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

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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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

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Exhibit No.	Description	Short Title
USA-137	*Countervailing Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China*: GOC Second Supplemental Questionnaire Response (Oct. 14, 2011)	

I. INTRODUCTION

1. As the United States noted in its closing statement at the first meeting with the Panel, this dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements and requires an objective assessment of the specific facts in the dispute. Yet, in China's first written submission and its responses to questions from the Panel, China has cut corners in its legal analysis, failed to analyze the specific facts of each investigation, and failed to make a *prima facie* case with respect to most of its claims. For example:

- With respect to the terms of reference, China asserts that it is not "expanding the scope" of the investigation, while it provides shifting analysis of why it has added both new measures and claims since the consultations request;

- With respect to "public body," China asks the Panel simply to apply the standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* without engaging in the kind of interpretative analysis required by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU");

- With respect to the use of out-of-country benchmarks, China only belatedly provided the Panel with information in an attempt to make its *prima facie* argument, but that information still does not adequately support its claims;

- With respect to specificity determinations for inputs provided for less than adequate remuneration, China asserts that Commerce "made up" the subsidy programs at issue, without discussing the information that was on the record in each investigation, and why that information was insufficient to support Commerce's determinations;

- With respect to specificity of land provided for less than adequate remuneration, China continues to rely on the legal reasoning and factual findings made by the panel in *US – Anti-Dumping and Countervailing Duties (China)* and has declined to provide any discussion of the facts at issue in the investigations that are the subject of this dispute, or the relevance of the provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") to those facts;

- With *respect* to China's initiation claims, China fails to address the evidence that was before Commerce when it decided to initiate, thus precluding the possibility of making a prima facie case as to whether that evidence was sufficient to justify initiation;

- With respect to export restraints, China asks this Panel simply to apply a single panel's reasoning without regard to Appellate Body findings since that panel report and the posture of the investigations at issue in this dispute; and

- With respect to Commerce's use of "facts available," China has merely provided excerpts of a portion of the discussions of "facts available" from Commerce's issues

and decision memoranda, and has failed to discuss the underlying facts at issue in the determinations.

The Panel should not accept China's invitations to take short cuts, and the Panel cannot make China's case for it. China's arguments simply do not provide a basis on which the Panel could sustain China's allegations that the United States has acted inconsistently with its WTO obligations.

2. During the first meeting with the Panel and in its responses to questions from the Panel, China has done little to remedy the deficiencies of its first written submission, instead insisting that it has done enough. Only when asked directly for specific arguments did China begin to produce particularized references to Commerce's determinations. This is the kind of information that would have been most useful for the Panel if it had been included in China's first written submission, providing the United States with a full opportunity to respond to it in the U.S. first written submission. Now, halfway through this panel proceeding, it appears that China intends to wait until the last possible moment before providing this panel the information it needs to properly deliberate on China's claims.

3. China's continued refusal to engage with the facts deprives the Panel of the argumentation necessary for the Panel to assess whether the challenged measures are inconsistent with the SCM Agreement. Moreover, the legal interpretations China advances — including its assertion that the Panel is bound simply to follow prior Appellate Body reports without undertaking its own interpretative analysis under the customary rules of interpretation — lack support in the SCM Agreement and the DSU.

4. The Panel should make its own interpretative analysis under the customary rules, and it must assess for itself whether China has presented sufficient argument related to the facts to support its claims. We, of course, believe that China has failed in that task, and the United States respectfully submits that the only conclusion to be drawn is that China's claims are without merit and must be rejected.

II. TERMS OF REFERENCE

5. China argues that adding the preliminary determinations in *Wind Towers* and *Steel Sinks* together with adding new legal claims in its panel request does not "expand the scope of the dispute" [1] because it made similar claims with respect to <u>different</u> investigations in its consultations request. However, China's arguments are not consistent with the plain language of Articles 4 and 6.2 of the DSU. To the contrary, the fact that China considers the initiation of an investigation to be subject to different obligations from preliminary determinations (as shown by the separate legal claims that China makes with respect to these determinations) only highlights that they are distinct.

6. China's arguments are contradictory. China first argues that adding the preliminary determinations does not expand the scope of the dispute because the preliminary determinations

[1] China's Responses to the Panel's First Set of Written Questions ("China Responses to First Panel Questions"), para. 3.

are the "next phase" of the investigations.[2] But then China shifts its approach to argue that adding the associated new legal claims does not expand the scope of the dispute because it made the same claims with respect to other investigations at issue in the dispute. In other words, China concedes that the preliminary determinations are distinct from the initiations of investigations but attempts to convince the Panel that the distinction should not matter because the same claims can be found in other investigations. In fact, China's responses highlight the fact that the legal claims are not a natural evolution from the claims associated with the measures consulted upon – the initiation of the investigations – but are distinct, and it is only due to the fact that China challenged separate, different measures using the same claims that there is any similarity in the scope of the dispute.

7. The fact that China brought claims against multiple measures does not relieve China of its obligations under Article 6.2 of the DSU to identify "the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Instead, the fact that China is challenging multiple measures increases the need for clarity of its claims.

8. China's approach has very problematic implications. Taking China's approach to its logical end, a Member would not need to wait to file a request for consultations until a determination was made in a particular investigation. A Member could simply file a consultations request when the initiation of the investigation occurred, and then add to a panel proceeding as many additional determinations made in the course of that investigation as it wished, regardless of when during the course of the panel proceedings they occurred. Further, using China's logic, a Member could add additional determinations during the course of different determinations as long as they shared similar claims. The responding Member could find itself faced with arguments and claims over determinations made just prior to the second panel meeting, for example, or involving separate investigations.

9. China's approach fails to recognize the critical and unique nature of each determination made in the course of an investigation, despite the recognition accorded to each determination in the SCM Agreement. As discussed previously, 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."[3] 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."[4] Thus, initiations and preliminary determinations are distinct from each other.

10. China's arguments do not address the threshold fact that these preliminary determinations did not exist at the time China requested consultations, and so they could not have been the subject of consultations. Allowing Members to add measures would runs counter to the principles of consultations and the panel process. In its request for consultations, a Member

[2] China Responses to First Panel Questions, para. 2.
[3] SCM Agreement, Article 11.1.
[4] SCM Agreement, Article 19.1.

must include an "identification of the measures at issue and an indication of the legal basis for the complaint."[5] Where the responding Member engages in consultations, the complaining Member may request the establishment of a panel on the disputed matter only "[i]f the consultations fail to settle the dispute."[6] This request for panel establishment under Article 7.1 of the DSU, in turn, establishes the terms of reference for the panel proceeding. The process helps facilitate resolving disputes earlier in the context of consultations, thereby potentially reducing the number of panel proceedings.

11. The procedure of consultations on a measure before a panel request has been agreed by Members in the DSU, and China's attempted procedural shortcuts are inconsistent with the DSU.

III. CHINA HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE WITH RESPECT TO ALLEGED VIOLATIONS OF THE SCM AGREEMENT

12. China's first submission relied on broad and inaccurate generalizations regarding the facts of Commerce's preliminary and final determinations. Because China did not discuss how the provisions of the SCM Agreement apply to any of the determinations made by Commerce, it failed to make a *prima facie* case with respect to any of its claims. China belatedly submitted exhibits CHI-121 through CHI-125, which provide excerpts from various documents, but these exhibits fail to cure the deficiencies in China's submissions in making out its *prima facie* case.[7] In particular, the "cut and paste" excerpts in CHI-121 through CHI-125 fail to "explain the basis for the claimed inconsistency of the measure with"[8] the provision at issue, which China acknowledges is a necessary component of a *prima facie* case.[9]

13. In particular, China fails to provide evidence or argumentation to support its assertion that the facts are similar across each investigation.[10] China does not discuss or cite to the facts of the investigations at all, much less demonstrate that those facts are all "similar." Exhibits CHI-121 through 125 do not shed light on the facts at issue for each determination. Rather, they merely quote certain of Commerce's conclusions without any discussion of the facts and circumstances of the investigation relevant to understanding those conclusions and whether they are consistent with the obligations set out in the SCM Agreement. Because China has not

[5] DSU, Article 4.4.
[6] DSU, Article 4.7.
[7] The additional exhibits are useful in as much as they assist in clarifying the precise determinations which are the subject of China's claims. Mere citations to pages which may include references to multiple determinations failed to adequately identify the subject matter of the claims.
[8] *US – Gambling (AB)*, para. 141. In its response to a question from the Panel, China cites to the Appellate Body's statements in *US – Gambling (AB)* for support for the proposition that China need not address the facts of each determination. China Responses to First Panel Questions, paras. 12-15. The *US – Gambling* dispute presented very different facts from those at issue here. In particular, the measures at issue in that dispute were statutes, while the measures at issue here are fact-specific countervailing duty determinations, and the number of claims total almost 100. The content of a *prima facie* case will vary from dispute to dispute, and China's sweeping generalizations and refusal to explain the basis for *each claim* result in a failure to carry its burden.
[9] China Responses to First Panel Questions, paras. 12-14.
[10] *See* China Responses to First Panel Questions, para. 17.

discussed the facts of each investigation, China has not demonstrated that Commerce "adopted an 'assembly line' approach,"[11] or any other approach, to its subsidy determinations.

14. Further, China cannot avoid its burden to present a *prima facie* case for *each* of its numerous claims by simply asserting that "the central issues in this dispute are issues of legal interpretation" and that its claims concern the "applications of legal standards."[12] In particular, China must place the relevant facts for each of Commerce's determinations before the Panel in order for the Panel to understand, with respect to each of China's claims, what aspect of each determination China alleges to result in the breach of a specific WTO obligation. It is impossible to know whether, as a threshold matter, any particular "legal standard" (as proposed by China) was applied in a given determination and, further, whether a particular *application* of any such legal standard was inconsistent with the SCM Agreement, because China has not discussed the facts at issue in the investigation.

15. In short, China must discuss these facts to meet its burden, and China is not excused from this requirement merely because it has chosen to bring a large number of claims in this dispute.

16. For these reasons, and as explained in the U.S. first written submission[13] and responses to the Panel's questions following the first substantive meeting,[14] China has not met its burden to establish its *prima facie* case with respect to its numerous "as applied" claims.

IV. THE PANEL SHOULD FIND THAT A "PUBLIC BODY" IS AN ENTITY CONTROLLED BY THE GOVERNMENT SUCH THAT THE GOVERNMENT CAN USE THAT ENTITY'S RESOURCES AS ITS OWN

17. The U.S. first written submission explains in detail the reasons why the Panel should conclude that the term "public body" in Article 1.1(a)(1) of the SCM Agreement means an entity controlled by the government such that the government can use that entity's resources as its own.[15] China dismisses this proposed interpretation as "a litigation ploy" and "a superficial gloss" on the interpretation that the United States proposed during *US – Anti-Dumping and Countervailing Duties (China)*.[16] We disagree. In the view of the United States, the interpretation we have proposed here is that which results from the proper application of the customary rules of interpretation of public international law. Rather than seriously engage with the interpretation of "public body" that the United States has proposed, China simply insists repeatedly that the interpretative question has been "definitive[ly]" settled as a result of the DSB adoption of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*.[17] China is incorrect.

[11] China Responses to First Panel Questions, para. 17.
[12] *See* China Responses to First Panel Questions, para. 18; China First Opening Statement, para 3.
[13] *See* U.S. First Written Submission, paras. 22-27; U.S. Responses to First Panel Questions, paras. 18-28.
[14] *See* U.S. Responses to First Panel Questions, paras. 18-28.
[15] *See* U.S. First Written Submission, paras. 28-126.
[16] China Responses to First Panel Questions, para. 46.
[17] *See* China First Written Submission, para. 18, subheading II.B., and paras. 20-29; China First Opening Statement, paras. 9-16; China Responses to First Panel Questions, paras. 27-28, 34, 43-45, and 50-51.

18. As we explain further in this submission, the Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation of public international law. The DSU not only empowers the Panel to take on that task, it charges the Panel with that responsibility through DSU Articles 11 and 3.2, and does not limit the Panel to simply "apply[ing] the legal standard"[18] adopted by the Appellate Body, as China urges. Indeed, the analytical approach China proposes is impermissible under the DSU.

19. In addition, we explain why the Panel should take into account all prior panel and Appellate Body reports that have addressed the meaning of the term "public body," and which are relevant to the Panel's own consideration of the proper interpretation of that term. The DSU, consistent with the practice of GATT and WTO panels and the Appellate Body, gives the Panel broad authority to draw upon the reasoning of prior dispute settlement reports, both adopted and unadopted, as the Panel works to resolve the legal questions that have been presented to it.

20. Finally, we address the concern that has been raised about the potential for circumvention of the SCM Agreement disciplines if the term "public body" were interpreted too narrowly. That concern is well founded. China's proposed interpretation would permit a government to provide the same financial contribution with the same economic effects and escape the SCM Agreement definition of a "financial contribution" merely by changing the legal form of the grantor. This could have wide-ranging effects in the international marketplace if Members began engaging in subsidizing activity that, under China's proposed interpretation, would technically be outside the scope of the SCM Agreement. Such an outcome would be a major step backwards from the subsidies disciplines that were a key accomplishment of the Uruguay Round, but would not result from a proper interpretation of the term "public body."

21. In sum, the United States continues to urge the Panel to engage in a fulsome interpretative analysis in accordance with the customary rules of interpretation of public international law. We remain confident that doing so will lead the Panel to conclude that a "public body" is an entity controlled by the government such that the government can use that entity's resources as its own.

A. Under the DSU, the Panel's Role is To Make an Objective Assessment of the Matter before It and Undertake an Interpretative Analysis in Accordance with the Customary Rules of Interpretation of Public International Law

22. In response to question 15 from the Panel, China asserts that "[t]he issue before the Panel is one of proper legal interpretation . . . ."[19] On this, the United States agrees. However, China further suggests that the Panel must decide "whether [to] apply the legal standard adopted by the Appellate Body in DS379 or the control-based standard that the Appellate Body expressly rejected and that the United States has revived for purposes of this dispute."[20] Here, China has incorrectly framed the Panel's task and misrepresented the U.S. argument in this dispute.

23. As explained further below, the DSU empowers the Panel to engage in a fulsome interpretative analysis and does not bind the Panel simply to "apply the legal standard" from an

[18] China Responses to First Panel Questions, para. 42.
[19] China Responses to First Panel Questions, para. 42.
[20] China Responses to First Panel Questions, para. 42.

earlier Appellate Body report. And while Appellate Body reports certainly should be taken into account, and the reasoning therein may be adopted by the Panel and applied if the Panel finds it persuasive, the Appellate Body itself has recognized that, under the DSU, its reports do not establish authoritative interpretations of the covered agreements that must be followed by panels in subsequent disputes.[21]

24. China's insistence that the Panel "apply the legal standard adopted by the Appellate Body in DS379" is curious and objectionable for two further reasons. First, China is simultaneously arguing in *China – Rare Earths* that another panel should *not* apply a legal standard adopted by the Appellate Body, for the simple reason that China believes the Appellate Body erred in the interpretation of the relevant WTO provision in a previous dispute. Second, here China is, in fact, urging the Panel to apply a legal standard that is quite different from that which the Appellate Body adopted. Thus, the United States would expect China to agree that the Panel should itself interpret the term "public body" in accordance with the customary rules of interpretation of public international law, even if China would argue that such an analysis should lead to a different conclusion than that which we propose.

25. China, however, proposes an analytical approach – a simple binary choice between two competing interpretations to be applied – that simply is not permissible. The DSU tasks each panel with making its own "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."[22] In making that objective assessment of the "applicability of and conformity with the relevant covered agreements," the panel contributes to the proper functioning of the WTO dispute settlement system, which serves to "preserve the rights and obligations of Members under the covered agreements" and to "clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law."[23] Notably, Article 3.2 of the DSU points to the use of customary rules of interpretation of public international law and not to applying or deferring to adopted Appellate Body – or panel – reports. Accordingly, given that a question of the interpretation of the SCM Agreement has been put before it, the Panel should interpret the Agreement "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."[24] That is, rather than simply "apply the legal standard" from an earlier Appellate Body report, as China urges, the Panel should address the arguments that the Parties have put before it here and should come to its own conclusions about the proper interpretation of the term "public body" using customary rules of interpretation, pursuant to the DSU.

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[21] *See US – Stainless Steel (Mexico) (AB)*, para. 158; *see also Japan – Alcoholic Beverages II (AB)*, pp. 12-14 (pdf version on WTO website).
[22] DSU, Article 11.
[23] DSU, Article 3.2.
[24] Vienna Convention, Article 31(1); *see also US – Gasoline (AB)*, pp. 16-17 ("That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other 'covered agreements' of the *Marrakesh Agreement Establishing the World Trade Organization* (the '*WTO Agreement*').").

26. Furthermore, we recall that "[i]t is well established that Appellate Body reports are not binding except with respect to resolving the particular dispute between the parties,"[25] and the exclusive authority to adopt authoritative interpretations of the covered agreements is reserved to the Ministerial Conference and the General Council.[26] The WTO Members have not adopted an authoritative interpretation of the term "public body" pursuant to Article IX.2 of the WTO Agreement. Accordingly, the Panel should refrain from "apply[ing] the legal standard" adopted by the Appellate Body and should undertake its own interpretative analysis of the term "public body" as it assesses the legal claims China has presented in this dispute.

27. The United States is surprised by China's emphasis here on the purportedly "dispositive"[27] and "definitive"[28] nature of the Appellate Body's interpretation in *US – Anti-Dumping and Countervailing Duties (China)*, and China's suggestion that it is "expected" that the Panel will not deviate from the interpretation that the Appellate Body has established.[29] In *China – Rare Earths*, a current dispute between China and the United States, China is not arguing that is "expected" that that panel will not deviate from a previous Appellate Body interpretation. To the contrary, China is arguing that, under Article 11 of the DSU, the panel there must conduct a *de novo* review of a legal issue that was expressly addressed by the Appellate Body in a prior dispute, also between China and the United States.[30] In *Rare Earths*, China argues that an error in legal interpretation in an adopted panel or Appellate Body report would appear to supply ample cogent reasons for a subsequent panel or the Appellate Body to differ with that interpretation, and that reiterating a legally flawed interpretation could do the system more harm than a measured, independent, and objective re-examination of the issue, duly taking into account all arguments presented by the Parties and Third Parties. The United States agrees with these arguments by China, and China in that dispute agreed with (and quoted or paraphrased from) the U.S. position on that issue. We do not understand how China can assert contradictory positions on the role of a panel in the light of an adopted Appellate Body report to two different WTO panels at the same time. But in any event, China's position in the *Rare Earths* dispute is correct, and the same understanding of the Panel's role under the DSU is correct here.

28. Indeed, it is especially the case here, given that the Appellate Body has considered the interpretation of the term "public body" only once before, and the United States and other Members have raised concerns about the Appellate Body's findings in that regard. So, while China has persistently reminded the Panel of the concern expressed by the Appellate Body when another panel "depart[ed] from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues,"[31] the Appellate Body's interpretation of the term "public body" is hardly "well-established" at this point, after only one Appellate Body report considering

[25] *US – Stainless Steel (Mexico) (AB)*, para. 158.
[26] *See* WTO Agreement, Article IX.2; *see also* DSU, Article 3.9.
[27] China First Written Submission, para. 12.
[28] China First Written Submission, para. 18.
[29] China Responses to First Panel Questions, para. 34.
[30] In *China – Raw Materials*, the Appellate Body interpreted paragraph 11.3 of China's Accession Protocol as precluding the availability of exceptions under Article XX of the GATT 1994. *China – Raw Materials (AB)*, para. 307. In *China – Rare Earths*, China seeks once again to invoke Article XX as a justification for measures alleged to be inconsistent with paragraph 11.3 of China's Accession Protocol.
[31] *See US – Stainless Steel Mexico (AB)*, para. 162.

the issue.[32] Indeed, even China itself seeks a further clarification – in reality a significant modification – of the Appellate Body's interpretation of "public body." China asks the Panel to find that every public body "must itself possess the authority to 'regulate, control, supervise or restrain' the conduct of others,"[33] but the Appellate Body itself did not find that. This requested modification reveals that China, too, considers that further elaboration of the Appellate Body's interpretation in *US – Anti-Dumping and Countervailing Duties (China)* is necessary.

29. Finally, beyond its incorrect framing of the Panel's task, we note that China's description of one of what it considers the Panel's two interpretative choices – as the "control-based standard that the Appellate Body expressly rejected and that the United States has revived for purposes of this dispute"[34] – misrepresents the U.S. argument here. As the United States explained during the first substantive meeting with the Panel, and in response to questions 25 and 26 from the Panel, the interpretation we now propose reflects our further consideration of this issue following the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)*. The United States now proposes 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 is not the same interpretation considered by the Appellate Body previously. In our view, the interpretation of public body we now propose is similar to the concept of "meaningful control" discussed and actually relied upon by the Appellate Body in the context of its own assessment of Commerce's "public body" determinations *US – Anti-Dumping and Countervailing Duties (China)* – discussed further in the next subsection – 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.

30. Accordingly, the Panel should consider the interpretation of "public body" by applying the customary rules of interpretation of public international law, taking due account of previous interpretations of that term, and should conclude that the term "public body" means an entity controlled by the government such that the government can use the entity's resources as its own.

B. The Panel Should Take Into Account All Prior Panel and Appellate Body Reports that Have Addressed the Meaning of the Term "Public Body"

31. When asked whether "the Panel should take into consideration *only* the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, and should *not consider* other reports that may have considered the term 'public body,'"[35] surprisingly, China responded, "Yes."[36] China's position is wrong, and it does not reflect the status of panel and Appellate Body reports within the WTO dispute settlement system. As the Appellate Body has explained, "the legal interpretation embodied in [*both*] adopted *panel and Appellate Body reports* becomes part and parcel of the *acquis* of the WTO dispute settlement system,"[37] and "a panel could [also]

[32] We note that *US – Stainless Steel (Mexico)* concerned the issue of zeroing, which, at that time, had been the subject of numerous Appellate Body reports, and that may explain the Appellate Body's view that the "jurisprudence" related to zeroing was "well-established."
[33] China First Written Submission, para. 22.
[34] China Responses to First Panel Questions, para. 42.
[35] Panel Question 16 (emphasis added).
[36] China Responses to First Panel Questions, para. 43.
[37] *US – Stainless Steel (Mexico) (AB)*, para. 160 (emphasis added).

find useful guidance in the reasoning of an *unadopted* panel report that it considered to be relevant."[38]

32. The "hierarchical structure contemplated in the DSU"[39] exists only in relation to a particular dispute. If a panel report is not appealed, the DSB may adopt that report at the request of a party to the dispute. If a panel report is appealed, the Appellate Body is authorized to "uphold, modify or reverse the legal findings and conclusions of the panel."[40] Upon adoption, an appealed panel report must be read together with the Appellate Body report to understand the content of any DSB recommendations and rulings. In both scenarios (appeal or no appeal), adoption by the DSB results in recommendations and rulings with equal legal force for the parties. Outside the context of a dispute in which there has been an appeal, however, Appellate Body reports do not have an elevated status above adopted or even unadopted panel reports.

33. As Justice Robert H. Jackson once explained of the role of the U.S. Supreme Court:

> Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.[41]

In the WTO dispute settlement system, the Appellate Body is not infallible, nor are its legal interpretations binding outside the context of a particular dispute. Accordingly, the Panel should not limit itself only to consideration of the most recent Appellate Body report concerning a given legal issue. Rather, the Panel should take into account all panel and Appellate Body reports that discuss the same issue and that the Panel considers could assist the development of its own reasoning.

34. That being said, China is wrong when it refers to the "United States' categorical rejection of the Appellate Body jurisprudence" with respect to the interpretation of the term "public body."[42] The United States does not categorically reject the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. The Panel should take the reasoning in that report into account. However, the Panel should also take into account the reasoning in the panel reports in *Korea – Commercial Vessels*, *EC and certain member States – Large Civil Aircraft*, and *US – Anti-Dumping and Countervailing Duties (China)*, in which each panel found that a "public body" is an entity controlled by the government.[43] We respectfully submit that the Panel should

[38] *Japan – Alcoholic Beverages II (AB)*, p. 15 (pdf version on WTO website) (emphasis added).
[39] China First Opening Statement, para. 11.
[40] DSU, Article 17.13.
[41] *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Opinion of Justice Robert H. Jackson, concurring in the result).
[42] China Responses to First Panel Questions, para. 44.
[43] *See Korea – Commercial Vessels*, para. 7.50. *See also id.*, paras. 7.172, 7.353, and 7.356; *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.1359; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.94.

find the reasoning in those panel reports persuasive as it undertakes its own interpretative analysis in accordance with the customary rules of interpretation of public international law.

35. China asserts that the panel in *Canada – Renewable Energy* "applied the Appellate Body's legal standard without a second thought" and suggests that that panel report "should guide the Panel's consideration of China's claims under Article 1.1(a)(1)."[44] The United States agrees that the Panel should take into account the panel report in *Canada – Renewable Energy*, but we submit that the panel's application of the public body standard there is much closer to the U.S. proposed interpretation than it is to China's. Key to that panel's finding was the observation"[t]hat the Government of Ontario has '*meaningful control*' over Hydro One's activities in a way that confirms it is a 'public body' within the meaning of Article 1.1(a)(1) of the SCM Agreement . . . ."[45] Notably absent from the panel's reasoning was any finding that Hydro One "itself possess[ed] the authority to 'regulate, control, supervise or restrain' the conduct of others."[46] In the U.S. view, that concept of "meaningful control" can be restated more clearly as control over the entity such that the government can use the entity's resources as its own.

36. The Appellate Body itself applied the public body standard similarly in *US – Anti-Dumping and Countervailing Duties (China)* when it upheld Commerce's determinations that state-owned commercial banks (SOCBs) in China were public bodies.[47] The Appellate Body repeatedly referred to the government's "meaningful control" over an entity,[48] ultimately explaining that:

> [T]he USDOC, in CFS Paper, discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions. Whether or not we would have reached the same conclusion, it seems to us that in its CFS Paper determination, the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions.[49]

37. The Appellate Body agreed that there were sufficient links between the government and the SOCBs such that, when the banks "exercise[d] . . . their functions" (lending), they were effectively carrying out governmental functions. The Appellate Body called the links "meaningful control." We think the clearest way to understand the links sufficient to constitute "meaningful control" is to examine the economic relationship between the government and an entity. As we have suggested, there will be sufficient links when a government controls an entity such that it can use the entity's resources as its own. Using this approach, the government certainly had "meaningful control" over the SOCBs in *US – Anti-Dumping and Countervailing Duties (China)*, so that when the banks carried out their lending activities it was appropriate to

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[44] China Responses to First Panel Questions, para. 45.
[45] *Canada – Renewable Energy (Panel)*, para. 7.235 (emphasis added); *see also id.*, para. 7.239. The *Renewable Energy* panel's findings in this regard were not appealed.
[46] China First Written Submission, para. 22.
[47] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 355-356.
[48] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 318, 346, and 355.
[49] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.

consider that lending a financial contribution attributable to the Government of China. On the other hand, there was no evidence that the banks could or did regulate, control, supervise, or restrain the conduct of others. This is hardly surprising, since banks typically do not possess such authority. The implication of this, though, is that the SOCBs the Appellate Body found were public bodies in *US – Anti-Dumping and Countervailing Duties (China)* would fail to meet the new test China has proposed in this dispute.[50] This demonstrates that China's approach is, in reality, a deviation from the standard articulated in *US – Anti-Dumping and Countervailing Duties (China)*, as applied by the Appellate Body.

38. In sum, the United States once again respectfully requests the Panel to take into account all prior panel and Appellate Body reports that discuss the interpretation of the term "public body," including those in *US – Anti-Dumping and Countervailing Duties (China).* We believe that doing so, in conjunction with the proper application of the customary rules of interpretation of public international law to the text of the SCM Agreement, leads inescapably to the conclusion that a "public body" is an entity controlled by the government such that the government can use the entity's resources as its own.

C. The Term "Public Body" Should Be Interpreted in a Way that Does Not Permit Circumvention of the Subsidy Disciplines in the SCM Agreement

39. Finally, we would like to comment on the concern that interpreting "public body" as an entity that has "governmental authority" creates loopholes allowing for the circumvention of the disciplines of the SCM Agreement. The United States agrees with Canada's response to question 4 from the Panel to the Third Parties. The concern about circumvention is well founded, and Canada ably explains a number of reasons for such concern in its response to question 4.

40. In particular, the United States is concerned that defining "public body" so as to remove from SCM Agreement coverage artificially a host of government-controlled entities, which cannot reasonably be called "private bodies," will permit Members, acting completely within their rights (under China's proposed interpretation), to provide substantial subsidies that will have a negative impact on the international marketplace, and which otherwise would be governed by the Agreement. Such an outcome would be contrary to logic, it would upset the "delicate balance [reflected in the SCM Agreement] between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures,"[51] and it would be inconsistent with the object and purpose of the SCM Agreement to "strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[52]

41. As the United States has explained, the SCM Agreement is intended to discipline the use of subsidies by governments so as to permit economic actors to compete in the international marketplace without the effects of subsidies distorting the outcome of that competition. An understanding of "public body" as reaching financial contributions flowing from an entity that is

[50] *See* China First Written Submission, para. 22.
[51] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 115.
[52] *US – Softwood Lumber IV (AB)*, para. 64.

controlled by the government such that the government can use that entity's resources as its own supports that goal. To find otherwise would permit a government to provide the same financial contribution with the same economic effects and escape the definition of a "financial contribution" merely by changing the legal form of the grantor from a government agency to, for example, a wholly government-owned corporation. A correct interpretation of "public body" avoids such an outcome.

42. While the Appellate Body eschewed reliance on considerations of circumvention in the interpretation of Article 1.1 of the SCM Agreement in its report in *US – Anti-Dumping and Countervailing Duties (China),*[53] prior panels and the Appellate Body itself have identified circumvention as a relevant concern to be taken into account when interpreting the SCM Agreement. In *Australia – Automotive Leather II*, the panel declined to restrict its analysis of export contingency exclusively to the legal instruments or administrative arrangements surrounding the subsidy, stating that "[s]uch a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a)…."[54] In *Canada – Autos*, the Appellate Body rejected an interpretation of Article 3.1(b) of the SCM Agreement that "would make circumvention of obligations by Members too easy."[55] And in *US – Softwood Lumber IV*, the Appellate Body explained that "to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly …would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money…."[56] Circumvention was a relevant concern in those disputes, and it is relevant to the interpretative analysis here as well. Additionally, taking into account the concern about circumvention does not hinder the Panel's "good faith" interpretation of the SCM Agreement, nor does it require the Panel to assume that one party is seeking to evade its obligations and exercise its rights so as to cause injury to the other party.[57] As noted above, the circumvention concern is simply a matter of what one would expect some WTO Members to do – *consistent* with the SCM Agreement rules under China's proposed interpretation – if the term "public body" is interpreted narrowly, and the negative economic implications that would follow from such an interpretation.

43. As we have explained, we believe that our proposed interpretation of the term "public body" – that it is an entity controlled by the government such that the government can use the entity's resources as its own – is consistent with and supports the object and purpose of the SCM Agreement, and it is the interpretation that results from the proper application of the customary rules of interpretation of public international law.

V. THE DISCUSSION IN *KITCHEN SHELVING* IS NOT A MEASURE THAT CAN BE CHALLENGED "AS SUCH"

44. As demonstrated in the U.S. first written submission and U.S. responses to the Panel's questions,[58] Commerce's discussion of the public body issue in the *Kitchen Shelving* final determination is not a "measure" that can be challenged "as such." In *Kitchen Shelving*,

[53] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 326-327.
[54] *Australia – Automotive Leather II*, para. 9.56.
[55] *Canada – Autos (AB)*, para. 142.
[56] *US – Softwood Lumber IV (AB)*, para. 64.
[57] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 326.
[58] *See* U.S. First Submission, paras. 135-137; U.S. Responses to First Panel Questions, paras. 35-39, 60-62.

Commerce described its past determinations regarding the public body issue. As explained in the U.S. first written submission, the discussion in *Kitchen Shelving* does not bind Commerce to any particular analysis of whether an entity is a public body. At most, it explains Commerce's past actions. However, an explanation is not a "measure," and even a practice or policy is not necessarily a "measure."[59] In this submission, we will not repeat all of the arguments from the U.S. first written submission, but rather will respond to some arguments China has since advanced.

45. China argues that "any act or omission attributable to a WTO Member" can be a measure.[60] However, even with this problematic and broad definition of a measure, the explanation in *Kitchen Shelving* that China challenges is not an "act or omission."[61] The explanation, on its own, does not do or accomplish anything. It has no "independent operational status such that it could independently give rise to a WTO violation."[62] As we have explained, in *Kitchen Shelving*, Commerce discussed its historic approach to the public body issue, and noted that the issue was becoming a recurring one in countervailing duty investigations. It is descriptive, rather than proscriptive.

46. China also argues that the explanation in *Kitchen Shelving* represents a "rule or norm of general and prospective application," in light of what China calls its "systematic application."[63] However, at most, China has shown that Commerce generally followed the approach in *Kitchen Shelving* in other investigations. However, as the panel in *US – Steel Plate* stated, the fact that "a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure."[64]

47. Indeed, the fact that the discussion in *Kitchen Shelving* does not have "general and prospective application" is fatal to China's claim. There is no indication in that discussion that Commerce intended the *Kitchen Shelving* reasoning to apply to all cases, regardless of the unique facts and record in each case. There is no indication that Commerce intended "to conclusively treat all entities controlled by the Government of China as 'public bodies' in *all* cases…."[65] The language used in *Kitchen Shelving* indicates that rather than opining on the conclusive status of all entities controlled by the government in all cases and for all time, Commerce would in the future examine evidence and arguments that "majority ownership does not result in control of the firm" and would consider "all relevant information."[66] Although some of the language is written in the future tense, this does not transform the explanation in *Kitchen Shelving* into a rule or norm of general or prospective application.

48. The *Kitchen Shelving* discussion is not similar to the Commerce policy bulletin found to be a "measure" in *US – Oil Country Tubular Goods Sunset Reviews* and also discussed in *US –*

[59] *See US – Export Restraints*, para. 8.126; *US – Steel Plate*, paras. 7.20-7.24.
[60] *See* China First Opening Statement, para. 23.
[61] The *Kitchen Shelving* final determination is a measure, which China challenges as part of its "as applied" challenge, but the discussion of the public body issue itself is not an "act" independent of the actual final determination.
[62] *US – Export Restraints*, para. 8.126.
[63] China First Opening Statement, para. 24.
[64] *US – Steel Plate*, para. 7.22.
[65] China Responses to First Panel Questions, para. 30 (emphasis in original).
[66] *Kitchen Shelving* IDM at 43-44 (CHI-38).

Corrosion-Resistant Steel Sunset Review. The policy bulletin at issue in those disputes provided "guidance regarding the conduct of sunset reviews."[67] It was a separate document, not a response to various parties' arguments made in the course of, and based on the distinct record of, an investigation.[68] That policy bulletin was published before any sunset reviews were conducted,[69] unlike the discussion in *Kitchen Shelving*, which occurred after Commerce had conducted a number of other investigations, and it was those past determinations that Commerce was explaining in *Kitchen Shelving*. There is no basis for China's claim that the *Kitchen Shelving* discussion "provides guidance and creates expectations among the public and among private actors" in the same manner as the policy bulletin at issue in *US – Oil Country Tubular Goods Sunset Reviews* and *US – Corrosion-Resistant Steel Sunset Review*.[70]

49. It is notable that China can cite to no prior dispute in which a panel or Appellate Body has found that an investigating authority's explanation of its reasoning in the context of a trade remedy investigation is a "measure" that can be challenged "as such." China can only cite to disputes in which stand-alone policy documents with stated prospective effect, or well-established methodologies reflected in computer programming, were found to be measures.[71]

50. There is a good reason for the lack of support for China's claim. China's argument would lead to absurd results, because every statement by an investigating authority in the course of a countervailing duty investigation provides some guidance and creates some expectations among the public and private actors. Every statement gives the public some indication of the investigating authority's analysis and approach to subsidy issues. Every statement creates expectations, because the public can assume that the investigating authority means, and will do, what it says.

51. Further, China's argument is inconsistent with Article 22.5 of the SCM Agreement, which requires investigating authorities to provide, in a public notice or separate report, their "reasons which have led to the imposition of final measures" in a countervailing duty investigation. China's argument would transform this provision of reasons, an obligation under Article 22.5, into a "measure" independent of the final measures themselves. In drafting and agreeing to Article 22.5, Members cannot have intended such a result. Such a result dissuades Members from meeting their obligations under Article 22.5.[72]

52. The Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* discussed the reasons why it makes sense that some measures can be challenged "as such," stating that allowing such challenges improves the "security and predictability needed to conduct future

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[67] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 187; n.258.
[68] *See Kitchen Shelving* IDM at 40-42 (CHI-38) (detailing parties' arguments in the investigation).
[69] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 11.
[70] China Responses to First Panel Questions, para. 32.
[71] *See, e.g.*, China Responses to First Panel Questions, para. 32 (citing *US – Oil Country Tubular Goods Sunset Reviews (AB)* and *US – Corrosion-Resistant Steel Sunset Review (AB)*); China First Opening Statement, para. 23 (citing *US – Zeroing (EC) (AB)*).
[72] Some Members need to be persuaded to abide by their Article 22.5 obligations, and the Panel should not adopt any reasoning that would dissuade them from doing so. *See China – GOES (Panel)*, paras. 8.1, 8.5 (finding that China acted inconsistently with Article 22.5 and recommending that China bring its measures into conformity with its obligations under that Article); *China – GOES (AB)*, para. 268 (same).

trade."[73] But the "security and predictability" of the trading system would not be advanced if Members are dissuaded from providing explanations and reasoning for their final countervailing duty determinations.

53. For these reasons, as well as those set forth in our prior submissions, China has failed to establish that the *Kitchen Shelving* discussion or explanation is a measure that can be challenged as such.

VI. OUT-OF-COUNTRY BENCHMARKS

A. China Has Failed To Demonstrate That a Public Body Analysis from Article 1.1(a)(1) of the SCM Agreement *Must* Extend To an Evaluation of Market Distortion in a Benchmark Analysis under Article 14(d) of the SCM Agreement.

54. In this dispute, China argues that Commerce's use of out-of-country benchmarks was inconsistent with U.S. obligations under the SCM Agreement. However, China itself accepts that an investigating authority may use an out-of-country benchmark in appropriate circumstances to determine the benefit conferred by goods provided for less than adequate remuneration in a manner consistent with Articles 1.1(b), and 14(d) of the SCM Agreement.[74] One such circumstance, as found by the Appellate Body and accepted by China, is when "it has been established that . . . private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."[75] Moreover, by its own admission, China does not challenge what might demonstrate government predominance for purposes of finding distortion in a given market.[76]

55. What China does challenge is Commerce's use of an out-of-country benchmark in the determinations at issue as allegedly being "unlawfully premised on [Commerce's] equation of SOEs with the government, pursuant to its flawed control-based standard."[77] For China to succeed on this claim, the Panel not only would have to agree with China's interpretation of public body, but also would have to accept China's proposition that "the same legal standard for defining what constitutes 'government' for purposes of the financial contribution inquiry must also apply when determining whether 'government' is a predominant supplier for purposes of the

[73] *See US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 82.
[74] *See, e.g.*, China First Opening Statement, para. 36; China Responses to First Panel Questions, para. 69. It is also noteworthy that 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. Additionally, paragraph 44 of the Working Party Report is helpful to an examination of China's claims concerning Commerce's benefit analyses in this dispute because it reflects some Members' concern about the government of China influencing decisions and activities relating to sales and purchases by state-owned enterprises. *See generally* U.S. Responses to First Panel Questions, paras. 66-71.
[75] *US – Softwood Lumber IV (AB)*, para. 103.
[76] China First Opening Statement, para. 36; China Responses to First Panel Questions, para. 69.
[77] China Responses to First Panel Questions, para. 74.

distortion analysis."[78] China's proposition is incorrect, and the United States use of out-of-country benchmarks is consistent with the SCM Agreement text and intent.

56. As the United States demonstrated previously, China's argument conflates two distinct analyses: a financial contribution analysis under Article 1.1(a)(1) on the one hand, and a benefit analysis under Article 14(d) on the other hand. Article 14(d) is solely focused on the adequacy of the remuneration. Thus, the question before the Panel is whether it is inconsistent with the text of the SCM Agreement for Commerce to focus on those aspects of the Government of China's ownership and control that are necessary to affect the adequacy of the remuneration – i.e., the prices. As the United States has explained, Commerce in fact asked the appropriate questions, and reached the correct conclusions, regarding the adequacy of remuneration.

57. In China's opening statement, it points to the term "government" in Article 1.1(a) of the SCM Agreement, and that Article's creation of a shorthand providing that "government" means "a government or any public body within the territory of a Member" throughout the SCM Agreement.[79] Assuming that the definition of public body that the Appellate Body articulated in *US – Anti-Dumping and Countervailing Duties (China)* for purposes of Article 1.1(a)(1) is correct, China attempts to impose that definition upon Commerce's market distortion analysis under Article 14(d) without explaining why such definition must be applied in spite of the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, where the Appellate Body chose not to apply that definition when it examined the consistency of Commerce's determinations with Article 14(d). China argues that "wherever the term 'government' appears in the SCM Agreement, that is the meaning that applies, including as it may be relevant to the interpretation and application of Article 14(d)."[80] While the term "government" does appear in Article 14(d) of the SCM Agreement, it is only in the context of financial contribution analysis, not benefit analysis, which is a different inquiry. Specifically, Article 14(d) states, "the provision of goods or services or purchase of goods by a *government* shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration . . . ."[81]

58. Furthermore, China's reliance on the specific reasoning of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* regarding public body is misplaced. As China acknowledges, prior Appellate Body findings regarding adequacy of remuneration demonstrate that, depending on the facts of a given case, a government's predominant role in a given market can be the basis of an investigating authority's finding of distortion and the resulting use of an out-of-country benchmark to determine the benefit conferred by a good provided for less than adequate remuneration.[82] Further, "predominance does not refer exclusively to market shares, but may also refer to market power", which the Appellate Body has equated with the ability to influence prices.[83]

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[78] China Responses to First Panel Questions, para. 85; U.S. Responses to First Panel Questions, para. 73.
[79] China First Opening Statement, para. 39.
[80] China First Opening Statement, para. 39.
[81] SCM Agreement, Article 14(d) (emphasis added).
[82] *US – Softwood Lumber IV (AB)*, para. 103; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.
[83] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444.

59. 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, which have shared ownership by the Government of China, are producers in the relevant market in China, they are evidence of the government's ability to influence prices in that market. In other words, based on the above analysis, SOE presence in a particular market can be evidence of the government's market power in that particular market. In contrast, the methodology for finding when an SOE is a public body in *US – Anti-Dumping and Countervailing Duties (China)* was focused on the identity of the entity making a financial contribution. It is not necessary nor does it make sense as a policy matter or as a matter of interpretation of the SCM Agreement for the Panel to find that the only way a government can exert market power or influence prices in a particular market is through entities engaging in governmental functions—i.e., the public body analysis from *US – Anti-Dumping and Countervailing Duties (China)*. Therefore, it would be inappropriate to limit the benefit analysis in this way. Accordingly, where prior Appellate Body findings permit the use of out-of-country benchmarks because of the government's ability to affect prices, and SOE presence in a market is evidence of a government's ability to affect prices in that market, Commerce's benefit analysis is consistent with prior Appellate Body findings.

60. China is also incorrect when it states that "USDOC's equation of SOEs with the government is explicitly or implicitly based on its belief that entities majority-owned and controlled by the government are '*public bodies*'."[84] China does not cite each and every challenged determination demonstrating that Commerce, in its benefit determination, equated SOEs with public bodies. Even if China had pointed to such evidence, it would not support China's arguments in this case to the extent Commerce applied the ownership and control test in each context. Instead, such evidence simply would demonstrate that the United States believed the ownership and control test was appropriate in each context. As the United States demonstrates above, SOEs need not be public bodies under Article 1.1(a)(1) as interpreted by the Appellate Body to indicate a government's ability to influence prices in a given market. Instead, the government's ownership and control of SOEs is relevant for Commerce's assessment of government presence in a given input market. In turn, such SOE presence is an indicator of government presence in that market for purposes of evaluating the government's ability to influence prices in the relevant input market. Again, through its ownership of SOEs, the government has the ability to influence the SOEs' prices and, thereby, private prices in the market, particularly where the government maintains a predominant role in that market through SOE market share and possibly other forms of government involvement in the market.

B. China Has Failed to Demonstrate Why the Appellate Body's Findings in *US – Anti-Dumping and Countervailing Duties (China)* Are Not Persuasive Evidence That Analyses under Article 1.1(a)(1) and Article 14(d) Are Legally and Factually Distinct Analyses.

61. In order for China to succeed on its claims concerning benefit, it must convince this Panel that the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* on the issue of out-of-country benchmarks is unpersuasive, because the *US – Anti-Dumping and Countervailing Duties (China)* report demonstrates that the Appellate Body did not perceive

[84] China Responses to First Panel Questions, para. 76 (emphasis added).

altering the public bodies standard in Article 1.1(a) of the SCM Agreement as an impediment to upholding Commerce's reliance on out-of-country benchmarks in the investigations challenged in *US – Anti-Dumping and Countervailing Duties (China)*.[85]

62. China calls this a "facially irrational result"[86] and, in a failed effort to overcome the hurdle described above, asserts that "the Appellate Body was simply deciding the case in the posture that was presented to it . . . The parties neither briefed nor argued the issue that China now raises, which explains why the Appellate Body did not address it, even in passing, much less decide it."[87] China's explanation assumes the conclusion and is thus completely without merit. A finding in favor of Commerce's use of out-of-country benchmarks, while adopting a "government-function" definition of public body for the purposes of financial contribution, is not "facially irrational"; to the contrary, as explained above, these findings are different because the underlying inquiries (the entity providing the financial contribution and the adequacy of remuneration) are fundamentally different.

63. Indeed, the findings in *US – Anti-Dumping and Countervailing Duties (China)* demonstrate that a public body analysis under Article 1.1(a) of the SCM Agreement is not an "essential factual predicate"[88] for the market distortion analysis under Article 14(d). Although China may frame its challenge to Commerce's use of out-of-country benchmarks differently in this dispute than it did in *US – Anti-Dumping and Countervailing Duties (China)*,[89] the findings of *US – Anti-Dumping and Countervailing Duties (China)* still reflect that the examination of public bodies and market distortion are two distinct analyses such that even if the Panel were to find Commerce's public body determinations in this dispute to be WTO inconsistent, it still could find Commerce's benchmark determinations not to be WTO inconsistent. Whether or not China made the same argument before the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body was fully aware in that dispute that (1) Commerce applied an ownership or control standard in its analysis that certain SOEs constituted public bodies;[90] and (2) Commerce had treated SOE presence in the market as indicative of government presence in the market.[91] Nevertheless, notwithstanding its finding of WTO

[85] U.S. First Written Submission, paras. 147-149.
[86] China Responses to First Panel Questions, para. 78.
[87] China Responses to First Panel Questions, para. 82.
[88] China First Written Submission, para. 59.
[89] The Appellate Body summarized China's appeal in *US – Anti-Dumping and Countervailing Duties (China)* as requesting that the Appellate Body "find that the Panel erred in interpreting Article 14(d) of the *SCM Agreement* to permit investigating authorities to reject in-country private prices as a benchmark based solely on evidence that the government is the predominant supplier of the good in question . . . ." *US – Anti-Dumping and Countervailing Duties (China)(AB)*, para. 427. Notably, recognizing that China takes a different position in this dispute, China concedes that in *US – Anti-Dumping and Countervailing Duties (China)(AB)* it "accepted" Commerce's analysis that SOE presence was evidence of government presence in the relevant market for purposes of Commerce's market distortion analysis. China Responses to First Panel Questions, para. 80.
[90] "With respect to the SOEs, we recall the Panel's findings that in all of the investigations at issue, the USDOC determined that the relevant SOEs were public bodies based on the fact that the Government of China held the majority ownership of the shares in the respective companies." *US – Anti-Dumping and Countervailing Duties (China)(AB)*, para. 343.
[91] In the investigations at issue, "the USDOC found, relying at least to some extent on facts available, that SOEs produced 96.1 per cent of all [hot-rolled steel] produced in China and that all the SOE suppliers are majority owned by the government." *US – Anti-Dumping and Countervailing Duties (China)(AB)*, para. 451. Additionally, "the USDOC concluded . . . that, 'because of the government's overwhelming involvement in [China's] [hot-rolled steel]

inconsistency with respect to Commerce's public body analysis, the Appellate Body still found that China had not demonstrated that Commerce's benchmark determinations were WTO inconsistent.

64. China incorrectly contends that the "only justification" the United States provides to support its benefit arguments in this case is the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China).*[92] Of course, as demonstrated above, the *US – Anti-Dumping and Countervailing Duties (China)* report is relevant to China's claims because, consistent with the Appellate Body's findings, it is evident that Commerce's determinations of whether SOEs constitute public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement are legally and factually separate from Commerce's determinations concerning distortion in an input market by SOE involvement and the resulting use of out-of-country benchmarks to measure the benefit of inputs provided for less than adequate remuneration. Beyond the Appellate Body's *US – Anti-Dumping and Countervailing Duties (China)* report, the United States also has explained why applying an ownership or control test is a correct standard for determining that SOE presence is indicative of government presence in the relevant input market for the purpose of evaluating distortion of private prices in that market. The *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report supports the conclusion that an ownership or control standard can be appropriate for purposes of evaluating distortion in the relevant input market.

C. China's Exhibit CHI-124 Only Serves to Confirm That China Has Failed To Make A Prima Facie Case With Respect to Each Challenged Benefit Determination

65. After its first written submission and the first substantive meeting, China finally specified (in the form of the new exhibit CHI-124) the language from the challenged benefit determinations contained in CHI-1 which allegedly supports a claim of inconsistency with the SCM Agreement.[93] This new exhibit, however, only serves to confirm that China has failed to make a prima facie case with respect to Commerce's benefit determinations.

66. The United States recalls that the Panel went out of its way to give China a second opportunity to present a *prima facie* case; the Panel requested that "China present the facts on the record for each investigation challenged in relation to the use of out-of-country benchmarks" and "detail how the USDOC treated such facts for its benefit analysis."[94] But China failed to use that opportunity to support its claims. Instead China responds to the first aspect of the Panel's request by providing a table, CHI-124, which merely contains block quotes from the determinations China challenges. China then asserts that "it is evident on the face of the cited pages that the USDOC's justification for its recourse to an out-of-country benchmark is its conclusion that SOEs provide at least a 'substantial portion' of the market for the input, which renders the market distorted due to the 'government's' predominant role as a supplier in the

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market, the use of private producer prices in China would be akin to comparing the benchmark to itself' and that, therefore, private prices in China could not be used to determine the adequacy of remuneration." *Id.*, para. 452.

[92] China First Opening Statement, para. 44.

[93] *See* Relevant Excerpts from the USDOC's Adequate Remuneration Determinations Pertaining to Market Distortion (CHI-124).

[94] First Panel Questions, question 32.

market."[95] Once again, China's analytical shortcuts fall short of providing the Panel with the information it requested and needs to make a finding for China.

67. Moreover, the text quoted in CHI-124 not only fails to support China's allegation of a breach of the SCM Agreement, but confirms that China has mischaracterized Commerce's benefit analysis. In its first written submission, China argued that the "*fundamental flaw* in the USDOC's framework is that the USDOC's finding that the 'government' is playing a 'predominant' role in the market for a good *is based exclusively* on the percentage of the relevant input produced by SOEs."[96] Additionally, China argued that in each challenged case, the USDOC applied the same framework for evaluating whether market prices for a particular input in China are distorted: "it inquires whether the government provides the majority, or even a 'substantial portion' of the market for a good, and if the answer is affirmative, it concludes that the government is playing a 'predominant role' in the market, and *on that basis alone* concludes that private prices are distorted."[97]

68. Contrary to China's argument, CHI-124 demonstrates that Commerce did not in each challenged determination find that the government maintained a predominant role in the relevant input market "based exclusively" on the SOE share of the relevant market. For example, CHI-124 demonstrates that in *Kitchen Shelving* and *Wire Strand* Commerce considered other indicia of the government's market power beyond SOE market share, including low level of imports, export taxes and export licensing requirements.[98] These differences between the investigations demonstrate the importance of China putting together a complete *prima facie* case from the beginning of the proceedings, not a piecemeal case that it adds to only when asked throughout the proceedings.

69. Additionally, in an apparent concession that China's claims in its first written submission were incorrect, China has since modified its argument. Whereas in its first written submission, China argued that Commerce found government predominance in a given market based "*exclusively*" on its equation of SOEs with government suppliers, China now argues that Commerce based such findings "exclusively *or primarily*" on its equation of SOEs with the government.[99] This new argument demonstrates that there is no generally applicable measure by which Commerce finds distortion in a particular market, as indicated by China's highly generalized legal theory arguments.[100] This new argument also supports the point that

[95] China Responses to First Panel Questions, para. 76.
[96] China First Written Submission, para. 70 (emphasis added).
[97] China First Written Submission, para. 69 (emphasis added).
[98] *See* Relevant Excerpts from Commerce Determinations Showing Other Indicia Considered (USA-91), which demonstrates that in certain cases Commerce considered additional forms of government involvement in the relevant input market beyond SOE market share.
[99] "In every case cited in CHI-1, Commerce's finding that the 'government' played a predominant role in the market was based exclusively or primarily on equating SOEs with 'government' suppliers . . . ." China First Opening Statement, para. 47 (emphasis added); "the USDOC's finding that private prices in China were distorted due to the predominant role of the 'government' was predicated *exclusively or primarily* on its treating SOEs as 'government' suppliers . . . ."); China Responses to First Panel Questions, para. 88 (emphasis added).
[100] For this reason, too, China's argument that "the only relevant 'fact' for purposes of determining whether the USDOC is acting inconsistently with the SCM Agreement is the fact that the USDOC premised its recourse to an out-of-country benchmark in each of the 14 investigations under challenge on an impermissible equation of SOEs with the government" fails. China Responses to First Panel Questions, para. 77.

Commerce's benefit analyses in the challenged determinations were case-by-case determinations, dependent upon the facts of each particular case, and that China's arguments should have been as well. In some challenged determinations, Commerce relied on factors beyond SOE share of the market to find distortion. Thus, even assuming *arguendo* that the Panel agrees with China that government ownership and control is not a basis to find market distortion, Commerce did not rely solely on this factor and, as a result, China has failed to establish that Commerce used a WTO-inconsistent standard in establishing government predominance in the market in all the challenged investigations. Because China has been unwilling or unable to differentiate these claims based on the facts, findings and circumstances of each challenged determination, this Panel should not attempt to do so either.

70. In addition to some determinations of government predominance in a particular market being based on more than SOE market share alone, CHI-124 demonstrates that certain of Commerce's other market distortion findings were based on facts available pursuant to Article 12.7 of the SCM Agreement.[101] China incorrectly, argues that those determinations, made pursuant to Article 12.7 of the SCM Agreement, are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. However, the use of out-of-country benchmarks pursuant to Article 12.7 was proper where China failed to provide information Commerce requested to evaluate the government's role in the relevant input market.

71. The United States disagrees with China's argument that "[b]ecause the USDOC is applying the wrong legal standard in its distortion analysis, it does not matter if its findings were based on evidence on the record or on 'adverse facts available.'"[102] China has failed to demonstrate that Commerce has applied an incorrect legal standard in any of the challenged benefit determinations. Moreover, where Commerce lacked information requested concerning the Government of China's involvement in a particular market because China failed to provide it, Commerce properly relied on facts available to reach its determinations. Given that Commerce's reliance on facts available is consistent with Article 12.7 of the SCM Agreement, and Article 14(d) permits the use of out-of-country benchmarks, Commerce's determinations that the relevant input markets were distorted and use out-of-country benchmarks as facts available is not inconsistent with Articles 1.1(b) or 14(d) of the SCM Agreement.

VII. COMMERCE'S DETERMINATIONS THAT THE PROVISION OF CERTAIN INPUTS FOR LESS THAN ADEQUATE REMUNERATION WERE SPECIFIC WERE CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

72. Each of Commerce's determinations that the provision of an input for less than adequate remuneration was specific is fully consistent with Article 2 of the SCM Agreement.[103] In particular, after identifying a subsidy in accordance with Article 1.1(a)(1)(iii) of the SCM Agreement, Commerce determined, based on evidence on the record, that a "limited number of certain enterprises" used the subsidy in accordance with Article 2.1(c).

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[101] *See* Relevant Excerpts Demonstrating Facts Available Findings in Distortion Analysis (USA-92), which demonstrates that in certain cases Commerce based its finding of market distortion and resulting use of out-of-country benchmarks on facts available pursuant to Article 12.7 of the SCM Agreement.

[102] China First Written Submission, n. 83.

[103] As noted in the U.S. Response to the First Panel Questions at footnotes 18 & 66, Article 2.1 is a definition, and thus it is not accurate to refer to a Member breaching Article 2.1. *See US – Zeroing (Japan) (AB)*, para. 140.

73. China continues to argue that more is required of Commerce, but that is not the case. Commerce was not required to identify a subsidy program of the type described by China (alternatively described as a "facially neutral" or a formal program based on written or other explicit pronouncements); Commerce was not required to analyze subparagraphs (a) or (b) absent a basis for finding *de jure* specificity; Commerce was not required to expressly analyze or identify a "granting authority"; and Commerce was not required to analyze economic diversification or length of time of the subsidy program where it is clear that these two factors are immaterial to the specificity determination. This section will address each element of China's argument related to Commerce's specificity determinations

74. As an initial matter, China has not disputed the fact that the record of each investigation supported a finding that the number of users of each of the inputs in question was limited. Rather, China appears to argue that Commerce should have considered these subsidies in light of an overarching formally implemented subsidy program, even though it points to no facts or arguments on the record that would have supported the existence of such a program. In this respect, exhibit CHI-122, distributed at the conclusion of the first meeting of the Panel, fails to explain why Commerce's specificity findings were deficient in each instance. The chart contains nothing more than excerpts of the narratives from the applications, initiation checklists, and issues and decision memoranda or preliminary determinations, without any discussion of the facts underlying those statements. The chart does not describe, or even reference, for example, the relevant information contained in the applications submitted to Commerce indicating that the subsidies are specific.[104] China has not provided support for its arguments that Commerce should have disregarded evidence relating to the existence of a subsidy program constituting the provision of an input for less than adequate remuneration. Accordingly, China has failed to present the necessary analysis or evidence to make a *prima facie* challenge to Commerce's determinations that the number of users of each of the inputs in question was limited for purposes of initiation, or for purposes of its preliminary or final determinations, in accordance with Articles 11.3 and 2.1 of the SCM Agreement.

A. Commerce Properly Determined that the Subsidy Programs at Issue Were Used by a Limited Number of Certain Enterprises

75. In each specificity determination at issue, Commerce properly determined that only a limited number of enterprises used the input being provided for less than adequate remuneration, which was the subsidy program being evaluated under Article 2.1(c). Contrary to China's arguments, (1) Commerce was not required to identify a formal subsidy program and (2) Commerce's identifications of the subsidy programs were supported by the record of the investigations.

1. Commerce Was Not Required to Identify a Formal Subsidy Program

76. The ordinary meaning of "program" includes "[a] plan or outline of (esp. intended) activities . . . a planned series of activities or events."[105] From this element of a dictionary definition, China jumps to the conclusion that an investigating authority must identify a formally

[104] *See* U.S. First Written Submission, paras. 223-30; U.S. Responses to First Panel Questions, paras. 110-12. China's chart does not address this evidence.
[105] The New Shorter Oxford English Dictionary at 2371 (1993) (CHI-117).

implemented "plan or outline" as part of its *de facto* analysis, asserting that a program must take the form of a written document, such as "a piece of legislation, published eligibility requirements, an application form, budget allocations . . . , some other type of document" or "express pronouncements of the relevant granting authority."[106] However, there is nothing in the ordinary meaning of the word "program" that requires that a program be written or "expressly pronounced." Consistent with the ordinary meaning of "program," a subsidy program might just as well be formally or informally established through a "series of activities or events." For example, as the European Union has observed in this dispute, the existence of a subsidy program might be "evidenced as a matter of fact, by the stream of subsidies to 'certain enterprises' using such [a] subsidy programme."[107]

77. Not only is China's proposed interpretation of the term "subsidy program" not supported by the ordinary meaning of that term, but China's position also does not comport with the context of the term in Article 2.1(c). In particular, Article 2.1(c) is concerned with whether a subsidy is *in fact* specific (which may be demonstrated through the operation of the subsidy program) not whether it is "explicitly" specific (demonstrated through some written document or pronouncement), which is the subject of an Article 2.1(a) inquiry. A requirement that all subsidies be implemented through some formal means would frustrate the operation of the SCM Agreement and enable Members to avoid its application by providing the subsidy, in fact, to various recipients, without formal implementation.[108]

78. Based on its incorrect interpretation of Article 2.1(c), China argues that information related to the "end use" of a particular input cannot be a basis for determining that the number of "users" is limited.[109] China appears to argue that where a good is provided for less than adequate remuneration, an investigating authority is barred from examining which enterprises "use" the subsidy, that is, which enterprises are being provided the good in the first place. China's interpretation of Article 2.1(c) appears designed to preclude the finding of a "subsidy program" of the type identified by Commerce, but that interpretation is illogical and finds no support in the text of the SCM Agreement.

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[106] China Responses to First Panel Questions, para. 108. *See also* China First Written Submission, paras. 101, 109, 113.

[107] European Union's Response to Panel Questions, para. 14. Notably, China argues in furtherance of its claim that "without the identification of the relevant subsidy programme," no "examination of the last sentence of Article 2.1(c)" can proceed.[107] China Responses to First Panel Questions, para. 103. Taken alone, this statement appears correct. However, China additionally claims that the subsidy program must be implemented through a formal written document in order to satisfy this requirement, which is supported by no text in the SCM Agreement.

[108] As the United States explained in its first written submission, China's overly restrictive interpretation of the term "subsidy program" ignores the diversity of facts and circumstances that authorities confront when analyzing the subsidies under Article 2, and is inconsistent with Article 2.1 which the Appellate Body addressed in *US-Anti-Dumping and Countervailing Duties (China)*. In that dispute, the Appellate Body explained that "a limitation . . . to a subsidy may be established in many different ways". *US-Anti-Dumping and Countervailing Duties (China) (AB)*, para 413. *See also US-Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.30 (finding that China's restrictive reading of that language in Article 2.1 "would frustrate the purpose of the specificity provisions, and would open considerable scope for circumvention of the SCM Agreement, based on a distinction in form but not substance," because otherwise countervailable subsidies would be determined to be non-specific).

[109] *See* China First Written Submission, paras. 92-93; China Responses to First Panel Questions, paras. 145, 147.

2. Commerce's Identifications of the Subsidy Programs Are Supported by Facts on the Record

79. In addition to advancing an erroneous textual interpretation, China's characterizations of Commerce's determinations are divorced from the facts of the investigations. Contrary to China's assertions, Commerce did not "merely assert" or "makeup" the existence of the "subsidy programs" for purposes of its Article 2.1(c) analysis.[110] China declines to discuss the underlying facts of the specificity determinations,[111] which in fact demonstrate that China's allegations are not supported by the investigations' records. An evaluation of the record for each investigation demonstrates that, far from being "made up," the existence of the subsidy programs are grounded in the facts on the record. In particular, in each challenged investigation, the subsidy programs which Commerce investigated were first identified in the application, which contained evidence as to their existence. Then, Commerce investigated the programs, including by asking questions of China and other interested parties; identified the programs in the preliminary determinations; gave all parties the opportunity to comment on these programs; and ultimately made a final determination with respect to those programs. The following lays out these steps with respect to *Aluminum Extrusions* to illustrate the factual nature of the identification of the "subsidy program":

- As the United States explained in detail in its first written submission, U.S. domestic industry filed its application with Commerce, alleging that primary aluminum was being provided for less than adequate remuneration and that the provision of that input was specific to a limited number of users.[112] The application contained several pieces of evidence indicating that the number of potential users of primary aluminum was limited to the production of the seven main aluminum fabricated products, including casts, planks, screens, extrusions, forges, powder and die casting.[113] The application also contained evidence that both Canada and Australia, in their investigations of aluminum extrusions from China, had previously concluded that the provision of primary aluminum by China for less than adequate remuneration was specific.[114] The application clearly contemplated that the informal "subsidy program" was the provision of primary aluminum to all users of the input, although the "subsidy" which was the subject of the application was the provision of primary aluminum to the aluminum extrusions industry.

- Commerce reviewed the accuracy and adequacy of the evidence provided in the application, and determined that the evidence was sufficient to justify the initiation of an investigation, in accordance with Article 11 of the SCM Agreement.[115] With respect to

[110] China Responses to First Panel Questions, para. 103; China First Opening Statement, para. 65.
[111] *See* China Responses to First Panel Questions, para. 91.
[112] U.S. First Written Submission at para. 224.
[113] *Aluminum Extrusions* Petition, Exhibit III-135 at 45 (containing the 2008 Annual Report of CALCO Aluminum Corporation of China Limited) (USA-08).
114 *Aluminum Extrusions* Petition, Exhibit III-7 at 70-72 (containing Statement of Reasons Concerning the Making of Final Determinations With Respect to the Dumping and Subsidizing of Certain Aluminum Extrusions Originating In or Exported From the PRC); Volume III at 83 & Exhibit III-134, para. 2.7 (containing *Alleged Subsidisation of Aluminum Extrusion Exported from the People's Republic of China: Preliminary Report on Existence of Countervailable Subsidies*, prepared by the Australian Customs and Border Protection Service) (USA-08).
[115] *Certain Aluminum Extrusions from the People's Republic of China*: Initiation Checklist at 28-30 (April 23, 2010) (USA-13).

"the provision of primary aluminum to aluminum extrusions producers" specifically, Commerce found that the application contained sufficient evidence, for purposes of initiation, indicating the subsidy was specific, citing to the relevant information in the application, which included information that there was only a limited number of users of primary aluminum.[116]

- Commerce then issued a questionnaire to China, in which Commerce identified the subsidy alleged by the applicants and requested information from China with respect to the alleged subsidy, including "a list of the industries in the PRC that purchase aluminum directly, using a consistent level of industrial classification."[117] This question demonstrates that Commerce considered the program at issue to be the provision of primary aluminum for less than adequate remuneration. China responded that "primary aluminum could be used in unlimited number of industries," but provided no evidence to support its claim, arguing that "[a]s commercial commodities, the primary aluminum flows into every possibly industry that may consume it."[118] China argued, again without providing any evidence, that there was no "factual or legal basis" to the applicant's claims that "the provision of primary aluminum is specific."[119]

- Commerce subsequently issued its preliminary determination, and under the heading "Analysis of Programs," explained that it was "investigating whether producers and suppliers, acting as Chinese government authorities, sold primary aluminum to the Guang Ya and Zhongy Companies for" less than adequate remuneration.[120] Commerce preliminarily determined that United States law "clearly directs the Department to conduct its analysis on an industry or enterprise basis," and that, based on its "review of the data," it determined that "the industries" which consume primary aluminum were "limited in number and hence, the subsidy is specific."[121]

- In its case brief filed with Commerce, China acknowledged that Commerce had identified the subsidy program at issue as the provision of primary aluminum for less than adequate remuneration and argued that this identified subsidy was not specific, claiming that China had "submitted record evidence that the end uses of primary aluminum relate to the type of industry involved as a direct purchaser of the input, and the [Government of China] documented that the consumption of primary aluminum occurs across a broad range of industries," but citing for support only China's unsubstantiated statement to the same

[116] *Certain Aluminum Extrusions from the People's Republic of China*: Initiation Checklist at 28-30 (April 23, 2010) (USA-13).
[117] *Aluminum Extrusions from China*: Response of the Government of China to the Department of Commerce's Initial CVD Questionnaire, Sections VI and VII at 9 (Aug. 9, 2010) (USA-10).
[118] *Aluminum Extrusions from China*: Response of the Government of China to the Department of Commerce's Initial CVD Questionnaire, Sections VI and VII at 9 (Aug. 9, 2010) (USA-10).
[119] *Aluminum Extrusions from China*: Response of the Government of China to the Department of Commerce's Initial CVD Questionnaire, Sections VI and VII at 10 (Aug. 9, 2010) (USA-10).
[120] *Aluminum Extrusions from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 54302, 54309, 54317 (Dep't of Commerce Sept. 7, 2010) (CHI-86) ("*Aluminum Extrusions* Preliminary Determination").
[121] *Aluminum Extrusions* Preliminary Determination, 75 Fed. Reg. at 54309, 54317 (CHI-86).

effect in its questionnaire responses.[122] The applicants' rebuttal brief observed that China never provided evidence to support its claims, and argued that "[b]y its vary [sic] nature, primary aluminum is purchased and used by companies that produce downstream aluminum products. Thus, the benefit from the provision of primary aluminum is limited to the industry producing finished aluminum products."[123]

- Upon the conclusion of the *Aluminum Extrusions* investigation, the record contained evidence from the application with respect to the limited uses for primary aluminum, and China had provided no evidence contradicting a finding of specificity, despite the opportunities granted to China to place such evidence on the record. Under a section of the issues and decision memorandum titled "Analysis of Programs," and more specifically, "Programs Determined to be Countervailable," Commerce explained that "while numerous companies may comprise" the industries that consume primary aluminum, those industries are still "limited in number."[124] Accordingly, Commerce determined that "the provision of primary aluminum for [the] LTAR program is specific."[125]

80. The example of *Aluminum Extrusions* demonstrates that Commerce did not "merely assert" the existence of a subsidy program, as claimed by China, but in fact investigated the subsidy program alleged in the application and supported by evidence on the record. As the excerpts provided by China in table CHI-122 indicate, each application for the investigations at issue requested the initiation with respect to the provision of a good for less than adequate remuneration, and the applications alleged that the good was used by a limited number of enterprises, including the investigated enterprises. Further, China has not disputed that each application contained evidence indicating that the input at issue was specific to a limited number of enterprises.[126] As part of its investigation, in each investigation Commerce investigated the alleged programs, including the question of specificity, and reviewed the administrative record as a whole and concluded in the final determination that a subsidy program was used by a limited number of certain enterprises, and was therefore *de facto* specific in accordance with Article 2.1(c).

81. China's interpretation of the term "subsidy program" has no support in the text of Article 2.1 or the SCM Agreement. As with its the interpretation of Article 2 that it proffered in *US – Anti*-Dumping *Countervailing Duties (China)*, an interpretation which limits the scope of countervailable subsidies to those implemented through a formal program would permit Members to circumvent the disciplines of the SCM Agreement through informal and unwritten subsidy programs. Such an interpretation is contrary to the ordinary meaning of the provision, as well as the object and purpose of the SCM Agreement, and should be rejected. Further, for the reasons explained above, China's allegations that Commerce "made up" the subsidy programs lack any basis in the factual records of the investigations.

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[122] *Aluminum Extrusions*: Case Brief of the Government of China at 30 (Feb. 9, 2011) (USA-82).
[123] *Aluminum Extrusions from the People's Republic of China*: Petitioners' Rebuttal Brief at 43 (Feb. 15, 2011) (USA-89).
[124] *Aluminum Extrusions* IDM at 17, 21-22 (CHI-87).
[125] *Aluminum Extrusions* IDM at 17, 21-22 (CHI-87).
[126] *See* China Responses to First Panel Questions, paras. 145, 151.

B. China's Order of Analysis Argument Is Inconsistent with the Text of the SCM Agreement

82. China's argument that Commerce was required to analyze subparagraphs (a) and (b) of Article 2.1 before turning to subparagraph (c) is contradicted by the text and context of that provision in the SCM Agreement. Further, as explained below, the Appellate Body's consideration of Article 2.1(c) confirms that there is no mandatory order of analysis. The Appellate Body has repeatedly found that the subparagraphs are "principles" that should be concurrently applied in a manner appropriate given the facts of a particular specificity analysis.[127] For these reasons, there is no merit to China's claim that the SCM Agreement requires investigating authorities to always conduct a *de jure* specificity analysis before conducting a *de facto* specificity analysis, even where there is no basis for a *de jure* specificity finding.

83. China's order of analysis argument rests primarily on the location of a subordinate clause in the first sentence of Article 2.1(c).[128] China's proposed interpretation, however is not supported by the text, and indeed contradicts the ordinary meaning of the provision. The main focus of that sentence, and in fact all of Article 2.1(c), is to determine if a subsidy – even if not specific on its face – is *de facto* specific. This is clear from the operative conditional clause of the first sentence of Article 2.1(c): "[i]f . . . there are reasons to believe that the subsidy may in fact be specific," followed by the provision's language setting out the list of factors that may be considered in determining *de facto* specificity.

84. China's reliance on the dependent clause in the first sentence of Article 2.1(c) is misplaced. (The clause provides: "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b).") Nothing in this language states or implies a legal requirement to start an analysis with the principles in 2.1(a) and (b).[129] As the United States explained in its response to questions from the Panel,[130] the purpose of the dependent "notwithstanding" clause is to convey that a finding of non-specificity under (a) or (b) does not *prevent* further consideration of a subsidy from under Article 2.1(c), not that such a finding is a mandatory, condition precedent to a determination of *de facto* specificity.[131]

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[127] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371; *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 796; *EC and certain member States – Large Civil Aircraft (AB)*, para. 945.

[128] That sentence states: "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."

[129] China argues that the conditional *if* applies to both of those clauses, instead of just the operative clause, China First Opening Statement, para. 52; *see also* China Responses to First Panel Questions, para. 129, but the basic structure of the sentence does not support that interpretation.

[130] U.S. Responses to First Panel Questions, paras. 85-87.

[131] Further, as the United States explained in its answers to the Panel's question, in the investigations at issue, the subsidies were not implemented pursuant to any known relevant instruments and so the evidence before Commerce unequivocally indicated that the subsidies were not *de jure* specific under subparagraph (a), thus any consideration was unnecessary to determine that there was an appearance of non-specificity under subparagraphs (a) and (b). *See* U.S. Responses to First Panel Questions, para. 89.

85. Furthermore, China's interpretation is in conflict with the context of subparagraph (c) provided by the chapeau of Article 2.1. The chapeau states that, in determining if a subsidy is specific to certain enterprises, "the following principles," set out in subparagraphs (a), (b) and (c), "apply". The instruction that certain "principles . . . apply" to a specificity analysis does not either implicitly or explicitly mandate the manner in which the administering authority should apply the principles in any particular factual circumstance.

86. In fact, the Appellate Body has repeatedly discussed the structure of Article 2.1 in the context of several disputes and concluded that Article 2.1 does not mandate that investigating authorities address each subparagraph of Article 2.1. Rather, the Appellate Body has stated that a determination as to which principle or principles applies is dependent on "the nature and content of measures challenged in a particular case."[132] In *US* – Anti-*Dumping and Countervailing Duties (China)*, the Appellate Body stressed that the use of the term "principles," in the chapeau of Article 2 "instead of, for instance, 'rules' – suggest that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle."[133] Thus, a "proper understanding of specificity under Article 2.1 must allow for the concurrent application of these principles to the various legal and factual aspects of a subsidy in any given case."[134] In applying the "principles" set out in subparagraphs (a) through (c), the Appellate Body recognized "that there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary."[135]

87. The Appellate Body's use of the term "concurrent application" is significant. The term "concurrent" is defined as "occurring or operating simultaneously or side by side."[136] Accordingly, in using that term, the Appellate Body recognized that on a case-by-case basis, it is appropriate for an investigating authority to consider each of the principles "concurrently" and decide, in light of the nature and content of the subsidy at issue, which principles or principles apply.

88. Subsequent to *US – Anti-Dumping and Countervailing Duties (China)*, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body observed that an analysis of subparagraph (c) would only "normally"[137] or "ordinarily"[138] follow after an analysis of the other two subparagraphs. In *EC and certain member states – Large Civil Aircraft*, it reiterated the observation that there may be cases where the evidence "unequivocally indicates specificity or non-specificity under one of the subparagraphs of Article 2.1."[139] In which case examining specificity under one subparagraph may be appropriate, where "the potential for application of the other subparagraphs" is not "warranted in the light of the nature and content of measures

[132] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371.
[133] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.
[134] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371.
[135] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371.
[136] *The New Shorter Oxford English Dictionary* at 470 (1993) (USA-90).
[137] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 796.
[138] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 873.
[139] *EC and certain member States – Large Civil Aircraft (AB)*, para. 945.

challenged in a particular case."[140] In both disputes, the Appellate Body, again, explained that because each paragraph represents a principle, instead of a rule, "a proper understanding of specificity under Article 2.1 must allow for the concurrent application of the principles set out" in that provision.[141]

89. In contrast to China's interpretation, the Appellate Body's statements are consistent with the fact that the SCM Agreement applies to a wide variety of subsidies that must be considered on a case-by-case basis. Although many subsidies are, in fact, implemented pursuant to legislation, regulations, guidance or other sources which may contain an explicit limitation on access to a subsidy, others are not. The specificity inquiry will vary depending on the facts of the investigation, because as the Appellate Body has explained, "Article 2.1 makes it clear that the assessment of specificity is framed by the particular subsidy found to exist under Article 1.1."[142] Thus, the Appellate Body's statements regarding the structure of Article 2.1 correctly anticipate that the facts presented will determine if an investigating authority should commence its specificity analysis under a *de jure* analysis pursuant to Article 2.1(a), or if, as was the case in the challenged investigations before this Panel, it is appropriate to proceed directly to a *de facto* specificity analysis under Article 2.1(c).

90. In its response to questions from the Panel, China takes certain statements by the Appellate Body in *US – Large Civil Aircraft (2nd complaint)* out of context in an attempt to support its order of analysis argument.[143] Specifically, China claims that the Appellate Body "began" its analysis in that dispute by stating that the first sentence of Article 2.1(c) "makes clear that the application of Article 2.1(c) proceeds on the basis of the conclusions reached as a result of the application of the preceding subparagraphs of Article 2.1."[144] However, China ignores the facts at issue in that dispute. In particular, the question before the Appellate Body was whether, despite the fact that the European Communities in its WTO challenge "did not present a claim of specificity with reference to subparagraphs (a) or (b), the Panel" may "nevertheless proceed[] to examine specificity within the meaning of Article 2.1(a)."[145] The language to which China cites was therefore part of the Appellate Body's analysis of whether or not "it was correct for the Panel to assess whether the legislation pursuant to which the IRBs were granted explicitly limited access to certain enterprises within the meaning of Article 2.1(a), *even though it was not claimed by the European Communities*."[146] The cited language does not speak to whether such an analysis is *mandatory*.

91. Furthermore, China fails to note that the IRBs at issue in *US – Large Civil Aircraft (2nd Complaint)* were granted pursuant to *legislation*. In the situation in which legislation exists pursuant to which a subsidy has been issued, an initial analysis under Article 2.1(a) may be

[140] *EC and certain member States – Large Civil Aircraft (AB)*, para. 945.
[141] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 796. *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 945.
[142] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 841.
[143] *See* China Responses to First Panel Questions, paras 95-97; *see also* China First Opening Statement, para. 54;
[144] China's Responses to Questions, para. 95 (citing *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 876).
[145] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 874. It was necessary and appropriate for the Appellate Body to consider this issue because the EC did not present a claim of specificity with reference to subparagraphs (a) or (b), and a panel may not make the case for a complaining party. *See Japan Agricultural Products II (AB)* at 14.
[146] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 876 (emphasis added).

warranted. However, with respect to subsidies which are not issued pursuant to legislation or other explicit means, such as those subsidies at issue in this dispute, only a *de facto* analysis under Article 2.1(c) is necessary.

92. For these reasons, there is no mandatory "order of analysis" of the subparagraphs in Article 2.1 of the SCM Agreement.

C. Commerce Was Not Required to Identify a "Granting Authority" as Part of its Specificity Analysis

93. Contrary to China's novel interpretation of Article 2.1, Commerce was not required to identify a "granting authority" as part of its specificity analysis. China's assertion, in its responses to questions from the Panel, that it is "impossible" to conduct an analysis of specificity under Article 2.1 and that identification of a granting authority is "require[d]"[147] directly contradicts the numerous specificity analyses undertaken by the panels and Appellate Body in *US – Large Civil Aircraft (2nd complaint)*, *EC and certain member States – Large Civil Aircraft*, and *US – Anti-Dumping and Countervailing Duties (China)*, none of which involved the identification of a "granting authority." Further, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body emphasized that the identification of the granting authority is not the pertinent question for purposes of Article 2.1, and did not even resolve the question of whether there was a single or multiple "granting authorities."[148] In that dispute, the relevant inquiry was whether the alleged subsidy was "expressly limited to specific groups of subsidy *recipients*" within the meaning of Article 2.1(a); in this dispute the relevant inquiry is whether the subsidies are used by a limited number of certain enterprises.[149]

94. Indeed, the focus of a *de facto* analysis under the first factor of Article 2.1(c) is on the universe of *users* of the subsidy, not on the "granting authority" – for that reason the relevant jurisdiction of the granting authority for purposes of the specificity analysis is the jurisdiction where those users are located. For each specificity determination at issue in this dispute, Commerce determined that the inputs at issue were provided for less than adequate remuneration to a limited number of users *within China*. That is, in each case, Commerce considered the

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[147] China Responses to First Panel Questions, paras. 111-12, 125

[148] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 756 ("While the scope and operation of the granting authority is relevant to the question of whether such an access limitation with respect to a particular class of recipients exists, it is important to keep in mind that it is not the purpose of a specificity analysis to determine whether the authorities involved in granting the subsidies constitute a single subsidy *grantor* or several *grantors*.") (underlining added). *See also id.* note 1570.

[149] In its response to the Panel's question, China mischaracterizes the Appellate Body's statements in *EC and certain member States – Large Civil Aircraft* and *US – Anti-Dumping and Countervailing Duties (China)*. China Responses to First Panel Questions, para. 111 & n. 84. In particular, in neither report did the Appellate Body state that it was "critical" to identify the "granting authority." Rather, the Appellate Body observed in *US – Anti-Dumping and Countervailing Duties (China)* that it is a "critical feature" that the principles "*direct scrutiny to the eligibility requirements* imposed by 'the granting authority, or the legislation pursuant to which the granting authority operates.'" *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 368 (emphasis added). The Appellate Body reiterated the observation in *EC and certain member States – Large Civil Aircraft*. *EC and certain member States – Large Civil Aircraft (AB)*, para. 943. The Appellate Body never observed that the identification of the granting authority is "critical."

jurisdiction within which it was conducting its specificity analysis (i.e., the jurisdiction of the granting authority) to be China.[150]

95. China's interpretation is far removed from the text of Article 2.1, as well as the context provided by the rest of the SCM Agreement. China advances a convoluted theory that if Commerce had analyzed subparagraphs (a) and (b), it would have necessarily identified the "subsidy program" and "granting authority."[151] This interpretation is inexplicable given that the term "subsidy program" does not appear in subparagraphs (a) and (b), and the fact that past panels and the Appellate Body have consistently not identified a "granting authority" as part of the analysis of these subparagraphs. Further, for the reasons described above at paragraphs 82-92, there is no requirement to examine subparagraphs (a) or (b) where there is no evidence or allegation of a *de jure* specific subsidy.

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[150] It is clear from the context of the investigations that Commerce considered the jurisdiction at issue to be China. In many cases, Commerce or an interested party explicitly stated that China was the relevant jurisdiction. Certain of the excerpts pasted in Exhibit CHI-122 include such statements: SPP (SSC) (Initiation Checklist: "it is part of the [Government of China's] overall policy to subsidize **the Chinese** steel industry") (emphasis added); SLP (HRS) (Final Determination: stating that China discussed "[t]he sale of hot-rolled steel **in the Chinese market**") (emphasis added); TBLG (HRS) (Initiation Checklist: "a limited number of **Chinese industries** use hot-rolled steel") (emphasis added); KASR (SWR) (Initiation Checklist: "[t]he program is limited to a **limited number of Chinese industries**") (emphasis added); SWS (SWR) (Initiation Checklist: "[t]he program is limited to a limited number of **Chinese industries**") (emphasis added); AE (Primary Aluminum) (Petition: "[t]he manufacture of aluminum is one of the main uses [sic] of primary aluminum **in China**") (emphasis added); USWT (HRS) (Petition: "[t]he provision of hot-rolled plate to wind tower producers **in China** is therefore specific") (emphasis added); SSI (SSC) (Petition: describing "the main **Chinese consumers**" of stainless steel) (emphasis added). *See also OCTG* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation at 75 (Nov. 23, 2009) (CHI-45) (explaining the government of China's positions with respect to the provision of steel billets and steel rounds "**in the [People's Republic of China]**") (emphasis added); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination* 77 Fed. Reg. 17439, 17444 (Dep't of Commerce Mar. 26, 2012) (CHI-105) ("*Solar Cells* Preliminary Determination") (stating "[t]he Department asked the [Government of China] to provide a list of **industries in the [People's Republic of China]** that purchase polysilicon directly") (emphasis added); *Circular Welded Austenitic Stainless Pressure Pipe – CVD Investigation*: Government of China's Supplemental Response at 12 (May 14, 2008) (USA-134) (providing a question and answer relating to "the market for the good/service provided in **your country,**" including the "[w]hat types of industries generally consume this good/service") (emphasis added); *Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*: Response of the Government of China to Commerce's Initial CVD Questionnaire at 126 (Jan. 8, 2010) (USA-11) (answering the following question from Commerce: "Provide a list of the industries in the [**People's Republic of China**] that purchase papermaking chemicals directly, using a consistent level of industrial classification") (emphasis added); *Drill Pipe from the People's Republic of China*: Response of the Government of China to the U.S. Department of Commerce's Questionnaire, Volume I at 52, 58 (April 20, 2010) (USA-135) (responding to the following question from Commerce related to steel rounds and green tubes: "Provide a list of the industries in the [**People's Republic of China]** that purchase [steel rounds/green tubes] directly, using a consistent level of industrial classification") (emphasis added); *Countervailing Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China*: GOC Initial Questionnaire Response at 30, 39 (Sept. 7, 2011) (USA-136) (responding to the following question from Commerce related to hot rolled steel and seamless tube steel: "Provide a list of the industries in the [**People's Republic of China]** that purchase [HRS/STS] directly, using a consistent level of industrial classification") (emphasis added);. *Countervailing Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China*: GOC Second Supplemental Questionnaire Response at 7 (Oct. 14, 2011) (USA-137) (discussing a question previously posed by Commerce related to billets requesting that China provide: "a list of the industries in the [**People's Republic of China]** that purchase standard commodity SBB directly, using a consistent level of industrial classification") (emphasis added).

[151] China Responses to First Panel Questions, para. 126.

96. In addition to lacking any textual basis, China's arguments seem designed to preclude investigating authorities from examining subsidies of the type maintained by China – the provision of certain inputs for less than adequate remuneration – despite the fact that such subsidies are specifically covered by the SCM Agreement.[152] Because China's argument asserting that an investigating authority must identify the granting authority is premised on misunderstandings of prior Appellate Body and panel reports and the text of Article 2 of the SCM Agreement, and because China's arguments in combination would ultimately permit subsidies to escape the disciplines of the SCM Agreement, this Panel should reject China's argument. Article 2 does not require an investigating authority to identify a "granting authority."

97. Finally, China premises the bulk of its argumentation in its responses to questions from the Panel[153] on a mischaracterization of the U.S. position.[154] The United States did not state that the SOEs are the "granting authority" for purposes of Article 2.1; rather, the United States explained that it is not necessary to analyze and identify the granting authority as part of its specificity analysis: "[i]n each challenged determination, Commerce determined that input producers were public bodies controlled by varying parts of the Chinese government, and that those public bodies provided inputs for less than adequate remuneration to certain enterprises. No further analysis was required under Article 2 of the SCM Agreement."[155]

D. Commerce Was Not Required to Explicitly Analyze Economic Diversity or the Length of Time the Subsidy Program Was in Operation

98. Contrary to China's assertions that it reiterates in its response to questions from the Panel,[156] an investigating authority is not required to analyze economic diversity or the length of time a subsidy program has been in operation where – as was true with respect to the determinations at issue – there is no reason to believe either of these factors would alter the specificity analysis.

99. The language in the last sentence of the principles set out in Article 2.1(c) requires only that an investigating authority "take into account" the two factors. "Account shall be taken" does not mean that an investigating authority must explicitly analyze the two factors in each and every investigation. Rather, as the panel in *EC and certain member States – Large Civil Aircraft* observed, "[t]o take something into account means to take something into reckoning or consideration; to take something on notice."[157] This understanding of the ordinary meaning of Article 2.1(c) is supported by the panel's findings in *EC – Countervailing Measures on DRAM Chips*. That panel found that, in the context of the facts at issue in that dispute, including the fact that no party had raised the relevance of the two factors, it was reasonable for the investigating authority to refrain from explicitly addressing the two factors.[158] As the *EC – Countervailing*

[152] *See* SCM Agreement, Articles 1.1(iii) & 14(d).
[153] China Responses to First Panel Questions, paras 110-27.
[154] China Responses to First Panel Questions, para. 116.
[155] U.S. First Written Submission, para. 192.
[156] China Responses to First Panel Questions, para. 98.
[157] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.969 (citing The New Shorter Oxford Dictionary, Fourth Edition, p. 15).
[158] *See EC – Countervailing Measures on DRAM Chips*, para. 7.229.

Measures on DRAM Chips report demonstrates, Article 2.1(c) does not require a mechanical analysis of the two factors where they are not relevant to the specificity analysis.[159]

100. With respect to the determinations at issue, Commerce had no reason to believe that the two factors would be relevant, and China has not pointed to any reason either before Commerce during the investigations or before this Panel in this dispute. This is despite the fact that, in each case, Commerce identified the subsidy programs at issue in its preliminary determinations,[160] and all parties were given the opportunity to raise arguments or facts with respect to this issue,

[159] *See Softwood Lumber VI (Panel)*, para. 7.124 (finding 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") (emphasis omitted). The panel in *Softwood Lumber VI* found it relevant, for purposes of the economic diversification language of Article 2.1(c), that it was a "publicly known fact that Canadian economy and the Canadian provincial economies in particular are diversified economies." *Id.* Likewise, in *EC-Large Civil Aircraft*, the panel accepted "that the European Communities has a highly diversified economy," with no further analysis on this point. *EC-Large Civil Aircraft (Panel)* at para. 7.990. China has made no attempt to claim that its economy is anything but diversified. *See also* U.S. First Written Submission, paras. 196-202.

[160] Preliminary determinations identified the provision of the input at issue under sections entitled "Analysis of Programs" and subsections such as "Programs Preliminarily Determined to Be Countervailable" or "Programs for Which We Preliminarily Determine More Information is Needed." *Circular Welded Austenitic Stainless Pressure Pipe From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 73 Fed. Reg. 39657, 39662-63 (Dep't of Commerce July 10, 2008) (CHI-11); *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 73 Fed. Reg. 52297, 52303, 52306 (Dep't of Commerce Sept. 9, 2008 (CHI-18); *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 73 Fed. Reg. 70971, 70976, 70979 (Dep't of Commerce 73 Nov. 24, 2008) (CHI-30); *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 74 Fed. Reg. 683, 688, 690 (Dep't of Commerce Jan. 7, 2009) (CHI-37); *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); *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 74 Fed. Reg. 56576, 56581 (Dep't of Commerce Nov. 2, 2009) (CHI-51); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination*, 75 Fed. Reg. 9163, 9171, 9173 (Dep't of Commerce Mar. 1, 2010) (CHI-65); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 75 Fed. Reg. 10774, 10782, 10788 (Dep't of Commerce Mar. 9, 2010) (CHI-72); *Drill Pipe From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 33245, 33252, 33255, 33258 (Dep't of Commerce June 11, 2010) (CHI-79); *Aluminum Extrusions* Preliminary Determination 75 Fed. Reg. at 54309, 54317 (CHI-86); *High Pressure Steel Cylinders From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination*, 76 Fed. Reg. 64301, 64303-05 (Dep't of Commerce Oct. 18, 2011) (CHI-98); *Solar Cells* Preliminary Determination, 77 Fed. Reg. at 17449, 17451 (CHI-105); *Utility Scale Wind Towers From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 33422, 33431, 33433 (Dep't of Commerce June 6, 2012) (CHI-109); *Drawn Stainless Steel Sinks From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 46717, 46723-24 (Dep't of Commerce, Aug. 6, 2012) (CHI-113).

and did not do so.[161] Given the nature of the subsidy programs at issue, as well as the failure of China to identify, *either* in the underlying investigations *or* in the instant dispute, any facts or arguments indicating that the two factors are relevant, there is no basis for the Panel to find that the two factors were relevant to Commerce's specificity analyses. As a result, China is incorrect to argue that Article 2 of the SCM Agreement required Commerce in the challenged investigations to analyze economic diversity or the length a time a subsidy program has been in operation.

VIII. CHINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE WITH RESPECT TO THE SEVEN CHALLENGED REGIONAL SPECIFICITY DETERMINATIONS

101. At this late stage in the dispute, China has only just clarified that its Article 2.2 claim is limited solely to the seven specific regional specificity determinations in CHI-121. However, China still fails to make a *prima facie* case with respect to any of the alleged breaches.

102. China continues to rely on the legal reasoning and factual findings in *US – Anti-Dumping and Countervailing Duties (China)* even though that panel's conclusion was made on an "as applied" basis and was "driven by the specific facts that were on the record of that investigation."[162] That panel's conclusion cannot serve as a finding *in this dispute* that the seven regional specificity determinations that China is challenging are inconsistent with Article 2.2. Further, it is incumbent on China to demonstrate, on an as applied basis that each of the seven challenged determinations was inconsistent with WTO obligations. China contends that the seven challenged investigations are not materially different from the facts in *US – Anti-Dumping and Countervailing Duties (China)* and that the excerpts in CHI-121 make evident that Commerce's regional specificity determinations are inconsistent with Article 2.2. These blanket assertions are insufficient for China to meet its burden of making a *prima facie* case.[163] For China to meet its burden, it must 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. Because China has failed to do so, it has not made its *prima facie* case.

103. In the absence of China making a *prima facie* case, the United States cannot at this time respond to China's claim under Article 2.2 with additional arguments. For the reasons set out in its first written submission, the United States respectfully submits that it is not the responsibility of the United States in this dispute to demonstrate, in the first instance, that the facts underlying each of Commerce's regional specificity analyses do not support a claim that China has failed to explain.[164] In the event that China does attempt to meet its burden and to make a *prima facie* case with respect to the specific regional specificity determinations cited in CHI-121 – which

[161] As explained by China in its response to the Panel's question, similarly, in *EC – Countervailing Measures on DRAM Chips*, the investigating authority had identified the subsidy program and found that it had been used by a limited number of certain enterprises, and no party in the investigation explained how lack of economic diversification or length of time of the program's operation could be relevant. *See* China Responses to First Panel Questions, para. 101.
[162] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.162.
[163] *See* China Responses to First Panel Questions, para. 134.
[164] U.S. First Written Submission, paras. 203-08.

China has made clear are the sole findings subject to its Article 2.2 claim[165] – then the United States reserves the right to respond to, and to provide submissions related to the substance of, any such properly asserted claim.

104. Regarding China's blanket assertion that the provision of land-use rights within an industrial park or economic development zone is "immaterial" to a determination that the provision of land use rights is regionally specific, China is in error.[166] Such a finding is material to Commerce's analysis of whether the land at issue in the investigation constitutes a "geographical region," and the weight of such a finding depends on the case-specific facts that are available on the record. Commerce makes its regional specificity determinations on a case-by-case basis and considers the information available on the record of each investigation in making its determination. Thus, Commerce may consider, during the course of an investigation – if available on the record of the investigation and verified – whether the land is located within an industrial park or zone. In addition, Commerce's analysis includes the other available and verified record evidence related to the provision of land-use rights, which may also include, among other things, information on whether a regional authority is responsible for creating the industrial park or zone, whether the regional authority controlled the granting of land-use rights in the industrial park or zone, and whether the respondent company is located within the industrial park or zone.

105. China's assertions in its response to questions from the Panel regarding Commerce's regional specificity finding in *Coated Paper* (referred to by China as *Print Graphics*) have no merit.[167] Specifically, China argues that Commerce applied the "same legal standard" (according to China, an analysis of the type conduced in *Laminated Woven Sacks*) in *Coated Paper* as it did in the other six challenged regional specificity determinations.[168] To the contrary, Commerce's analysis in *Coated Paper* differed from that applied in *Laminated Woven Sacks* (or the other determinations at issue in this investigation). In *Coated Paper*, due to noncooperation by responding parties, Commerce had insufficient facts regarding the provision of land use rights to the Gold companies to conduct such an analysis.[169]

106. In contrast to the information available in *Coated Paper*, the panel in *US – Anti-Dumping and Countervailing Duties (China)* found that an investigating authority should examine evidence of special rules, distinctive pricing, or other elements that distinguished the provision of land inside and outside the industrial park or zone to determine whether a distinct land regime exits.[170] Notably, the panel's conclusion was driven by the evidence on the record of *Laminated Woven Sacks*, which had been provided by cooperative respondents and included information of how the industrial park was created, irregularities in that process, and how the land-use prices were set both inside and outside the industrial park.[171] In contrast, in *Coated Paper*, China

[165] *See* China Responses to First Panel Questions, para. 140.
[166] China Responses to First Panel Questions, para. 136.
[167] China Responses to First Panel Questions, paras. 141-42.
[168] China Responses to First Panel Questions, para. 141-42.
[169] 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 4, 6, 24-25 (Sept. 20, 2010) ("*Coated Paper* IDM") (CHI-73).
[170] *Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 9.159, 9.162.
[171] *Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 9.154, 9.163.

provided some information, but failed to provide the requested information regarding land prices in the zone.[172] In addition, the governmental authority that provided land-use rights to the Gold companies did not participate in verification.[173] Because Commerce could not satisfy itself as to the accuracy of the information supplied by China regarding the exact nature of the government's role as a land-use rights seller in the zone, this information was considered "not verified" and Commerce did not rely on it in making a determination.[174]

107. For these reasons, absent verified information in *Coated Paper*, Commerce could not undertake *any* kind of detailed analysis of the specificity of the land-use rights provided for less than adequate remuneration. Instead, Commerce relied on the limited information on the record, and determined that the land use rights were specific.[175] China has failed to provide any legal or evidentiary support for why the regional specificity determination in *Coated Paper*, which was decidedly distinct from the facts and analysis employed in *Laminated Woven Sacks*, is inconsistent with Article 2.2 of the SCM Agreement.

108. Further, China's contention that Commerce's use of facts available in *Coated Paper* is inconsistent with Article 12.7 of the SCM Agreement[176] is also in error. Article 12.7 provides that a final determination may be made on the basis of the facts available in cases in which an interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation. As noted above, and detailed in *Coated Paper*, Commerce had insufficient facts regarding the provision of land use rights to the Gold companies as a result of China's failure to provide verifiable information regarding the provision of land-use rights.[177] Accordingly, Commerce's use of the facts available was consistent with Article 12.7 of the SCM Agreement.

IX. COMMERCE'S INITIATIONS WERE CONSISTENT WITH ARTICLE 11 OF THE SCM AGREEMENT

A. Commerce's Initiations with Respect to Specificity Were Consistent with Article 11 of the SCM Agreement Because the Applications Contained Sufficient Evidence of Specificity

109. Commerce's initiation determinations with respect to the specificity of the provision of goods for less than adequate remuneration were consistent with the standard set out in Articles 11.2 and 11.3 of the SCM Agreement because the applications at issue contained "sufficient" evidence, in light of the information reasonably available to the applicant, to justify initiation.

110. China's arguments with respect to these initiation claims fail for several reasons. First, China does not dispute that certain of the applications contain substantial evidence relating to the use of the inputs provided for less than adequate remuneration.[178] Rather, China discounts this

[172] *Coated Paper* IDM at 24, 81-82.
[173] *Coated Paper* IDM at 24, 81-82.
[174] *Coated Paper* IDM at 24, 82.
[175] *See Coated Paper* IDM at 24; Exhibit USA-94 at 57-60.
[176] *See* China Responses to First Panel Questions, para. 142.
[177] *Coated Paper* IDM at 24-25.
[178] China Responses to First Panel Questions, para. 145.

evidence because it is "based solely on the end uses of a particular type of input."[179] China's position is inexplicable and unconvincing. The relevant question under the first factor of Article 2.1(c) is whether there are a limited number of *users* of the subsidy program, and so the question of which enterprises "use" the input is relevant to the inquiry. An examination of the provision of a good by the government will necessarily involve the question of whether only a limited number of enterprises are capable of using the good. As the panel observed in *US – Softwood Lumber IV*:

> 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.[180]

111. China's assertion that it is inappropriate to examine the users of the subsidy in question ignores both the facts at issue in the investigations, as well as the plain meaning of Article 2.1(c).[181]

112. Second, China appears to argue that an application must identify, and contain evidence of a "facially non-specific subsidy program," the "granting authority," and the two factors set out in the last sentence of Article 2.1(c).[182] As an initial matter, this argument is flawed because none of these elements are required as part of an Article 2.1(c) analysis for the reasons described in paragraphs 75-100 above. Moreover, there is no basis to conclude that these elements would be necessary to meet the standard of "sufficient evidence" to justify the initiation of the investigation, which only requires "adequate evidence, tending to prove or indicating"[183] specificity, in light of the information reasonably available to the applicant. If anything, this argument reveals that the end result of China's arguments with respect to Articles 2 and 11 would be the creation of procedures extraneous to the ultimate question of specificity that have no support in the text of the SCM Agreement.

113. Finally, although China does not dispute that applications in the investigations at issue cited to past determinations of Commerce regarding the same or similar subsidies, and that prior determinations are the type of information regarding specificity that can be expected to be "reasonably available to the applicant" at the time of initiation, China makes sweeping,

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[179] China Responses to First Panel Questions, para. 145.
[180] *US – Softwood Lumber IV (Panel)*, para. 7.116.
[181] To the extent that Commerce determined in each challenged investigation that an application did not contain sufficient evidence to warrant initiation, Commerce either did not initiate an investigation into an alleged program, or, if it was uncertain if information was "reasonably available" to the applicants, it requested additional information or explanation to determine if initiation was warranted. For example, in the *Kitchen Shelving* investigation, Commerce did not believe that there was sufficient explanation in the application with respect to several important factors, including the industries that "purchase wire rod." *See Kitchen Shelving*: Petitioner's Response to Request for Additional Information (August 13, 2008) at 58-59 (USA-12). Commerce therefore requested not only a description of those industries that purchase wire rod, but also an explanation why those "industries comprise a specific enterprise or industry or group thereof," to which the applicants provided a response and citations to previous determinations by Commerce addressing the use and specificity of similar inputs. *Id.*
[182] China First Written Submission, para. 126; China First Opening Statement, para. 63.
[183] *China – GOES (Panel)*, para. 7.55.

unsupported factual statements regarding those determinations.[184] In particular, China states that Commerce "never properly determined, in any investigation of products from China, that an alleged input subsidy is specific."[185] China cites no evidence supporting this general assertion, nor does it place the cited final determinations on the record, or discuss why applications citing to those determinations fail to meet the Article 11 standard. In the absence of any demonstration of what those cited final determinations contain, the Panel has no factual basis to evaluate further China's claims.[186]

B. Commerce's Initiations of Investigations into Whether "Public Bodies" Provided Goods for Less than Adequate Remuneration Were Not Inconsistent with Article 11 of the SCM Agreement

114. As explained in the U.S. first written submission, Commerce did not act inconsistently with Article 11 of the SCM Agreement in initiating investigations into whether "public bodies" provided goods for less than adequate remuneration. There was sufficient evidence, within the meaning of Article 11.3 of the SCM Agreement, to justify initiation in each of the cases challenged by China. We will not repeat here the points we made in our first submission and in our responses to the Panel's questions, but rather will respond to some of China's assertions made in its responses to the Panel's questions and opening statement.

115. China argues that Commerce initiated investigations into whether public bodies provided goods using an "incorrect" legal standard, and that once an investigating authority initiates based upon an "incorrect" legal standard, it "necessarily" has acted inconsistently with Article 11 of the SCM Agreement.[187] There is no basis for this argument.

116. Article 11 of the SCM Agreement states, in pertinent part, that an application "shall include sufficient evidence of the existence of … a subsidy…."[188] It further states that an application shall contain reasonably available information on "evidence with regard to the existence, amount and nature of the subsidy in question…."[189] Then, it requires investigating authorities to "review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation."[190] In other words, Article 11 speaks to providing and evaluating "evidence."

117. Article 11 does not require that applicants allege, or that investigating authorities recite, a particular legal standard prior to initiation. The panel in *US – Softwood Lumber V* faced an analogous situation under the initiation provision of Article 5.3 of the AD Agreement, with the complaining party arguing that an investigating authority must properly apply the substantive dumping provisions of Article 2 of the AD Agreement when initiating an investigation.[191] That

[184] China Responses to First Panel Questions, para. 151.
[185] China Responses to First Panel Questions, para. 151.
[186] *See US – Gambling (AB)*, para. 281 ("[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."). See also paragraphs 74 above addressing the deficiencies in CHI-122 with respect to this claim.
[187] China First Opening Statement, para. 32.
[188] SCM Agreement, Article 11.2.
[189] SCM Agreement, Article 11.2.
[190] SCM Agreement, Article 11.3.
[191] *See US – Softwood Lumber V (Panel)*, paras. 7.81-7.83.

panel explained that "[a]lthough we agree that Article 2 provides context for the interpretation of Article 5.3, we are of the view that a clear distinction should be made between the determination of a margin of dumping according to the requirements of Article 2.2 for purposes of a preliminary or a final determination, and the evaluation of evidence of dumping for purposes of determining whether there is sufficient evidence to justify initiation of an investigation."[192] Likewise, there is a distinction between a finding that an entity is a public body for purposes of a preliminary or final determination, and a finding that there is sufficient evidence within the meaning of Article 11 of the SCM Agreement to support initiation of an investigation into whether entities are public bodies.

118. Indeed, the SCM Agreement indicates that interested parties present "arguments" to the investigating authority (Article 12.2) and that the authority's determinations shall set out "findings and conclusions reached on all issues of fact and law considered material by the investigating authority" (Article 22.2). Those issues of law may involve the legal standards to be applied, and arguments related to those issues may be considered during the investigation itself.

119. In *US – Softwood Lumber V*, Canada challenged the United States for not making certain conclusions regarding cost allocation prior to the initiations. The panel, noting that cost allocation is "very contentious", was "not an issue that needs to be definitively resolved prior to initiation of an investigation", but rather "it cannot be expected from an investigating authority to do a cost allocation in the same way as it is required when making a preliminary or final determination of dumping."[193] Similarly, the findings of a public body do not need to be definitively resolved at the time of initiation, all that is necessary is sufficient evidence to initiate. Additional evidence can be gathered throughout the course of the investigation.

120. China's argument is particularly misplaced, given that evidence of government ownership or control is relevant to a public body analysis, even under the legal standard it advances. That is, evidence of government ownership or control can tend to prove or indicate that an entity is a public body under (1) a standard that an entity is a public body if it is simply controlled by the government, (2) a standard that an entity is a public body if it is controlled by the government such that the government can use the entity's resources as its own, or (3) a standard that an entity is a public body if it possesses, exercises, or is vested with governmental authority.[194] The United States explained this at length in its first written submission,[195] and we will not repeat all of our arguments here.

121. Further, contrary to China's argument, the United States is not advancing an *ex post* rationalization to support Commerce's initiations.[196] In the Appellate Body's view, a Member is "precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority's determination."[197] The rule does not make sense in the context of an initiation, considering that Article 22.2 of the SCM Agreement (in contrast to

[192] *US – Softwood Lumber V (Panel)*, para. 7.83.
[193] *US – Softwood Lumber V (Panel)*, para. 7.97.
[194] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[195] *See* U.S. First Written Submission, paras. 234-254.
[196] *See* China First Opening Statement, para. 32-34.
[197] *Japan – DRAMS (Korea) (AB)*, para. 159.

Article 22.3 for determinations) does not require any public explanation of reasons which have led to the initiation of the investigation.

122. An *ex post* rationalization, as the name indicates, is a new "rationale or explanation."[198] The United States is advancing no new "rationale or explanation" for Commerce's initiations into whether entities were public bodies. In its initiations, Commerce did not explain that it was initiating based upon any particular interpretation of the term "public body" (or "public entity" under U.S. law). Commerce merely reviewed the accuracy and adequacy of the evidence provided in each application to determine whether the evidence was sufficient to justify initiation into whether there were public bodies at issue – that is, to determine whether there was evidence that certain entities were owned or controlled by the government such that further investigation into whether they were public bodies was appropriate.[199] Therefore, China's argument that the United States advances an *ex post* rationalization must fail.

123. In short, Commerce, as required by Article 11 of the SCM Agreement, simply reviewed the evidence presented in each application to determine whether it was sufficient to justify initiation, and did not adopt any particular interpretation of the term "public body" in initiating the investigations at issue. Further, as described in the U.S. first written submission, there was sufficient evidence that the entities concerned were public bodies, and Commerce therefore did not act inconsistently with Article 11 of the SCM Agreement in initiating its investigations.

X. COMMERCE'S INITIATION OF INVESTIGATIONS INTO CERTAIN EXPORT RESTRAINT POLICIES IMPOSED BY CHINA AND DETERMINATIONS THAT THESE EXPORT RESTRAINTS CONSTITUTED COUNTERVAILABLE SUBSIDIES ARE CONSISTENT WITH THE SCM AGREEMENT

A. China Ignores Record Evidence That Supports The Existence of a Financial Contribution.

124. To recall, in the investigations at issue, Commerce considered whether the Government of China, through export restraint schemes, was indirectly providing goods—coke in *Seamless Pipe*, and magnesia in *Magnesia Carbon Bricks*—pursuant to Article 1.1(a)(1)(iv) and within the meaning of Article 1.1(a)(iii) of the SCM Agreement to downstream users.[200] For the reasons

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[198] *Japan – DRAMS (Korea) (AB)*, para. 159.

[199] The limitation on *ex post* rationalization does not preclude a party from identifying evidence on the record before the investigating authority. In *US – Countervailing Duty Investigation on DRAMS (AB)*, the Appellate Body expressly did not apply the *ex post* "rule" to evidence that was on the investigating authority's record, but not cited in the investigating authority's final determination. *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 159-165. The Appellate Body stated that an investigating authority is not required "to cite or discuss every piece of supporting record evidence for each fact in the final determination." *See id.* at para. 164. In other words, nothing in the WTO Agreements prohibits a Member from providing additional argument during WTO dispute settlement proceedings to support the reasoning in an investigating authority's determination, so long as this additional argument relates to that reasoning. Similarly, in *US – Hot-Rolled Steel*, the panel found that an argument pertaining to a factor not addressed by the investigating authority was not an *ex post* rationalization because that particular factor was merely a subset of a larger factor which the investigating authority had, in fact, addressed. *See US – Hot-Rolled Steel (Panel)*, paras. 7.245-7.246.

[200] "[W]e determine that the [Government of China's] export restraints on coke constitute a financial contribution (*i.e.*, provision of goods) to PRC producers of downstream goods . . . ." *Seamless Pipe* IDM, 7 (CHI-66); "[Commerce] continues to find . . .that the [Government of China's] export restraints on magnesia constitute a

the United States previously has articulated, export restraints can constitute a financial contribution under Article 1.1(a)(1)(iv).[201]

125. China argues "an export restraint cannot, as a matter of law, constitute government entrusted or directed provision of goods."[202] China does not argue, in the alternative, that the evidence in the applications was insufficient for initiation purposes if the Panel were to find that an export restraint scheme could constitute a financial contribution determination in some situations. Therefore, if the Panel – as it should[203] – rejects China's contention that any measure that could be described as an "export restraint" cannot, in any possible factual scenario, support a financial contribution determination,, the Panel should reject China's claim that Commerce's initiations are inconsistent with Articles 1.1(a)(1)(iv), 11.2 and 11.3 of the SCM Agreement.

126. At the same time, in China's responses to the Panel's questions, China criticizes the factual basis for the initiation of the investigations at issue with regard to export restraints.[204] China has no legitimate basis for this criticism, as China has ignored important and relevant evidence on the record in the investigations.

127. The applications for *Seamless Pipe* and *Magnesia Carbon Bricks* contained sufficient evidence of the existence of the export restraint schemes themselves, and sufficient evidence that through these policies the government was entrusting or directing private entities to provide the covered goods to downstream producers in China.[205] Contrary to China's contention, the *Seamless Pipe* and *Magnesia Carbon Bricks* applications and supplement thereto contained evidence along the lines of the types of evidence the European Union discussed in its third party submission.[206] The European Union suggested 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" could be relevant in determining the existence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement.[207] The United States agrees. In *Seamless Pipe*, there was evidence that export restraints on coke were part of a broader government policy of promoting the manufacture and export of higher-value goods through increasing the domestic supply of coke. A report prepared for the European Confederation of Iron and Steel Industries stated:

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financial contribution (*i.e.*, provision of goods) to PRC producers of downstream goods . . . ." *Magnesia Carbon Bricks* IDM, 39 (CHI-59).

[201] *See* U.S. First Written Submission, paras. 295-302.

[202] China First Opening Statement para. 80.

[203] *See, e.g.,* U.S. First Written Submission, paras. 295-302

[204] China Responses to the First Panel Questions, para. 157.

[205] *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure from the People's Republic of China*: Petitions for the Imposition of Antidumping and Countervailing Duties (Sept. 16, 2009) ("*Seamless Pipe* Petition"), Exhibit III-165 (USA-47); *Seamless Pipe* Petition at 120-124 (USA-48), at Exhibits III-242, III-244, and III-246 (USA-49), Exhibits III-249 and III-250 (USA-50), Exhibit III165 (USA-47), and Exhibits III-109 at 5 and III-54 at 32, 145 (USA-71). Certain *Magnesia Carbon Bricks from People's Republic of China*: Petition for the Imposition of Countervailing Duties (July 29, 2009)("*MCB* Petition") (USA-52); *MCB* Petition at Exhibit I-29 (USA-53); *Certain Magnesia Carbon Bricks from People's Republic of China*: Supplement to Petition for the Imposition of Countervailing Duties ("*MCB* Supplement to the Petition"), Exhibit S-4 (August 7, 2009) (USA-54); *MCB* Supplement to the Petition, exhibit S-5 (USA-55); and *MCB* Petition, Exhibit 23 at 36 (USA-73).

[206] *See* European Union Third Party Submission, para. 77; China Responses to First Panel Questions, para. 157.

[207] European Union Third Party Submission, para. 77.

> [t]he quantities [of coke] allowed for export, therefore, constitute only a tiny fraction of China's total coke output of 328 million tons in 2007. As a consequence, the by far largest part of the Chinese coke production is sold domestically irrespective of higher prices that could be realized on the international markets.[208]

This same report further stated:

> [i]t appears that measures undertaken by Chinese government authorities to actively discourage the export of raw materials (like coke) . . .are aimed at bottling up vital input for steelmaking inside the Chinese market. The increase in domestic supply depresses prices for Chinese steel producers. At the same time, cutting down the export volume reduces the supply of these resources on international markets and thus functions to keep world market prices (and costs of international steel producers) artificially high . . . . Not only does China maintain a strict export quota for coke, the government has also undertaken further steps to discourage exports . . . . but the whole extent of the trade measures surrounding coke exports suggests that there are other goals involved . . . notably the creation of a significant price differential for domestic and international consumers of coke.[209]

Similarly, the *Magnesia Carbon Bricks* application and supplement thereto contained evidence that "[r]ecent changes in Chinese governmental export policies, such as a newly instituted export tax on raw materials, has led to a rapid increase in imports from China, as the purpose of these changes was to encourage the export of finished refractory products."[210]

128. Therefore, while China argues that Commerce initiated investigations into China's export restraint schemes based only on "evidence and assertions concerning the existence of the export restraints and their purported effect on the prices at which downstream consumers purchased raw material inputs,"[211] Commerce initiated based on evidence which, when considered in its totality, tended to prove or indicated that export restraints provided a financial contribution through entrustment or direction. As such Commerce's initiation was consistent with Articles 1.1(a)(1)(iv), 11.2 and 11.3 of the SCM Agreement.

129. Additionally, to the extent China suggests that effects on prices are not relevant to an analysis of entrustment or direction,[212] China misses the point that evidence of price effects in the *Seamless Pipe* and *Magnesia Carbon Bricks* applications tends to prove or indicates entrustment or direction and, thereby, is sufficient evidence to support an investigation into whether there was a financial contribution pursuant to Article 1.1(a)(1)(iv). On this point, the *Seamless Pipe* application contained evidence of a $400 per metric ton differential between the price of coke in China and abroad.[213] This evidence can be reasonably interpreted as tending to

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[208] *Seamless Pipe Petition*, Exhibit III-54 (January 2009) (USA-93).
[209] *Seamless Pipe Petition*, Exhibit III-54 (January 2009) (USA-93).
[210] *MCB* Petition, Exhibit I-23 (USA-73).
[211] China First Opening Statement, para. 82 (emphasis omitted).
[212] *See, e.g.*, China Responses to First Panel Questions, para. 157.
[213] *See Seamless Pipe Petition*, Exhibit III-165 (January 2009), (USA-47).

prove or indicating the existence of entrustment or direction to suppliers in China to sell domestically to the downstream industry, because normally a firm would prefer to sell at the higher price. The *Magnesia Carbon Bricks* application similarly contained evidence of a differential between the price of magnesite in China and abroad alleged to be caused, in part, by a supply restraint on magnesite and magnesite products.[214]

130. It should also be noted that China's claim is an "as applied" claim, notwithstanding that China's arguments grasp for a sweeping conclusion about all policies defined loosely as export restraints. To make an "as applied" claim, China must show that the application of a measure resulted in a breach of a covered agreement.[215] Here, for China to succeed on its challenge to Commerce's initiation of an investigation into China's export restraint schemes on coke and magnesia, the Panel must find that an unbiased and objective investigating authority would have found that the relevant application contained insufficient evidence to justify the initiation of the investigation.[216] In addition, the amount of evidence that is "sufficient" for the initiation of an investigation must be considered in light of the qualification in Article 11.2 that an "application shall contain such information as is reasonably available to the applicant" on the existence, amount and nature of the subsidy in question. Considered in this light, and considering the evidence contained in the applications, Commerce's initiation of investigations into China's export restraint schemes was consistent with Articles 11.2 and 11.3 of the SCM Agreement.

B. China Has Failed To Demonstrate that the Challenged Export Restraint Schemes Could Never Be a Financial Contribution

131. As previously discussed, Article 1.1(a)(1)(i)-(iv) of the SCM Agreement describes various forms of government conduct that may be considered a financial contribution. The list is not exhaustive; instead it includes "general terms with illustrative examples that provide an indication of the common features that characterize the conduct referred to more generally."[217] Rather than prescribing any particular *action* from possibly being a financial contribution, an investigating authority must seek to determine whether or not such government *behavior* is a financial contribution under Article 1.1(a)(1)(i)-(iv). Particularly with respect to entrustment or direction under (iv), this analysis will necessarily "hinge on the particular facts of the case."[218] Certainly, there is no basis in the text of the SCM Agreement for declaring all measures defined loosely as export restraints to be exempt from coverage under the SCM Agreement. The Appellate Body has rejected interpretations which exempt particular categories of government action from Article 1.1(a)(1).[219] For example, in *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body considered the Panel's rejection of "purchases of services" as being excluded from Article of 1.1(a)(1) of the SCM Agreement. The Appellate Body found that:

> It is not clear to us why, in the face of arguments by the European Communities that the payments under the contracts fall within the scope of Article 1.1(a)(1)(i)

[214] *See MCB* Supplement to the Petition, Exhibit S-4 (USA-55).
[215] U.S. Responses to First Panel Questions, para. 33.
[216] *See China – GOES (Panel)*, para. 7.51 (quoting *US – Softwood Lumber V (Panel)*, para. 7.78 (discussing the analogous provision under the Anti-Dumping Agreement)).
[217] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para 613.
[218] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.
[219] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 590.

> because they are grants—a category of financial contributions expressly mentioned in that provision—the Panel started from the premise that it was required to determine whether purchases of services—a category that is not mentioned in that provision—are excluded from its scope. We consider that the Panel should first have examined the measures to determine their relevant characteristics, and then considered whether, in the light of a proper interpretation of Article 1.1(a)(1), these measures, properly characterized, fall within the scope of that provision.[220]

132. Even the report in *US – Export Restraints*, upon which China so heavily relies, recognized that "an export restraint could result in a private body or bodies 'provid[ing] goods'."[221]

133. It follows that when it is alleged that a government is providing a financial contribution through a private body, an authority may investigate whether a "private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii)."[222] In this instance, that type of function is the provision of goods. It is up to the authority to "identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the SCM Agreement."[223] Commerce's investigation into China's export restraint schemes was consistent with these principles.

134. The investigations were likewise consistent with the object and purpose of the SCM Agreement, as the investigations addressed what the Government of China may be doing indirectly – through private entities – which would certainly be subject to disciplines if done directly.[224] Contending that the United States is repeating arguments previously rejected by the *US Export Restraints* panel, China attempts to marginalize the U.S. position. But the fact remains that if the Panel were to declare categorically that as a matter of law the export restraints in *Seamless Pipe* and *Magnesia Carbon Bricks* cannot constitute a financial contribution under Article 1.1, the Panel would enable circumvention of subsidy disciplines by Members,[225] an outcome the Appellate Body has warned should be avoided.[226] Further, in the language China quotes in its responses to first panel questions,[227] the *US – Export Restraints* panel was not

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[220] *US – Large Civil Aircraft (2nd Complaint) (AB)*, paras. 588-589.
[221] *US – Export Restraints*, para. 8.50.
[222] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 108.
[223] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 108.
[224] U.S. First Written Submission, paras. 295-302.
[225] China Responses to First Panel Questions, para. 174.
[226] *Canada – Autos (AB)*, para. 142 (finding the panel's interpretation of Article 3.1(b) of the SCM Agreement to "be contrary to the object and purpose of the *SCM Agreement*, because it would make circumvention of obligations by Members too easy").
[227] "[W]e do not see any contradiction between the said object and purpose of the SCM Agreement and the fact that certain measures that might be commonly understood to be subsidies that distort trade might in fact be excluded from the scope of the Agreement. Indeed, while the object and purpose of the Agreement clearly is to discipline subsidies that distort trade, this object and purpose can only be in respect of 'subsidies' as defined in the Agreement. This definition, which incorporates the notions of 'financial contribution', 'benefit', and 'specificity', was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the

addressing the issue of circumvention of obligations. Instead, the focus of the quoted language appears to reflect the panel's view that "this object and purpose can only be in respect of 'subsidies' as defined in the Agreement."[228]

C. The *US – Export Restraints* Panel Finding that the Hypothetical Export Restraints Considered In That Dispute Cannot Constitute Government-Entrusted or Government Directed Provision of Goods Is Not Persuasive for this Dispute

135. Given that the *US – Export Restraints* panel recognized that it was possible for a private entity to provide a good as a result of an export restraint scheme, this Panel's analysis of the relevance of the *US – Export Restraints* panel findings to this dispute should focus, in part, on the *US – Export Restraints* panel's interpretation of entrustment or direction. This Panel's analysis should also consider and decide whether there are differences between the evidence in *US – Export Restraints* and this dispute such that the findings of the *US – Export Restraints* are not persuasive for purposes of this dispute.

136. The United States agrees with China that the Appellate Body has found the *US – Export Restraints* panel's interpretation of entrustment or direction is too narrow.[229] And it is that very interpretation of entrustment or direction that led the panel to conclude that "an export restraint in the sense that the term is used in this dispute cannot satisfy the 'entrusts or directs' standard of subparagraph (iv)."[230] When the Appellate Body examined this issue, it took the view that entrustment or direction is a broader concept than articulated in *US – Export Restraints*. Specifically, contrary to the statement in *US – Export Restraints* that "'entrusts' and 'directs' require an explicit and affirmative action of delegation or command," the Appellate Body found that, "the terms 'entrusts' and 'directs' in Article 1.1(a)(1)(iv) are not limited to 'delegation' and 'command', respectively."[231] The Appellate Body also stated: "[i]n our view, there may be other means by which governments can give responsibility to or exercise authority over a private body that may not fall within the terms 'delegation' and 'command', if these terms are strictly construed."[232]

137. The United States agrees with this analysis. It is quite possible that if the *US – Export Restraints* panel had the Appellate Body's broader interpretation in mind, the panel would have concluded that the hypothetical it was examining could satisfy the entrusts or directs standard.[233] In any event, given that the findings in *US – Export Restraints* were based on an overly narrow interpretation of entrustment or direction, the findings of the panel are not persuasive for purposes of determining whether the export restraints in this dispute satisfy the entrustment or

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coverage of the Agreement." China Responses to First Panel Questions, para. 174 (*US – Export Restraints*, para.8.63).

[228] *US – Export Restraints*, para. 8.63.

[229] "In *US – DRAMS*, the panel had endorsed and applied the finding of the panel in *US – Export* Restraints that the word 'entrust' and 'direct' contain a notion of 'delegation' (in the case of entrustment) or 'command' (in the case of direction). The Appellate Body considered that interpretation 'too narrow' . . . ." China First Opening Statement, para. 87.

[230] *US – Export Restraints*, para. 8.44.

[231] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 118.

[232] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 118.

[233] The United States is of course of the view that that would have been the appropriate outcome.

direction standard in Article 1.1(a)(1)(iv).[234] Instead, the Panel should base its analysis on the broader interpretation of entrustment or direction recognized by the Appellate Body.

138. In its answers to the Panel's questions, China construes the Appellate Body's interpretation of entrusts or directs too narrowly, arguing that an export restraint involves neither the government giving responsibility to a private body nor the government exercising authority over a private body.[235] However, such a restrictive view of entrustment or direction is mistaken. Indeed, the Appellate Body has stated that direction can take the form of "guidance."[236] Furthermore, China considers export restraints in a vacuum, without considering the context in which an export restraint scheme is imposed and operates. Commerce had such contextual evidence on the record to support its initiation.[237] This context can help inform whether an export restraint constitutes a financial contribution.

139. In addition to the subsequent legal interpretation of entrustment or direction, the fact that the *US – Export Restraints* findings are not persuasive for purposes of this dispute is demonstrated by the difference between the evidence and legal posture presented to this Panel and the hypotheticals before the panel in *US – Export Restraints*. First, in this case there are actual export restraint schemes at issue, which was not the case in *US – Export Restraints*. Additionally, as described above, there was evidence before Commerce relating to the context in which the export restraint schemes were imposed as well as other direct and circumstantial evidence to inform the analysis of the export restraint schemes.[238] Such direct and circumstantial evidence was not before the *US – Export Restraints* panel, which considered a hypothetical export restraint as defined in that case. Therefore, although China alleges that the export restraint schemes investigated by Commerce "fall squarely within the definition of export restraints" considered in *US - Export Restraints*,[239] that simply is incorrect in light of the different evidence under consideration in this dispute as compared with *US – Export Restraints*.

140. Rather than recognizing that subsequent broader interpretation of entrustment or direction by the Appellate Body and certain panels calls into question the relevance of the *US – Export Restraints* panel's findings to this dispute, China emphasizes the Appellate Body's statements that "'entrustment' or 'direction' cannot be inadvertent or a mere by-product of government regulation" and that "not all government measures capable of conferring benefits would necessarily fall within Article 1.1(a)."[240] This line of argument does not advance China's claims. As is evident from the questions Commerce asked China in the *Seamless Pipe* and *Magnesia*

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[234] We would remind the Panel that, as discussed in the U.S. First Written Submission, panels have likewise found a more expansive definition of entrustment or direction. In *Japan – DRAMs*, the panel recognized that, "the entrustment or direction of a private body will rarely be formal, or explicit." *Japan-DRAMs (Panel)*, para. 7.73. In *Korea – Commercial Vessels*, the panel stated that it saw "nothing in the text of Article 1.1(a)(1)(iv) that would require the act of delegation or command to be 'explicit.' . . .In [its] view, the affirmative act of delegation or command could be explicit or implicit, formal or informal." *Korea – Commercial Vessels*, para. 7.370.

[235] China Responses to First Panel Questions, paras. 165-166. *See also US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[236] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[237] *See, e.g., supra*, para. 127.

[238] *See supra*, paras. 124-128.

[239] China First Opening Statement, para. 82; China Responses to First Panel Questions, para. 162.

[240] China First Opening Statement, para. 88 (*quoting US – Countervailing Duty Investigation on DRAMS (AB)*, para 114).

Carbon Bricks investigations, Commerce was examining the *Government of China's* actions to determine whether China was entrusting or directing private parties to provide a good rather than the *reactions* by private entities.[241] If anything, this line of argument underscores the relevance of the information Commerce requested and China refused to provide, where responsive information would have allowed Commerce to examine the Government of China's actions.

141. The examination of whether or not the export restraint schemes constituted entrustment or direction should have occurred during the course of the investigation, rather than the context of dispute settlement. But China's refusal to cooperate prevented this. After the United States initiated the investigation, it sought additional information regarding the export restraints to help it understand whether China structured the export restraints to provide a financial contribution to downstream industries.[242] However, China refused to cooperate with the investigation.[243] That was an error on China's part, but not one that the Panel need correct here. China having refused to cooperate, the United States correctly relied upon Article 12.7 of the SCM Agreement to determine that China's export restraints constituted a countervailable subsidy.

142. In sum, the reasoning articulated in *US – Export Restraints* is not persuasive with regard to the issues in this dispute, specifically Commerce's decision to initiate and investigate, and ultimately countervail, certain non-hypothetical export restraints. That panel's interpretation of entrustment or direction has subsequently been recognized as too narrow. Additionally, different from *US – Export Restraints*, the export restraints under consideration presented themselves with additional contextual and other evidence for Commerce to consider in its determinations. Accordingly, the *US – Export Restraints* findings are inapposite for this case.

XI. COMMERCE'S "FACTS AVAILABLE" DETERMINATIONS ARE BASED ON A FACTUAL FOUNDATION

143. China argues that because its position is that Commerce applied an incorrect legal standard in its use of facts available, it is unnecessary for China to discuss in detail each facts available claim.[244] As an initial matter, as the United States noted in its answers to the questions from the Panel, China has not challenged a measure of general applicability with respect to Commerce's facts available determinations.[245] Moreover, China does not dispute the U.S. description of the legal standard under Article 12.7. Instead, China's only argument – that Commerce's facts available determinations were allegedly not based on facts – necessarily involves an analysis of the facts and circumstances of each determination. China has not

[241] *See* USA-61, USA-64, USA-65, and the U.S. First Written Submission, paras. 319-321 (explaining the relevance of the aforementioned exhibits).
[242] *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure from the People's Republic of China*: Commerce's Third Supplemental Questionnaire for the Government of the People's Republic of China (April 13, 2010) (excerpt) (USA-61); *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure from the People's Republic of China:* Response of the Government of China to the Department's Export Restraint Letter (May 12, 2010) (USA-63); *Certain Magnesia Carbon Bricks from the People's Republic of China:* Commerce's Supplemental Questionnaire (Dec. 8, 2009) (USA-64); *Certain Magnesia Carbon Bricks from the People's Republic of China*: Commerce's Second Supplemental Questionnaire (Feb. 22, 2010) (USA-65).
[243] U.S. First Written Submission, para. 319-321.
[244] China Responses to First Panel Questions, paras. 20, 24.
[245] U.S. Responses to First Panel Questions, para. 137.

presented any such analysis to the Panel, and accordingly, China has failed to show any breach of the SCM Agreement.

144. Commerce's facts available determinations are case-specific and rely on the totality of the evidence in any given investigation. In these circumstances, the only way for China to establish a *prima facie* case would be to demonstrate that Commerce acted inconsistently with the SCM Agreement in each of the 48 separate uses of facts available that China has challenged. In particular, China would need to demonstrate that Commerce's determinations are not supported by the record of the investigations. China has failed to do so, and as a result, has failed to meet its burden.

145. As the United States explained in its first written submission, Commerce's use of an "adverse" inference in selecting from among the facts otherwise available is, by its terms and in each case, based on "facts available" and is therefore consistent with Article 12.7 of the SCM Agreement.[246] China has not demonstrated to the contrary. China has based its 48 facts available claims on sweeping and inaccurate generalizations.[247] And China's new exhibit, CHI-125, fails to advance China's arguments. The exhibit consists of excerpted text, taken out of context, and does not explain how and why China views the excerpts of text as support for the proposition that Commerce did not base its determinations on available facts on the record in the investigations. In contrast, the United States has explained in detail in its answers to questions from the Panel how China took one such facts available-based determination, in the *Coated Paper* (or *Print Graphics*) investigation, out of context in its opening statement.[248] In particular, as in many of the determinations at issue, the application in *Coated Paper* contained evidence regarding the alleged subsidy, including information regarding specificity.[249] Commerce requested information from China over the course of the investigation, which China refused to provide.[250] As a result of this non-cooperation, Commerce resorted to facts available and relied on information available on the record to make its determination, consistent with Article 12.7.[251] As this example demonstrates, excerpts from the issues and decision memoranda and preliminary determinations, divorced from the facts of the investigations, do not accurately reflect Commerce's use of facts available. In exhibit CHI-125, China merely repeats this mistake across each of the 48 claims related to facts available it is pursuing in this dispute.

146. In particular, the excerpts included in exhibit CHI-125 merely provide a description of Commerce's conclusion with respect to each determination. China highlights the use of terms such as "inferring" or "assuming" as supporting its arguments that Commerce's determinations were not based on facts.[252] To the contrary, these terms merely reflect the fact that, due to the lack of cooperation by China and other responding parties, there was often very little factual information on the record, other than the evidence provided in the application, for Commerce to make the applicable determination. Commerce used this limited factual basis to, consistent with

[246] *See* U.S. First Written Submission, paras 325-340.
[247] *See, e.g.*, China First Written Submission, paras. 143-156 (providing minimal discussion of a handful of determinations, and describing the rest in broad generalizations).
[248] U.S. Responses to First Panel Questions, paras. 134-137.
[249] U.S. Responses to First Panel Questions, para. 135.
[250] U.S. Responses to First Panel Questions, para. 135.
[251] U.S. Responses to First Panel Questions, para. 136.
[252] China Responses to First Panel Questions, para. 185.

Article 12.7, make inferences to reach its determination. Because necessary information, which might have been more direct evidence on the issue to be determined, was unavailable due to a lack of cooperation, an "inference" was needed to connect the fact relied upon to the conclusion in the determination.[253]

147. Article 12.7 of the SCM Agreement, together with the context provided by Annex II of the AD Agreement, make clear that a lack of cooperation should impede neither the conclusion of an investigation nor the disciplines of the SCM Agreement, and that reliance on facts available is consistent with the SCM Agreement. In particular, paragraph 7 to Annex II of the AD Agreement provides that, in situations where "an interested party does not cooperate and thus relevant information is being withheld from the authorities" the result may be "less favourable to the party than if the party did cooperate." In fact, China agrees that "the use of 'facts available' by an investigating authority could be 'adverse' to the interests of the non-cooperating party."[254] In light of China's (or another interested party's) noncooperation, Commerce looked to what information was available to make its determination, consistent with Article 12.7.

148. The United States has prepared a table at exhibit USA-94 that provides additional information regarding China's facts available claims. In particular, the table provides the complete discussion from the relevant issues and decision memorandum or preliminary determination for each determination and provides examples of the record evidence supporting the determinations,[255] thereby demonstrating that, in using an adverse inference in selecting from among the facts available, Commerce's determinations were supported by "facts" on the record of the investigations.

149. Finally, China does not dispute the U.S. description of the legal standard under Article 12.7, nor does it dispute that there were no other facts that Commerce should have relied on in making its determinations.[256] In its answers to the Panel's question regarding the facts that Commerce should have relied on in making its determinations, China avoids the obvious point that, due to the lack of cooperation on the part of China and other responding parties, there were generally no verifiable facts on the record contradicting the facts on the record that Commerce relied on in making its determinations.[257]

150. Rather, China apparently tries to refocus the issue by alleging that Commerce failed to provide a "reasoned and adequate explanation" of its facts available determinations, and that on *that* basis the Panel should conclude that Commerce's determinations were inconsistent with Article 12.7.[258] To the extent that China is alleging that Commerce has insufficiently explained the basis for its uses of facts available, and even though Commerce's explanation was more than

[253] *See* EU Third Party Written Submission, paras. 61-63.
[254] China Responses to First Panel Questions, para. 184.
[255] The United States disputes China's interpretation of the term "public body", and therefore does not further address, in the table at USA-94, China's claims relating to the application of facts available to determinations of whether certain entities are "public bodies."
[256] *See* China Responses to First Panel Questions, paras. 181-82. Contrary to China's assertion, the United States does not ask China to take on the investigating authority's burden. However, if China were to argue that there were facts other than that provided in the application that *should* have been relied on, China must explain those facts to the Panel. Apparently, China asserts no such arguments.
[257] China Responses to First Panel Questions, paras. 180-183.
[258] China Responses to First Panel Questions, paras. 182-183.

sufficient, the sufficiency of an investigating authority's explanations is dealt with under the procedural obligations under Article 22 of the SCM Agreement, and not Article12.7.

151. To the extent that the level of detail of an investigating authority's description of its use of facts available is relevant to a claim under Article 12.7, it would only help inform a panel's analysis.[259] Here, Commerce's determinations do indicate how and why Commerce made its fact available determinations. Moreover, it is not the case – as China implies – that an investigating authority is required "to cite or discuss *every* piece of supporting record evidence for each fact in the final determination,"[260] but rather only "those facts that allow an understanding of the factual basis that led to the imposition of the final measures."[261] In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body found that it was inappropriate for the panel to disregard information on the record of the investigation, but not cited in Commerce's final determination.[262]

152. In any event, the core question raised by China's claim under Article 12.7 is whether the determinations at issue were based on facts that were available on the record of each respective proceeding. And, as explained in the U.S. first written submission, Commerce relied on facts available on the record, such as information from the application, which China and other interested parties were unable or refused to refute. It is without question that this information was on the record of each investigation, and Commerce was not required to explicitly cite such information in its determinations. For the convenience of the Panel, the United States outlines this information at exhibit US-94 explaining where on the record of each investigation this information is found.

153. As exhibit US-94 demonstrates, Commerce's determinations were supported by facts on the record. China does not dispute the fact that Commerce may rely on facts available on the record in the face of noncooperation, nor does it point to any other "facts" which Commerce should have relied on instead in those circumstances. For these reasons, China has failed to demonstrate that the United States acted inconsistently with Article 12.7 of the SCM Agreement.

XII. CONCLUSION

154. For the reasons set forth above, along with those set forth in the U.S. written filings and oral statements, the United States requests that the Panel reject all of China's claims.

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[259] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186.

[260] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 164. *See also US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.50 (recalling "the Appellate Body's finding that it is not necessary for an authority conducting a countervailing duty investigation to cite or discuss *every* piece of supporting record evidence for each fact in the final determination"); *EC – Salmon (Norway)* para. 7.837 (noting that the panel was not "limited to the information actually set forth or specifically referenced in the determination at issue" and finding "support for this view in the Appellate Body's report in *US – Countervailing Duty Investigation on DRAMS*, where it rejected the view that an investigating authority could not defend its determination on the basis of information contained in the record that was before it at the time of the determination, but not specifically cited or discussed in that determination").

[261] *US – GOES (AB)*, para. 256 ("With regard to 'matters of fact', [Articles 12.2.2 and 22.5 of the SCM Agreement] do not require authorities to disclose *all* the factual information that is before them, but rather those facts that allow an understanding of the factual basis that led to the imposition of final measures.").

[262] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165 ("[W]e find no basis for the Panel's exclusion of the United States evidence in question. That evidence was on the record of the investigation . . . .").