter Oxford English Dictionary at 2317 (1993) (USA-88).
[51] *US – Export Restraints*, para. 8.126.
[52] The New Shorter Oxford English Dictionary at 2317 (1993) (USA-88).

any time, provided that the approach is permissible under the statute and that Commerce provides a reason for the change.[53]

64. An announced "policy" is a non-binding expression of Commerce's general understanding of an issue not explicitly addressed by the statute or regulations. Commerce may depart from a policy, or change a policy, in any particular case, so long as it explains its reasons for doing so. A "policy" announcement simply provides the public with guidance as to how Commerce may interpret and apply the statute and regulations in individual cases.

65. The *Kitchen Shelving* discussion is an explanation of Commerce's past practice, which can be changed, adapted, modified, or abandoned at any time. Commerce identified a "longstanding practice" that is "reflected in numerous determinations."[54] Commerce clarified its policy on public bodies, recognizing that it will consider "all relevant information."[55] The memo is intended to explain Commerce's actions, not to create binding rules.

5. BENEFIT & OUT-OF–COUNTRY BENCHMARK: ARTICLE 1.1(B) OF THE SCM AGREEMENT

a. Question to both parties

30. Do the parties consider that Article 15.b of China's Protocol of Accession's is relevant for examining China's claim regarding the benefit analysis of USDOC?

66. As provided in the Protocol of Accession, the "Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."[56]

67. Paragraph 15(b) of China's Protocol of Accession states:

> In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply*; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks.* In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China. (emphasis added)

68. Paragraph 15(b) of the Protocol of Accession reflects that, in addition to agreeing to be bound by the text of the SCM Agreement, China also agreed to additional provisions concerning

[53] *See* U.S. First Written Submission, para. 133.
[54] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China at 43 (July 20, 2009) ("*Kitchen Shelving* IDM") (CHI-38).
[55] *Kitchen Shelving* IDM p. 43 (CHI-38).
[56] China's Protocol of Accession, para. 1.2.

the use of out-of-country benchmarks in countervailing duty investigations. Paragraph 15(b) addresses a specific concern that certain Members had regarding their ability to find reliable benchmarks within China. These Members explained in paragraph 150 of the Working Party Report that out-of-country benchmarks are particularly important in the case of China because "China was continuing the process of transition towards a full market economy" and thus, "special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations." Therefore, paragraph 15(b) was included in the Accession Protocol because the "special difficulties" associated with the transitional nature of China's economy may justify the use of out-of-country benchmarks. Paragraph 15(b) of China's Protocol of Accession is relevant to a benefit analysis in China in that it demonstrates that Members were concerned enough with the possibility that "prevailing terms and conditions in China may not always be . . . appropriate benchmarks" that the possibility of using some other benchmark was included in China's Protocol of Accession.

69. It is worth noting that elements of the Working Party Report are also helpful to an examination of China's claims concerning Commerce's benefit analyses in this dispute. Specifically, paragraph 44 of the Working Party Report reflects some Members' concern about the government of China influencing decisions and activities relating to sales and purchases by state-owned enterprises. Paragraph 44 states, "[i]n light of the role that state-owned and state-invested enterprises played in China's economy, some members of the Working Party expressed concerns about the continuing governmental influence and guidance of the decisions and activities of such enterprises relating to the purchase and sale of goods and services." Thus, to the extent Commerce determined in a benefit analysis that a particular market was distorted based on the role of the government in that market as indicated, in whole or in part, by the state-owned-enterprise presence in that market, paragraph 44 of the Working Party report provides support for such analysis.

70. We would reiterate that in light of the fact that China has thus far failed to tie the facts in each of the challenged investigations to China's arguments and, thereby, failed to make its *prima facie* case, there is no basis to reach the merits of China's claims. Also, we would note that in terms of China's claims, China "*do[es] not* challenge the proposition that an investigating authority may reject in-country prices under Article 14(d) if it has demonstrated that the government's predominant role as a supplier in a market has distorted those prices."[57] Nor does China challenge "the standards under which government predominance in a market may justify a finding that private prices are distorted."[58]

71. Notwithstanding China's failure to make its *prima facie* case, to the extent Commerce may have relied on out-of-country benchmarks to determine the benefit conferred by certain goods provided for less than adequate remuneration, Commerce did not rely on paragraph 15(b) of China's Protocol of Accession as a justification for using out-of-country benchmarks. Instead, Commerce relied on Article 14(d) of the SCM Agreement and used out-of-country benchmarks in a manner consistent with the use of out-of-country benchmarks that the Appellate Body found not to be WTO-inconsistent in both *US-Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*. Nevertheless, notwithstanding that Commerce did not rely on

[57] China First Opening Statement, para. 36 (emphasis in original).
[58] China First Opening Statement, para. 36.

paragraph 15(b) of China's Protocol of Accession to the extent it determined to use an out-of-country benchmark in its benefit analysis, paragraph 15(b), as well as paragraph 44 of the Working Party Report, are useful in examining China's claims.

31. Is China's "benefit" claim dependent on the Panel's acceptance of China's interpretation of the term "public body"?

72. To begin, it should be noted that China has more than 14 separate "benefit" claims in 14 separate investigations. As China indicates in its first written submission, each investigation requires a case-by-case analysis.[59] China has failed to make a *prima facie* case for each of the claims in each of the *14* challenged investigations where China alleges that Commerce equated SOEs with the government. China still has failed to adequately support an argument that a reasonable and objective investigating authority could not reach the conclusion that in-country private prices were unreliable benchmarks.[60]

73. As China stated in its first written submission, "in the absence of USDOC's unlawful public body *determinations*, there would be no basis in any of the investigations at issue for the USDOC's conclusion that Chinese market prices for the relevant inputs were 'distorted'… ."[61] Furthermore, China argued that, "[t]he USDOC's equation of SOEs with the government was premised, in the investigations under challenge, on the USDOC's flawed determination that entities majority owned or controlled by the Government of China constitute public bodies. On the basis of this determination, the USDOC deemed the market share held by SOEs equivalent to the market share held by the government itself. . . . however, government ownership or control is insufficient evidence on which to base a finding that an SOE is a public body."[62] These arguments are predicated on the notion that the Panel must adopt China's interpretation of "public body". Furthermore, beyond accepting China's interpretation of public body, the Panel would need to find that China's interpretation of public body necessarily extends to Commerce's analysis of market distortion for purposes of analyzing benefit. Without both steps, China's arguments would fail on their own terms.

74. However, even if the Panel were to accept China's interpretation of the term public body, this would not mean that Commerce's use of out-of-country benchmarks in any of the challenged determinations is inconsistent with Articles 14(d) and 1.1(b) of the SCM Agreement. The Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* demonstrates as much, having rejected China's claim that Commerce's use of out-of-country benchmarks was WTO-inconsistent, notwithstanding its finding that Commerce's analysis that certain SOEs were public bodies was WTO inconsistent. As in *US – Anti-Dumping and Countervailing Duties (China) (AB)*, the interpretation of public bodies is not an "essential factual predicate"[63] for the USDOC's benchmark findings. The finding in that dispute concerning the interpretation of the term public body was expressly limited to Article 1.1(a)(1) of the SCM Agreement ("In completing the analysis, first we find that the USDOC acted inconsistently with Article 1.1(a)(1)

[59] *See* China First Written Submission, para. 65.
[60] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454.
[61] China First Written Submission, para. 60.
[62] China First Written Submission, para. 71.
[63] China First Written Submission, para. 59.

and with the obligations under Article 10 and 32.1)".[64] China has not as of yet demonstrated why this finding should be extended to include determinations made under Articles 1.1(b)[65] or 14(d).

75. Government ownership or control—in and of itself—is an appropriate test for determining whether SOE presence in a given market indicates government involvement in that market. Where the government maintains a controlling ownership interest in SOEs, the government, like any owner of a company, has the ability to influence that entity's prices. Therefore, to the extent SOEs in the relevant input market in China, which have shared ownership by the government of China, are producers in the relevant market, they are indicative of the government's ability to influence prices in that market. Additionally, the larger the SOE presence vis-à-vis private producer and import presence, the stronger the market power of the SOEs and, through the SOEs, the government and its ability to affect private prices in the relevant market. Beyond SOE presence, it is important to keep in mind that Commerce considers other forms of government involvement in the market as well in examining whether the relevant market in China is distorted. Accordingly, contrary to China's interpretation, an entity owned or controlled by the government need not "possess[], exercise[], or [be] vested with governmental authority" to be indicative of government involvement in the relevant market for a good for purposes of the benefit analysis under Articles 1.1(b) and 14(d) of the SCM Agreement.

6. SPECIFICITY OF THE ALLEGED INPUT SUBSIDIES: ARTICLE 2.1 OF THE SCM AGREEMENT

a. Questions to both parties

34. At footnote 117 of its first written submission, China gives some examples of the investigations in which USDOC identified input specific "programmes." Did USOC identify such "programmes" in all 14 of the investigations at issue under Article 2.1 of the SCM Agreement?

76. As an initial matter, the United States notes that this question is addressed to China as well. If it is China's position that the preliminary and final determinations at issue are inconsistent with an obligation under the SCM Agreement[66] because the United States has not identified the relevant program in each of those determinations, it is China's burden to discuss the specificity determinations in each of the determinations and explain how these determinations demonstrate that Commerce did not comply with this purported WTO obligation. China has not done so.

77. As the United States explained in its first written submission, in the determinations at issue in this dispute, Commerce relied on the use of a subsidy program by a limited number of

[64] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 359.
[65] Further, the United States would note that Article 1.1(b) is a definition. It does not contain any obligation on a Member. As a result, it is not accurate to refer to a Member "breaching" Article 1.1(b), and a measure cannot be found to be inconsistent with Article 1.1(b) alone. *See US – Zeroing (Japan) (AB)*, para. 140.
[66] As discussed above, Article 2.1 is a definition, and thus not accurate to refer to a Member "breaching" Article 2.1. *See US – Zeroing (Japan) (AB)*, para. 140.

certain enterprises, Commerce identified the "program" at issue.[67] For example, in one of the investigations discussed by China in its first written submission – *Aluminum Extrusions*[68] – Commerce considered the provision of primary aluminum to all potential users of the product, and not just the investigated users, to determine whether the program was specific, although the subsidy was not implemented by legislation or other formal government means.[69]

78. The fact that Commerce identified subsidy programs is also demonstrated by its discussions of those programs in the preliminary determinations and issues and decision memoranda. For example, in the *OCTG* investigation, Commerce discussed the provision of steel rounds for less than adequate remuneration in the preliminary determination under the heading "Analysis of Program,"[70] and in the issues and decision memorandum, included the provision of steel rounds for less than adequate remuneration in the discussion of "Programs Determined To Be Countervailable."[71]

35. At paragraph 55 of its third party written submission the European Union argues that "the Appellate Body has merely stated that an analysis under sub-paragraph (c) [of 2.1] normally follows one under sub-paragraphs (a) and (b). So the question for the Panel may be: in what circumstances is it permissible to resort directly to sub-paragraph (c), and could this include the situation in which it is evident that no* de jure *specificity is present?" Could the parties please comment.

79. The European Union's submission references the Appellate Body's statement in *US – Large Civil Aircraft (2nd Complaint)*, in which it observed that "the language of Article 2.1(c) . . . indicates that the application of this provision will *normally* follow the application of the two subparagraphs of Article 2.1."[72] This observation is consistent with the Appellate Body's explanation in *US – Anti-Dumping and Countervailing Duties (China)*, "that the use of the term 'principles'—instead of, for instance, 'rules'—suggests that subparagraphs (a) through (c) are to be considered in an analytical framework that recognizes and accords appropriate weight to each principle."[73] For the reasons set out in the U.S. first written submission at paragraphs 185-191 and *infra* in response to question 43, these statements of the Appellate Body describing the specificity analysis comport with the ordinary meaning of Article 2.1.

80. The European Union's submission raises an important point relevant to the instant dispute. Where there is no allegation that the granting authority, or the legislation pursuant to which it operates, "explicitly limits" access to the subsidy, there is no need to analyze it under

[67] U.S. First Written Submission, para. 177.
[68] China First Written Submission, para. 91.
[69] U.S. First Written Submission, para. 179.
[70] *Certain Oil Country Tubular Goods From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Negative Critical Circumstances Determination*, 74 Fed. Reg. 47210, 47217, 47219 (Dep't of Commerce Sept. 15, 2009) (CHI-44).
[71] *OCTG* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation at 12, 13 (Nov. 23, 2009) (CHI-45).
[72] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 796 (emphasis added). *See also id*., para. 873 ("We have also noted that the structure of Article 2.1 suggests that the specificity analysis will *ordinarily* proceed in a sequential order by which subparagraph (c) is examined following an assessment under subparagraphs (a) and (b)".).
[73] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366. *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 942.

subparagraphs (a) or (b). In most cases, there will be legislation, regulations, guidance, or other sources indicating whether there is an explicit limitation on access to a subsidy. As a result, an investigating authority would "normally" examine those sources to evaluate whether such an explicit limitation exists. Where no such sources exist, it is not possible to evaluate them. An explicit limitation cannot be discerned from observing the activities of a granting authority, which is the information that was available to Commerce. The panel in *EC and certain member States – Large Civil Aircraft* considered what qualified as an explicit limitation:

> It follows from the ordinary meaning of the word 'explicit' that it is not any limitation on access to a subsidy to certain enterprises that will make it specific within the meaning of Article 2.1(a), but only a limitation that '{d}istinctly express{es} all that is meant; leaving nothing merely implied or suggested'; a limitation that is 'unambiguous' and 'clear'.[74]

Because no party alleged or presented a possible source "distinctly expressing" the limitation on access to the subsidy in the investigations at issue, there was no utility to undertaking an examination under subparagraphs (a) or (b). In such circumstances, an investigating authority may proceed directly to Article 2.1(c) to determine whether the subsidy is *de facto* specific.

81. The United States notes that, although the European Union's question raises an important issue, it appears to assume that an investigating authority must conduct its analysis adhering to the order of analysis proceeding from subparagraph (a) through (c) unless it is otherwise "permissible" to take another approach. The implication is that there is an order of analysis "rule" that is subject to exceptions. However, there is nothing in the text of Article 2.1 that would support this interpretation. Rather, the Appellate Body has stated that "subparagraphs (a) through (c) of Article 2.1 are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle, and which allows for their ***concurrent*** application."[75] Depending on the facts of an investigation, it may be appropriate for an investigating authority to analyze subparagraphs (a) through (c) in order, or it may be appropriate, as in the investigations at issue, to consider only subparagraph (c).

82. In this regard, the United States notes that Article 2.1, in stating principles that apply for purposes of determining specificity, would also govern the analysis by a panel or the Appellate Body in a dispute in which it is alleged that there is a subsidy that is specific. China's approach therefore would also apply to panels and the Appellate Body. However, the United States sees no basis in Article 2.1 for interpreting it to mean that a panel must first make findings under Article 2.1(a) and (b) before proceeding to an analysis under Article 2.1(c), particularly if neither party alleges that there is a possible source of an explicit limitation such that the subsidy is *de jure* specific.

36. We refer to China's argument that USDOC acted inconsistently with Article 2.1(c) because USDOC did not take into account the two mandatory factors listed in the final sentence of the sub-paragraph. We note that in* EC - Countervailing Measures on DRAM Chips*, the panel stated that as no interested party had raised the relevance of

[74] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.919.
[75] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 873 (emphasis added).

> ***the two factors in relation to the de facto specificity analysis, then it was not unreasonable that the final determination did not explicitly address the two factors. Could the parties please comment. How does the position of the panel in* EC - Countervailing Measures on DRAM Chips *fit with the mandatory language found in the final sentence of Article 2.1(c)?***

83. Where no party has raised the relevance of the two factors in the last sentence of subparagraph (c), and where there are no facts before an investigating authority that would indicate either factor may be relevant, it is not necessary for an investigating authority to explicitly address those factors in its final determination.

84. The requirement that "account shall be taken" of the economic diversification of the relevant jurisdiction and the length of time of the subsidy's operation does not mean that an investigating authority must explicitly address the two factors in each and every proceeding, nor accord those factors any particular weight. As the panel in *EC and certain member States – Large Civil Aircraft* observed:

> To take something into account means to take something into reckoning or consideration; to take something on notice. Therefore, in the context of the third specificity factor, the last sentence of Article 2.1(c) requires that the length of time during which the relevant subsidy programme has been in operation must form part of the *consideration or reckoning*.[76]

In other words, a paragraph (c) analysis is "informed" by these considerations.[77] Whether an investigating authority is actually required to explicitly address the factors depends on the facts and circumstances relevant to the investigation.[78] It is not the case that Article 2.1(c) requires an investigating authority to "mechanically address this issue in its written determination."[79]

c. Questions to the United States

43. How does the United States respond to paragraph 52 of China's oral statement, in which China argues that the consideration of "other factors" under Article 2.1(c) of the SCM Agreement is conditional upon the application of the principles in subparagraphs (a) and (b)?

85. In its opening statement, China argues for an interpretation of Article 2.1(c) that is inconsistent with the ordinary meaning of the provision and ignores the structure of the first sentence of that subparagraph: "If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered."

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[76] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.969 (citing The New Shorter Oxford Dictionary, Fourth Edition, p. 15).
[77] *US – Large Civil Aircraft (2nd Complaint) (Panel)*, para. 7.747.
[78] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 9.975.
[79] Canada Third Party Oral Statement, para 10.

86. China rearranges the sentence and ignores the fact that the operative condition for application of paragraph 2.1(c) is "[i]f . . . there are reasons to believe that the subsidy may in fact be specific." The question for the Panel is whether the clause — "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" — which is dependent to the operative condition, mandates that an investigating authority first examine those subparagraphs, even where, as in the investigations at issue, there is no possible source of an explicit limitation. It does not.

87. "Notwithstanding" is defined as "in spite of, without regard to or prevention by".[80] Thus, the clause at issue means that if there are reasons to believe that the subsidy is specific, the investigating authority may consider other factors, in spite of, without regard to or prevention by any findings made under subparagraphs (a) or (b). The purpose of the clause is to convey that a finding of non-specificity under (a) or (b) therefore does not *prevent* consideration of additional factors, not to require such an analysis. China's argument is incorrectly premised upon the idea that this language restricts the circumstances in which an investigating authority can determine that a subsidy is, in fact, specific. Rather, this dependent clause makes clear that an investigating authority *may analyze* a subsidy to determine whether it is *de facto* specific, including, but not limited to, those subsidies which may have been determined initially not to be *de jure* specific.

88. China's approach has a certain irony. China is certainly not arguing that there is evidence of specificity resulting from the application of Article 2.1(a) or (b). Accordingly, China is seeking a hollow, formalistic exercise that would serve no purpose.

89. Further, in this instance there was an "appearance of non-specificity" in the investigations at issue since there is no legislation or other source identified by the parties, or notified by China to the WTO containing an alleged "explicit" limitation.[81] Consistent with the Appellate Body's statement in *US – Anti-Dumping and Countervailing Duties (China)*, "there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary."[82] Because the subsidies in the challenged investigations were not implemented pursuant to known relevant instruments (such as legislation, regulations, or other government decrees), the evidence before Commerce "unequivocally" indicated that the subsidies were not *de jure* specific under subparagraph (a), thus any consideration was "unnecessary."

44. On what basis did USDOC determine that the provision of each input for less than adequate remuneration constituted an individual programme, rather than there being a single overarching programme? Where in the determinations can this reasoning be found?

[80] *See EC – Tariff Preferences (AB)*, para. 90.

[81] The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* stated that "a subsidy is specific under Article 2.1(a) if the limitation on access to the subsidy to certain enterprises is express, unambiguous, or clear *from the content of the relevant instruments*, and not merely 'implied' or 'suggested'." *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 372 (emphasis added).

[82] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371.

90. Commerce made its specificity determinations based on the information and arguments on the record of each investigation. Article 12.2 of the SCM Agreement states that "[a]ny decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation." In accordance with Article 12.2, Commerce determined in the challenged investigations that the provisions of the identified inputs by certain public bodies for less than adequate remuneration were specific subsidy programs because that analysis and determination was supported by the facts and arguments on the written record.

91. The written record of the challenged investigations included the submissions of the interested parties, including China. Throughout the conduct of the investigations, interested parties, including China, had the opportunity to place information and arguments on the record regarding the scope of the subsidies being investigated. Had China believed a single "subsidy program" existed in the challenged investigations, China could and should have submitted facts to support such a claim on the written record.

92. For example, as explained the U.S. first written submission, in both *Aluminum Extrusions* and *Coated Paper*, evidence on the written record indicated that the inputs in question, primary aluminum and caustic soda, respectively, were provided to a limited number of users.[83] In neither case did China, or any party, place information on the record which indicated that these diverse inputs were provided by different public bodies to different industries pursuant to a single subsidy program.[84] China now argues that Commerce should have examined factual issues and claims not raised during the investigation and not supported by record evidence with respect to an "overarching program," which China itself paradoxically states does not exist.[85]

93. Furthermore, China has pointed to no evidence on the records of the challenged investigations indicating that any identified public body was supplying certain inputs for less than adequate remuneration as part of an "overarching" formally-implemented program, and instead merely makes an unsupported claim that Commerce has an "evident belief that the provision of inputs for LTAR is a widespread practice."[86]

94. For these reasons, there is no merit to China's argument that Commerce was required to look for the existence of a "single overarching programme" absent any evidence or arguments in support of such a claim.

45. In its first written submission, the United States does not deny that USDOC did not expressly address the two factors in the final sentence of Article 2.1(c). Is the United States' position that USDOC did not consider the factors at all, or that it considered them, but not expressly? If the latter, is there anything on the record to indicate that it implicitly considered them?

95. As an initial matter, China has not raised substantive reasons that the two factors were relevant to the investigations at issue, nor has it explained why Article 2.1(c) requires an

[83] *See* U.S. First Written Submission, para. 183.
[84] U.S. First Written Submission, para. 183.
[85] *See* China First Opening Statement, para. 62.
[86] China First Written Submission, para. 110.

investigating authority to mechanically reference the two factors even when they are not relevant. For these reasons, China has failed to make a *prima facie* case with respect to the two factors.

96. Further, as noted *supra* in response to question 36, the requirement that "account shall be taken" of economic diversification and the length of time of the subsidy's operation means that the investigating authority should take the factors "into reckoning or consideration; to take something on notice."[87] Where no party has raised the relevance of the factors, and the written record does not indicate that the factors are relevant, it is not necessary for the authority to analyze further the factors. "Account" may be taken of a factor without according it any particular weight. In *EC – DRAMS (Korea)*, Korea argued that the EC failed to take into account the two factors, but the panel concluded that, where interested parties have not raised the relevance of the two factors, "[w]e do not find it unreasonable that the EC did not include in the Final Determination any explicit statement regarding these matters."[88] Further, to the extent that Commerce did not explicitly address the factors in some of its written determinations, the lack of discussion demonstrates its consideration that the factors did not contribute meaningfully to its analysis in the subject investigations.[89]

97. Notably, not even China itself in this dispute has made a claim that "a length of time" analysis was relevant to Commerce's specificity determinations or that China's economy is not diverse. It is evident that China has not made such an allegation because there is no factual basis to support such arguments. Accordingly, China is again seeking an empty exercise in which an investigating authority would be required to address factors that China itself has advanced no reason to believe are relevant.

7. REGIONAL SPECIFICITY: ARTICLE 2.2 OF THE SCM AGREEMENT

a. Questions to both parties

46. Are there any relevant differences between the facts of the Laminated Woven Sacks investigation, considered by the panel in US - Anti-Dumping and Countervailing Duties (China), and the seven investigations challenged by China under Article 2.2 of the SCM Agreement in this dispute?

98. China claims that in "each investigation" Commerce's determination of specificity with respect to land-use rights is inconsistent with Article 2.2 of the SCM Agreement. As we explained in our first written submission, China has failed to make a *prima facie* case of any of these alleged breaches. Instead, China focuses on the facts in *Laminated Woven Sacks*, the investigation at issue in *US – Anti-Dumping and Countervailing Duties (China)*, and simply

[87] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.969 (citing The New Shorter Oxford Dictionary, Fourth Edition, p. 15).
[88] *EC – Countervailing Measures on DRAM Chips*, para 7.229.
[89] Similarly, in *US – Softwood Lumber IV*, the panel found that Commerce had "taken account of diversification of economic activities" even though it "did not explicitly and as such address the extent of economic diversification in its Final Determination." *US – Softwood Lumber IV (Panel)*, para. 7.124 (emphasis omitted). The panel referenced the "publicly known fact that the Canadian economy and the Canadian provincial economies in particular are diversified economies." *Id.*

asserts that Commerce relied on the same analysis used there to determine whether the provision of land-use rights was regionally specific in the challenged investigations. It is incumbent on China to demonstrate what was the analysis of regional specificity used in each of the challenged investigations and that each such analysis is inconsistent with the SCM Agreement. The United States notes that this question has also been posed to China. Since the burden is on China to explain what are the facts at issue and whether there are or are not relevant differences in the facts at issue, the United States will respond to the case presented by China.[90]

99. It is also helpful to recall that the panel's conclusion in *US – Anti-Dumping and Countervailing Duties (China)* was made on an "as applied" basis and was "driven by the facts that were on the record of that investigation."[91] Therefore, the Panel's conclusion cannot in any event be applied to the regional specificity determinations in the challenged investigations. China has failed to address the facts of the seven investigations at issue *in this dispute* or to apply the provisions of Article 2 to those facts and thus has failed to make a *prima facie* case of any of these alleged breaches.

47. Do USDOC's determinations under Article 2.2 of the SCM Agreement amount to a finding that because land constitutes a "geographical region", then for this reason alone the provision of land-use rights is regionally specific?

100. The United States notes that a finding in an investigation that the land at issue constitutes a "geographical region" does not mean that Commerce's regional specificity determinations are made on the basis of this reason alone. Commerce makes its regional specificity determinations on a case-by-case basis and considers the entirety of the information available on the record of the proceeding.

48. What is the relevance of USDOC's statements that regional specificity exists because the land is located within industrial parks or economic development zones? Under USDOC's reasoning, would regional specificity exist if land-use rights were granted outside such a park or zone?

101. It is unclear to which statements in which investigations the Panel is referring. However, the United States notes that Article 2.2 of the SCM Agreement provides that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific." As the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, industrial parks and economic development zones are designated geographical regions within the meaning of Article 2.2.[92] (However, a "geographic region" is not necessarily limited to such a park or zone.) Thus, record evidence pertaining to whether an industrial park or economic development zone exists is relevant to a regional specificity analysis under Article 2.2 of the SCM Agreement. Thus, to find that lands located within industrial parks or economic development zones are regionally specific would accord with

[90] U.S. First Written Submission, paras. 203-08.
[91] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.162.
[92] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.156.

the definition in Article 2.2. China must present the facts of each determination and legal arguments to the Panel.[93]

c. Question to the United States

52. Is the United States' response to China's claim under Article 2.2 of the SCM Agreement confined to the argument that China has not made a prima facie case? Does the United States have any submissions relating to the substance of the claim? If so, what is the United States' view of the panel's reasoning under Article 2.2 of the SCM Agreement in US - Anti-Dumping and Countervailing Duties (China)?

102. Before the United States can respond to the substance of China's claim, China needs to present that substance. However, to date China has not done so. China has failed to explain the facts at issue in each investigation as well as what Commerce ultimately determined, and then explain how those facts are relevant to each of its "as applied" claims under Article 2.2.[94]

103. China has failed to carry its burden as complaining party. As a result, the United States cannot at this time respond substantively to China's claims under Article 2.2 as China has not set out evidence and arguments relating to the regional specificity determinations in any of the seven challenged investigations.

8. INITIATION OF INVESTIGATIONS – SUFFICIENT EVIDENCE OF THE EXISTENCE OF A PUBLIC BODY

b. Questions to the United States

54. With reference to paragraph 32 of China's oral statement, does the United States agree that when an investigating authority initiates a subsidy investigation on the basis of an incorrect legal standard, it necessarily acts inconsistently with Article 11.3 of the SCM Agreement?

104. No, the United States does not agree. China's argument in paragraph 32 is incorrect in at least two ways. First, China reads into Article 11.3 words that are not there – China reads into Article 11.3 a requirement that the investigating authorities, in conducting the review called for under Article 11.3, articulate and be bound by some "legal standard." Second, China ignores the difference between what may be sufficient to initiate an investigation and what is sufficient to make a final determination.

105. Article 11.3 of the SCM Agreement speaks to the accuracy and adequacy of the evidence provided to justify the *initiation of the investigation*. It requires investigating authorities to review the accuracy and adequacy of the evidence to determine whether it is "sufficient" to justify initiation. Nowhere does Article 11.3 require investigating authorities to articulate, and

[93] *Japan – Agricultural Products II (AB*), para. 129 ("[W]hen a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU.").

[94] China would not be able to establish a breach of this provision alone since Article 2 does not itself contain an obligation – it is part of a definition of a term defined for purposes of that term's use in the SCM Agreement. See *US – FSC (Article 21.5 - EC) (AB)*, para. 85; *see also US – Zeroing (Japan) (AB)*, para. 140.

subsequently be bound by, a certain legal standard, such as the standard for determining what a public body is, at the initiation stage. In other words, the inquiry under Article 11.3 is whether the evidence was sufficient to justify the initiation of an investigation and not whether the investigating authorities articulated any particular legal standard.

106. Furthermore, what is sufficient to justify initiating an investigation is different from what is sufficient to make a final determination. As the panel in *US – Softwood Lumber V* correctly states, "the quantity and quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination."[95] As explained in the U.S. first written submission, no matter the legal standard for determining whether an entity is a "public body," evidence of government ownership or control is relevant to that standard, and may be the only "reasonably available" evidence at the time of the petition and initiation.[96] Evidence of government ownership or control can tend to prove or can indicate that an entity is controlled by the government such that the government can use the entity's resources as its own. It can also tend to prove or can indicate that the entity possesses, exercises, or is vested with governmental authority. In the context of a final determination, the Appellate Body has clearly stated that "[s]tate ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority."[97] If this evidence is relevant for a final determination, then it follows that evidence of state ownership is sufficient to justify initiating an investigation so that an investigating authority could further investigate whether those "other elements" are present such that it could make the entity in question a "public body."

9. INITIATION OF INVESTIGATIONS – SUFFICIENT EVIDENCE OF SPECIFICITY: ARTICLE 11 OF THE SCM AGREEMENT

a. Questions to both parties

55. Do the parties agree that Article 11 of the SCM Agreement requires evidence of specificity to be included in an application?

107. The United States agrees that Article 11 of the SCM Agreement requires evidence of specificity to be included in the application. Under Article 11, such evidence only needs to be "sufficient," in light of the information reasonably available to the applicant, to justify the initiation of the investigation.[98]

108. Article 11.2 of the SCM Agreement provides that an application "shall include sufficient evidence of the existence of a subsidy and, if possible, its amount," and states that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." However, the quantum of evidence required in an application is

[95] *US – Softwood Lumber V (Panel)*, para. 7.84.
[96] *See* U.S. First Written Submission, paras. 235-254.
[97] *US – Antidumping and Countervailing Duties (China) (AB)*, para. 310.
[98] Another panel recently addressed this issue found that there is no difference in the standard set out under Article 11.2 and 11.3 with respect to specificity, benefit and financial contribution. *China – GOES* (Panel), para. 7.62.

limited in Article 11.2 by the requirement that the application "shall" only "contain such information as is reasonably available to the applicant."

109. The "reasonably available" requirement of Article 11.2 is of significant importance, because for certain aspects of a subsidy the information reasonably available to the applicant may be very limited, yet in such cases that limited evidence may nonetheless be sufficient to justify the initiation of the investigation. For these reasons, although the United States agrees that Article 11 of the SCM Agreement requires the application to contain evidence of specificity, whether or not that evidence is "sufficient to justify the initiation of an investigation," in accordance with Article 11.3, is a factual determination, largely dependent on the information reasonably available to the applicant.

56. At paragraphs 224 and 226 of its first written submission, the United States lists information found in two applications that it contends provides evidence of specificity sufficient to justify initiation. Was similar information provided in the other 12 applications at issue?

110. The information in paragraphs 224 and 226 is provided as examples. In this proceeding, China has made sweeping and inaccurate allegations with respect to the facts, declining to discuss the circumstances of each investigation. China's discussion of the initiation determinations comprises barely more than a page of its first written submission, even though there are twenty individual initiation determinations[99] with respect to specificity across fourteen separate investigations at issue.[100] It is incumbent on China, as the Member alleging that the quantum of evidence in each application pertaining to specificity was insufficient in each of the challenged investigations, to discuss the applications in each investigation and the evidence they contained and explain how, in China's view, each initiation determination is inconsistent with the obligations set out in Article 11. China has not done so. The United States is not in a position to respond to China's allegations until China completes this task.

111. The United States also recalls that the panel in *US – Softwood Lumber IV* considered the provision of goods for less than adequate remuneration as a subsidy and observed:

> In the case of a *good* that is provided by the government – and not just money which is fungible – and that has utility only for certain enterprises (because of its inherent characteristics), it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only.[101]

[99] *See* CHI-122.

[100] China First Written Submission, paras. 123-127. At the first meeting of the Panel, China supplied exhibit CHI-122, which merely provides cut and pasted text from the petitions and initiation checklists. Although this document supplies for the first time the actual list of initiations which China plans to challenge (available nowhere in its first written submission), it does not explain whether any of the exhibits and other information submitted with the petition relate to the question of specificity. For that reason, this exhibit does little beyond merely identifying the determinations at issue.

[101] *US – Softwood Lumber IV (Panel)*, para. 7.116.

In other words, even before analyzing the specificity of a subsidy in the form of the provision of a good for less than adequate remuneration, the characteristics of the good may suggest that the users of the subsidy are limited.[102]

112. As the Panel indicates in its question, some applications, such as those described in the U.S. first written submission, contained evidence such as research reports, financial statements of Chinese companies and the findings by foreign governments that China had provided those inputs for less than adequate remuneration to a limited number of users.[103] Other applications cited evidence, such as Commerce's previous determinations with respect to the provision of the same or similar inputs, which also indicates that the provision of the inputs for less than adequate remuneration was specific.[104] China has failed to provide any explanation of why this information fails to meet the standard set out in Article 11 to the SCM Agreement.

10. MAGNESIUM BRICKS AND SEAMLESS PIPES: ARTICLES 11 AND 1 OF THE SCM AGREEMENT

a. Questions to both parties

62. Is there an accepted definition of "export restraints" in the WTO? If so, please provide specific references.

113. The specific term "export restraints" does not have an accepted definition within the WTO. Article XI:1 limits the type and form of "prohibitions or restrictions" that a Member can place on its imports or exports. However, China's policies of placing export quotas, export duties, and licensing requirements have been considered within the context of the GATT 1994 Article XI:1. For example, in the *China-Various Restrictions on Raw Materials* dispute, there were four types of measures that related to the exportation of certain raw materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. As a general matter, the Appellate Body found that all four types of measures constituted "export restraints."[105]

114. Furthermore, in the *China – Various Restrictions on Raw Materials* dispute, the Panel noted that the term "restrictions" had not been considered by the Appellate Body.[106] In the Panel's discussion, it noted that the panel in *India – Quantitative Restrictions* "concluded that the scope of the term 'restriction' is 'broad' and, in terms of its ordinary meaning, is 'a limitation on

[102] *See* U.S. First Written Submission, para. 220.
[103] U.S. First Written Submission, paras. 223-228 (referencing and describing as examples the information in the *Aluminum Extrusions* and *Coated Paper* applications).
[104] *See* U.S. First Written Submission, paras. 229-30 and accompanying footnotes.
[105] By way of background, we note that secondary literature, such as various documents issued by the WTO Secretariat, has used the term export restriction (which Commerce uses interchangeably with the term export restraint) as a general concept covering restraints such as export taxes and bans on exports. Specifically, in discussing "[e]xport restrictions to promote domestic processing and environmental conservation" the Secretariat has noted that "[r]estricting exports of the primary resource encourages downstream processing *by providing, in effect, an input subsidy* to processors." Therefore, this literature reflects the notion that an export restriction, or export restraint, can be, in economic terms, a subsidy. *See* USA-60.
[106] *China – Various Restrictions on Raw Materials*, para. 7.206.

action, a limiting condition or regulation'."[107] The panel in *China – Various Restrictions on Raw Materials* went on to say that it "thus understands the obligation imposed in Article XI:1 is to explicitly forbid Members from maintaining a restriction made effective through a prohibition or quota on the exportation of any product. Export quotas are inconsistent with Members' obligations by virtue of Article XI:1 because they have a restrictive or limiting effect on exportation."[108]

63. Where has USDOC explained in its determinations the justification for initiating the investigations into the export restraints?

115. We reiterate that China has failed to make a *prima facie* case for this claim. Rather than adducing sufficient evidence and making legal arguments unique to the facts in these investigations, China merely argues that the findings of a prior WTO dispute should be applied uniformly to the facts in these investigations.

116. Commerce explained the basis for initiating its investigations of export restraints on coke in *Seamless Pipe*, and on magnesia in *Magnesia Carbon Bricks* in its initiation checklist for each investigation, which can be found at USA-51 and USA-56, respectively. Commerce's initiations were based on allegations, and supported by information, contained in the *Seamless Pipe* and *Magnesia Carbon Bricks* applications and supplements thereto. The allegations can be found at USA-48 and USA-52, respectively. Further supporting information from the relevant applications can be found at USA-47, USA-49, USA-50, USA-53, USA-54, USA-55, USA-71, and USA-73. The United States also summarized the allegation and some supporting information at paragraphs 288 through 291 of the U.S. first written submission.

64. Is there any reference in China's Accession Protocol or Working Party Report to export restraints?

117. There are references to various forms of export restraints in China's Accession Protocol and Working Party Report. During China's accession to the WTO, there was no disagreement that China maintained various restraints on exportation.[109] During the negotiations, some Members "expressed particular concern about export restrictions on raw materials."[110] They stated that non-automatic export licensing and export restrictions "should only be applied, after the date of accession, on those cases where this was justified by GATT provisions."[111] In response, China committed that "it would abide by WTO rules in respect of non-automatic export licensing and export restrictions" and that, upon its accession to the WTO, "remaining non-automatic restrictions on exports . . . would be eliminated unless they could be justified."[112]

118. Some members of the Working Party also expressed concerns regarding taxes and charges that China applied exclusively to exports. China noted that while the majority of

[107] *China – Various Restrictions on Raw Materials*, para. 7.206, quoting *India – Quantitative Restrictions*, para. 5.128.
[108] *China – Various Restrictions on Raw Materials*, para. 7.206.
[109] Working Party Report, paras. 157-165.
[110] Working Party Report, para. 161.
[111] Working Party Report, para. 162.
[112] Working Party Report, paras. 157-165.

products were exported from China free of export duty, China subjected 84 items to export duties.[113] With respect to export duties, China committed in paragraph 11.3 of its Accession Protocol that it would "eliminate all taxes and charges applied to exports unless specifically provided for" in certain circumstances or "applied in conformity with" certain provisions.[114] However, China has not eliminated its use of all such export duties; as is evident from China's concessions that export taxes, and other export restraints, on coke and magnesia were in place during the periods covered by the *Seamless Pipe* and *Magnesia Carbon Bricks* investigations, as relevant.[115]

119. China's commitments under paragraphs 5.1 and 5.2 of Part I of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments) can also be considered to affect and restrict the use of export restraints. These trading rights commitments require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export most products. Furthermore, China explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining the right to export.

65. At paragraph 77 of its third party written submission, the European Union states that evidence of the existence of the government's intention to support the downstream industry, or the existence of other government measures, ensuring a particular result on the market (e.g., an export restraint together with a government measure preventing operators subject to those restraints from stocking their products) may be relevant to determining the existence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement. How do the parties respond to this submission?

120. The United States agrees with the European Union's contention. In considering whether the particular export restraint scheme at issue constitutes a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement through the provision of goods, consistent with Article 1.1(a)(1)(iii) of the SCM Agreement, various pieces of evidence may be relevant. Such evidence could include the existence of a government's intention to support the downstream industry or the existence of other government measures that are intended to create a particular result on the market. When considered in conjunction with the particular export restraint scheme, the totality of the evidence may clearly tend to prove or indicate the existence of a financial contribution. The United States discussed its analysis in this regard in paragraphs 319-320 of its first written submission.

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[113] Working Party Report, paras. 155-156.

[114] Accession Protocol, para. 11.3 (China's obligations under paragraph 11.3 of Part I of the Accession Protocol states: "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.").

[115] *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China*: Response of the Government of China to the Department of Commerce's Cross-Owned Affiliates Questionnaire (Jan. 26, 2010) (USA-45) ("The [government of China] has not imposed measures regarding the exportation of coke, *except an export quota and an export tax*."). *See also Certain Magnesia Carbon Bricks from the People's Republic of China*: Government of China's Second Supplemental Questionnaire Response (Mar. 15, 2010) (USA-46) ("As noted in its initial and supplemental questionnaire responses, the [government of China] acknowledges that it maintains a quota and related competitive bidding system for exports of magnesia, as well as an export tax of 10% for fused and dead-burned magnesia, and 5% for light-burned magnesia. The [government of China] has provided sufficient documentation establishing these facts . . . .").

121. The *US – Export Restraints* panel did not consider such additional contextual evidence when it examined whether the hypothetical export restraint in that case could constitute a financial contribution. Furthermore, the aforementioned contextual considerations are non-exhaustive; other evidence may also be relevant to determine whether a financial contribution exists within the meaning of Article 1 of the SCM Agreement.

122. It is important to note, however, that while government intent may be a *relevant* factor, and the provision of goods cannot be a "mere side effect"[116], a finding of intent is not *required* to determine that a particular measure constitutes a financial contribution under Article 1.1(a)(1)(iv).

123. Importantly, in determining the existence of a financial contribution under Article 1.1(a)(1)(iv), including when an investigating authority does consider a government's intention as relevant to that determination, the investigating authority may rely on circumstantial evidence, as compared with direct evidence, to support a finding of financial contribution.[117] In other words, there need not be a "smoking gun" reflecting a government's intent to find a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement. This logic is consistent with findings of the Appellate Body and prior panels. For example, the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* recognized that an analysis of entrustment or direction may be based on circumstantial evidence.[118] Also, the *Korea – Commercial Vessels* panel stated that, "[t]here is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence . . . ."[119] Similarly, the *EC – Countervailing Measures on DRAM Chips* panel expressed that, "[i]n the absence of a clear and explicit government order, the evidence to be relied on will inevitably be circumstantial."[120]

c. Questions to the United States

71. Can the United States respond to the last sentence of paragraph 84 of China's oral statement? Do you agree with the assertion in that sentence? If not, please explain your point(s) of difference.

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[116] *China – GOES (Panel)*, para. 7.91.

[117] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 150. The Appellate Body recognized that "in cases of entrustment or direction under Article 1.1(a)(1)(iv) . . .much of the evidence that is publicly-available, and therefore readily accessible to interested parties and the investigating authority, will likely be of a circumstantial nature." *US – Countervailing Duty Investigation on DRAMS (AB)*, note 277.

[118] *US – Countervailing Duty Investigation on DRAMS (AB)*, note 277. Furthermore, where various pieces of circumstantial evidence exist, the standard is not whether any individual piece of circumstantial evidence is probative taken on its own. Rather, the probative value of various pieces of circumstantial evidence may be considered together, in light of the totality of circumstances. "Individual pieces of circumstantial evidence are unlikely to establish entrustment or direction; the significance of individual pieces of evidence may become clear only when viewed together with other evidence." *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154. Also, "when an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation." *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 157.

[119] *Korea – Commercial Vessels*, para. 7.373.

[120] *EC – Countervailing Measures on DRAM Chips*, para. 7.105.

124. In the last sentence of paragraph 84 of its first opening statement, China states, "[i]n *Seamless Pipe* and *Magnesia Bricks*, it is undisputed that no measures other than the export restraints themselves were alleged to constitute a financial contribution."

125. China is reacting to the statement in paragraph 78 of the European Union's third party written submission:

> "Whether there was sufficient evidence in this case, as contained in the petitions or otherwise available to the United States, that the export restraints at issue were accompanied by other specific sets of measures aiming at increasing domestic supply of the products subject to export restraints, and whether the United States was legitimately entitled to rely on such evidence in view of China's lack of cooperation in the investigations, are factual matters on which the European Union does not take a position."[121]

126. The last sentence in paragraph 84 of China's First Opening Statement does not address precisely the point the European Union seemed to have been making in paragraphs 77 and 78 of its third party written submission. It would appear from those paragraphs that, following the Appellate Body's statement in *US – Countervailing Duty Investigation On DRAMS from Korea* that "there must be a demonstrable link between the government and the conduct of the private body,"[122] the European Union contends that "evidence of the government's intention to support the downstream industry, or the existence of other government measures ensuring a particular result on the market (*e.g.* an export restraint together with a government measure preventing operators subject to those restraints from stocking their products), may be relevant to determine the existence of a 'financial contribution' under Article 1.1(a)(1)(iv) of the SCM Agreement (in particular as an indirect manner for the government to provide goods, as provided for in sub-

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[121] China's conclusion in the last sentence of paragraph 84 of its first opening statement follows its argument that, "China's claims do not raise, and the Panel need not decide, the issue of whether export restraints 'accompanied by other specific sets of measures aiming at increasing domestic supply of the products subject to export restraints' might constitute a financial contribution" (quoting European Union Third Party Submission, para. 78).
The relevant text from the European Union's Third Party Written Submission states,

> 77. To which extent producers subject to export restraints have other options than selling domestically and reduce their prices has to be examined in the specific circumstances of each case. As the Appellate Body put it in *US – DRAMs*, "there must be a demonstrable link between the government and the conduct of the private body". In this respect, evidence of the government's intention to support the downstream industry, or the existence of other government measures ensuring a particular result on the market (e.g. an export restraint together with a government measure preventing operators subject to those restraints from stocking their products), may be relevant to determine the existence of a "financial contribution" under Article 1.1(a)(1)(iv) of the SCM Agreement (in particular as an indirect manner for the government to provide goods, as provided for in sub-paragraph (iii)).
> 78. Whether there was sufficient evidence in this case, as contained in the petitions or otherwise available to the United States, that the export restraints at issue were accompanied by other specific sets of measures aiming at increasing domestic supply of the products subject to export restraints, and whether the United States was legitimately entitled to rely on such evidence in view of China's lack of cooperation in the investigations, are factual matters on which the European Union does not take a position.

European Union Third Party Written Submission, paras. 77-78.

[122] European Union Third Party Written Submission, para. 77 (*quoting US – Countervailing Duty Investigation on DRAMS from Korea*, para. 112).

paragraph (iii)).”[123] In other words, the European Union appears to be stating that the link between the government and the conduct of the private body potentially could be demonstrated by “evidence of the government's intention to support the downstream industry or by the existence of some other government measure ensuring a particular result on the market.”

127. Therefore, the issue described in the European Union's third party written submission is not whether “measures other than the export restraints themselves *were alleged to constitute a financial contribution,*”[124] as China characterized it, but rather whether there is “evidence of the government's intention to support the downstream industry, or [that the] export restraints at issue were accompanied by other specific sets of measures *aiming at increasing domestic supply of the products subject to export restraints*”[125] which may be relevant to analysing whether China's export restraints constitute a financial contribution.

128. With this understanding, the United States does not agree with the assertion in the last sentence of paragraph 84 of China's First Opening Statement. Instead, the applications in *Seamless Pipe* and *Magnesia Carbon Bricks* contained contextual evidence relating to the particular export restraints at issue over and above the existence of the export restraints themselves. When the undisputed evidence of these export restraints are considered in conjunction with this contextual evidence, the totality of this evidence tends to prove or indicates the existence of a financial contribution such that Commerce's decisions to initiate an investigation into the particular export restraints in *Seamless Pipe* and *Magnesia Carbon Bricks* were fully consistent with the SCM Agreement.

11. USE OF FACTS AVAILABLE: ARTICLE 12.7 OF THE SCM AGREEMENT

b. Questions to the United States

75. We refer to footnote 407 of the United States' first written submission, in particular the final sentence, which states that “the United States continues to object to the overly broad scope of China's 'facts available' claim as set out in China's Panel Request”. We also refer to the United States' response to a Panel question during the hearing with the parties on 1 May, in which the United States indicated that it was requesting the Panel to reconsider its Preliminary Ruling. Can the United States please confirm that its response at the oral hearing represents its position?

129. As indicated in its oral response at the first meeting of the Panel on May 1, the United States maintains that China's panel request failed to meet the standard set out in Article 6.2 of the DSU with respect to its “facts available” claim. Recognizing that the Panel has made its preliminary finding relying in part on an assertion by China which turned out to be inaccurate, the United States considers that the Panel could choose to reconsider the conclusions made in its preliminary finding.

130. In its preliminary finding, the Panel observed:

[123] European Union Third Party Written Submission, para. 77.
[124] China First Opening Statement, para. 84 (emphasis added).
[125] European Union Third Party Written Submission, para. 78.

> The United States' complaint that China did not adequately identify the "instances" of the use of facts available at issue appears to be premised upon an assumption that China is not intending to challenge *every* application of facts available by USDOC. For example, the United States argues that China fails to indicate "which of the potentially hundreds of applications of facts available are of concern for purposes of the dispute". However, the panel request states that China will challenge "each" instance of the use of facts available ***and China insists that this should be read literally. In particular, China argues that it will challenge "each", in the sense of "every", use of facts available by USDOC. If the panel request were to state that China challenges "some" or "numerous" applications of facts available, we would consider the United States to have a valid argument. However, in our view, the panel request is clear that all "instances" of the use of facts available will be challenged, and China confirms this in its submissions to the panel.***[126]

131. Despite its representations to the Panel, China is not in fact challenging "each" instance of the use of facts available. Rather, China has clearly selected a subset of the instances and avoided revealing the scope and content of its claim until its first written submission. In fact, China's first written submission makes clear not only that it is not challenging "each" instance of the use of facts available but also that "it has decided to focus its legal challenge on the USDOC's unlawful use of 'adverse facts available'."[127] It was impossible for the Panel or the United States to discern what China's claim consisted of prior to that submission.

132. The United States raises this issue because the Panel's finding was, on its face, based on a certain factual premise – that China was challenging all uses of facts available. Given that this premise has been shown to be incorrect, the Panel could determine it would be appropriate to reconsider the finding based on the new, correct information demonstrating that China's case is actually far different from the one China alleged it had presented on the face of its panel request. For these reasons, and the reasons stated in the U.S. Preliminary Ruling Request and related submissions, China failed to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Therefore, China's facts available claims are not within the Panel's terms of reference and, accordingly, the Panel should make no findings with respect those claims.[128]

76. At paragraph 325 of its first written submission, the United States argues that USDOC's use of "'adverse'" inferences are based on facts…The 'adverse' element is introduced when [USDOC] decides which available facts are appropriate to use when a responding party has provided no verifiable, substantiated information relevant to the determination at hand". If the responding party has provided no relevant information, does USDOC really have a range of facts before it to choose between? Are the only facts available in this situation the facts provided in the application?

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[126] Preliminary Ruling, para. 4.5 (footnotes omitted, emphasis added).
[127] China First Written Submission, paras. 143-156.
[128] *See China – Various Restrictions on Raw Materials (AB)*, para. 235 (finding that the panel erred under Article 6.2 of the DSU in making findings regarding claims that failed to present the legal basis of the complaints with sufficient clarity to meet the standard set out in Article 6.2); *see also EC–Hormones (AB)*, para. 156 (noting that panels "are inhibited from addressing legal claims falling outside their terms of reference").

133. In the challenged determinations, Commerce sought information from China and Chinese exporters and producers to investigate the alleged subsidies. When a responding party failed to cooperate and did not provide the relevant information, the facts available to Commerce to reach the determination were limited and varied depending on the particular facts and circumstances of each investigation. In some cases, information provided in the application may have been the only facts available, and so the range of facts to choose from was limited to those provided in the application. In others, there may have been additional information on the record of the investigation. But ultimately, contrary to China's assertion, Commerce's facts available determinations were based on facts.

77. With reference to paragraph 70 of China's oral statement, what does it mean when USDOC "assumes" the relevant finding?

134. In its oral statement, China mischaracterizes a facts available determination in *Coated Paper* (referred to by China as *Print Graphics*) to support its generalizations by selectively taking three sentences out of context. China argues that Commerce's statement that "we are assuming adversely that the subsidies bestowed by the GOC through the provision of caustic soda are specific" demonstrates that the facts available determination is not based on any facts because "the 'facts' are conspicuously absent from its analysis."[129] China is wrong. The quote from Commerce's determination in *Coated Paper* at paragraph 70 of China's first opening statement must be understood in the context of the facts and circumstances of the determination.

135. As discussed in the U.S. first written submission at paragraphs 226 to 227, Commerce initiated an investigation with respect to an allegation in the application that calcium carbonate, kaolin clay, caustic soda and titanium dioxide were provided as a subsidy. Information in the application demonstrated, *inter alia*, that the main uses of caustic soda are for "pulp and paper, alumina, soap and detergents, petroleum products and chemical production."[130] As explained in the *Coated Paper* issues and decision memorandum, during the course of the investigation, Commerce requested information from China to determine whether the provision of caustic soda was specific to the papermaking chemical industry.[131] Specifically, Commerce requested that China identify the industries that use papermaking chemicals and the share of each papermaking chemical used by that industry.[132] China refused to provide the requested information despite having been given multiple opportunities to do so.[133] As a result, Commerce determined that China failed to cooperate to the best of its ability by refusing to provide the information necessary to analyze whether the alleged subsidy program was specific.

136. Because necessary information was not on the record, Commerce resorted to the facts available. In particular, Commerce explained that the information in the application demonstrated that caustic soda's "main uses are for pulp and paper, alumina, soap and

[129] China's First Opening Statement, para. 71.
[130] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China at 65 (Sept. 20, 2010) ("*Coated Paper* IDM") (CHI-73); *see also* Coated Paper Petition, Volume IV at 88 & Exhibit 114 (USA-09).
[131] *Coated Paper* IDM at 23 and 64 (CHI-73).
[132] *Coated Paper* IDM at 23 and 64 (CHI-73)
[133] *Coated Paper* IDM at 23 and 64 (CHI- 73).

detergents, petroleum products and chemical production" and that "one of the largest consumers of caustic soda is the pulp and paper industry where it is used in pulping and bleaching processes."[134] Commerce also explained that China "failed to provide adequate usage data to refute Petitioners' arguments that chemicals are specific to the papermaking industry in general."[135] On that basis, Commerce determined that the subsidies bestowed by China through the provision of caustic soda were specific.[136] Accordingly, Commerce's statement in *Coated Paper* — that it was "assuming" that the provision of caustic soda was specific — simply reflects that Commerce used as facts available the information in the application as the basis for its findings on specificity. Therefore, contrary to China's argument, this facts available determination was, indeed, based on facts.

137. Paragraph 70 of China's first opening statement is yet another example of how China continues to take shortcuts in discussing its claims by relying on sweeping factual generalizations and mischaracterizations of Commerce's determinations. China generalizes that Commerce follows a "consistent pattern" in its facts available determinations, and then goes on to discuss only two of the 48 instances of facts available determinations – a set insufficient to establish a "pattern," even if China's allegations with respect to those instances were true. Further, China has not challenged a measure of general applicability with respect to Commerce's facts available determinations. As a result, China's assertion that Commerce's facts available determinations somehow follow a "pattern" is neither supported by China's argumentation, nor pertinent to its claims. The facts and circumstances of each determination are unique because Commerce's facts available determinations are case-specific and rely on the totality of the evidence in front of Commerce in any given investigation.

78. With reference to paragraph 39 of the United States' oral statement, where in its determinations does USDOC describe the factual basis for its adverse facts available determinations?

138. As noted in the U.S. oral statement at paragraph 39, Commerce's facts available determinations are based on the factual information available on the record of each investigation, including information in the application and information obtained during the course of the investigation. Commerce describes the factual basis for its adverse facts available determinations in documents issued at various stages of its investigation, such as in the initiation checklist, published notices and other memoranda. In addition, Commerce discusses adverse facts available determinations made in a final determination in the *Federal Register* notice of the final determination and/or the issues and decision memorandum resulting from the final determination. These documents may in turn refer to a discussion in a preliminary determination or elsewhere.

79. If USDOC relies upon information in the applications as facts available, does this require "special circumspection" as provided for in Annex II(7) of the Anti-Dumping Agreement? Is there evidence on the record to suggest that USDOC used special circumspection?

[134] *Coated Paper* IDM at 65 (CHI-73).
[135] *Coated Paper* IDM at 65 (CHI-73).
[136] *Coated Paper* IDM at 23 (CHI-73).

139. As the United States explained in its first written submission, Annex II of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (AD Agreement) provides relevant context for interpreting Article 12.7 of the SCM Agreement.[137] However, whether the context provided by Annex II in construing the SCM Agreement means that specific AD Agreement provisions should be imported wholesale into the SCM Agreement is a proposition to be approached itself with circumspection. In any event, China has not argued that such an obligation exists under the SCM Agreement, nor has China established that Commerce somehow failed to comply with such a standard.

80. How does the United States respond to the European Union's third party submission at paragraph 61, in which the European Union states that in "drawing inferences, the authority is not permitted to identify two different equally possible inferences and then select the inference that is more adverse to the interests of a particular party, solely because it is more adverse"?

140. In paragraph 61 of its third party submission, the European Union makes the general statement that an investigating authority is not permitted to identify two different equally possible inferences and select the more adverse inference solely because it is more adverse. However, the European Union goes on to explain that *all facts* pertinent to the investigation may be considered for the purposes of Article 12.7 of the SCM Agreement, and the facts surrounding the non-cooperation of an interested party are pertinent to whether it is reasonable to draw an inference that, for example, the firm in question benefitted from the subsidy.[138]

141. An investigating authority may have different possible inferences to choose from, and one inference may be more reasonable or logical in light of the totality of the evidence before the investigating authority, including the facts surrounding an interested party's failure to cooperate. For example, in the hypothetical example where a granting authority provides an investigating authority fabricated information regarding the distribution of a subsidy, it may not be equally reasonable to draw the inference that the subsidy is specific as it is to draw an inference that the subsidy is not specific. The fact that, under this hypothetical, the granting authority fabricated false information makes an inference that the subsidy is specific a more reasonable, or logical, inference. In such situations, as the European Union notes, "the more uncooperative a party is in fact, the more attenuated and extensive the inferences that it may be reasonable to draw."[139]

Furthermore, the conclusions drawn by Commerce in the investigations at issue are based on facts available from the investigation, and China does not dispute that the interested parties failed to cooperate and has not argued that those facts support the drawing of other inferences. As the European Union points out, "[w]hether or not a particular inference is reasonable, taking into account all the circumstances, is something that can only be considered on a case-by-case basis."[140]

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[137] *See* U.S. First Written Submission, paras. 327-328.
[138] European Union Third Party Written Submission, para. 61.
[139] European Union Third Party Written Submission, para. 61.
[140] European Union Third Party Written Submission, para. 61.