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

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I. INTRODUCTION

1. This dispute brought by the government of China ("China") is one of the largest in the history of the WTO. As described in its first written submission, China advances claims with respect to 97 individual alleged breaches of various provisions of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"). These alleged breaches concern 17 different countervailing duty ("CVD") investigations conducted since 2007 by the United States Department of Commerce ("Commerce") into Chinese products imported into the United States and address 31 initiations of investigations or preliminary or final determinations. Despite the enormous scope of this case, in its first written submission, China follows a pattern – established in its consultations and panel requests – of taking shortcuts. In particular, China makes sweeping factual generalizations regarding the various investigations and fails to adequately link its broad legal arguments with the specific facts of the determinations.

2. China starts out its submission by mischaracterizing what the submission contains, and highlighting deficiencies in its own arguments. China asserts that its claims "largely entail the application of the findings in DS379, as well as other well-settled jurisprudence," to 17 of the 22 CVD determinations that China cited in its panel request.[1] In fact, this dispute involves several novel interpretations of the SCM Agreement that were not addressed in DS379, or any other dispute, such as China's interpretation of Article 2, relating to specificity determinations, and Article 12.7, regarding the application of facts available.

3. Moreover, China's statement reveals an inappropriate reliance on the findings of other panels relating to the facts of those *other disputes*.[2] China declines to include in its submission virtually any discussion of the facts at issue in the determinations it challenges. China's submission includes 97 individual alleged breaches of the SCM Agreement by the United States, and it barely discusses the facts for any of those claims, much less the application of the relevant provisions of the SCM Agreement to those facts. For this reason, China has failed to establish its *prima facie* case with respect to its claim. Rather, as the United States will highlight throughout this submission, China relies merely on broad, fact-distorting generalizations to mischaracterize the distinct factual issues in each of the investigations. Further, China's legal arguments lack support in the text of the SCM Agreement. Instead of applying the provisions of the SCM Agreement to the facts in this dispute, China relies on the statements of panels and the Appellate Body, which are not sources of WTO obligations, but are rather interpretations developed in the facts of those disputes.

4. For these and other reasons set out in full in the body of this submission, China's claims have no merit.

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[1] China First Written Submission, para. 2. *See also* China First Written Submission, para. 1 & note 1 (explaining that China is not advancing arguments with respect to five of the 22 investigations named in its panel request).

[2] *See US – Continued Zeroing (AB),* para. 190 ("Factual findings made in prior disputes do not determine facts in another dispute.").

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background to CVD Investigations

5. As noted, China has taken enormous shortcuts in its presentation of the facts and resorted to sweeping generalizations of the CVD orders at issue. The precise facts at issue in this dispute would be those set out in the relevant determinations and other documents issued under each of those orders. It is obviously not possible to present those facts here, nor should the United States be in the position of combing through those documents to divine which facts may be relevant for China's claims. Here, the United States an only offer a summary of certain facts related to the investigations.

6. China's claims relate to 31 initiations of investigations or preliminary or final determinations in 17 CVD investigations conducted from 2007 through 2012. In each investigation, U.S. domestic producers submitted an application alleging that subsidized imports of the subject product from China were causing injury to the respective U.S. industries. Upon the receipt of each application, before initiating the investigation, Commerce conducted consultations with Chinese government officials regarding the subject matter of the application. Commerce initiated investigations only for those programs in each investigation for which the application included sufficient information tending to indicate the existence and nature of the subsidy in question, including with respect to the allegations that public bodies provided goods for less than adequate remuneration, and that the provisions of goods were specific. Where a petition lacked a sufficient factual basis with respect to particular alleged subsidies, Commerce declined to initiate an investigation on those matters.[3]

7. After Commerce initiated its investigations, it issued questionnaires to the Chinese government and selected Chinese companies to gather information regarding the alleged subsidies. In cases where necessary information was not provided in response to the initial questionnaires, Commerce typically issued supplemental questionnaires to provide the Chinese government and the Chinese companies an additional opportunity to provide the information. In addition, in each case, a team of Commerce officials traveled to China to verify questionnaire responses submitted by relevant levels of the Chinese government and investigated companies. Prior to conducting the verification visits, Commerce issued preliminary determinations in each of the CVD investigations which included the findings and conclusions reached on all issues of fact and law considered material, and Commerce invited all interested parties, including the Chinese government, to comment on the preliminary determination. Further, Commerce held public hearings, upon request, in which interested parties, including China, could meet with Commerce officials to discuss issues the parties had raised in the investigation.

8. As with any CVD investigation, in each of the determinations contested by China, Commerce's factual determinations were based largely on the information provided by the

[3] *See, e.g.*, *Notice of Initiation of Countervailing Duty Investigation: Lightweight Thermal Paper from the People's Republic of China*, 72 Fed. Ref. 62209, 62211 (Dep't of Commerce Nov. 2, 2007) (CHI-3); *Notice of Initiation of Countervailing Duty Investigation: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*, 73 Fed. Reg. 50304, 50306-07 (Dep't of Commerce Aug. 26, 2008) (CHI-36); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Initiation of Countervailing Duty Investigation*, 76 Fed. Reg. 70966, 70969 (Dep't of Commerce Nov. 16, 2011) (CHI-104).

interested parties (including, where applicable, the government of China). Across the investigations, the Chinese government and/or Chinese firms repeatedly refused to provide at least some portion of the requested information, or provided information that Commerce determined was inaccurate or could not be verified. When faced with noncooperation on the part of these interested parties and China, Commerce resorted to the use of "facts available" in order to complete its investigations of the subsidies at issue.

9. From November 2008 to May 2012, Commerce published the final determinations in 13 of the challenged CVD investigations. At the time that China requested consultations in this dispute, there was no final determination in two of the investigations, and there was no preliminary or final determination in another two investigations.[4] The United States International Trade Commission has notified Commerce that, with respect to 16 of the investigations, it had found material injury to a U.S. industry as a result of the programs deemed countervailable by Commerce. Accordingly, Commerce issued CVD orders in those investigations.

B. Procedural Background to this Dispute

10. China submitted a request for consultations with the United States on May 25, 2012.[5] China's request for consultations named measures related to 22 of Commerce's CVD investigations and described nine types of "as applied" claims related to certain determinations made in those investigations,[6] and one "as such" claim.[7] The United States and China held consultations on July 28, 2012, but were unable to resolve the matter.

11. On August 20, 2012, China submitted a request for the establishment of a panel, which also named the same 22 CVD investigations and claims.[8] While China dropped some of the investigations from the Panel Request, it also contained additional measures and claims related the CVD investigations.[9] These additional measures are not within the Panel's term of reference, for the reasons set out at Section III. At its meeting of September 28, 2012, the Dispute Settlement Body established the Panel.

III. THE PRELIMINARY DETERMINATIONS IN *WIND TOWERS* AND *STEEL SINKS* ARE NOT WITHIN THE PANEL'S TERMS OF REFERENCE

12. As noted, China has challenged 31 initiations or determinations reached in over a dozen CVD investigations. Two of these determinations – the preliminary determinations in *Wind*

[4] China's Consultation Request challenged the initiation of *Wind Towers* and *Steel Sinks* and the initiation and preliminary determinations in *Solar Panels* and *Steel Cylinders*. *See infra* Section III.
[5] Request for Consultations by China, WT/DS437/1, circulated May 30, 2012 ("Consultations Request").
[6] Consultations Request at 1-4 & Appendix 1.
[7] Consultations Request at 4.
[8] Request for Establishment of a Panel by China, W/DS437/2, circulated August 21, 2012 ("Panel Request").
[9] The Consultations Request does not contain claims under Article 1.1(a), Article 2, Article 1.1(b), Article 14(d) or Article 12.7 of the SCM Agreement with respect to the *Steel Sinks* or *Wind Towers* investigations, although the Panel Request does contain those claims. The *Steel Sinks* and *Wind Towers* preliminary determinations were also not included in the Consultations Request. *Compare* Consultations Request, notes 4, 6, 7, 10, *with* Panel Request, notes 4, 6, 7, 10.

Towers and *Steel Sinks* – are in a fundamentally different procedural posture than the others.[10] China has no legal basis for its challenges to these preliminary determinations, as China did not request consultations on these determinations, and, as is plain from Appellate Body findings, matters that have not been subject to consultations are outside the terms of reference of a panel proceeding.[11]

13. China's panel request lists the preliminary determinations in *Wind Towers* and *Steel Sinks* as measures at issue. These measures, however, are not listed in China's request for consultations.[12] As such, these measures were never subject to consultations, and thus, as a matter of law, these measures are not within the terms of reference of this proceeding. In the Consultations Request, China listed only the initiations in connection with the *Wind Towers* and *Steel Sinks* investigations.[13] China limited to the issues of public bodies and specificity their claims in the consultations request with regard to these initiations.[14]

14. In its request for consultations, a Member must describe the matter at issue. In particular, the request must include an "identification of the measures at issue and an indication of the legal basis for the complaint."[15] Where – as was the case here – the defending 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."[16] This request for panel establishment under Article 7.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), in turn, establishes the terms of reference for the panel proceeding.[17]

15. It follows from these DSU provisions that – as the Appellate Body has affirmed – Articles 4 and 6 of the DSU "set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel."[18] As a "prerequisite to panel proceedings," consultations play a

[10] The confused nature of China's claims is also apparent with regard to *Steel Cylinders*. In its Consultation Request, China references challenging the preliminary determination in *Steel Cylinders* on the issues of public body and benchmarks. *See* notes 4 and 7. However, the preliminary determination is not cited in its Appendix, which cited to the final determination instead.

[11] In addition to these procedural errors, China has also failed to establish a proper legal foundation for challenging preliminary determinations as compare to final determinations. In its Panel Request and written submission, China treats the preliminary determinations in *Wind Towers*, *Solar Cells*, and *Steel Sinks* the same as the final determinations at issue in this dispute. However, under the SCM Agreement, preliminary determinations and final determinations are distinct legal instruments, and challenging an administering authority's preliminary findings is, under certain circumstances, improper. *US – Continued Zeroing (AB)*, para. 210 (challenging preliminary results is "premature" because "preliminary results can be modified by final results"). Accordingly, China must demonstrate why it has a legal basis to challenge these preliminary determinations.

[12] Consultations Request at 8. Indeed, these two preliminary determinations were not even in existence at the time of China's request for consultations. China's request for consultations is dated May 25, 2012. The preliminary determination in *Wind Towers* was issued on June 6, 2012, and the preliminary determination in *Steel Sinks* was issued on August 6, 2012.

[13] Consultations Request at 8.

[14] Consultations Request, notes 4 and 5.

[15] DSU, Article 4.4.

[16] DSU, Article 4.7.

[17] The Panel's terms of reference for this dispute, set out in WT/DS437/3, are the standard terms of reference provided in Article 7.1 of the DSU.

[18] *Brazil – Aircraft (AB)*, para. 131.

critical role in the dispute settlement process because they "serve the purpose of, *inter alia*, allowing parties to reach a mutually agreed solution, and where no solution is reached, providing the parties an opportunity to 'define and delimit' the scope of the dispute between them."[19]

16. On the other hand, this purpose of consultations is frustrated where the complaining party introduces measures in its panel request that were not identified in the consultations request and which, by definition, could not have formed part of the basis for the parties' attempts to further define the scope of the dispute between them. The Appellate Body has made clear that, in such circumstances, those additional measures do not fall within the panel's terms of reference.[20]

17. With these principles in mind, the Appellate Body has repeatedly considered the issue of adding measures to a dispute from the consultations request to the panel request. Generally, it has found that the relevant question is whether "the scope of the dispute" was expanded as a result of their addition.[21]

18. For example, in *US – Certain EC Products*, the Appellate Body upheld the panel's finding that a particular action taken by the United States was not part of the panel's terms of reference because the EC, while referring to that action in its panel request, had failed to request consultations upon it.

19. In particular, the EC's request for consultations made reference to the increased bonding requirements levied by the United States as of March 3, 1999, on EC listed products in connection with the EC Bananas dispute, but not to U.S. action taken on April 19, 1999, which imposed 100 percent duties on certain designated EC products.[22] When the EC sought findings with respect to both the March 3rd measure and the April 19th action, the panel found that the March 3rd measure and the April 19th measure were legally distinct, and that the April 19th action did not fall within the panel's terms of reference.[23]

20. The Appellate Body upheld the panel's findings. The Appellate Body found that because the consultations request did not refer to the April 19th action, and as the EC admitted at the oral hearing that the April 19th action "was not formally the subject of consultations," it was not a measure in that dispute and fell outside the panel's terms of reference.[24]

21. In the present case, China's consultations request makes no mention of the preliminary determinations in *Wind Towers* and *Steel Sinks*. The inclusion of claims related to these determinations would inarguably expand the scope of this dispute as compared to the matter described in the request for the consultations. Under the DSU and Appellate Body findings, the terms of reference of this proceeding cannot extend to these two determinations.

[19] *US – Customs Bond Directive (India) (AB)*, para. 293.
[20] *See, e.g., US – Customs Bond Directive (India) (AB)*, para. 296; *US – Certain EC Products (AB)*, para. 82.
[21] *US – Continued Zeroing (AB)*, quoting *US – Upland Cotton*, para. 293.
[22] *US – Certain EC Products (AB)*, para. 70.
[23] *US – Certain EC Products (AB)*, para. 82.
[24] *US – Certain EC Products (AB)*, para. 70.

IV. CHINA HAS FAILED TO ENGAGE IN THE CASE-SPECIFIC ANALYSIS REQUIRED TO ADVANCE CLAIMS ON THE MEASURES AT ISSUE IN THIS DISPUTE

22. Throughout its first written submission, China follows a pattern established in its panel request of taking numerous shortcuts in the presentation of its case. China, as the complaining party in this dispute, must make a *prima facie* case of each of the 97 alleged breaches of the relevant provisions of the WTO agreements by the United States. It has failed to do so. China's submission contains virtually no discussion of the facts at issue in the determinations made by Commerce. For the reasons described below, China's submission lacks legal arguments and evidence sufficient to establish China's *prima facie* case.

23. A party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim. With respect to the allocation of the burden of proof, the Appellate Body has explained:

> We first recall that, in WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence. . . . Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.[25]

A "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[26] The case presented by China fails to meet this standard. In order to meet its burden, China must make an adequate legal argument for each of its claims[27] and "adduce[] evidence sufficient to raise a presumption that what it claims is true."[28] The Panel may not make the case for it.[29]

24. China has failed to make its *prima facie* case. Rather, China merely argues that the "as applied" findings of a prior WTO dispute should be applied to the investigations at issue in the instant dispute. This line of reasoning is inadequate. China must apply the relevant provisions of the SCM Agreement to the facts in *this dispute*, but it has failed to do so. Both the legal arguments and evidence must be present for a panel to address a claim, because "when 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."[30]

25. Further, China makes conclusory and generalized allegations as to what Commerce found across 17 investigations without discussing the evidence, and instead discusses the facts at issue in *US – Anti-Dumping and Countervailing Duties (China)*. China must demonstrate, with

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[25] *Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134 (internal footnotes omitted).
[26] *EC – Hormones (AB)*, para. 104.
[27] *See Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134.
[28] *US – Wool Shirts and Blouses (AB)* at 14.
[29] *See Japan – Agricultural Products II (AB)*, para. 129.
[30] *US – Gambling (AB)*, para. 281.

evidence, that Commerce's determinations in each investigation were inconsistent with the SCM Agreement.[31] Despite the fact that China advances a total of 97 individual claims that Commerce's findings were inconsistent with the SCM Agreement,[32] it barely discusses Commerce's determinations at all, providing a cursory description of only as examples,[33] and leaving the task of explaining how each one of these "as applied" claims violates the SCM Agreement to the Panel. For example, China's submission contains no discussion of its seven claims with respect to Commerce's regional specificity determinations, and China briefly discusses only two out of 48 challenged uses of facts available.[34]

26. In addition, China fails to link its legal challenges to the facts and evidence of each of the investigations it challenges. This is evident in its frequent reference to exhibits CHI-1 and CHI-2.[35] These exhibits, however, contain nothing more than citations to Commerce determinations. China leaves it to the Panel to discover for itself how the facts relate to the obligations in the SCM Agreement.

27. In *Canada – Wheat*, the Appellate Body addressed the consistency of a piece of legislation with the covered agreements.[36] The Appellate Body noted that:

> [I]t is incumbent upon a party to identify in its submissions the *relevance* of the provisions of legislation—the evidence—on which it relies to supports its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.[37]

Similarly, in *US – Gambling*, the Appellate Body found that it the Panel erred in examining certain U.S. state laws because Antigua's "general discussion of state gambling laws" and inclusion of the measures as exhibits failed to establish its *prima facie* case with respect to those measures.[38] Therefore, it is not sufficient for China merely to submit copies of the countervailing measure determinations it challenges (or a chart with citations to those determinations) and expect the Panel to discern, on its own, the relevance of those determinations to China's legal position. For these reasons, and as described in more detail below with respect to each claim, the Panel must reject China's claims.

V. CHINA'S PUBLIC BODY CLAIMS ARE FOUNDED ON AN ERRONEOUS INTERPRETATION OF THE SCM AGREEMENT AND THEREFORE MUST BE REJECTED

28. In its first written submission, China claims that Commerce's public body determinations in the challenged investigations are inconsistent with Article 1.1(a)(1) of the SCM Agreement

[31] *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence.").
[32] *See* Exhibits CHI-1 & CHI-2.
[33] *See, e.g.*, China First Written Submission, paras. 49-51, 91, 147-154.
[34] China First Written Submission, paras. 147-154.
[35] *See* China First Written Submission, paras. 146, 152, 156 & notes 3, 65, 79, 80, 94, 103, 136, 151, 157.
[36] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.
[37] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191 (emphasis added).
[38] *US – Gambling (AB)*, paras. 151-54.

because Commerce did not "determine that the SOEs in the investigations at issue were actually 'vested with, and exercising, authority to perform governmental functions'."[39] However, China's first written submission fails to provide the Panel with arguments necessary to support China's claims because China erroneously interprets the phrase "public body" in Article 1.1(a)(1).

29. As explained in detail below, when interpreted according to the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU, the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own.[40] China has not presented any legal argument that Commerce's determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement, when properly interpreted. Accordingly, the Panel should reject China's claims.

A. Interpreted in Accordance with the Customary Rules of Interpretation of Public International Law, 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

30. In its first written submission, China attempts to short circuit the Panel's interpretative analysis by asserting that "the Appellate Body's interpretation of [the term 'public body'] in DS379 is dispositive of the claims that China has raised under Article 1.1 of the SCM Agreement in the present dispute."[41] Rather than analyzing the ordinary meaning of the term "public body" in its context and in light of the object and purpose of the SCM Agreement – *i.e.*, rather than undertaking a proper Vienna Convention analysis – China considers it sufficient simply to "briefly recall the central components of the Appellate Body's interpretative analysis" in *US – Anti-Dumping and Countervailing Duties (China)*.[42]

31. The United States disagrees with China's approach, as well as the legal conclusions that China urges the Panel to make. Accordingly, we present here a fulsome interpretative analysis of the term "public body" in accordance with customary rules of interpretation of public international law.

32. We first start with the relevant text of the SCM Agreement and its ordinary meaning. While dictionary definitions of the terms "public" and "body" can capture a wide range of meanings, we note that the primary definitions in the context of groups of persons would point towards ownership by the community of legal persons or organizations. On the other hand, dictionary definitions do not point to government authority as a primary meaning of these terms.

33. Next, we turn to understanding the ordinary meaning of the terms in their context. We examine the language of Article 1.1(a)(1) itself, including "government *or any* public body"

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[39] China First Written Submission, para. 31.
[40] The United States notes that government ownership is relevant to an evaluation of government control, although ownership may not always be sufficient by itself to indicate a level of control such that the government can use the entity's resources as its own. At the same time, in the view of the United States, control must be evaluated on a case-by-case basis and in the contextual framework of the country subject to investigation.
[41] China First Written Submission, para. 12.
[42] China First Written Submission, para. 20.

(italics added), and other context in Article 1.1(a), such as "private body," "financial contribution," and "funding mechanism." These contextual elements support an interpretation of "public body" as an entity that is controlled by the government. Control of such an entity means that the government can use that entity's resources as its own. In this way, the financial contributions (in the ordinary sense) flowing to recipients through the economic activities of such entities are a conveyance of value from a Member to a recipient in the same way as if the government had provided the financial contribution directly.

34. Then, we turn to an understanding of the text in its context in light of the object and purpose of the SCM Agreement. We note that the SCM Agreement is intended to discipline the use of subsidies by governments so as to permit economic actors to compete in the 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 controlled by the government such that the government can use that entity's resources as its own supports the object and purpose of the SCM Agreement. 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-owned corporation.

35. Throughout the following discussion, we address relevant panel and Appellate Body reports, including the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. We also consider certain additional rationales laid out by the Appellate Body in support of its interpretation of the term "public body." After examining those closely, however, we respectfully conclude that they do not support an interpretation of the term "public body" that differs from the proper interpretation that we present to the Panel.

1. The Ordinary Meaning of the Term "Public Body" or "Organisme Public" or "Organismo Público" as Reflected in Dictionary Definitions Supports the Conclusion that a Public Body Is Any Entity Controlled by the Government

36. Article 1.1 of the SCM Agreement provides, in relevant part, that "a subsidy shall be deemed to exist if:"

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or service other than general infrastructure, or purchases goods;

> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments . . . .

37. While the SCM Agreement does not define the term "public body," and "public body" is not defined in dictionaries as a compound word, the definitions of the words "public" and "body" shed light on the ordinary meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

38. We start with the noun "body." While dictionary definitions cover a number of senses, as used in the construction "public body," the term refers to the sense of a group of persons or an entity (as opposed to, for example, the "material frame" of persons). This definition in the sense of "an aggregate of individuals" is: "an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society."[43]

39. Turning to the adjective "public," the relevant definition that pertains to a "body" as a group of individuals is the first: "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." A second definition is "carried out or made by or on behalf of the community as a whole; authorized by or representing the community."[44] However, in conjunction with the term "body" (in the sense of a legal person or corporation or organization), this second definition appears less apt.

40. Thus, the ordinary meaning of the composite term "public body" according to dictionary definitions would be "an artificial person created by legal authority; a corporation; an officially constituted organization"[45] that is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." These definitions therefore convey two primary elements: first, that there is an entity; and second, that this body belongs to, pertains to, or is "of" the community or people as a whole. These elements point towards ownership by the community as one meaning of the term "public body." If an entity "belongs to" or is "of" the community, it also suggests that the community can make decisions for, or control, that entity.

41. Dictionary definitions of the corresponding words in the French and Spanish versions of Article 1.1(a)(1) of the SCM Agreement are similar. As the panel in *US – Anti-Dumping and Countervailing Duties (China)* explained:

> The French term for public body is "organisme public", and the Spanish is "organismo público". In French, the word "organisme" (in the non-biological sense) has the broad meaning of an organized grouping of elements (persons,

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[43] *The New Shorter Oxford English Dictionary* at 253 (1993) (USA-85). *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285 (*citing* Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 261).

[44] *The New Shorter Oxford English Dictionary* at 2404 (1993) (USA-85). *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285 (*citing* Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2394).

[45] We note that the additional senses of "an assembly, an institution, a society" appear less relevant as they become increasingly general.

> offices, etc.) working to a common purpose (e.g., "institution formée d'un ensemble d'éléments coordonnés entre eux et remplissant des fonctions déterminées; [. . .], chacun des services ainsi coordonnés, ou des associations de personnes les constituant", and "[e]nsemble des services, des bureaux affectés à une tâche"). The French word "public" also has a broad meaning, including related to, belonging to, or controlled by the State (e.g., "d'État, qui est sous contrôle de l'État, qui appartient à l'État, qui dépend de l'État, géré par l'État"). The Spanish term "organismo" is defined similarly to the French "organisme" as referring to a grouping of elements forming a body or institution (e.g., "conjunto de oficinas, dependencias o empleos que forman un cuerpo o institución"). The Spanish term "público", like the French "public", is defined as belonging to or related to the government (e.g., "perteneciente o relativo al Estado o a otra administración").[46]

42. In light of the dictionary definitions it examined in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered that:

> The composite term "public body" could thus refer to a number of different concepts, depending on the combination of the different definitional elements. As such, dictionary definitions suggest a rather broad range of potential meanings of the term "public body", which encompasses a variety of entities, including both entities that are vested with or exercise governmental authority and entities belonging to the community or nation.[47]

43. The Appellate Body further considered that "dictionary definitions of these words in Spanish and French would accommodate a similarly broad range of potential meanings of the term 'public body'."[48]

44. The United States agrees with these observations of the Appellate Body to some extent. That is, dictionary definitions suggest that the ordinary meaning of the term "public body" could have a broad meaning. However, the Appellate Body's analysis does not identify the *concept* that is at the heart of the "range of meanings" it discerned. That is, while "public body" in different contexts could "encompass[] a variety of entities," all of those entities would share the common element of an entity of, belonging to, or pertaining to the community as a whole. Such an entity would be owned or controlled by the community. Responding to China's argument that the term "public body" is limited only to entities "authorized by law to exercise functions of a governmental or public character, whose acts are performed in the exercise of such authority," the panel in *US – Anti-Dumping and Countervailing Duties (China)* considered that dictionary definitions "would appear to encompass, *but could not be said to be limited to*, such entities."[49] The United States agrees with the panel's observation.[50]

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[46] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.61 (citations omitted).
[47] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.
[48] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.
[49] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.59 (emphasis added).
[50] It may be the case that an entity vested with or exercising governmental authority could be considered an organ of the government or potentially a public body. In *US – Countervailing Duty Investigation on DRAMS*, the panel raised

45. In the view of the United States, the correct conclusion to draw at this point in the interpretative analysis is that dictionary definitions of "public" and "body" suggest the ordinary meaning of those terms refers to an entity of, belonging to, or pertaining to the community as a whole. Nothing in those dictionary definitions would restrict the meaning of the term "public body" to an entity vested with, or exercising, government authority. Interpreting the term "public body" as an entity of, belonging to, or pertaining to the community as a whole (*e.g.*, through government) would provide a coherent interpretation that fully respects the broadness of the ordinary meaning of the term.

46. As a final point on the ordinary meaning conveyed by dictionary definitions, the United States notes that, just as the definitions examined do not convey the meaning of "vested with or exercising governmental authority," which the Appellate Body found there, there were a number of other terms that were available to the drafters had they wished to convey that meaning. For example, to convey the sense of governmental authority in relation to an entity, the drafters might have used "governmental body," "public agency," "governmental agency," or "governmental authority." These terms would have, through their ordinary meaning, more clearly conveyed the sense of exercising governmental authority.[51] That they were not used does not itself determine the ordinary meaning of "public body," but the juxtaposition of those terms (governmental versus public; agency or authority versus body) does shed light on the different concept captured by the term "public body."

47. The Panel's role as treaty interpreter is to understand the ordinary meaning of the term "public body" in its context. Thus, with these observations on the dictionary definitions of "public" and "body," the United States now turns to an examination of those terms in the their context. This context reveals that it is indeed government ownership or control that is central to the proper interpretation of "public body," for these elements mean that the government can use the entity's resources as its own.

2. Reading the Term "Public Body" in Context Supports the Conclusion that a "Public Body" is Any Entity Controlled by the Government Such that the Government Can Use that Entity's Resources as Its Own

48. The ordinary meaning of the terms of a treaty must be understood "in their context."[52] As explained below, reading the term "public body" in context supports the conclusion that a "public body" is an entity controlled by the government such that the government can use that entity's resources as its own.

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the possibility that an entity that the investigating authority had found to be a "private body" might also have been classified as a "public body." *US – Countervailing Duty Investigation on DRAMS (Panel)*, note 29 to para. 7.8 & note 80 to para. 7.62; *see also US – Countervailing Duty Investigation on DRAMS (AB)*, note 225 to para. 131.

[51] Indeed, the Appellate Body noted in *Canada – Dairy* that "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens." *Canada – Dairy (AB)*, para. 97.

[52] Vienna Convention, Article 31.

a. The Use of the Distinct Terms "Government" and "Public Body" Suggests that these Terms Have Different Meanings

49. In Article 1.1(a)(1) of the SCM Agreement, the term "public body" is part of the disjunctive phrase "by a government or any public body within the territory of a Member. . . ." The SCM Agreement thus uses two different terms – "a government" on the one hand and "any public body" on the other hand – to identify the two types of entities that can directly provide a financial contribution.[53] As a contextual matter, the use of the distinct terms "a government" and "any public body" together this way suggests that the terms have distinct and different meanings. Treaty interpretation should give meaning and effect to all terms of a treaty. As the Appellate Body has explained, "the internationally recognized interpretive principle of effectiveness should guide the interpretation of the *WTO Agreement*, and, under this principle, provisions of the WTO Agreement should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility."[54] Accordingly, the term "public body" cannot be interpreted in a manner that would render it redundant with the word "government."

50. The term "government," as the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, means, among other things: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry."[55] In *Canada – Dairy*, the Appellate Body explained that "[t]he essence of 'government' is . . . that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority."[56] The Appellate Body further explained that a "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[57]

51. The term "public body," therefore, should be interpreted as meaning something other than an entity that performs "functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[58] Otherwise, a "public body" is "a government," or a part of "a government," and there is no reason for the term "public body" to have been included in Article 1.1(a)(1) of the SCM Agreement. That is, the term would be reduced to redundancy or inutility, contrary to the customary rules of interpretation.[59]

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[53] A financial contribution can also be provided through the use of a "funding mechanism" or via a "private body" entrusted or directed to provide the financial contribution. *See* SCM Agreement, Article 1.1(a)(1)(iv).
[54] *US – Offset Act (Byrd Amendment) (AB)*, para. 271. *See also US – Gasoline (AB)* at 23.
[55] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (*citing* Shorter Oxford English Dictionary, L. Brown (ed.) (Claredon Press, 1993), Vol. I, p. 1123).
[56] *Canada – Dairy (AB)*, para. 97.
[57] *Canada – Dairy (AB)*, para. 97.
[58] *Canada – Dairy (AB)*, para. 97.
[59] Although the terms "government" and "public body" must have distinct meanings, the United States is not suggesting that the terms are completely unrelated or unconnected. As we will describe further below, the terms are related, in that a "public body" is an entity controlled by the government, such that the government can use the entity's resources as its own. In the end, the public body's actions are attributable to the Member by virtue of government control. The terms are distinct, however, in that the public body need not have the authority to "regulate," "restrain," "supervise," or "control" the conduct of private citizens.

b. The Use of the Words "A," "Any," and "Or" in Article 1.1(a)(1) Suggests that the Term "Public Body" Should Be Interpreted as Meaning Something Different from and Broader than the Term "Government"

52. In *US – Anti-Dumping and Countervailing Duties (China)*, the panel "consider[ed] significant that in Article 1.1(a)(1) the terms 'a government' and 'any public body' are separated by the disjunctive 'or', suggesting that they are two separate concepts rather than a single concept or nearly synonymous."[60] The United States agrees.

53. That panel also reasoned that "the word 'any' before 'public body' suggests a rather broader than narrower meaning of that term, i.e., as referring to 'public bodies' of 'any' kind."[61] The panel concluded that:

> Taking these contextual elements together suggests a meaning of the term "public body" as something separate from and broader than "government" or "government agency", and we consider that given the use of the words "a", "or" and "any", this reading of the phrase "a government or any public body" gives meaning to that phrase as a whole.[62]

54. The United States also agrees with this conclusion, which captures the idea that there might be different *types* of public bodies, consistent with the broad range of entities that may be a "public body" according to the dictionary definition of that term – that is, an entity of, pertaining to, or belonging to a community. Some entities that would correctly be deemed "public bodies" might be more akin to government agencies, while others might be corporations engaging in business activities. The unifying characteristic of all public bodies is that they are controlled by the government, such that the government can use their resources in the same manner as its own.

55. Additionally, we note that the use of the term "any" draws a further contextual distinction between the terms "government" and "public body" and indicates that the term "public body" should not be interpreted as relating back to the term "government." The language in the SCM Agreement could have been written as "government or public body," or "government or its public bodies," or "government or another public body" or "government or similar public bodies." The SCM Agreement was not written in this way, and the language actually used must be given effect.

[60] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.
[61] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.
[62] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.

c. The Use of the Term "Government" as a Shorthand Reference for the Phrase "a Government or any Public Body within the Territory of a Member" in Article 1.1(a)(1) of the SCM Agreement Does Not Require a Narrow Interpretation of the Term "Public Body"

56. The United States is not suggesting that there is no relationship between the terms "government" and "public body." While their use and juxtaposition in Article 1.1(a)(1) of the SCM Agreement suggests that they are distinct terms with independent definitions, the provision in Article 1.1(a)(1) that the phrase "a government or any public body within the territory of a Member" is referred to in the SCM Agreement as "government" also suggests that the terms "government" and "public body" are related.

57. The question is: what is the nature of the relationship of these two terms? Understanding the relationship to be one in which the government has authorized the public body to perform governmental acts – *i.e.*, "to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens"[63] – would mean that the terms "government" and "public body" are not merely related, but that they are identical. Furthermore, such an understanding is also not consonant with the dictionary definitions of "public" and "body" examined earlier, which nowhere suggest that these terms refer to government or entities with governmental authority.

58. On the other hand, understanding the relationship as one of control of a "public body" by "a government" (on behalf of the community it represents) gives meaning to both terms and avoids reducing the term "public body" to redundancy. It is also consistent with the dictionary definitions relevant to the term "public body," as discussed above.

59. The United States agrees with the panel in *US – Anti-Dumping and Countervailing Duties (China)*, which found that the use of the term "government" to refer to the phrase "a government or any public body within the territory of a Member" is a drafting technique, used so that the lengthy phrase need not be repeated throughout the SCM Agreement.[64] We note that this drafting technique is similar to that used in Article 2.1 of the SCM Agreement, which refers to "an enterprise or industry or group of enterprises or industries" as "certain enterprises." Clearly, the terms "enterprise" and "industry" (and groups thereof) have different meanings, despite being referred to collectively as "certain enterprises." The use of the term "certain enterprises" in Article 2.1 of the SCM Agreement is a drafting technique used to obviate the need to repeat the lengthy phrase "an enterprise or industry or group of enterprises or industries" throughout the text.[65]

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[63] *Canada – Dairy (AB)*, para. 97.
[64] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.66.
[65] This type of drafting technique is used elsewhere in the WTO agreements as well. "Injury" is defined in the SCM Agreement and AD Agreement to mean not only "material injury" and "threat of material injury," but also "material retardation" of the establishment of a domestic injury. *See* SCM Agreement, Article 15, note 45; AD Agreement, Article 3, note 9. The term "financial services" is defined in the GATS Annex on Financial Services as including not only financial and banking services, but also "insurance and insurance-related services." *See* GATS Annex on Financial Services, para. 5(a).

60. Of course, we recognize that the Appellate Body disagreed with the panel in *US – Anti-Dumping and Countervailing Duties (China)* that "the use of the collective term 'government' has no meaning besides facilitating the drafting of the Agreement."[66] The Appellate Body considered that the "defining elements of the word 'government' inform the meaning of the term 'public body'" and "[t]his suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body."[67] This, however, is an assertion. The Appellate Body does not explain why its conclusion necessarily follows from the use of the collective term "government."

61. A more logical conclusion to draw from the SCM Agreement's reference to "a government" and "any public body" together as "government" is that, as the *Korea – Commercial Vessels* panel found, "[i]f an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the SCM Agreement."[68] That panel considered that such an "approach is consistent with the fact that Article 1.1(a)(1) provides that both governments and public bodies shall be referred to as 'government'."[69] Similarly, the panel in *US – Anti-Dumping and Countervailing Duties (China)* viewed "the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of 'government' for purposes of the Agreement, as well as when 'private' actors may be said to be acting on behalf of 'government'."[70]

62. The Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* does not address the *Korea – Commercial Vessels* panel's analysis of the context of Article 1.1(a)(1). The conclusion of the panels in *Korea – Commercial Vessels* and *US – Anti-Dumping and Countervailing Duties (China)* is more logical because it preserves the dichotomy established in Article 1.1(a)(1) by the use of the two different terms "government" and "public body." The interpretation adopted by the panels is consistent, once again, with the interpretive principle of effectiveness as it avoids reducing the term "public body" to a redundancy. This interpretation also preserves the relationship between the "government" and a "public body" in the sense that the government can use the resources of the public body in the same way that it can use its own resources.

d. The Context Provided by the Term "Private Body" in Article 1.1(a)(1)(iv) of the SCM Agreement Supports an Understanding of the Term "Public Body" as an Entity Controlled by the Government Such that the Government Can Use the Entity's Resources as Its Own

63. The understanding of "public body" as an entity controlled by the government such that the government can use the entity's resources as its own is further supported by the context provided in Article 1.1(a)(1)(iv) of the SCM Agreement by the use of the term "private body."

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[66] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 289.
[67] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.
[68] *Korea – Commercial Vessels*, para. 7.50 (footnote omitted).
[69] *Korea – Commercial Vessels*, para. 7.50, note 43.
[70] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.90.

64. The terms "public body" and "private body" are, more or less, opposites. Indeed, the dictionary definition for the term "public" includes: "In general, and in most of the senses, the opposite of *private* adj."[71] "Private," on the other hand, in the sense "Of a service, business, etc.," is defined as "provided or owned by an individual rather than the State or a public body."[72]

65. Logically, since the ordinary meaning of the term "public" is the opposite of "private," the term "public" means "*provided or owned by the State or a public body rather than an individual*." This is further support for interpreting the term "public body" as meaning an entity controlled by the government.

e. The Context Provided by "Financial Contribution" in Article 1.1(a)(1) of the SCM Agreement Supports an Understanding of "Public Body" as an Entity Controlled by the Government Such that the Government Can Use the Entity's Resources as Its Own

66. In seeking to understand the term "public body" in its context, it is important to recall that the Agreement is identifying those entities which may make "financial contributions." Those financial contributions are one part of a definition of "subsidy," and those subsidies are granted or maintained by Members. A Member can make the financial contribution underlying the subsidy directly through its "government" (narrowly understood). However, it also can make that financial contribution through entities that it controls.

67. Article 1.1(a)(1) of the SCM Agreement identifies a variety of actions that constitute financial contributions, including "a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)," foregoing or not collecting "government revenue," "provid[ing] goods or services other than general infrastructure, or purchas[ing] goods," and "mak[ing] payments to a funding mechanism." The ordinary meaning of a "financial contribution" suggested by this list of actions is to convey value. In this ordinary sense, entities controlled by the government can convey value just as the government can, and the value conveyed can be precisely the same as that conveyed by the government.

68. Consider, for example, a "direct transfer of funds" by a government to a recipient in the form of a grant. Conveying value in this way is plainly a "financial contribution" within the meaning of the SCM Agreement.

69. If the government formed a legal entity (for example, a corporation), controlled the entity (for example, by holding 100 percent of the shares of the corporation), and the entity provided the same grant to a recipient, the same financial contribution (in the ordinary sense) has occurred: the government has conveyed value. Whether the funds are provided directly by the government or by an entity controlled by the community through its government, it is a Member's funds that are being used to make the financial contribution (in the ordinary sense).

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[71] *Oxford English Dictionary Online*, definition of "public, *adj.* and *n.*," at 2 (2009) (USA-86). China submitted this definition to the panel in *US – Anti-Dumping and Countervailing Duties (China)* as Exhibit CHI-95.
[72] *The New Shorter Oxford English Dictionary* at 2359 (1993) (USA-85).

70. There is no evident reason for one transaction to fall within the scope of Article 1.1(a)(1) of the SCM Agreement and the other not to. Nor would the term "financial contribution" suggest that a distinction should be drawn between those transactions based on whether the entity or corporation is "vested with or exercising governmental authority."

71. Rather, the context supplied by "financial contribution" suggests a different common concept between "government" and "public body" than that discerned by the Appellate Body. If a "financial contribution" (in the ordinary sense) means to convey something of value, this suggests that the concept sought to be captured by the SCM Agreement term is the use by a government of its resources, or resources it controls, to convey value to economic actors.

72. If a government undertakes the activities described in Article 1.1(a)(1)(i)-(iii), there is a conveyance of value from a Member to a recipient. Equally, when a Member establishes an entity (for example, a wholly-government-owned corporation), whose resources the Member can control and use, and the entity engages in the same activities, there is a conveyance of value from a Member to a recipient.[73]

73. The same logic applies to lower levels of ownership as well, so long as the government controls the entity. Irrespective of the government's ownership stake, if the government, through whatever means, controls the corporation such that it can use the corporation's resources as its own, then a grant provided by the corporation to a recipient is a conveyance of value by the Member. The corporation's transfer of its financial resources is a transfer of the government's resources (that is, financial resources the government could otherwise use as its own for other purposes). And because the government can control the corporation, any transaction that conveys value to a recipient is either authorized by or not restrained by the government.

74. The context provided by "financial contribution" (as well as "a government or any," as explained above) suggests that a "public body" is an entity controlled by the government such that the government is entitled to use the entity's resources as it can use its own.[74] The financial contribution (in the ordinary sense) flowing to a recipient through the economic activity of an entity controlled by the government conveys value from a Member to a recipient in the same way as if the government had provided the financial contribution directly.

f. Further Context in Article 1.1(a)(1) of the SCM Agreement, Such as "Payments to a Funding Mechanism," Supports This Understanding of the Scope of Transactions That Are "Financial Contributions"

75. The understanding of "financial contribution" set out above suggests that this concept is intended to delineate economic activities of entities through which a Member may convey value to a recipient. It further underscores that the SCM Agreement reaches activities through which value may be conveyed in the same way as if the government had provided the financial

[73] To simplify matters, we have used as a hypothetical example a "direct transfer of funds" in the form of a grant. The same logic applies with equal force in case of other forms of financial contribution, such as when a government provides goods for less than adequate remuneration.

[74] It should be noted that the context provided by the term "financial contribution" does not suggest that the entity through which the flow occurs must be vested with or exercising governmental authority.

contribution directly. For example, Article 1.1(a)(1)(iv) describes another means to convey value: "a government makes payments to a funding mechanism."

76. While not further elaborated in the SCM Agreement, the clause suggests that the government or any public body transfers money to a pool or instrument that then provides financial resources (funds) to recipients. The dictionary defines the noun "fund" as "a stock or sum of money, esp. as set apart for a particular purpose," "the money at a person's disposal; financial resources," and "a portion of revenue set apart as security for specified payments." As a verb, "fund" is defined as "supply with funds, finance (a person, position, or project)" and "funding" as "the action of the [verb]."[75] The word "mechanism" is defined as "a means by which a particular effect is produced."[76] The ordinary meaning of the term "funding mechanism" suggested by these dictionary definitions is a means by which money is supplied for a particular purpose.

77. However, significantly, nothing in the phrase "a government makes payments to a funding mechanism" suggests that the government makes any further decisions on what payments are made and to which recipients. The term "mechanism" rather suggests that it is that pool or instrument that undertakes to distribute the financial resources.

78. Thus, this "funding mechanism" provision indicates that the transfer of value by a government to a recipient through such a mechanism can be at issue under the SCM Agreement. The government could have made a payment directly to a recipient, but instead used a funding mechanism. The Agreement reaches the funding mechanism transaction because, if the government makes payments to a funding mechanism and then those funds are provided to recipients, there is the same conveyance of value from the Member. And nothing in the ordinary meaning of the term "funding mechanism" indicates that the funding mechanism is vested with or exercising governmental authority when it carries out this transfer. Rather, the funding mechanism just dispenses funds.

79. This context, then, supports the understanding of "financial contribution" within which "public body" should be interpreted, as indicated above. When a financial contribution (in the ordinary sense) flows to a recipient through the economic activity of an entity controlled by the government, value is conveyed from a Member to that recipient in the same way as if the government had provided the financial contribution directly. Article 1.1(a)(1) of the SCM Agreement is designed to capture such flows within its definition "financial contribution."

g. The Context Provided by the "Entrusts or Directs" Language in Article 1.1(a)(1)(iv) of the SCM Agreement Does Not Weigh Against an Understanding of "Public Body" as an Entity Controlled by the Government Such that the Government Can Use the Entity's Resources as Its Own

80. In its first written submission, China asserts that "[a] public body, like government in the narrow sense, . . . must itself possess the authority to 'regulate, control, supervise or restrain' the

[75] *The New Shorter Oxford English Dictionary* at 1042 (1993) (USA-85).
[76] *The New Shorter Oxford English Dictionary* at 1728 (1993) (USA-85).

conduct of others."[77] China suggests that this conclusion follows from a contextual analysis of the language in Article 1.1(a)(1)(iv) of the SCM Agreement.[78] China is incorrect.

81. Article 1.1(a)(1)(iv) of the SCM Agreement provides that "there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government')" where:

> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

82. Analyzing this provision as part of its contextual analysis of the term "public body" in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered that:

> [B]ecause the word "government" in Article 1.1(a)(1)(iv) is used in the sense of the collective term "government", that provision covers financial contributions provided by a government or any public body where "a government or any public body" entrusts or directs a private body to carry out one or more of the type of functions or conduct illustrated in subparagraphs (i)-(iii). Accordingly, subparagraph (iv) envisages that a public body may "entrust" or "direct" a private body to carry out the type of functions or conduct illustrated in subparagraphs (i)-(iii).[79]

83. The Appellate Body further reasoned that "for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command" and, "[s]imilarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility."[80] The United States agrees with these Appellate Body propositions as far as they go.

84. However, it does not follow from these propositions that a public body must be vested with governmental authority to perform governmental functions, *i.e.*, regulating, restraining, supervising or controlling the conduct of private citizens.[81] In other words, the fact that an entity has the "authority" or "responsibility" to do a task, such as selling steel or chemicals, which can be entrusted to another entity if the first entity so chooses, does not mean that the entity has "authority" or "responsibility" to perform governmental functions. There was no basis for the Appellate Body to conclude that the authority or responsibility to entrust or direct is the same as the authority or responsibility to perform governmental functions.

85. Further, even assuming *arguendo* that the authority or responsibility to entrust or direct is the same as the authority or responsibility to perform governmental functions, it does not follow

[77] China First Written Submission, para. 22.
[78] *See* China First Written Submission, para. 23.
[79] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 293.
[80] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294.
[81] *See Canada – Dairy (AB)*, para. 97.

that all public bodies must have this authority. In other words, it does not follow that all public bodies must be homogeneous in their possession of authority to entrust or direct private bodies. Indeed, many organs of Member governments – including ministries, departments and agencies – do not possess the legal authority to entrust or direct private bodies to carry out the functions identified in Articles 1.1(a)(1)(i)-(iii), even though, in other respects, they may possess and exercise authority to "'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[82] The absence of authority to entrust or direct private bodies does not move these organs outside the category of "government." Likewise, logically, the absence of authority to entrust or direct private bodies does not, as a definitional matter, move any particular entity outside the category of "public body." The "entrusts or directs" provision of Article 1.1(a)(1)(iv) of the SCM Agreement simply provides no contextual guidance for the interpretation of the term "public body" in Article 1.1(a)(1).

86. The same is true of the reference in Article 1.1(a)(1)(iv) to "the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." China asks the Panel to conclude that this reference to government functions is a reference to the "authority to 'regulate, control, supervise or restrain' the conduct of others."[83] That is incorrect.

87. As the Appellate Body explained in *US – Countervailing Duty Investigation on DRAMS*:

> Paragraph (iv) of Article 1.1(a)(1) further states that the private body must have been entrusted or directed to carry out *one of the type of functions* in paragraphs (i) through (iii). As the panel in *US – Export Restraints* explained, this means that "the scope of the actions . . . covered by subparagraph (iv) must be the same as those covered by subparagraphs (i)-(iii)". A situation where the government entrusts or directs a private body to carry out a function that is outside the scope of paragraphs (i) through (iii) would consequently fall outside the scope of paragraph (iv). Thus, we agree with the *US – Export Restraints* panel that "the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the *actor*, and not with the nature of the *action*."[84]

The panel in *US – Export Restraints*, with which the Appellate Body agreed in *US – Countervailing Duty Investigation on DRAMS*, was more explicit: "the phrase 'type of functions' refers to the physical functions identified in subparagraphs (i)-(iii)."[85]

88. We also recall that the term "government" in subparagraph (iv) of Article 1.1(a)(1) is used in the collective sense.[86] Thus, subparagraph (iv) provides that there is a financial contribution when a government or any public body entrusts or directs a private body:

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[82] *Canada – Dairy (AB)*, para. 97.
[83] China First Written Submission, para. 22.
[84] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 112 (citations omitted, emphasis in original).
[85] *US – Export Restraints*, para. 8.53.
[86] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 293.

> . . . to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the [*government or any public body within the territory of a Member*] and the practice, in no real sense, differs from practices normally followed by [*governments or any public bodies within the territory of a Member*].

89. China's suggestion that the reference to government functions in Article 1.1(a)(1)(iv) relates to the "authority to 'regulate, control, supervise or restrain' the conduct of others"[87] is unsupported by the text. The language in subparagraph (iv) of Article 1.1(a)(1) simply refers back to the functions described in subparagraphs (i) through (iii).

90. Consequently, it is circular to read Article 1.1(a)(1)(iv) as requiring that the term "public body" be interpreted as meaning an entity vested with or exercising authority to perform governmental functions. Necessarily, an entity alleged to have taken one or more of the actions identified in Article 1.1(a)(1)(i)-(iii) possesses – at least allegedly – authority to perform such actions. So, an entity's possession of such authority tells us nothing about whether the entity is a "public body" or a "private body" – or part of "a government" for that matter. On the other hand, the presence or absence of government control permits distinctions to be drawn between entities that are "public bodies" and those that are "private bodies."

h. The Working Party Report on China's Accession to the WTO Is Context for the Interpretation of the Term "Public Body" and Supports the Conclusion that Entities Controlled by the Government Are "Public Bodies"

91. The commitments China made as part of its accession to the WTO provide further context for Article 1.1(a)(1) of the SCM Agreement. China's Accession Protocol states: "This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."[88] In *China – Auto Parts*, both the Appellate Body and the panel noted that the Accession Protocol and the commitments in the Working Party Report are integral parts of the WTO Agreement.[89] Accordingly, the Accession Protocol and commitments in the Working Party Report are important context in an interpretation of Article 1.1(a)(1) of the SCM Agreement.

92. The Working Party Report contains the following passage:

> Some members of the Working Party, in view of the special characteristics of China's economy, sought to clarify that when state-owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement. The representative of China noted, however, that such financial contributions would not necessarily give rise to a benefit within the meaning of Article 1.1(b) of the SCM Agreement. He pointed out that China's objective was that state-owned enterprises, including

[87] China First Written Submission, para. 22.
[88] *China Accession Protocol*, Part I, Article 1.2.
[89] *China – Auto Parts (AB)*, paras. 213-214; *China – Auto Parts (Panel)*, paras. 7.740-41.

> banks, should be run on a commercial basis and be responsible for their own profits and losses. The Working Party took note of this commitment.[90]

93. Although this commitment by China does not use the exact language of Article 1.1(a)(1) of the SCM Agreement, the intent is clear. State-owned enterprises in China are government actors, or at least public bodies within the meaning of the SCM Agreement. Notably, the representative of China *did not dispute* that there is a financial contribution when a state-owned enterprise provides something; instead simply noting that "such financial contributions" might not necessarily confer a benefit.[91] China's acceptance that actions by its state-owned enterprises constitute financial contributions is a recognition that Chinese state-owned enterprises are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

3. Reading the Term "Public Body" in Light of the Object and Purpose of the SCM Agreement Supports the Conclusion that a "Public Body" Is Any Entity Controlled by the Government Such That the Government Can Use the Entity's Resources As Its Own

94. Under the customary rules of interpretation, the terms of an international agreement also must be interpreted in light of the object and purpose of the agreement. Here, the object and purpose of the SCM Agreement support an interpretation of the term "public body" as meaning an entity controlled by the government such that the government can use the entity's resources as its own, without the additional requirement that the entity must be vested with authority from the government to perform governmental functions.

95. While the SCM Agreement has no preamble or explicit indication of its object and purpose, the Appellate Body has said that the object and purpose of the SCM Agreement is 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."[92] In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body stated that the SCM Agreement "reflects a delicate balance 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."[93]

96. The Appellate Body and panels have sought to ensure that the SCM Agreement is not interpreted rigidly or formalistically in a manner that would undermine its disciplines on trade-distorting subsidization. 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."[94] 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). . . ."[95] In *US – Softwood*

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[90] *Working Party Report*, para. 172.
[91] *Working Party Report*, para. 172.
[92] *US – Softwood Lumber IV (AB)*, para. 64.
[93] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 115.
[94] *Canada – Autos (AB)*, para. 142.
[95] *Australia – Automotive Leather II*, para. 9.56.

Lumber IV, the Appellate Body explained that "the object and purpose of the *SCM Agreement* . . . includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies."[96] The Appellate Body emphasized in *US – Softwood Lumber IV* the right of WTO Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[97]

97. Interpreting the term "public body" as referring to entities controlled by the government preserves the strength and effectiveness of the subsidy disciplines and inhibits circumvention. Such an interpretation ensures that governments cannot escape those disciplines by using entities under their control to accomplish tasks that would potentially be subject to those disciplines were the governments themselves to undertake them. China's understanding of the "governmental functions" test for determining whether an entity is a "public body," on the other hand, is at odds with the object and purpose of the SCM Agreement. As the Appellate Body has found, inherent "governmental functions" are to regulate, control, supervise, or restrain private persons.[98] Government-controlled entities that do not engage in these typical "governmental functions" could nevertheless provide financial contributions that confer benefits to certain enterprises, but such subsidization might not be reachable under China's mistaken interpretation.

98. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body noted the panel's concern about "what it saw as the implications of too narrow an interpretation" but cautioned that "too broad an interpretation of the term 'public body' could equally risk upsetting the delicate balance embodied in the SCM Agreement because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies." [99]

99. An interpretation of the term "public body" that includes entities controlled by a government such that the government can use the entity's resources as its own is not so broad that it undermines the object and purpose of the SCM Agreement. The panel in *US – Anti-Dumping and Countervailing Duties (China)* discussed this issue at length, explaining that a "public body" analysis is only the first step in a subsidy analysis.[100] As that panel explained, a finding that an entity is a "public body" does not "condemn that entity, or otherwise . . . cast it in a negative light."[101] Nor does such a finding end the subsidy analysis. It only means that there is the potential for a financial contribution that confers a benefit.[102] These elements of a subsidy, as well as specificity, can then be examined. In other words, determining that a particular entity is a public body does not mandate finding that an actionable subsidy exists. Therefore, finding entities controlled by the government to be "public bodies" does not extend the reach of the SCM Agreement in a manner that is inconsistent with its object and purpose. To the contrary, it simply ensures that certain entities are subject to the *potential* disciplines of the Agreement.

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[96] *US – Softwood Lumber IV (AB)*, para. 95 (*citing US – Carbon Steel (AB)*, paras. 73-74).
[97] *US – Softwood Lumber IV (AB)*, para. 95 (*citing US – Carbon Steel (AB)*, paras. 73-74).
[98] *Canada – Dairy (AB)*, para. 97.
[99] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.
[100] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.78-8.81.
[101] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.78.
[102] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.80-8.81.

100. Ultimately, the Appellate Body concluded in *US – Anti-Dumping and Countervailing Duties (China)* that "considerations of the object and purpose of the SCM Agreement do not favour either a broad or a narrow interpretation of the term 'public body'."[103] As explained above, the United States disagrees. We believe that our proposed interpretation of the term "public body" is consistent with and supports the object and purpose of the SCM Agreement. However, if the Panel agrees with the Appellate Body's observations with respect to the object and purpose of the SCM Agreement, it should nevertheless interpret the term "public body" as meaning an entity controlled by the government, because such an interpretation is consistent with the broad range of meanings suggested by the ordinary meaning of the words "public" and "body," and because reading the term "public body" in context likewise supports that interpretation.

4. When Interpreting Article 1.1(a)(1) of the SCM Agreement, It Is Not Necessary to Take into Account the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts

101. Article 31(3)(c) of the Vienna Convention provides that:

> 3. There shall be taken into account, together with the context:
>
> . . .
>
> (c) any relevant rules of international law applicable in the relations between the parties.

102. In *US – Anti-Dumping and Countervailing Duties (China)*, there was a great deal of argument by the parties and discussion by the panel and the Appellate Body of whether, when interpreting the terms of Article 1.1(a)(1) of the SCM Agreement, certain provisions of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles"), in particular Article 5, may be taken into account as one among several interpretative elements.[104]

103. The Appellate Body, while it discussed the ILC Articles in response to arguments of the parties and the findings of the panel, did not appear to take the ILC Articles into account in its interpretation of Article 1.1(a)(1). Rather, the Appellate Body found that it was "not necessary . . . to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law."[105] Without first resolving the question of whether and to what extent Article 5 of the ILC Articles reflects customary international law, it is not permissible under the customary rules of interpretation reflected in the Vienna Convention to take Article 5 into account with the context of Article 1.1(a)(1) of the SCM Agreement when interpreting that provision. Thus, the United States understands the Appellate Body not to have taken Article 5 of the ILC Articles into account in its interpretative analysis of Article 1.1(a)(1) of the SCM

[103] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.
[104] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 304-316; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.84-91.
[105] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 311.

Agreement. This was appropriate because the ILC Articles are not relevant rules of international law applicable in the relations between the parties.

104. With respect to the status of the ILC Articles, that is, whether the ILC Articles constitute "rules of international law applicable in the relations between the parties," we note that they have not been adopted and cannot be considered an agreement between the parties.[106] In *US – Line Pipe*, the Appellate Body explained that "the International Law Commission's Draft Articles . . . do not constitute a binding legal instrument as such . . . ."[107] While the Appellate Body has recognized that certain parts of the ILC Articles may be understood as setting out recognized principles of customary international law,[108] the United States notes that, given the level of detail and fine-line distinctions constructed in Articles 5-8 of the ILC Articles, it remains an open, and contested, question whether all of these details and distinctions have risen to the status of customary international law. Only if these articles were customary international law could they be said to be "applicable in the relations between the parties" and, as a result, possibly relevant to an interpretative analysis under Article 31(3)(c) of the Vienna Convention. That some parts of the ILC Articles might reflect customary international law does not mean that all of the details of the ILC Articles, including the ILC Commentaries, have attained this status.[109]

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[106] In 2001, the United Nations General Assembly adopted a resolution on the ILC Articles, which indicated that the General Assembly:

> *Takes note* of the articles on responsibility of States for internationally wrongful acts, presented by the International Law Commission, the text of which is annexed to the present resolution, and commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action . . . .

Resolution Adopted by the General Assembly, A/RES/56/83 (12 December 2001) (underlining added). The United Nations General Assembly adopted similar resolutions in 2004, 2007, and 2010. *See* Resolution Adopted by the General Assembly, A/RES/59/35 (2 December 2004) (The resolution "*Commends once again* the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . ." (underlining added)); Resolution Adopted by the General Assembly, A/RES/62/61 (6 December 2007) (The resolution "*Commends once again* the articles on responsibility of States for internationally wrongful acts, to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action . . . ." (underlining added)); "General Assembly, on Recommendation of Legal Committee, Adopts Texts on Measures to Eliminate Global Terrorism, Programme of International Legal Assistance; Also Adopts Texts on Rule of Law; Work of United Nations Commission on International Trade Law, International Law Commission," http://www.un.org/News/Press/docs//2010/ga11030.doc.htm (6 December 2010) ("Before the Assembly is a report on the responsibility of States for internationally wrongful acts (document A/65/463). It contains one resolution approved on 5 November, by which the Assembly would request Governments to consider the question of future adoption of the draft articles or other appropriate action and submit written comments on such future action to the Secretary-General." (emphasis added)). That these resolutions are all "without prejudice to the question of [the ILC Articles'] future adoption" indicates that the ILC Articles have not been adopted and cannot be considered an "agreement between the parties."

[107] *US – Line Pipe (AB)*, para. 259.

[108] *See US – Line Pipe (AB)*, para. 259 (noting that Article 51 of the Draft Articles sets out a recognized principle of customary international law).

[109] In this regard, we would note that the first sentence of the General Commentary to the ILC Articles states that "[t]hese articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts." The reference, in

105. Assuming *arguendo* that the ILC Articles can be considered "rules of international law applicable in the relations between the parties," it is nevertheless impermissible to take them into account because the ILC Articles are not "relevant" to the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

106. The ILC Articles are clear that their purpose is *not* to define the primary rules establishing obligations under international law, but rather to define when a state (as opposed to some other entity) is responsible for a breach of those primary rules.[110] In the context of countervailing duties under the SCM Agreement, the primary rule is contained in Article 10 of the SCM Agreement – namely, that Members shall ensure that imposition of a countervailing duty "is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement," including Article 1.1(a)(1) of the SCM Agreement. The question in this dispute is whether the United States breached this primary obligation, and the ILC Articles have nothing to say about *whether* such a breach occurred.

107. In this respect, the commentaries to the ILC Articles are helpful. The commentaries state:

> It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States. In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc.[111]

108. The task of the Panel here is to determine whether the United States breached its obligation to impose countervailing duties only in accordance with the provisions of the SCM Agreement.[112] With respect to the "public body" issue, the Panel needs to assess whether Commerce's findings are inconsistent with Article 1.1(a)(1) of the SCM Agreement. This is a question solely for the SCM Agreement and the GATT 1994. The ILC Articles are not helpful in determining *whether* the United States breached its obligations; they would only be helpful in determining whether the United States was responsible for any alleged breach, for example, if

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particular, to "progressive development" suggests that the authors of the ILC Articles recognized themselves that the ILC Articles go beyond current public international law.

[110] *See ILC Articles, General Commentary*, para. 1 ("These articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility."). The commentaries also quote one of the architects of the ILC Articles as saying that the Articles specify "the principles which govern the responsibility of States for internationally wrongful acts, *maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. . . .*" *Id.*, para. 2 (emphasis added).

[111] *ILC Articles*, Commentary to Chapter III, para. 2 (footnote omitted).

[112] *See* SCM Agreement, Art. 10.

there was some question about whether the action of Commerce is attributable to the United States.[113]

109. Even if the issue in this dispute were whether China (as opposed to the United States) breached its obligations, the question of whether a "public body" provided goods in China is not one of attribution of "wrongful" acts to China. The question simply relates to the substantive conditions for something potentially to be deemed a subsidy under the SCM Agreement. Even if a subsidy is deemed to exist, it may not be wrongful as such, but rather may give the right to another WTO Member, in this case, the United States, to impose countervailing duties if certain additional conditions under the "primary rules" of the SCM Agreement are met. As the Appellate Body stated in *US – FSC (Article 21.5 I)*:

> Article 1.1 of the *SCM Agreement* sets out a *definition* of a "subsidy" for the purposes of that Agreement. Although this definition is central to the applicability and operation of the remaining provisions of the Agreement, Article 1.1 itself does not impose any obligation on Members with respect to the subsidies it defines. It is the provisions of the *SCM Agreement* which follow Article 1, such as Articles 3 and 5, which impose obligations on Members with respect to subsidies falling within the definition set forth in Article 1.1. . . .
>
> In other words, Article 1.1 of the SCM Agreement does not prohibit a Member from foregoing revenue that is otherwise due under its rules of taxation, even if this also confers a benefit under Article 1.1(b) of the SCM Agreement. . . .[114]

110. Similarly, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body confirmed that:

> . . . the granting of a subsidy is not, in and of itself, prohibited under the SCM Agreement. Nor does granting a "subsidy", without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the SCM Agreement.[115]

111. In sum, secondary rules of general international law (limited to responsibility for wrongful conduct) cannot be grafted onto primary rules of international law that do not even define wrongful conduct.

112. As the panel in *US – Anti-Dumping and Countervailing Duties (China)* recognized, a determination that a government-controlled entity is a "public body" under the SCM Agreement, or that such public body has provided a financial contribution, is not a determination that the Member has engaged in "wrongful conduct." That panel correctly observed that "to say that certain behaviour of an entity is covered by the SCM Agreement (*i.e.*, is a specific subsidy) in itself carries no negative connotation. Only in the particular, narrow instance of a prohibited

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[113] *See, e.g.*, *US – Gambling (Panel)*, para. 6.127 (finding that "as an agency of the United States government with specific responsibilities and powers, actions taken by the USITC pursuant to those responsibilities and powers are attributable to the United States.").
[114] *US – FSC (Article 21.5 I) (AB)*, paras. 85-86.
[115] *Canada – Aircraft (Article 21.5 – Brazil) (AB)*, para. 47.

subsidy does the existence of the subsidy give rise to such a connotation, and otherwise the existence of specific subsidies is a neutral event under the Agreement, actionable only where it causes, in particular instances, defined forms of adverse effects on another Member's interests."[116] Similarly, in *Korea – Commercial Vessels*, Korea urged the panel to adopt a test drawn from Article 5 of the ILC Articles, but the panel there declined to do so.[117] The Panel here should likewise refrain from taking into account the ILC Articles as it undertakes its interpretative analysis of Article 1.1(a)(1) of the SCM Agreement.

5. Other Dispute Settlement Panels, WTO Members, and Commentators Have Disagreed with the Appellate Body's Interpretation of the Term "Public Body" in *US – Anti-Dumping and Countervailing Duties (China)*

113. We note that three WTO dispute settlement panels have interpreted the term "public body" in Article 1.1(a)(1) of the SCM Agreement and concluded that a "public body" is an entity controlled by the government.

114. In *Korea – Commercial Vessels*, the panel concluded that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)."[118] In reaching this conclusion, that panel rejected some of the very same arguments China advanced before the panel and the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

115. In *EC and certain member States – Large Civil Aircraft*, the panel, addressing the status of a government-owned financial institution, explained that, "at the time of its 1992 investment in Aerospatiale, Credit Lyonnais was controlled by the French government and was a 'public body' for purposes of Article 1.1(a)(1) of the SCM Agreement."[119] Accordingly, the capital contribution made by Credit Lyonnais to Aerospatiale constituted a financial contribution by a public body.[120]

116. In *US – Anti-Dumping and Countervailing Duties (China)*, the panel concluded that "a 'public body', as that term is used in Article 1.1 of the SCM Agreement, is any entity controlled by a government." That panel viewed that as "the correct interpretation, which emerges from an analysis of the ordinary meaning of the term in its context and in the light of the object and purpose of the provision and of the SCM Agreement."[121]

117. Additionally, we note that during the meeting of the WTO Dispute Settlement Body at which the panel and Appellate Body reports in *US – Anti-Dumping and Countervailing Duties (China)* were adopted, seven WTO Members joined the United States in raising concerns about the Appellate Body's findings with respect to the interpretation of the term "public body."[122]

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[116] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.78.
[117] *See Korea – Commercial Vessels*, paras. 7.37, 7.39, 7.44-45, 7.48-49.
[118] *Korea – Commercial Vessels*, para. 7.50. *See also id.*, paras. 7.172, 7.353, and 7.356.
[119] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.1359.
[120] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.1359.
[121] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.94.
[122] *See* WT/DSB/M/294, paras. 103-127.

118. Finally, we draw the Panel's attention to an article in the Journal of World Trade penned by Michael Cartland, Gérard Depayre, and Jan Woznowski, each of whom participated in the Negotiating Group on subsidies and countervailing measures in the Uruguay Round.[123] The article presents a detailed discussion of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* and raises a host of concerns with the Appellate Body's interpretation of the term "public body."

6. The Parties Agree and China's Arguments Reveal that the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* Does Not Bar the Panel's Own Consideration of the Interpretation of "Public Body" in This Dispute

119. China has approached the issue of "public body" as if the Appellate Body's report in *US – Anti-Dumping and Countervailing Duties (China)* is "dispositive" of the issue, but the United States notes that China does not assert that the Panel is bound to apply the same interpretation as that developed by the Appellate Body.[124] Nor could it. While the parties are in agreement that the findings of the Appellate Body on "public body" are important and need to be taken into account in this dispute, China does not and cannot assert that the Panel may merely rely on or apply those findings, for several reasons.[125]

120. First, we understand that there is no disagreement between *these parties* that the Panel can examine issues of law and develop its own legal interpretations, taking into account prior panel and Appellate Body reports. China has taken the view in dispute settlement that a panel not only can, but must, make its own assessment of the applicability of the covered agreements in order to fulfill its role under Article 11 of the DSU. The United States agrees. Thus, for purposes of securing a positive solution to *this* dispute between *these* parties, the Panel can take as its starting point the parties' agreement that the Panel should make its own evaluation of the meaning of "public body" in accordance with the customary rules of interpretation of public international law.

121. Second, China should be understood as having agreed that in this particular dispute the Panel may and must make its own legal interpretation of the term "public body." China is arguing for the proposition in another, contemporaneous dispute that a panel must make its own assessment of the applicability of the covered agreements. While the United States does not doubt the right of each WTO Member to change its position on any issue of interpretation, it would profoundly undermine the work of the Panel and the dispute settlement system were a party to argue *simultaneously* for opposing interpretations of the same provisions of the covered agreements (in this case, those that govern the role of the Panel). Therefore, China should be understood as agreeing to its own position, and for purposes of this dispute, the Panel may proceed on that basis.

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[123] Cartland, Michael, Depayre, Gérard &Woznowski, Jan. 'Is Something Going Wrong in the WTO Dispute Settlement?' Journal of World Trade 46, no. 5 (2012): 979–1016 (USA-87).

[124] In fact, in its first written submission, China carefully states only that the challenged determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement "for the same reasons that the Appellate Body identified in its report in DS379." China First Written Submission, para. 16.

[125] The Panel will be aware of the U.S. systemic view of the significant value of adopted panel and Appellate Body reports, but this systemic view is not at issue in the circumstances of this dispute, for the reasons set out above.

122. Third, China relies for its understanding of the term "public body" on one Appellate Body report. In the interpretation set out above, the United States has presented additional arguments and interpretative material not considered by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* to permit the Panel to consider fully the interpretative issues. Therefore, the arguments presented in this dispute are not the same as those considered in *US – Anti-Dumping and Countervailing Duties (China)*. The Panel will be in a better position to set forth a comprehensive analysis in its report if the arguments are fully developed in this dispute. If the Panel's interpretation is appealed, the Appellate Body, too, would benefit from a thorough engagement in this proceeding with the parties' arguments.

123. Fourth, China is not arguing that the Appellate Body has considered all aspects of the interpretative issues (which would be difficult to do in but one report). Nor is China arguing that that the Appellate Body's interpretation may merely be applied in this dispute. In fact, China itself is arguing for an elaboration and further development of the Appellate Body's finding in *US – Anti-Dumping and Countervailing Duties (China)* – for example, when China argues that a public body must itself possess authority to regulate, control, supervise, or restrain the conduct of others.[126] As the United States has explained, we believe that important aspects of the Appellate Body's approach in *US – Anti-Dumping and Countervailing Duties (China)* are flawed and that China's further elaboration of that approach is even more flawed. The key point, however, is that China itself does not take the Appellate Body's approach to "public body" as settled. Therefore, in the circumstances of this dispute, the Panel must engage with the parties' arguments and make its own interpretation of the relevant legal text.

124. For all of these reasons, for purposes of this dispute, 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. As explained above, 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 the entity's resources as its own.

B. China Has Failed To Demonstrate that Commerce's Public Body Determinations Are Inconsistent, as Applied, with Article 1.1(a)(1) of the SCM Agreement

125. In its first written submission, China argues that Commerce did not "determine that the SOEs in the investigations at issue were actually 'vested with, and exercising, authority to perform governmental functions'" and thus Commerce's "financial contribution determinations in all of the input subsidy investigations [are] inconsistent with Article 1.1(a)(1) of the SCM Agreement."[127]

126. As explained above, China's as applied claims are premised on a flawed interpretation of Article 1.1(a)(1) of the SCM Agreement. China has advanced no arguments supporting the conclusion that the United States has breached Article 1.1(a)(1), as that provision is correctly

[126] *See, e.g.*, China First Written Submission, para. 22.
[127] *See* China First Written Submission, para. 31.

interpreted. Consequently, China has failed to make a *prima facie* case, and the Panel should reject China's claims.[128]

VI. CHINA HAS FAILED TO ESTABLISH THAT THE *KITCHEN SHELVING* DISCUSSION NECESSARILY RESULTS IN A BREACH, NOR HAS CHINA SHOW THAT DISCUSSION IS A "MEASURE"

127. China raises an "as such" challenge to Commerce's discussion of the public body issue in the final determination in the *Kitchen Shelving* investigation. China claims that Commerce established a policy of a "rebuttable presumption" that majority government-owned entities are public bodies. Regardless of the Panel's finding regarding the proper interpretation of the term "public body," the Panel should find that the *Kitchen Shelving* discussion does not necessarily result in a breach of the SCM Agreement. In addition, China has not established that the Kitchen Shelving discussion is a "measure", and therefore that discussion cannot breach the SCM Agreement.

A. To Succeed in an "As Such" Challenge, China Must Demonstrate That the Commerce's Discussion in *Kitchen Shelving* Necessarily Results in Commerce Acting in a WTO-Inconsistent Manner

128. To succeed in its "as such" claim against Commerce's statement in *Kitchen Shelving*, China must show that this statement necessarily causes a breach of Article 1.1(a)(1) of the SCM Agreement. As the Appellate Body stated in *US – Oil Country Tubular Goods Sunset Reviews*, "an 'as such' claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instances that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations."[129] "It flows from this that, in general, measures challenged 'as such' should have general and prospective application, and 'necessarily' result in a breach of WTO obligations."[130]

129. China, as the complaining Member, has the burden of establishing that Commerce's statement in *Kitchen Shelving* "as such" breaches Article 1.1(a)(1) of the SCM Agreement.[131] This means that China has the burden of establishing that this statement necessarily causes Commerce to act inconsistently with Article 1.1(a)(1). China has not met this burden.

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[128] Additionally, we note China's argument that, in the *Wire Strand* investigation, Commerce "us[ed] the same 'majority ownership' control-based test that the Appellate Body rejected in DS379" to find that public bodies sold inputs. China First Written Submission, para. 16. China is incorrect. In fact, in *Wire Strand*, a Chinese respondent producer, Xinhua, failed to provide Commerce a complete list of its input suppliers and Commerce was forced to make a determination on the basis of the facts available that the suppliers withheld by Xinhua were public bodies. *See Wire Strand* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation (14 May 2010) ("*Wire Strand* IDM") at 10 (CHI-52).

[129] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.

[130] *EC –IT Products*, para. 7.154.

[131] *See US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 202.

B. Commerce's Discussion in *Kitchen Shelving* Does Not Necessarily Result in a Breach of the SCM Agreement

130. China's "as such" challenge to *Kitchen Shelving* fails, because China has not established that the discussion in *Kitchen Shelving* necessarily results in Commerce acting in a WTO-inconsistent manner. As described below, this discussion simply explained Commerce's approach, at the time of *Kitchen Shelving*, to the "public body" issue.

131. In *Kitchen Shelving*, Commerce addressed the issue of whether entities that are majority-owned by the government are "public bodies" (or "authorities" within the terminology of United States domestic law).[132] Commerce noted that this issue had become a recurring issue in CVD investigations, and therefore it took the opportunity in *Kitchen Shelving* "to clearly state our policy in this regard."[133] Commerce outlined the history of its "public body" practice and the factors it normally has examined. Commerce noted that "[i]n *most* instances, majority government ownership alone indicates that a firm is an authority (emphasis added)."[134] "This does not preclude parties from arguing that firms with majority government ownership are not authorities, but to succeed in such an argument a party must demonstrate that majority ownership does not result in control of the firm."[135] Further, Commerce stated that when "majority ownership does not exist, the Department will consider all relevant information regarding the control of the firm . . . in determining whether the firm should be treated as an authority."[136]

132. In *Kitchen Shelving*, Commerce merely discussed its historic approach to public body issues and explained how it viewed the issues at the time. The discussion is simply that – a discussion. It does not commit Commerce to any future course of action, and therefore does not necessarily lead to any action inconsistent with any WTO provision.

133. China argues that *Kitchen Shelving* established a "policy" or "practice" of a rebuttable presumption that majority government-owned entities are public bodies, which Commerce then followed in subsequent determinations.[137] However, even labeling the *Kitchen Shelving* discussion as a "policy" or "practice" by Commerce, would not necessarily result in a breach of the SCM Agreement. It is well-established as a matter of U.S. domestic law that Commerce can change a practice or policy at any time, provided it is (i) permissible under the statute and (ii) has a reason for doing so.[138] In fact, the U.S. courts have recognized the changing nature of Commerce's practice: "[a]s long as Commerce properly explains its reasons, and its practice is reasonable and permitted by statute, Commerce's practice can and should continue to change and evolve."[139] Because a particular policy or practice under U.S. law can and frequently does change, it does not itself direct Commerce to take any future action, and therefore it cannot necessarily result in a WTO breach.

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[132] *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation ") at 42-44 (July 20, 2009) ("*Kitchen Shelving* IDM") (CHI-38).
[133] *See Kitchen Shelving* IDM at 43(CHI-38).
[134] *Kitchen Shelving* IDM at 43 (CHI-38).
[135] *Kitchen Shelving* IDM at 43(CHI-38).
[136] *Kitchen Shelving* IDM at 44 (CHI-38).
[137] *See* China First Written Submission, paras. 35-41.
[138] *See Huvis Corp. v. United States*, 570 F.3d 1347, 1354 (Fed. Cir. 2009) (USA-1).
[139] *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253 (Ct. Int'l Trade 2002) (USA-2).

134. Therefore, the Kitchen Shelving discussion does not necessarily result in a breach of the SCM Agreement. Nor does labeling that discussion a "policy" or "practice" change the analysis. Accordingly, the Panel should find that China's "as such" challenge to the Kitchen Shelving discussion fails.

C. In Any Event, Commerce's Discussion in *Kitchen Shelving* Is Not a "Measure" and Therefore That Discussion Cannot Result in a Breach

135. In addition to the fact that the discussion in Kitchen Shelving does not necessarily lead to any action by Commerce, it also does not amount to a "measure" challengeable by China. Again, labeling that discussion as a "policy" or "practice" does not lead to the conclusion that China has established the existence of a measure that can be challenged. Prior panels have found that an administrative practice is not a "measure." For example, in *US – Export Restraints*, the panel found that "US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a breach WTO obligations as alleged by Canada."[140] The panel noted that a practice can be departed from, provided there is a reasoned explanation, and also noted that any expectation on the part of governments, exporters, consumers, or petitioners that a past practice would be followed does not mean that a "practice" has independent operational existence.[141] As noted above, the same considerations apply to a "policy" under U.S. domestic law.

136. Similarly, in *US – Steel Plate*, the panel found that a United States practice was "not a separate measure which can independently give rise to a WTO violation. . . ."[142] The panel reasoned that because the alleged practice could be departed from, provided there was a reasoned explanation, it was not an independent measure.[143] That panel also responded to the same argument as China raises here, *i.e.*, that repetition of a finding or practice gives rise to a "measure" that can be challenged.[144] The panel rightly explained:

> India argues that at some point, repetition turns the practice into a 'procedure', and hence into a measure. We do not agree. 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. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.[145]

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[140] *US – Export Restraints*, para. 8.126.
[141] *US – Export Restraints*, para. 8.126.
[142] *US –Steel Plate*, para. 7.24.
[143] *See US –Steel Plate*, paras. 7.20, 7.23.
[144] *See* China First Written Submission, para. 36.
[145] *US – Steel Plate*, para. 7.22.

137. This is exactly correct. China's allegations of repetition do not transform the discussion in *Kitchen Shelving* into a measure that can be challenged.[146] As China has not shown the existence of a policy or practice with independent operational status – that is, independent of the investigating authority's response to a particular set of circumstances – China has also not shown the existence of a measure. Not having established that the *Kitchen Shelving* discussion is a measure, China has also failed to show that that discussion can result in any breach of the SCM Agreement.

VII. COMMERCE'S USE OF OUT-OF-COUNTRY BENCHMARKS TO MEASURE THE BENEFIT WHEN INPUTS WERE PROVIDED FOR LESS THAN ADEQUATE REMUNERATION WAS NOT INCONSISTENT WITH THE SCM AGREEMENT

138. China argues that Commerce's determinations in 14 investigations concerning the use of out-of-country benchmarks are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement, because they are predicated on Commerce's allegedly WTO-inconsistent public body determinations in those cases.[147] However, even China recognizes that the use of out-of-country benchmarks to measure the subsidy benefit resulting from inputs provided for less than adequate remuneration is, in certain circumstances, consistent with Article 14(d) of the SCM Agreement.[148]

139. As an initial matter, China fails to make a *prima facie* case that, on an "as applied" basis, Commerce's use of out-of-country benchmarks was WTO-inconsistent in each of the 14 challenged investigations. Even if the Panel determines that China has made a *prima facie* case regarding its benchmark claims pursuant to Articles 1.1(b) and 14(d) of the SCM Agreement, we demonstrate below that those claims should nevertheless be rejected.

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[146] Further, the "zeroing" line of disputes is not to the contrary. In *US – Zeroing (EC) (AB)*, the Appellate Body found that "zeroing" was a "rule or norm" that could be challenged "as such." *See, e.g., US – Zeroing (EC) (AB)*, paras. 198, 205. The Appellate Body contrasted the situation regarding "zeroing" with the type of situation in the present dispute: "This evidence [that zeroing was a "rule or norm"] consisted of considerably more than a string of cases, or repeat action, based on which the Panel would have simply divined the existence of a measure in the abstract." *See id.* at para. 204. Because China would have this Panel "simply divine" that the discussion in *Kitchen Shelving* consists of a measure in the abstract, the Panel should reject China's "as such" claim.

[147] *See, e.g.*, China First Written Submission, para. 59. China appears to challenge Commerce's decisions concerning in-country benchmarks in the following 14 investigations: *Aluminum Extrusions, Coated Paper, Drill Pipe, Kitchen Shelving, Lawn Groomers, Line Pipe, OCTG, Pressure Pipe, Seamless Pipe, Solar Panels, Steel Cylinders, Steel Sinks, Wind Towers,* and *Wire Strand*. *See, e.g.*, China First Written Submission, paras. 60, 68 & notes 65, 79; CHI-1. However, although China's Consultation Request contained a challenge to the initiations in Commerce's *Steel Sinks* and *Wind Towers* investigations, China's Consultation Request did not contain a challenge to Commerce's decisions in those cases concerning appropriate benchmarks for inputs provided for less than adequate remuneration. Accordingly, China and the United States did not consult and as such these issues are not within the Panel's terms of reference. For further discussion, see Section II. In addition, regarding the *Solar Panels* investigation, China's Consultation Request challenged Commerce's preliminary determination. *See, e.g.*, China's Consultation Request at Section B.1.a.(5) & notes 7, 4. However, Commerce's preliminary determination has been superseded by Commerce's *Solar Panels* final determinations.

[148] *See* China First Written Submission, para. 68 (recognizing "the Appellate Body's assessment that recourse to an outside benchmark is permissible . . .").

A. China Failed to Make a *Prima Facie* Case for Its Claims Regarding Commerce's Use of Out-of-Country Benchmarks

140. As discussed in greater detail above in Section IV, the Appellate Body has explained that the party asserting its claim must make a prima facie case by "putting forward adequate legal arguments and evidence."[149] Yet China has failed to support its contentions and generalizations about out-of-country benchmarks with evidence for each of the determinations in each of the 14 investigations that it challenges. Instead, China merely refers to a table (CHI-1) that cites pages in Commerce's challenged determinations. For example, China argues that "[i]n each of these cases, the USDOC . . . 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."[150] China cites to no support for this argument from the investigations in question, failing to differentiate the unique facts of each investigation.

141. Outside of its references to CHI-1, China does not discuss the particular facts of the challenged determinations. Instead, China seems to hope the Panel will use CHI-1 as a cipher to determine just how China's contentions and generalizations about each benchmark determination actually correspond to the facts of each challenged determination and may be inconsistent with the SCM Agreement. This failure to demonstrate how the determinations are allegedly inconsistent with the SCM Agreement provisions that China contends the United States violated does not satisfy the fundamentals of legal reasoning, much less the requirements of a *prima facie* argument before a WTO dispute settlement panel. In the past, the Appellate Body has found that Members have failed to make a *prima facie* case when the panel has been forced to do the work the petitioning party should have done in the first place.[151] Here, China has failed to adduce facts for each of the challenged investigations, let alone demonstrate why "a reasonable and objective investigating authority" could not reach the "conclusion that in-country private prices were unreliable benchmarks . . . ."[152] Accordingly, the Panel should reject outright China's arguments relating to proper benchmarks and find that China has not made out its claims under Articles 1.1(b) and 14(d) of the SCM Agreement.

B. Article 14(d) of the SCM Agreement Permits an Investigating Authority to Rely on Out-Of-Country Benchmarks in Certain Circumstances.

142. In addition to basing its out-of-country benchmarks claims on generalizations instead of the specific facts of the determinations at issue, China also bases its arguments on improper legal interpretations of the SCM Agreement. Although the Panel need not reach these legal issues in the absence of any case-specific factual analysis by China, the United States will nonetheless demonstrate throughout this Section that China's arguments should also fail on their merits.

143. It is vital to recall the structure of the SCM Agreement in order to understand how it allows for the use of out-of-country benchmarks in certain circumstances. Article 1 of the SCM Agreement defines subsidy for purposes of that Agreement. For a subsidy to exist, Article

[149] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.
[150] China First Written Submission, para. 69.
[151] *US – Gambling (AB)*, paras. 151-54.
[152] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454.

1.1(a)(1) requires that there be a financial contribution. Article 1.1(b) requires that the financial contribution confer a benefit. Article 14 of the SCM Agreement provides guidelines for calculating the amount of a subsidy in terms of the benefit to the recipient. In relevant part, Article 14 provides:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
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> ***
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> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

144. In describing what it considers to be the legal framework for determining whether a benefit exists under Article 14(d) of the SCM Agreement, China relies on statements from the Appellate Body in *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*.[153] These findings, however, do not support China's proposed interpretation, and instead support an interpretation of Article 14(d) that allows for the use of out-of-country benchmark prices. Specifically, in *US – Softwood Lumber IV* the Appellate Body found that "an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."[154] Then, building upon the *US – Softwood Lumber IV* decision, in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body "concluded that the Panel correctly interpreted Article 14(d) of the *SCM Agreement* as permitting the rejection of in-country private prices if these are too distorted . . . ."[155] Accordingly, there can be no question that an investigating authority may rely on out-of-country benchmarks in certain circumstances.

145. Additionally, it should come as no surprise to China that an investigating authority might rely on out-of-country benchmarks for calculating the degree of benefit from inputs provided by the government of China for less than adequate remuneration. The reliability of Chinese in-country prices was of sufficient concern to Members that China's Accession Protocol recognizes that such prices within China might not always be appropriate benchmarks. Specifically, Article 15(b) states, "if there are special difficulties in [applying the relevant provisions of the SCM Agreement], the importing WTO Member may then use methodologies for identifying and

[153] *See* China First Submission, paras. 63-65.
[154] *US – Softwood Lumber IV (AB)*, para. 103.
[155] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 448.

measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks."[156]

C. Commerce Properly Found Distortion in China's Domestic Input Markets Regardless of the Standard

146. Having shown that out-of-country benchmarks are not inconsistent with Article 14(d), the United States next turns to China's contention that Articles 1.1(b) and 14(d) of the SCM Agreement prohibit findings of distortion in domestic input markets, and resulting reliance on out-of-country benchmarks, because the administering authority took account of the fact that a large percentage of the producing industry was government-owned.

147. China asserts that Commerce's determination concerning the benefit conferred by inputs provided by SOEs for less than adequate remuneration is not WTO consistent if, in the same investigation, Commerce's determination that a particular SOE constituted a public body is not consistent with the SCM Agreement.[157] This assertion is incorrect. China conflates what are, necessarily, two separate analyses: (1) a financial contribution analysis under Article 1.1 of the SCM Agreement; and (2) a benefit analysis under Article 14(d). As evidenced by *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body did not perceive Commerce's treatment of SOEs as public bodies as an impediment to upholding Commerce's reliance on out-of-country benchmarks in those investigations.

148. In the four CVD determinations China challenged in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that Commerce's public body determinations based solely on the government's majority ownership in SOEs were inconsistent with Article 1.1(a)(1) of the SCM Agreement.[158] Importantly, however, the Appellate Body did not find that the SOEs at issue in *US – Anti-Dumping and Countervailing Duties (China)*, or other SOEs in China, could not be considered public bodies. Instead, the Appellate Body found that the *analysis* underpinning Commerce's decision that these SOEs were public bodies was WTO inconsistent.[159]

149. Against the backdrop of these findings, the Appellate Body also examined Commerce's use of out-of-country benchmarks in measuring the benefit conferred by inputs provided by SOEs.[160] The Appellate Body conducted a full analysis and, notwithstanding its decision concerning public bodies, upheld Commerce's use of out-of-country benchmarks in the determinations challenged in *US – Anti-Dumping and Countervailing Duties (China)*.[161] Indeed, even after having rendered its findings concerning Commerce's methodology for determining whether SOEs are public bodies, the Appellate Body's benchmark findings did not concern whether or not SOEs are public bodies, but rather whether the extent of SOE involvement in a

[156] *See* China's Accession Protocol (USA-03).
[157] China First Written Submission, paras. 59-60.
[158] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 347.
[159] In light of the Appellate Body's findings concerning Commerce's analysis of SOEs as public bodies in that dispute, it was entirely possible that Commerce could determine again that those particular SOEs constituted public bodies using a different test. For this reason, the use of out-of-country benchmarks remained a viable issue for the Appellate Body's consideration.
[160] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 425-58.
[161] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 611.

marketplace supported a determination consistent with Article 14(d) that prices in that market were distorted and, thus, the use of out-of-country benchmarks was appropriate.

150. Consistent with the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*, 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 benefit of inputs provided for less than adequate remuneration. Therefore, as demonstrated by *US – Anti-Dumping and Countervailing Duties (China)*, regardless of the propriety of Commerce's decisions concerning SOEs as public bodies for purposes of evaluating whether a financial contribution occurred, Commerce's analysis of market distortion and resulting use of out-of-country benchmarks can stand independently as WTO consistent.[162] China has not demonstrated a reason why the Panel should conclude otherwise.

151. The Appellate Body's *US – Anti-Dumping and Countervailing Duties (China)* decision is also useful in refuting China's poorly considered position that "[o]ne would have thought it an uncontroversial proposition that commodity products . . . would be among the . . . 90 percent of products in China whose prices [Commerce] had found to be determined by market forces, and hence usable as benchmarks for determining the adequacy of remuneration under Article 14(d)."[163] For example, China includes hot-rolled steel as among such products,[164] yet the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China) (AB)* upheld Commerce's determination that China's hot-rolled steel market was distorted by virtue of the government's role in that market.[165] Regardless of comments about prices in general in China, whether prices in a particular market in China are distorted should be analyzed on a case-by-case basis dependent upon the facts before an investigating authority.[166]

152. As discussed above, the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* demonstrates that a WTO-inconsistent public body determination does not mean that an investigating authority's determination that government involvement in an input market distorts prices in that market, such that the use of out-of-country prices as a benchmark, is also WTO-inconsistent. Therefore, regardless of the propriety of Commerce's public body determinations, as a matter of law, "a reasonable and objective investigating authority could reach the conclusion that" the government of China's role in the relevant input markets resulted in distortion such that "in-country private prices were unreliable benchmarks . . . ."[167] and China's challenge to Commerce's determinations should fail.

[162] The United States would note that, as discussed in the next subsection, even China itself attributed relevance to SOEs in establishing government involvement in the input market and, thus, recognized the relevance of SOEs to the benefit analysis.
[163] China First Written Submission, para. 67.
[164] China First Written Submission, para. 67.
[165] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 425.
[166] *See US – Softwood Lumber IV (AB)*, para. 102.
[167] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454.

D. China Also Characterizes Production by Majority Government-Owned Firms as Being of Key Relevance to Commerce's Examination of the Government's Involvement in the Marketplace

153. China uses the same argument underlying its challenge to Commerce's public body analysis to challenge Commerce's examination of the extent of the government's involvement in the marketplace. Specifically, China argues that Commerce's benchmark methodology was flawed because Commerce "deemed the market share held by SOEs equivalent to the market share held by the government itself."[168]

154. Notwithstanding its claims before this Panel, China itself considered production by majority government-owned firms to be of key relevance in Commerce's examination of China's presence in the market.[169] As such, China essentially challenges Commerce's reliance on China's own reporting. China would have the Panel overturn Commerce's determinations to use out-of-country benchmarks where Commerce relied on China's own reporting.

155. For example, in *Kitchen Shelving*, there was an allegation that the government of China "controls the wire rod industry to [ ] ensure these inputs are provided at preferential prices to downstream, higher-value-added products."[170] In the context of examining whether the government of China controlled the wire rod industry, Commerce asked China to report the volume and value of domestic production of a given input by enterprises in which the government maintained an ownership or management interest.[171]

156. In response, China provided data on wire rod produced by SOEs.[172] China stated "[t]he GOC provides the total output volume of wire rod produced by State-owned companies, defined for purposes of this response as those companies with 50 percent or more government ownership or other SOE ownership. . . ."[173] That is, China interpreted Commerce's question about production by entities with government ownership or control interest more narrowly as being about SOEs.[174] Commerce then used the market share data *reported by China*, and based on

[168] China First Written Submission, para. 71.
[169] *See Certain Kitchen Appliance Shelving and Racks from the People's Republic of China – CVD Investigation*: Government of China's Questionnaire Response (Nov. 21, 2008) ("*Kitchen Shelving* Questionnaire Response") (USA-07).
[170] *See Kitchen Shelving* Questionnaire Response at 26 (USA-07) (describing the allegation).
[171] *See Kitchen Shelving* Questionnaire Response at 26 (USA-07) (where Commerce had requested that China report "the total volume and value of domestic production of wire rod that is accounted for by companies in which the [government of China]maintains an ownership or management interest either directly or through government-owned holding companies or other vehicles").
[172] *See Kitchen Shelving* Questionnaire Response at 26 (USA-07).
[173] *See Kitchen Shelving* Questionnaire Response at 26 (USA-07).
[174] *See, e.g.*, *See Kitchen Shelving* Questionnaire Response at 26 (USA-07), as updated in *Kitchen Shelving*, China's Third Supplemental Questionnaire Response at 32 (Apr. 9, 2009) (USA-04), as updated at verification by *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China:* Verification Report of the Foshan Municipal Government, Shunde District Government and the Guangdong Provincial Government of the People's Republic of China (June 19, 2009) (USA-05).

China's, not Commerce's, definition of SOE to calculate the percentage of wire rod in China produced by the government.[175]

157. It is puzzling that a few years ago China thought the market share of wire rod produced by SOEs was key information in response to Commerce's question asked in the context of government control of the market, but now, before this Panel, asserts that Commerce made a flawed determination in allegedly equating SOEs with the government for purposes of determining whether an in-country input market was distorted. China has not accurately explained how Commerce determined the percentage of government-produced good in a given Chinese input market. There is no flaw in China's own definition and reporting of production by SOE's, and the Panel should reject China's challenge.

E. China Mischaracterizes the Analysis Commerce Used To Determine Whether an Out-Of-Country Benchmark Was Needed to Measure a Subsidy Benefit.

158. China asserts that Commerce based all of its determinations that in-country markets were distorted *exclusively* on the degree of government-produced input in the in-country market, and therefore, according to China, the use of out-of-country benchmarks was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.[176] Specifically, China alleges that if Commerce "inquires whether the government provides the majority, or even a 'substantial portion' of the market for a good, and if the answer is affirmative, then it concludes that the government is playing a 'predominant role' in the market, and on that basis alone concludes that private prices are distorted."[177] China mischaracterizes Commerce's methodology by stating that Commerce applies a *per se* test that relies exclusively on government market-share rather than the case-by-case analysis that it actually performs.

159. According to *US – Softwood Lumber IV*, whether an appropriate in-country benchmark can be identified will depend upon whether "it has been established that [private prices of the goods in question in the country of provision] are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."[178] As the Appellate Body has explained:

> We read [the *US – Softwood Lumber IV*] Appellate Body report as indicating that, if the government is a significant supplier, this fact alone cannot justify a finding that prices are distorted. Instead, where the government is the predominant supplier, it is *likely* that private prices will be distorted, but a case-by-case analysis is still required.[179]

[175] *See Kitchen Shelving* IDM at 14-15 (CHI-38) (demonstrating that Commerce relied upon figures reported to it by the government of China when evaluating the share of government-produced wire rod in the Chinese market).
[176] China First Written Submission, paras. 69-70.
[177] China First Written Submission, para. 69.
[178] US – *Softwood Lumber IV (AB)*, para. 103.
[179] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 441 (emphasis in original).

160. The Appellate Body explained that there is no "*per se* rule" in which an investigating authority could conclude that the fact that the government is the predominant supplier of the input means that in-country prices are distorted.[180] In this regard, the Appellate Body stated:

> [W]e do not consider that, in cases in which the government is the "predominant" supplier, an investigating authority would be required to conduct the same type of analysis as in cases where the government is only a "significant" supplier. In both cases, the investigating authority would have to reach its conclusions based on all the evidence that is put on the record, including evidence regarding factors other than government market share.[181]

161. Thus, the determination that the in-country market is distorted "must be made on a case-by-cases basis, according to the particular facts underlying each countervailing duty investigation."[182]

162. China's argument appears to disregard the fact that it is possible that a government's share of production in the domestic market can be the determinative factor supporting a finding of distortion in a market. For example, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that China's predominant role in the input market shows that it is "likely that the government as the predominant supplier has the market power to affect through its own pricing strategy the pricing by private providers for the same goods, and induce them to align with government prices."[183] Further, the Appellate Body has said that "[t]here may be cases . . . where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."[184] The Appellate Body also has explained that "[t]he determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."[185]

163. Accordingly, as a matter of law, depending on the information obtained in a given countervailing duty investigation, a government's role as provider in a marketplace can be sufficient on its own to explain price distortion and, as a result, support a decision to rely on out-of-country benchmark prices for the benefit analysis.

164. In any event, China's generalization that Commerce relies exclusively on government-market share in each case to determine that distortion exists is incorrect, as Commerce relies on other facts as well. So even if, *arguendo*, Commerce could not rely on the share of government-produced good in the market alone to find distortion in the in-country market, China's arguments fail.

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[180] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 443.
[181] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 443.
[182] *Softwood Lumber IV (AB)*, para. 102.
[183] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 454. *See also US – Softwood Lumber IV (AB)*, para. 100 ("Whenever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods . . . .").
[184] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.
[185] *US – Softwood Lumber IV*, para. 102.

165. For example, in *Kitchen Shelving*, Commerce considered the government's share of wire rod production in the in-country market, as reported by China,[186] and determined that "the substantial market share held by [the government] shows that the government plays a predominant role in the market."[187] However, Commerce also found that the government of China's predominant role was further demonstrated by the low level of imports of wire rod available in the in-country market[188] and the fact that China imposed an export tax and export licensing requirements which added to the distortion in the market because they could "discourage exports and increase the supply of wire rod in the domestic market, with the result that domestic prices are lower than they otherwise would be."[189] Based on all these factors, and without evidence persuading Commerce otherwise, Commerce determined that it would not be appropriate to use a price from within China as a benchmark. Therefore China's generalization that Commerce exclusively relies on government market share to determine distortion for purposes of using in-country benchmarks is simply inaccurate.

166. Additionally, China argues that Commerce "has repeatedly rejected the relevance of evidence other than government ownership" and quotes Commerce's decision in *Wire Strand*.[190] As an initial matter, citation to a single decision does not demonstrate "repeated" refusal to consider information besides government ownership of production in a market. More importantly, however, the very example China cites, *Wire Strand*, does not support its argument, but instead, provides yet another example of where Commerce considered evidence other than government ownership. In *Wire Strand*, relying on the government of China's reported amount of government-produced wire rod in the Chinese market, Commerce found that the government played a predominant role in the market.[191] Commerce considered additional factors, including the low level of imports as well as the export tax and export licensing requirements on wire rod.[192] Based on all these factors, Commerce concluded that it would not be appropriate to rely

[186] *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China – CVD Investigation*: Government of China's Third Supplemental Questionnaire Response (April 9, 2009) (USA-04), as updated. *See Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*: Verification Report of the Foshan Municipal Government, Shunde District Government and the Guangdong Provincial Government of the People's Republic of China (Jun. 19, 2009) at 1-2 (USA-05). Relying on the *Aluminum Extrusions* investigation as an example, China mistakenly equates Commerce's public body determination with the government of China's reporting the percentage of its production of a given input. *See* China First Written Submission at note 81. As discussed above, Commerce's public body determination is a separate decision from Commerce's determination of distortion based on government presence in an input market for benefit purposes. Additionally, in the *Aluminum Extrusions* investigation, Commerce relied on the government share of the Chinese aluminum market *as reported by China*. *See Aluminum Extrustions* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation at 34 (March 28, 2011) ("*Aluminum Extrusions* IDM") (CHI-87). In other words, it was China, not Commerce, which determined government production. Commerce merely updated the information reported by China where it had information indicating that an enterprise China reported as privately-owned was government-controlled, *see Countervailing Duty Investigation: Aluminum Extrusions from the People's Republic of China (PRC)*: Factual Information Placed On Record Regarding the Ownership of a Primary Aluminum Producer (USA-06), including that enterprise's production volume in the government's market share of the in-country aluminum industry. *See Aluminum Extrusions* IDM at 34 (CHI-87).
[187] *Kitchen Shelving* IDM at 15, 51 (CHI-38).
[188] *Kitchen Shelving* IDM at 15, 51-52 (CHI-38).
[189] *Kitchen Shelving* IDM at 15 (CHI-38).
[190] China First Written Submission, note 82.
[191] *Wire Strand* IDM (CHI-52).
[192] *Wire Strand* IDM at 21, 85 (CHI-52).

on an in-country benchmark for wire rod.[193] Therefore, although China cites *Wire Strand* to support its assertion that Commerce rejects the relevance of information besides government ownership, that investigation actually demonstrates that China's assertion is simply incorrect.

167. As demonstrated above, contrary to China's unsupported argument, Commerce did not in each of the challenged decisions determine that the Chinese input market was distorted by relying exclusively on the degree of government production in the Chinese market.

F. Conclusion

168. For all the reasons discussed above, the Panel should reject China's challenge to Commerce's determination to use out-of-country benchmarks in all the investigations at issue. As a threshold matter, China failed to make a *prima facie* case that Commerce's determination to use out-of-country benchmarks was WTO-inconsistent in each relevant determination in the challenged investigations. In any case, to the extent China argues that an investigating authority's determinations to use out-of-country benchmarks are WTO-inconsistent because they are predicated on allegedly WTO-inconsistent public body determinations, the Appellate Body previously faced this very scenario and found Commerce's decision to rely on out-of-country benchmarks not to be WTO-inconsistent. Additionally, as demonstrated above, China failed to connect its arguments to the facts in every challenged determination. It also mischaracterized the analyses Commerce used to examine distortion and determine the share of government-provided good in the Chinese market. For all these reasons, the Panel should reject China's challenge to Commerce's decision to use out-of-country benchmarks.

VIII. COMMERCE'S DETERMINATIONS THAT INPUT SUBSIDIES WERE SPECIFIC WERE FULLY CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

169. China's claims that Commerce's specificity determinations are inconsistent with the SCM Agreement are without merit. Most importantly, China appears to challenges 17 different specificity determinations in 15 different investigations.[194] Each of those determinations was based on the specific facts and circumstances of those proceedings. If China wishes to advance claims with respect to those determinations, it must address the actual facts and circumstances of the individual proceedings. But China has failed to do so, instead relying on broad, inaccurate characterizations of the measures at issue. In addition, China proposes unsupportable legal interpretations of the SCM Agreement. Because China does not tie its unsupportable interpretations to the actual facts at issue in the determinations, the Panel need not respond to China's claims. Nonetheless, in Section VIII.B below, the United States will show that China's novel interpretations of the SCM Agreement are incorrect.

[193] *Wire Strand* IDM at 21-22 (CHI-52).
[194] *See infra* para. 171 (explaining that it is unclear which specificity determinations China is challenging).

A. China Has Failed to Make a *Prima Facie* Case With Respect to Its Claim That Commerce's Specificity Determinations in Each Challenged Investigation Were Inconsistent With Article 2 of the SCM Agreement

170. As a preliminary matter, China has failed to establish a *prima face* case with respect to its claim that in "each" of the challenged investigations in which Commerce found the provision of inputs for less than adequate remuneration to certain enterprises to be specific, the agency determinations violated Article 2 of the SCM Agreement.[195] To meet its burden, China must present adequate legal arguments and adduce sufficient evidence to demonstrate that, in each investigation, Commerce's determination that the provision of an input for less than adequate remuneration was specific is inconsistent with the obligations set out in Article 2. That is, on a case-by-case basis, China must discuss the elements of Commerce's analysis and explain why that analysis is alleged to be inconsistent with the requirements of Article 2. Rather than conduct such an analysis, China puts forth overbroad and conclusory legal and factual arguments which lack a clear connection to the individual challenged determinations.

171. In fact, it is unclear which input specificity determinations China is challenging. The "Table of Investigations" provided in China's submission indicates that China is allegedly challenging Commerce's specificity analyses in 14 investigations,[196] while its submission describes "21 separate investigations initiated since 2006"[197] and the chart at page 30 of China's submission identifies numerous inputs, including some which were not within the scope of the panel request.[198] When China does refer to particular determinations or investigations, it uses them as "examples," and includes only a cursory description.[199]

172. Further, China does not challenge Commerce's fundamental finding with respect to specificity across these investigations that are the subject of this dispute: that the inputs provided for less than adequate remuneration by public bodies were, as a matter of fact, only used by a limited number of industries and enterprises representing a discrete segment of China's economy. For example, in the *Aluminum Extrusions* and *Coated Paper* (referred to by China as *Print Graphics*) investigations, the U.S. domestic industry filed applications alleging that primary aluminum and papermaking chemicals, respectively, had been provided at below market values by state-owned producers, including evidence that the provision of those goods was specific.[200] In each investigation, China failed to provide evidence supporting its assertions that

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[195] As stated above at Section III, it is well settled that the party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim, by putting forth both adequate legal arguments and evidence. *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.

[196] China First Written Submission at 61-62.

[197] China First Written Submission, para. 74.

[198] *Compare* Panel Request at notes 4, 6 (explaining that China's claim with respect to specificity relates to "the determinations by the USDOC that certain SOEs provided inputs such as hot-rolled steel, steel wire rod, steel rounds and billets, stainless steel coil, caustic soda, primary aluminum, green tubes, zinc, and papermaking chemicals") *with* China First Written Submission, para. 92 (including the additional inputs of seamless tube, rubber, biaxially-oriented polypropylene, coking coal and polysilicon).

[199] China First Written Submission, para. 91.

[200] Petition for the Imposition of Antidumping and Countervailing Duties Against Aluminum Extrusions from the People's Republic of China Petition, Volume III at 76 (March 31, 2010) ("*Aluminum Extrusions* Petition) (USA-08); Petitions for the Imposition of Antidumping and Countervailing Duties on Certain Coated Paper from Indonesia and

the subsidy was not specific, despite multiple opportunities to do so.[201] China cannot deny this fundamental fact that there are only a limited number of enterprises or industries in China which actually use primary aluminum or caustic soda. As a result, China ignores Commerce's findings, and the record evidence which it relied upon, and instead advances an interpretation of Article 2 imposing irrelevant and unnecessary obligations on investigating authorities that are completely unmoored from the text of the SCM Agreement.

173. To the extent that China asks the Panel to find that in each challenged investigation Commerce made some number of specificity determinations that were inconsistent with Article 2.1 of the SCM Agreement, it is incumbent upon China to provide adequate legal arguments and sufficient facts with respect to each and every specificity determination. It has not done so in this case, and the Panel should conclude that China has not met its burden in establishing a *prima facie* case with respect to these claims and, therefore, reject them.

B. China's Claims Under Article 2 of the SCM Agreement Are Based on Incorrect Interpretations and Do Not Reflect the Facts of the Subject Investigations

174. China bases its challenge to Commerce's specificity determinations on four incorrect interpretations of Article 2 of the SCM Agreement, which it generally asserts creates requirements applicable across all of Commerce's determinations, and does not address the facts of individual investigations. As described above, the Panel need not reach these novel legal interpretations because China did not make a *prima facie* case tied to the specific facts of each of the challenged specificity determinations. Nevertheless, the United States will explain below why each of China's interpretations of the SCM Agreement are incorrect.

1. Structure of Article 2.1 of the SCM Agreement

175. Article 2.1 of the SCM Agreement sets out "principles" for determining whether a subsidy, identified according to Article 1 of the Agreement, is "specific" to "an enterprise, industry, or group of enterprises or industries," referred to as "certain enterprises."[202] This dispute involves specificity determinations made under Article 2.1(c) of the SCM Agreement. Article 2.1(c) addresses the principles for finding that a subsidy is *de facto* specific, that is, when a subsidy is limited in fact to certain enterprises.[203] This is in contrast to Article 2.1(a), which

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the People's Republic of China; Request for Proprietary Treatment and Accompanying Certifications, Volume IV at 81 (Sept. 23, 2009) ("*Coated Paper* Petition") (USA-09).

[201] *Aluminum Extrusions from China*: Response of the Government of China to Commerce's Initial CVD Questionnaire, Section VI and VII) at 9-10 (Aug. 9, 2010) (USA-10); *Aluminum Extrusions from China:* Case Brief of the Government of China at 30 (Feb. 9, 2011) (USA-82); *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); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*: Fourth Supplemental Questionnaire Response of the Government of the People's Republic of China at 1-2 (May 26, 2011) (USA-83); *Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*: Case Brief of the Government of the People's Republic of China at 45 (Sept. 7, 2010) (USA-84).

[202] SCM Agreement, Article 2.1.

[203] Article 2.1(c) provides:

> 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

addresses the principles applicable for finding that a subsidy is *de jure* specific, that is, when access to the subsidy is "explicitly limited to certain enterprises."[204] Thus, where an investigating authority clearly substantiates, on the basis of positive evidence,[205] that use of a subsidy is limited to "certain enterprises," then the determination of specificity made by that authority is consistent with the requirements of Article 2.1(c) of the SCM Agreement.

2. Article 2.1 of the SCM Agreement Does Not Require an Investigating Authority to Identify a Formal Subsidy Program Before Making a Specificity Determination

176. China's argument that Commerce was required to identify a formal "subsidy program" implemented through a "plan or outline" is not supported by the text of Article 2.1 of the SCM Agreement. China argues that, as part of a *de facto* specificity analysis under Article 2.1(c),[206] an investigating authority must identify a "subsidy program" as a "plan or outline" formally designated by the "granting authority."[207] Under this interpretation, a finding of specificity could only be made when a subsidy is implemented according to legislation or other written instrument laying out a "plan or outline." China's interpretation is not supported by the text of Article 2 and is inconsistent with the object and purpose of the SCM Agreement and the understanding of Article 2 articulated by the Appellate Body. As with the other aspects of Article 2, China's interpretation is divorced from the meaning and application of Article 2.1, and the SCM Agreement as a whole.

177. There is nothing in the text of Article 2.1(c) that requires an investigating authority to identify a "subsidy program," that is formally set out in a plan or outline. Article 2.1(c) provides that one of the "factors" that "may be considered" as part of *de facto* specificity analysis is "use of a subsidy programme by a limited number of certain enterprises." As China points out, in the challenged investigations, Commerce generally identified the "program" at issue in its specificity analysis.[208] China argues, however, that Commerce's identification of such subsidy programs was not in accordance with Article 2.1(c) because there was no "'legislation' or other type of official" government measures that provide for these subsidies," "dedicated funding," or an otherwise formal designation of "a series of subsidies as a program."[209] China is incorrect in its interpretation of Article 2, because neither the text of Article 2 nor any other provision of the SCM Agreement require a subsidy or "subsidy program" to be implemented pursuant to a

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> in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme has been in operation.

[204] Article 2.1(a) provides: "When the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific."
[205] SCM Agreement, Article 2.4.
[206] China First Written Submission, para. 106.
[207] China First Written Submission, para. 109.
[208] China First Written Submission, para. 109.
[209] China First Written Submission, paras. 101 & 109.

formally instituted government "plan or outline" as described by China. Accordingly, China's argument that Commerce was required to identify a discrete subsidy program (implemented formally through a plan or outline) finds no textual support in Article 2.1(c).

178. In addition China's interpretation must be understood within the context of Article 2 and the SCM Agreement as a whole. China's interpretation would negate the distinction between Article 2.1(c), which relates to subsidies that are *de facto* specific, and the text of Article 2.1(a), which relates to subsidies that are *de jure* specific. In particular, China seems to argue that both Article 2.1(a) and Article 2.1(c) require that a subsidy be formally implemented through legislation or some other instrument. A specificity determination under Article 2.1(a) requires a finding of an explicit limitation on access to a subsidy which would be made through legislation, a written document, including a "plan or outline," or other "explicit" means. Indeed, the term "*de jure*" indicates that a *de jure* analysis will often focus on legal instruments. In contrast, Article 2.1(c) has no such focus on an explicit limitation either through a legal instrument or other means, including a formal plan or outline; by its very nature, a *de facto* analysis is based on the *facts*, irrespective of the existence of any formal "plan or outline." Further, within the context of the SCM Agreement as a whole, Article 1.1(a) provides that a variety of subsidies are subject to the provisions of the SCM Agreement.[210] China's overly restrictive interpretation of "subsidy program" ignores the diversity of facts and circumstances that authorities confront when analyzing the range of subsidies under Article 2.

179. The facts at issue in the 17 specificity determinations that are the subject of this dispute demonstrate that China's interpretation would be overly restrictive and would result in specific subsidies being non-countervailable merely because there is no identified formal "plan or outline." The subsidies were not provided pursuant to any identified legislation or a written government plan relevant to the specificity analysis, or any document notified by China to the WTO Committee on Subsidies and Countervailing Measures, and there was no allegation that the subsidies were *de jure* specific. Instead, in the investigations at issue, specificity was demonstrated on a "*de facto*" basis – *i.e.*, by the fact that only a limited number of industries could use the alleged subsidies. For example, in *Aluminum Extrusions*, Commerce considered the provision of primary aluminum to *all potential users of that product* to determine whether it was specific as to the investigated industry.[211] Thus, although the subsidy was not implemented by any identified legislation or a formal government plan, in each case, Commerce appropriately considered the investigated subsidy at issue in relation to *all potential provisions* of the subsidy – primary aluminum provided for less than adequate remuneration.

180. China's interpretation of Article 2.1(c) would incorrectly focus an authority's specificity *de facto* inquiry on the existence of a plan or outline, and not on whether or not there is a limited number of users of the subsidy, the inquiry which is the subject of Article 2.1(c). This interpretation of Article 2.1(c) is not only unsupported by the text of the SCM Agreement, but also would allow Members to easily circumvent the disciplines of the SCM Agreement by avoiding the creation of an identifiable plan or outline in the implementation of a subsidy,

[210] In particular, a "financial contribution" may be made in the form of grants, loans, equity infusions, or loan guarantees; fiscal incentives such as tax credits; provision of goods or services, or the purchase of goods; payment to a funding mechanism; or income or price support. *See* SCM Agreement, Article 1.1(a).
[211] *See, e.g. Aluminum Extrusions* IDM at 36 (CHI-87).

thereby frustrating the ability of investigating authorities to countervail otherwise actionable subsidies.

181. The Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* confirm that China's overly restrictive reading of "subsidy program" is inconsistent with a proper interpretation of Article 2.1. In that dispute, China argued that the United States was required to identify a limitation on the access to both financial contribution *and* benefit as part of its specificity analysis under Article 2.1(a).[212] The Appellate Body disagreed that such an extensive analysis was required, stating that "the purpose of Article 2 of the *SCM Agreement* is not to identify the elements of the subsidy as set out in Article 1.1, but to establish whether the availability of the subsidy is limited *inter alia* by reason of the eligible recipients."[213] The Appellate Body explained that "a limitation . . . to a subsidy may be established in many different ways."[214] Similarly, here, China attempts to re-cast the purpose of Article 2 as the identification of a formal "subsidy program," rather than an inquiry into whether users of a subsidy, identified pursuant to Article 1, are limited. An adoption of China's reading "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 it would mean that subsidies that are otherwise specific are non-countervailable.[215]

182. Finally, China argues that Commerce was required "to explain . . . why the subsidy programmes that it assumes exist are *different* subsidy programmes, as opposed to a single subsidy programme."[216] China argues that Commerce should have looked at additional facts, or looked at the facts differently and adopted "a more natural assumption" that "all of these alleged subsidies are provided pursuant to a *single* subsidy programme."[217] China concludes that if Commerce found a "single programme encompassing all alleged input subsidies" in China, then the number of "certain enterprises" that received subsidies would not have been limited in number.[218] There is no basis for China's assertion.

183. As the interested Member in the investigation, to the extent that it believed there were facts supporting the finding of a single "subsidy program" encompassing the provision of goods in China, contrary to the *de facto* specificity determination Commerce made for the provision of particular inputs, China should have submitted those facts. In light of the facts demonstrating *de facto* specificity – and the complete absence of *any* evidence of a single overarching input

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[212] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 411.
[213] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413.
[214] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413. Similarly, the panel in *US – Anti-Dumping and Countervailing Duties (China)* found that "there are many ways in which access to a subsidy could be explicitly limited." *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.26. The panel concluded that "a formalistic reading of the specificity provisions as implying a particular conjunction of these elements, or a particular order of analysis, might have the effect of omitting from coverage measures which viewed in their entirety have all three necessary elements to be covered in the SCM Agreement." *Id.* at para. 9.30. *See also id*. at para. 9.21 (explaining that "the specificity requirement is not about the existence of a subsidy, which is dealt with in Article 1.1, but rather about access thereto").
[215] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.30 (discussing China's proposed interpretation of Article 2.1 as requiring a specificity finding as to both financial contribution and benefit).
[216] China First Written Submission, para. 110 (emphasis in original).
[217] China First Written Submission, paras. 110-12 (emphasis in original).
[218] China First Written Submission, paras. 110-12.

subsidy scheme – there was no basis for Commerce to assume the existence of such a scheme. For example, in *Aluminum Extrusions*, the evidence on the record indicated that China provided primary aluminum to certain industries, while in *Coated Paper* the record evidence supported Commerce's determination that caustic soda was provided to a limited number of users.[219] There was no evidence, however, on either record which indicated that these diverse inputs were provided by different public bodies to different industries pursuant to a single subsidy program. Article 2 does not impose an obligation on investigating authorities to examine factual issues that were not raised based on evidence that is not on the record. As these investigations illustrate, Commerce properly relied on the record evidence in each challenged investigation to determine that each subsidy was specific.

184. Because China's interpretation of Article 2.1(c) is inconsistent with the ordinary meaning and context of that provision, and would frustrate the operation of the specificity analysis under Article 2, it must be rejected.[220]

3. Article 2.1 of the SCM Agreement Does Not Prescribe an Order of Analysis for All Specificity Determinations

185. China advances a second incorrect interpretation of Article 2 of the SCM Agreement when it argues that an investigating authority must examine a subsidy under Articles 2.1(a) and 2.1(b) before examining Article 2.1(c).[221] China inexplicably links this argument with the alleged requirement that an investigating authority identify a formal "subsidy program,"[222] even though that term does not even appear in Articles 2.1(a) or (b), and as discussed, there is no requirement to identify a formal "subsidy program" as part of an Article 2.1(c) analysis. China's arguments are inconsistent with the text of Article 2 and misconstrue the Appellate Body's reasoning in other disputes.

186. As an initial matter, there is no language in the SCM Agreement indicating that an investigating authority must examine each paragraph of Article 2.1 in every case. Rather, the chapeau provides that they contain "principles" which "shall apply" to a specificity determination. In *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body explained:

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[219] *See supra* para. 172 & note 200.

[220] China's reliance for its interpretation on the panel's findings in *EC – Large Civil Aircraft*, instead of the ordinary meaning and context of Article 2.1(c), is misplaced. *See* China First Written Submission, paras. 106-108. The panel in that dispute was considering whether, as part of its analysis into whether certain loans provided to Airbus were "disproportionately large," and if Airbus was the "predominant user," the panel should consider a "subsidy program" and if so, what constituted the "subsidy program." *EC – Large Civil Aircraft (Panel)*, paras. 7.961-7.977. As a result, the facts and legal issues before that panel differed significantly from the issues that confront the Panel here, which relate to an entirely different type of subsidy. Further, China mischaracterizes the U.S. position in that dispute. *See* China First Written Submission, para. 106. The United States stated repeatedly that the identification of a "subsidy program" is not necessarily required for a specificity finding under Article 2.1(c). *See* U.S. Second Answers, *EC – Large Civil Aircraft (Panel)*, para. 257 (CHI-116) ("First, the Panel should note that Article 2.1(c) of the SCM Agreement does not require that a subsidy be granted pursuant to a subsidy program in order to be *de facto* specific."). *See also id.* at para. 259 ("Nor does the absence of a subsidy program preclude a finding of *de facto* specificity based on a consideration of factors other than disproportionality.").

[221] China First Written Submission, paras. 98-104.

[222] *See, e.g.*, China First Written Submission, para. 101.

> [S]ubparagraphs (a) through (c) of Article 2.1 are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle, and which allows for their concurrent application. We have also noted that the structure of Article 2.1 suggests that the specificity analysis will ordinarily proceed in a sequential order by which subparagraph (c) is examined following an assessment under subparagraphs (a) and (b).[223]

This statement of the Appellate Body conforms with the ordinary meaning of Article 2.1 and makes clear that, in general, the paragraphs in Article 2.1 should be applied "concurrent[ly]" and that, although Article 2.1 "suggests" that the specificity analysis will "ordinarily" proceed sequentially, this is not a mandatory prescription.[224]

187. Similarly, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body stated: "We consider that the use of the term 'principles'—instead of, for instance, 'rules'—suggests that subparagraphs (a) through (c) are to be considered in an analytical framework that recognizes and accords appropriate weight to each principle."[225] Further, the Appellate Body stated that it "recognize[d] 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."[226] Article 2.1 is not drafted with a mandatory order of analysis, but rather only requires that investigating authorities "apply" the "principles" set out in paragraphs (a) through (c).

188. China has not claimed that any party in the investigations alleged issues under paragraphs (a) or (b), including that the granting authority, or any legislation, "explicitly limits access to a subsidy" under paragraph (a), or that there were any established "criteria" or "conditions" governing the administration of the subsidy that could be considered under paragraph (b).[227] Absent an allegation of implementing legislation or other explicit limitation to access, or evidence on the records of such legislation or explicit limitation, there would have been no

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[223] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 873.
[224] *See also US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 796 (explaining that "the language of Article 2.1(c) . . . indicates that the application of this provision will *normally* follow the application of the two subparagraphs of Article 2.1") (emphasis added).
[225] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366. *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 942.
[226] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371. The Appellate Body also "caution[ed] against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, *when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case*," implying that when the potential for application of other subparagraphs is *not warranted*, Article 2.1 does not require such an examination. *Id.* (emphasis added). *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 945; *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 754.
[227] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371 (observing that, for example, there may be instances where consideration under subparagraph of Article 2.1(b) may be unnecessary where there is no "objective criteria or conditions that could be scrutinized"); *EC and certain member States – Large Civil Aircraft (AB)*, para. 951 (finding that analysis is not required under Article 2.1(b) or 2.1(c) for a particular subsidy program).

"appearance" of *de jure* specificity for Commerce to consider. Accordingly, it was appropriate for Commerce to focus its analysis solely on Article 2.1(c).[228]

189. China's order of analysis argument relies in part on its incorrect understanding of "subsidy program," described above. In particular, China appears to insert into Article 2.1(a) the requirement to identify a formal "subsidy program" set out in legislation or other "official measure."[229] Such an interpretation is devoid of textual basis in the SCM Agreement, as Article 2.1(a) does not even contain the term "subsidy program," nor does Article 2.1(c) necessitate the identification of a formally documented "subsidy program" for the reasons described above.

190. In fact, Article 2.1(c) by its terms addresses *all circumstances* where there is no explicit limitation, including circumstances in which there is no relevant legislation or other official measure, and applies broadly whenever "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." Even China acknowledges that subsidies are not always administered according to legislation or other official means.[230] Indeed, it is difficult to understand why the term "subsidy program" in Article 2.1(c) informs an understanding of Article 2.1(a) at all, since an investigating authority that undertakes an Article 2.1(a) analysis may or may not undertake an Article 2.1(c) analysis.[231] Article 2.1(c) therefore applies to subsidies which have been formally implemented pursuant to legislation or other formal legal measures, as well as subsidies, such as the provision of inputs for less than adequate remuneration to certain enterprises, which may be granted without a formally implemented plan or outline.[232]

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[228] This is in contrast to the facts at issue in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Large Civil Aircraft (2nd Complaint)*, which both involved subsidies granted pursuant to statutes, regulations and other formal government decrees that were examined under Article 2.1(a). *See, e.g.*, *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 374; *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 875. Accordingly, it was appropriate for the panels and Appellate Body to examine those instruments to determine whether there was indication of *de jure* specificity under Article 2.1(a). *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 876.

[229] *See* China First Written Submission, para. 101 ("Most importantly, had the USDOC applied Articles 2.1(a) and 2.1(b) before turning to Article 2.1(c), it would have become apparent that there is no 'subsidy programme' . . . . Examining these principles [set out in subparagraphs (a) and (b)], the USDOC would have recognized that there is no 'legislation' or other type of official measure providing for the alleged input of subsidies. There is no 'programme.'").

[230] *See* China First Written Submission, para. 121 ("As the Appellate Body has noted, a subsidy is *almost always* conferred pursuant to legislation or some other type of written measure. Even when it is not, the intention to confer a subsidy will *usually* be evident from the express actions or pronouncements of the granting authority.") (emphasis added).

[231] Article 2.1(c) states that an investigating authority "may" consider "other factors" in its *de facto* analysis of a subsidy, but it does not mandate that investigating authorities consider those factors set out therein. Accordingly, China's argument that the term "subsidy program" *requires* a particular order of analysis in *all* investigations is not supported by the text of that provision.

[232] In fact, "subsidy program" is not even mentioned with respect to the third and fourth factors of Article 2.1(c), contradicting the argument that a "subsidy program," as defined by China, needs to always be identified as part of the Article 2.1(a) analysis before moving to an examination of factors under 2.1(c).

191. Because China's arguments are inconsistent with the ordinary meaning and context of the provisions of the SCM Agreement, the Panel must find that there is no order of analysis requirement in Article 2.1.[233]

4. Article 2.1 of the SCM Agreement Does Not Require an Investigating Authority to Expressly Identify a Granting Authority as Part of the Specificity Determination

192. As with its other interpretations of Article 2, China inserts a nonexistent requirement into Article 2.1 when it argues that Commerce must identify a "granting authority" with respect to the provision of inputs for less than adequate remuneration. In 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.

193. China is incorrect to assert that the SCM Agreement requires investigating authorities to conduct a separate analysis and identity the granting authority as part of it evaluation of Article 2.1, if the granting authority has already been identified through the analysis of the financial contribution at issue under Article 1.1. There is no textual basis for China's claim, and China points to no language within that provision which would support such an argument. On this basis alone, the Panel should reject China's interpretation. As the panel observed in *US – Anti-Dumping and Countervailing Duties (China)*, "the specificity requirement is not about the existence of a subsidy, which is dealt with in Article 1.1" but rather whether the subsidy is used by a limited number of users.[234]

194. Furthermore, although China argues that the granting authority must be separately analyzed under Article 2, and that the jurisdiction of the granting authority can be relevant to that analysis, it does not explain how jurisdiction is relevant in the investigations at issue, nor does it claim that any interested parties raised jurisdiction as a relevant factor that should have been considered by Commerce.[235] In fact, where the Appellate Body has considered which authority qualified as a "granting authority," when the issue was raised by parties to the dispute, it observed that the identification of the granting authority is not the purpose of Article 2.1:

> As we have explained, the analysis under Article 2.1 focuses on ascertaining whether . . . the subsidy in question is limited to a particular class of eligible *recipients*. 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

[233] As with its other arguments, China looks to statements by the United States regarding other disputes as support for its position instead of the provisions of the SCM Agreement itself. China First Written Submission, para. 99. The U.S. answer to the panel's questions in *EC – Large Civil Aircraft* did not relate to whether there is a mandatory order of analysis under Article 2.1.

[234] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 9.21 (also noting that subsidies can take many forms, and a subsidy may not even appear specific on its face but "the superficial appearance of non-specificity is not sufficient for a subsidy to avoid coverage by the SCM Agreement").

[235] China First Written Submission, paras. 95-97.

specificity analysis to determine whether the authorities involved in granting the subsidies constitute a single subsidy *grantor* or several *grantors*.[236]

195. Accordingly, China's argument that Commerce was required in every specificity determination to analyze and identify the "granting authority" is without merit.

5. Article 2.1 of the SCM Agreement Does Not Require an Investigating Authority to Explicitly Address the Diversification of Economic Activities Within the Jurisdiction of the Granting Authority or the Length of Time During Which the Subsidy Program Has Been in Operation

196. China also argues that Commerce was required to expressly address the diversification of China's economy and the length of time inputs had been provided for less than adequate remuneration in each challenged determination,[237] even though China does not explain how the factors were relevant to the determinations at issue.

197. A specificity determination involves a fact-based analysis, made on a case-by-case basis.[238] Thus, the relevance of either (1) the length of time a subsidy has been in place or (2) the economic diversification in the Member country would also be determined on a case-by-case basis. In particular, those factors would be relevant only if the period of time examined could directly impact the specificity determination, or if the subject economy lacks diversification. This was not the case in any of the challenged investigations. Notably, China does not allege in its submission that either factor was actually relevant to the investigations at issue.[239] As a result, Commerce was not required to conduct any such analyses in determining whether the provision of the relevant inputs for less than adequate remuneration was *de facto* specific consistent with Article 2.1(c).

198. A "length of time" analysis under Article 2.1(c) is relevant for an investigating authority's specificity analysis only when it is necessary to observe how a program is administered over a length of time to determine whether or not it is specific. For example, if the subsidy at issue is in the form of a grant program, length of time may be relevant if over a short period of time, only a few grants are awarded, but a large pool of recipients can be observed over a longer period of time.[240] The investigations at issue here involves pools of recipients – the potential users of the products provided for less than adequate remuneration – which would not be expected to change significantly irrespective of the length of time is examined . China has

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[236] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 756.
[237] China First Written Submission, paras. 115-18.
[238] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373 (noting that the "determination of whether a number of enterprises or industries constitute 'certain enterprises' can only be made on a case-by-case basis").
[239] Instead, China asserts, hypothetically, that the two factors *could* be relevant to a specificity determination. China First Written Submission, para. 116.
[240] *See US – Large Civil Aircraft (2nd Complaint) (Panel)*, para. 7.747 ("[T]he length of time in which a subsidy programme has been in operation colours the analysis because if, for example, the subsidy programme is relatively new, the fact that 'certain enterprises' have been the main or most frequent beneficiaries under the programme may be a reflection of the fact that the programme has not been in operation long enough to have a wide range of users, rather than an indication that the programme is de facto specific.").

pointed to no evidence in support of time being a relevant factor in the investigation. Therefore, an analysis of the "length of time the program operated" in any of the challenged investigations would have been a useless exercise.

199. Similarly, the diversity of an economy is only an issue when there is reason to believe that there is a lack of diversity within the economy in question.[241] No interested party in any of the investigations alleged that China's economy lacked diversity or presented evidence supporting such a finding, and even in its submission, China itself does not refute the diversity of its economy.

200. The panel in *EC – Large Civil Aircraft* observed that "the relevance of the[] two factors to understanding whether there has been 'predominant use {of a subsidy programme} by certain enterprises' will depend upon the particular facts" at issue.[242] In *EC – DRAMS (Korea)*, the panel found that, because the record did not indicate that the parties ever raised allegations that the lack of diversification or the length of time the program had been in operation impacted the specificity analysis, it was reasonable for the EC to not include any explicit statement regarding those factors under Article 2.1(c).[243] Similarly, in the challenged investigations, no party, including China, argued that these factors were relevant. Accordingly, there was no reason for Commerce to "take account of" those factors and make explicit findings.

201. Likewise, in *US – Softwood Lumber IV*, the panel found that Commerce had "taken account of diversification of economic activities" even though it "did not explicitly and as such address the extent of economic diversification in its Final Determination."[244] The panel referenced the "publicly known fact that the Canadian economy and the Canadian provincial economies in particular are diversified economies."[245]

202. Thus, China's arguments that Commerce was required to expressly address the length of time the subsidies were in place and the diversification of China's economy are without merit, and Commerce's determinations that the provision of inputs was specific in the challenged investigations were fully consistent with U.S. obligations under Article 2.

IX. CHINA HAS FAILED TO MAKE A *PRIMA FACIE* CASE WITH RESPECT TO THE REGIONAL SPECIFICTY DETERMINATIONS IN THE CHALLENGED INVESTIGATIONS

203. China appears to challenge determinations made by Commerce in seven[246] countervailing duty investigations that the provision of land-use rights in China was specific within the meaning

[241] *See EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.975 ("[F]or example, where a subsidy programme operates in an economy made up of only a few industries, the fact that those industries may have been the main beneficiaries of a subsidy programme may not necessarily demonstrate 'predominant use'.").
[242] *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.975.
[243] *EC – Countervailing Measures on DRAM Chips*, para 7.229.
[244] *US – Softwood Lumber IV (Panel)*, para. 7.124 (emphasis omitted).
[245] *US – Softwood Lumber IV (Panel)*, para. 7.124.
[246] In its Panel Request, China stated that its specificity claim made in connection with the provision of land and land-use rights relates to eight investigations, including the *Aluminum Extrusions* investigation. Panel Request at note 8. However, exhibits CHI-1 and CHI-2 do not include any regional specificity claims related to *Aluminum*

of Article 2 of the SCM Agreement.[247] Although China claims that in "each investigation" Commerce's determination of specificity with respect to land-use rights is inconsistent with Article 2.2 of the SCM Agreement,[248] China has failed to make a *prima facie* case of any of these alleged breaches. For that reason, the Panel must reject China's claims with respect to regional specificity.

204. Instead of addressing the actual measures at issue, China's discussion of regional specificity in its submission discusses the facts of only one investigation – *Laminated Woven Sacks*, which was the subject of *US – Anti-Dumping and Countervailing Duties (China)*, and is not at issue in this dispute.[249] In *US – Anti-Dumping and Countervailing Duties (China)*, the panel made an "as applied" finding that Commerce's determination of regional specificity with respect to the provision of land-use rights to one company, Aifudi, was inconsistent with Article 2 of the SCM Agreement.[250] Despite the fact that the panel in that dispute "emphasize[d]" that its "conclusion concerning the USDOC's regional specificity finding in the [*Laminated Woven Sacks*] investigation is driven by the specific facts that were on the record of that investigation,"[251] China relies on the legal reasoning and factual findings in that dispute, without addressing the facts of the seven investigations at issue in *this dispute* or applying the provisions of Article 2 to those facts.

205. As is described *supra* in Section III, the party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim and putting forth both adequate legal arguments and evidence. [252] Thus, as the complaining party in this dispute, China must make a *prima facie* case of each alleged breach of Article 2 of the SCM Agreement by the United States and, more specifically, it must put forth an adequate legal argument and adequate evidence for each claim. China has failed to meet this burden with respect to the regional specificity determinations it alleges violate Article 2 of the SCM Agreement.

206. China's legal argument consists of assertions that the findings in another dispute, *US – Anti-Dumping and Countervailing Duties (China)*, should apply in this dispute.[253] This is not adequate to make a *prima facie* case. China ignores the fact that the panel's holding in *US – Anti-Dumping and Countervailing Duties (China)* was limited to the regional specificity analysis "as applied" by Commerce in the *Laminated Woven Sacks* investigation to the provision of land-use rights to Aifudi.[254] Accordingly, there is nothing about the panel's legal conclusions in *US – Anti-Dumping and Countervailing Duties (China)* that applies to Commerce's regional specificity determinations in the challenged investigations. Because China has failed to explain how the legal reasoning in *US – Anti-Dumping and Countervailing Duties (China)* is applicable to the

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Extrusions, and also appear to exclude certain other instances where Commerce determined that the provision of land-use rights in China was specific within the meaning of Article 2.2 of the SCM Agreement.

[247] *See* China First Written Submission, notes 156-57; CHI-1.

[248] Article 2.2 of the SCM Agreement provides that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific."

[249] *See* China First Written Submission, paras. 159-161.

[250] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.161.

[251] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.162.

[252] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.

[253] *See* China First Written Submission, para. 164.

[254] *US – Anti-Dumping and Countervailing Duties (China)* (Panel), para. 9.161.

individual regional specificity analyses challenged by China, it has failed to make an adequate legal argument.

207. China has also failed to put forth adequate evidence to support its claim. Indeed, it is unclear which investigations and findings of specificity are encompassed in China's claim.[255] In addition, China only refers to the investigations that it is challenging with respect to regional specificity in two footnotes.[256] Again, China principally relies on *US – Anti-Dumping and Countervailing Duties (China)*, and recites the facts at issue in that dispute,[257] despite the fact that "[f]actual findings made in prior disputes do not determine facts in another dispute."[258] China's limited references to CHI-1 and citations to the determinations neither provide sufficient evidentiary support for the alleged breaches of Article 2 of the SCM Agreement, nor do they demonstrate how the standards set out in Article 2 apply to those facts.

208. Because China has failed to put forth both adequate legal arguments and adequate evidence, the Panel must conclude that China has not met its burden in establishing a *prima facie* case with respect to each of the challenged land specificity determinations made by Commerce and must therefore reject each of China's claims.

X. COMMERCE'S INITIATIONS OF INVESTIGATIONS INTO WHETHER RESPONDENT COMPANIES RECEIVED GOODS FOR LESS THAN ADEQUATE REMUNERATION WERE CONSISTENT WITH ARTICLE 11 OF THE SCM AGREEMENT

209. China's claims that Commerce's initiations of CVD investigations are inconsistent with the SCM Agreement must fail because China has failed to establish a *prima facie* case. Furthermore, in all cases, Commerce's decisions to initiate the investigations with respect to the provision of goods for less than adequate remuneration were consistent with the standard set out in Article 11 of the SCM Agreement, as explained below.

A. China Has Not Made Out a *Prima Facie* Case With Respect to Its Article 11 Allegations

210. As described above, China bears the burden of demonstrating that Commerce's determinations are inconsistent with the SCM Agreement. China has failed to meet this burden with respect to its Article 11 challenge to Commerce's initiations of investigations into whether the respondent companies received goods for less than adequate remuneration. As with other determinations made in the course of a CVD investigation, initiation decisions are fact-specific, and the question of whether an investigating authority has complied with the standard set out in Article 11 of the SCM Agreement is similarly dependent on the facts presented by each

[255] *See supra* note 246. Although there were 15 separate determinations of regional specificity across eight investigations cited in the Panel Request, from the citations provided at CHI-1, it appears that only a portion of those determinations are being challenged. Further, it is unclear whether the land specificity determinations made on the basis of facts available are encompassed by China's claim. Unlike China's claims with respect to the five investigations listed in footnote 2 of China's submission, there is no explicit statement that China is not pursuing these claims.
[256] China First Written Submission, notes 151, 156.
[257] China First Written Submission, para. 159.
[258] *US – Continued Zeroing (AB)*, para. 190.

individual application. As with other sections of its brief, China's discussion of the facts consists of sweeping, conclusory statements regarding Commerce's determinations across a large number of investigations and the findings of panels in other disputes, with no application of the relevant provisions of the SCM Agreement to the particular facts at issue in its as applied claims. For these reasons, the Panel should reject China's claims under Article 11 due to China's failure to establish its *prima facie* case.

B. The Initiation Standard in Article 11 of the SCM Agreement

211. In addition to failing to make a *prima facie* case, China's interpretation of the initiation standard is erroneous. Article 11.3 of the SCM Agreement states that "[t]he authorities shall 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."

212. Article 11.2 of the SCM Agreement elaborates on the evidentiary requirements applicable to applications for the initiation of a countervailing duty investigation, stating that an application "shall include sufficient evidence of the existence of . . . a subsidy and, if possible, its amount." Article 11.2 further provides:

> Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following: . . .
>
> (iii) evidence with regard to the existence, amount and nature of the subsidy in question.

213. In assessing an investigating authority's initiation of a countervailing duty investigation, a panel's task is to "determine 'whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation of the investigation'."[259] A panel does not "conduct a *de novo* review of the accuracy and adequacy of the evidence to arrive at its own conclusion regarding whether the evidence in the application was sufficient to justify initiation,"[260] and may not "substitute its judgment for that of the investigating authority."[261]

214. The relevant question under Article 11.3 is whether the "evidence provided in the application" is "sufficient" to justify initiation of an investigation. The ordinary meaning of the term "evidence" is "[f]acts or testimony in support of a conclusion, statement, or belief" or an "indication, a sign; indications, signs."[262] The term "sufficient" is defined as "[a]dequate to satisfy an argument, situation, etc., satisfactory."[263] Accordingly, the term "sufficient evidence"

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[259] *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)).
[260] *China – GOES (Panel)*, para. 7.51.
[261] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187.
[262] *The New Shorter Oxford English Dictionary* at 867 (1993) (USA-17).
[263] *The New Shorter Oxford English Dictionary* at 3133 (1993) (USA-18).

as used in Articles 11.2 and 11.3 of the SCM Agreement can be understood to mean "adequate facts or indications."[264]

215. Further, under Article 11.3, the investigating authority must determine whether an application contains "sufficient evidence" or "adequate facts or indications" *to justify initiation of an investigation*, not to sustain a preliminary or final determination. Various panels have observed, in the context of both the SCM Agreement and the AD Agreement, that less evidence is required to initiate an investigation than is required to support a final finding by the investigating authority.[265] 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. Thus, an application can comply with the standard set out in Article 11.2 "even if it does not include all the specified information if such information was simply not reasonably available to the applicant."[266]

216. In short, Article 11 of the SCM Agreement requires only that there be "sufficient evidence" of the existence of a subsidy in an application to justify initiation of an investigation. As the panel stated in *China – GOES*, all that is required is "adequate evidence, tending to prove or indicating the existence of" a subsidy, not "definitive proof" of the subsidy's existence and nature.[267] China has failed to demonstrate that Commerce's determinations were inconsistent with this standard. This Section will examine China's claims with respect to specificity, before turning to public body.

C. Commerce's Initiations of Countervailing Duty Investigations With Respect to Specificity Were Consistent With Article 11 of the SCM Agreement

1. China Has Failed to Make a *Prima Facie* Case

217. As a threshold matter, China has failed to make a *prima facie* case with respect to its Article 11 specificity claims. China's only identification of the investigations and initiations with respect to specificity is contained in footnote 124 of its submission, which contains a list of citations to applications for the initiation of 14 investigations. In particular, despite the fact that the obligation at Article 11.3 relates to the review and action by an *investigating authority*, China does not cite or discuss any evidence related to Commerce's determinations. In fact, from

[264] The panel in *China – GOES* referred to a similar definition of the terms, observing that "evidence" is defined as "the available facts, circumstances, etc. supporting or otherwise a belief, proposition, etc., or indicating whether or not a thing is true or valid" and as "information given personally or drawn from a document etc. and tending to prove a fact or proposition," and that "sufficient" is defined as "adequate". *China – GOES (Panel)*, para. 7.54.
[265] *See China – GOES (Panel)*, para. 7.54, quoting *US – Softwood Lumber V (Panel)*, para. 7.84 ("[T]he quantity and the quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination."); *Argentina – Poultry Anti-Dumping Duties*, para. 7.62 ("We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the *quantity* and *quality* that would be necessary to support a preliminary or final determination."); *Guatemala – Cement II*, para. 8.35 (stating that an investigation "is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward").
[266] *US – Softwood Lumber V (Panel)*, para. 7.55 (discussing Article 5.2 of the AD Agreement).
[267] *China – GOES (Panel)*, para. 7.55.

China's submission, the Panel has no way of knowing what determination Commerce made with respect to the initiation of each of the subsidies at issue because China only cites to the applications, and not to Commerce's decisions with respect to those applications. For these reasons, China has failed to present evidence support making out a *prima facie* case with respect to its multiple "as applied" claims across 14 investigations. The Panel should accordingly find that China failed to establish a *prima facie* breach of Article 11 of the SCM Agreement and may stop its analysis there.

2. Commerce's Initiations Were Consistent With Article 11

218. For the reasons stated, China has failed to establish its *prima facie* case that the evidence with respect to specificity was insufficient to initiate in *each* determination. In the absence of such argumentation, any further rebuttal by the United States is both unnecessary and challenging given the fact that China has provided no case-specific arguments to rebut. Nonetheless, without relieving China of its burden of proof, the United States will show that China's broad characterization of Commerce's initiation decisions is inaccurate.

219. Contrary to China's unfounded allegations, the applications in the 14 investigations cited contained sufficient evidence of specificity, consistent with Article 11.2 of the SCM Agreement. Moreover, Commerce reviewed the accuracy and adequacy of the evidence provided by the applicants and determined that evidence of specificity was sufficient to warrant initiation, in accordance with Article 11.3 of the SCM Agreement.

220. Commerce's initiations were justified because evidence pertaining to the subsidies themselves indicated that the provision of the inputs in question for less than adequate remuneration was specific. Further, the applications provided additional evidence regarding specificity, such as detailed product descriptions by industry experts, financial statements of Chinese producers, the investigation results of other investigating authorities, and, as China points out, the final determinations of Commerce in other investigations involving the same or similar inputs.[268] China challenges the reliance on final determinations, but the analysis of a subsidy and determination by an investigating authority with respect to specificity is precisely the type of public information that would be "reasonably available" to an applicant, as anticipated by Article 11.2. This is in contrast to, for example, actual sales data for the products at issue, which would not be available to an applicant. For these reasons, Commerce's determinations to initiate the investigations were consistent with Article 11 of the SCM Agreement.

221. In the cases at issue, evidence as to the existence of the subsidy and to specificity provided in the applications tends to demonstrate that these inputs were used by a limited number of industries or enterprises. This is because the inputs alleged by the applicants to have been provided for less than adequate remuneration were, as a factual matter, useable by only certain enterprises or industries. There are only certain industries, for example, which produce

[268] China First Written Submission, para. 125.

merchandise that incorporates primary aluminum into the production process, and so, on its face, the evidence provided in the application indicates that the subsidy is *de facto* specific.[269]

222. The question of whether a subsidy is specific "to an enterprise or industry or group of enterprises or industries"[270] is a fact-specific question that must "be assessed on a case-by-case basis."[271] The SCM Agreement does not define an industry or restrict what may qualify as a "group of . . . industries" under the chapeau of Article 2.1. Thus, a subsidy, such as the provision of primary aluminum, may be "specific" even if its potential recipients are producers that make a diversity of products,[272] so long as the subsidy is "limited" to an "industry or group of . . . industries." The same is true with respect to the inputs in each of the other challenged investigations. In each case, the evidence supplied in the applications demonstrated that a public body provided an input for less than adequate remuneration. The evidence also demonstrated that the particular input was only consumed by certain industries. Accordingly, it was reasonable for Commerce to decide to initiate an investigation into the provision of these inputs. In each case, Commerce's analysis and determination that there was sufficient evidence of specificity to justify initiation was consistent with the requirements of 11.2 and 11.3 of the SCM Agreement.

223. Furthermore, China's allegation that each of the applications at issue "contain nothing more than an assertion" that the recipients of the input subsidies were limited in number, is contradicted by the records of those investigations and China's own observation that many of the applications cited to prior determinations of Commerce.[273] Some applications relied on evidence such as research reports and the financial statements of Chinese companies, in support of claims of specificity, while others, instead, or in addition, relied on prior determinations of Commerce. In addition, when Commerce concluded that the evidence in the application was insufficient, it notified the applicants that additional information was needed to justify an investigation.[274]

224. Two examples illustrate that China's broad characterizations of Commerce's determinations are inaccurate. First, in the *Aluminum Extrusions* investigation, Commerce examined the application and properly concluded that, for initiation purposes, it contained sufficient evidence indicating that the provision of primary aluminum was limited to a certain number of industries or enterprises. The application contained evidence indicating that primary aluminum is used in the production of the seven main aluminum fabricated products, including casts, planks, screens, extrusions, forges, powder and die casting. The evidence in the application included:

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[269] *See, e.g., US – Softwood Lumber IV (Panel)*, paras. 7.120-21 (finding that a determination that "wood product industries" constitute a limited group of industries was reasonable).
[270] SCM Agreement, Art. 2.1.
[271] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373. *See also US – Upland Cotton (Panel)*, para. 7.1142.
[272] *See US – Softwood Lumber IV (Panel)*, paras. 7.120-21 (explaining that Article 2 of the SCM Agreement does not "refer to enterprises producing specific goods or end-products" and concluding that it was reasonable to consider "wood product industries" as a limited group of industries).
[273] China First Written Submission, para. 125.
[274] *See, e.g., Kitchen Shelving*: Petitioner's Response to Request for Additional Information at 58-59 (Aug. 13, 2008) (USA-12) (responding to Commerce questions about industries that purchase wire rod).

- 2008 Annual Report of the Chinese company Aluminum Corporation of China Limited, listing the uses of primary aluminum;[275]

- The "Statement of Reasons" in Canada's final countervailing duty determination in the investigation of aluminum extrusions from China, including an analysis of primary aluminum and the conclusion that "all seven of the cooperative exporters have received benefits" from the provision of primary aluminum at less than fair market value;[276] and

- Preliminary Report and Preliminary Determination of the Australian government in Australia's countervailing duty investigation of aluminum extrusions, which preliminarily found:

> Given that primary aluminum is a key input in the manufacture of downstream semi-fabricated (e.g. flat-rolled products such as sheet, plate and foil) and extruded products, it is clear that only enterprises engaged in the manufacture of these fabricated products would stand to benefit from the provision of the input by the GOC at less than adequate remuneration.[277]

225. Commerce concluded that this evidence of specificity was sufficient to warrant initiation of an investigation into whether primary aluminum was provided to producers of aluminum extrusions for less than adequate remuneration. [278]

226. Likewise, in *Coated Paper*, Commerce initiated an investigation with respect to an allegation that calcium carbonate, kaolin clay, caustic soda and titanium dioxide (collectively, "papermaking chemicals") were provided as a subsidy. Commerce reviewed the accuracy and adequacy of the applicants' information and concluded that, for initiation purposes, the application contained sufficient evidence demonstrating that the provision of papermaking chemicals was specific. In particular, the application contained the following information:

- A research report prepared by SRI Consulting, showed that the paper industry uses 90% of calcium carbonate produced in the United States, and another showed that globally the paper industry accounted for 72% consumption of that chemical;[279]

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[275] *Aluminum Extrusions* Petition, Exhibit III-135 at 45 (containing 2008 Annual Report of CALCO Aluminum Corporation of China Limited) (USA-08).
[276] *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) (USA-08).
[277] *Aluminum Extrusions* Petition, 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).
[278] *Certain Aluminum Extrusions from the People's Republic of China*: Initiation Checklist at 28-30 (April 23, 2010) (USA-13).
[279] *Coated Paper* Petition at 87, notes 321-22 & Exhibits 127 (containing an August 2007 Report prepared by SRI Consulting on "Fine-Ground and Precipitated Calcium Carbonate") & 128 (containing an article titled "Paper Industry Accounted for 72% of Global Precipitated Calcium Carbonate Consumption in 2004) (Sept. 23, 2009) (USA-09).

- An article analyzing kaolin clays, stating that the paper industry is the largest end user for kaolin clays; [280]

- A description by two chemical companies of the types and uses of titanium dioxide, provided on their websites, showing that some types of titanium dioxide are used for papermaking alone;[281] and

- An article prepared by the Independent Chemical Information Service (ICIS) on the uses of caustic soda, indicating that certain types of caustic soda are primarily used in the production of pulp and paper.[282]

227. On the basis of this information, Commerce found there to be sufficient evidence of specificity of the provision of the inputs to initiate on three bases: 1) the recipients of the provision of papermaking chemicals for less than adequate remuneration are limited in number; 2) the paper industry is the largest user of the subsidy; and 3) record evidence suggested that the paper industry received a disproportionate share of the subsidy.[283]

228. These illustrative examples demonstrate that there is no basis for China's conclusory assertion that the applications in the challenged investigations contain mere assertion.[284] By failing to demonstrate that any applications that contained insufficient evidence of specificity, China has failed to adduce sufficient evidence for its arguments in this regard.

229. Further, even in those cases in which the applicants relied on Commerce's previous determinations of Commerce as evidence of specificity, China's claim is unfounded. The reliance on previous determinations of specificity for certain inputs was fully consistent with Article 11.2, and Commerce's decision to initiate investigations in light of the evidence provided in the applications was consistent Article 11.3. This is because prior determinations related to the same or similar products are precisely the type of information that can be expected to be "reasonably available to the applicant" at the time of initiation.

230. For example, in the *Wind Towers* investigation, Commerce initiated on the provision of hot-rolled steel plate, finding that there was sufficient evidence that the potential users of hot-rolled steel are limited in number.[285] Because Commerce had already concluded in a detailed analysis at that time that users of this input were limited in two previous investigations, *CWP* and *Light-Walled Rectangular Pipe*, the applicants cited to the final determinations of those

[280] *Coated Paper* Petition, Volume IV at 88, notes 32-24 & Exhibits 129 (containing an article entitled "Chinese Paper Industry's Demand for CaC0(3) to Exceed 3 M Tons/Y by 2008 (Sept. 2004)") & 130 (containing an article entitled "What is Kaolin?") (USA-09).
[281] *Coated Paper* Petition, Volume IV at 88, note 325 & Exhibits 131 (containing an article on "Titanium Dioxide Crystal Types") & 132 (containing another article on "Titanium Dioxide") (USA-09).
[282] *Coated Paper* Petition, Volume IV at 88 & Exhibit 114 (containing "Caustic Soda Uses and Market Data," Updated: April 2009, on ICIS Chemical website) (USA-09).
[283] *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*: Initiation Checklist at 24-26 (Oct. 19, 2009) (USA-14).
[284] China First Written Submission, para. 126.
[285] *Utility Scale Wind Towers from the People's Republic of China*: Initiation Checklist at 14-16 (Jan. 18, 2012) (USA-15) ("*Wind Towers* Initiation Checklist").

investigations as evidence of specificity.[286] Commerce concluded that its previous analysis of steel inputs in those and other investigations, together with other information provided in the application, was sufficient evidence of specificity to warrant initiation under Article 11.3 of the SCM Agreement.[287] China's submission contains no explanation as to why reliance on those previous determinations – which analyzed the same or similar inputs provided for less than adequate remuneration in China – fails to provide sufficient evidence [288] in accordance with Article 11.2.

231. In its challenge to Commerce's determinations to initiate with respect to specificity, China reiterates its theory that Commerce was required to provide evidence of a formally-implemented "subsidy programme," a "granting authority", and the factors described in the last sentence of Article 2.1(c), echoing its argument discussed above at Section VIII.[289] As discussed in detail above, this aspect of China's claim is based on a flawed interpretation of Article 2.1 and a misrepresentation of Commerce's determinations in each investigation.

232. As explained above, China has failed to establish a *prima facie* case for its claim that Commerce's initiation determinations with respect to specificity were inconsistent with Article 11 of the SCM Agreement. Further, illustrative examples demonstrate that China's broad characterizations are inaccurate. For those reasons, China's claim must fail.

D. The Applications Contained Sufficient Evidence, Within the Meaning of Article 11 of the SCM Agreement, That "Public Bodies" Provided Goods to Justify Initiation of an Investigation in Each Case

1. China Failed to Establish a *Prima Facie* Case

233. As an initial matter, China has not satisfied its burden to make a *prima facie* case that Commerce violated Article 11 of the SCM Agreement with respect to the four investigations it challenges. China does not even discuss two of these four investigations – *Solar Cells* and *Steel Sinks*. When discussing the other two, it merely provides selective quotes from the applications.[290] As with other sections of its brief, it is not sufficient for China merely to include as exhibits and attachments the challenged measures and expect the Panel to discover, on its own, the relevance of these measures to the party's legal case.[291] This, however, is exactly what China does. China's discussion of the facts consists of conclusory statements regarding Commerce's determinations and the findings of panels in other disputes, with no application of the relevant provisions of the SCM Agreement to the particular facts at issue in its as applied claims. It refers to the *Solar Cells* and *Steel Sinks* initiations only in footnotes, expecting this Panel to discover the relevance of those references to China's case. In short, China expects the Panel to make its case for it. The Panel should instead find that China failed to establish a *prima*

[286] *Utility Scale Wind Towers from the People's Republic of China and The Socialist Republic of Vietnam*: Petition for the Imposition of Antidumping and Countervailing Duties, Volume III at 35-37 (Dec. 29, 2011) (USA-16) (citing the *Light-Walled Rectangular Pipe* and *CWP* Information and Decision Memoranda).
[287] *Wind Towers* Initiation Checklist at 14-16 (USA-15).
[288] *See* China First Written Submission, para. 125.
[289] China First Written Submission, para. 126.
[290] *See* China First Written Submission, paras. 48-53.
[291] *See Canada – Wheat Exports and Grain Imports (AB)*, para. 191.

facie breach of Article 11 of the SCM Agreement and stop its analysis there. Further, for the reasons set out below, Commerce's decisions to initiate the investigations with respect to the provision of inputs for less than adequate remuneration were consistent with Article 11 of the SCM Agreement.

2. The Evidence Required Under Article 11 of the SCM Agreement With Respect to Whether an Entity Is a "Public Body"

234. As just described, Article 11 of the SCM Agreement requires that there be sufficient evidence of the existence of a subsidy to justify initiation of an investigation. A subsidy exists, within the meaning of Article 1.1 of the SCM Agreement, when there is *inter alia* a financial contribution by a government or any public body within the territory of a Member, and a benefit is thereby conferred. Accordingly, for initiation purposes under Article 11, there must be sufficient evidence of – that is, adequate evidence tending to prove or indicating – a financial contribution by a government or public body and a benefit conferred.

3. Because a Public Body Is an Entity Controlled by the Government, Article 11 Requires an Application to Contain Adequate Evidence Tending to Prove or Indicating That Entities Are Controlled by the Government

235. As described elsewhere in this submission, a "public body" within the meaning of Article 1.1 of the SCM Agreement is an entity controlled by the government such that the government can use that entity's resources as its own. It follows, therefore, that for initiation purposes, when the entity allegedly providing the subsidy is not the government, but rather is alleged to be a public body, Article 11 requires adequate evidence that tends to prove or indicating that the entity is controlled by the government. There does not need to be definitive evidence that the entity is controlled by the government. Nor does there need to be evidence that would be sufficient for a preliminary or final determination that the entity is controlled by the government. Rather, to meet the initiation standard, the SCM Agreement requires some adequate amount of evidence tending to prove or indicating that the entity is controlled by the government. As the *China – GOES* panel elucidated: "[t]herefore, while the amount and quality of the evidence required at the time of initiation is less than that required to reach a final determination, at the same time the requirement of 'sufficient evidence' is also a means by which investigating authorities filter those applications that are frivolous or unfounded."[292]

236. Further, as explained above, Article 11.3's requirement of sufficient evidence to justify initiation must be read in context with Article 11.2's recognition that some evidence is not "reasonably available" to an applicant. When assessing the sufficiency of evidence, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant. As the panel in *China – GOES* stated: "[i]n the Panel's view, the fact that an applicant must provide such information as is 'reasonably available' to it confirms that the quantity and

[292] *China – GOES (Panel)*, para. 7.55.

quality of the evidence required at the stage of initiating an investigation is not of the same standard as that required for a preliminary or final determination."[293]

237. In many situations, much of the evidence of government control may not be available before the initiation of an investigation. This is particularly the case with respect to entities alleged to be state-owned. Complete ownership information may not be publicly available. Board membership and documents such as charters, bylaws, annual reports, and other company records are frequently unavailable. Further, the identities of suppliers and lenders providing goods and funding are business confidential information. As a result, this information is typically not reasonably available to an applicant.

238. Accordingly, in some cases the only reasonably available information to an applicant might be general evidence of government control over an industry or sector of the economy. For instance, news articles, public statements or studies, or public financial reports concerning companies in an industry might contain evidence, sufficient for the purposes of Article 11, that the government controls companies in that industry. All that is required is some adequate evidence, tending to prove or indicating that the entities involved may be controlled by the government and therefore may be public bodies. And, in the context of China, some relevant information may even be considered "State Secrets."[294] As the *China – GOES* panel stated, the purpose of the initiation standard is to prevent "frivolous" or "unfounded" investigations, not to prevent valid investigations where the evidence is initially obfuscated.[295]

239. With these principles in mind, as demonstrated in Section X.D.5 below, it is clear that Commerce's initiations of investigations into whether public bodies were providing goods for less than adequate remuneration were not inconsistent with Article 11 of the SCM Agreement.

4. Even Under an Interpretation of a Public Body as an Entity That Possesses, Exercises or Is Vested With Governmental Authority, Article 11 Only Requires an Application to Contain Adequate Evidence Tending to Prove or Indicating That Entities Possess, Exercise or Are Vested With Governmental Authority

240. Even under China's interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, China errs in its analysis of Article 11 and the evidence required to justify an initiation of an investigation into "public body" status. Under China's interpretation of the term "public body," Article 11 would require is adequate evidence tending to prove or indicating that an entity possesses, exercises, or is vested with governmental authority, not definitive proof of such.

241. If this Panel were to adopt an interpretation that a "public body" within the meaning of Article 1.1 of the SCM Agreement is "an entity that possesses, exercises or is vested with governmental authority,"[296] then it would follow that for initiation purposes, when the entity

[293] *China – GOES (Panel),* para. 7.56.
[294] *See High Pressure Steel Cylinders from the People's Republic of China*: Petitions for the Imposition of Antidumping and Countervailing Duties ("*Steel Cylinders* Petition"), Exhibit III-9 (May 11, 2011) (USA-20).
[295] *China – GOES (Panel),* para. 7.55.
[296] *US – Anti-Dumping and Countervailing Duties (China) (AB),* para. 317.

providing the subsidy is alleged to be a public body, Article 11 requires adequate evidence that tends to prove or indicating that the entity possesses, exercises or is vested with governmental authority. There need not be definitive evidence that the entity exercises, possesses or is vested with governmental authority. Nor does there need to be evidence that would be sufficient for a preliminary or final determination that the entity exercises, possesses or is vested with governmental authority. Rather, what is required is some adequate amount of evidence tending to prove or indicating that the entity exercises, possesses or is vested with governmental authority.

242. The relevant question is therefore what type of evidence is adequate, for initiation purposes, to tend to prove or indicating that an entity possesses, exercises or is vested with governmental authority. Relying upon *US – Anti-Dumping and Countervailing Duties (China)*, China argues that evidence of government ownership or control is insufficient for initiation purposes. China is mistaken.

243. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body addressed four *final* countervailing duty determinations and the public body decisions reached in those final determinations.[297] That dispute did not involve initiations of investigations, and it did not address Article 11 of the SCM Agreement. Therefore, the Appellate Body did not opine on what type of evidence would be necessary to justify an initiation of an investigation when the entity allegedly providing the subsidy in question is claimed to be a public body.

244. It is true that the Appellate Body found, in the context of the final countervailing duty determinations at issue in that dispute, that evidence that the government is the majority shareholder of an entity is insufficient, in itself, to justify a final finding that such an entity is a public body.[298] It called for a "careful evaluation" of the question of whether an entity is a public body and cautioned against an investigating authority reaching an "ultimate determination" focusing on a single characteristic or piece of evidence.[299] This is because the Appellate Body, in that dispute, was reviewing *final* determinations by an investigating authority, made after an entire investigation, not initiation determinations.

245. At the same time, the Appellate Body did not find that evidence of government ownership or control is irrelevant to a final public body finding. On the contrary, evidence of "meaningful" government control over an entity can serve as evidence that the entity possesses, exercises or is vested with governmental authority.[300] Evidence of government ownership of an entity also can serve as evidence that the entity is a public body. The Appellate Body noted that evidence of government ownership "in itself" is insufficient to support a final finding that an entity is a public body. The use of the term "in itself" indicates that evidence of ownership is not irrelevant, but simply cannot, on its own, justify a finding in a final determination that an entity is a public body.[301] Indeed, the Appellate Body stated that "[s]tate ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the

[297] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 1-3.
[298] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[299] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 319.
[300] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[301] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 346.

delegation of governmental authority."[302] Then, the Appellate Body relied in part upon evidence of government ownership in affirming some of the final public body determinations in *US – Anti-Dumping and Countervailing Duties (China) (AB)*.[303]

246. It follows, then, that if evidence of government ownership or control is relevant to the question of whether an entity is a public body in a final determination, such evidence also is relevant at the initiation stage. It further follows that, even if such evidence might not be determinative at the final determination stage, such evidence nevertheless can be adequate to "tend to prove or indicate" or "support a statement or belief" that an entity is a public body at the initiation stage. This is because Article 11 of the SCM Agreement only requires "sufficient evidence" for initiation purposes, and "sufficient evidence" is evidence that is adequate to tend to prove or indicate, or to support a statement or belief, that something is true.

247. Additionally, as explained above, Article 11.3's requirement of sufficient evidence to justify initiation must be read in context with Article 11.2's recognition that some evidence is not "reasonably available" to an applicant. When assessing the sufficiency of evidence, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant and, while not proceeding with investigations that lack evidence, still proceeding with valid investigations where additional evidence will be required to eventually make a determination. Some evidence – such as the identities of entities supplying respondents with goods or loans – may be business confidential information, and other information will only become clear through the investigation. It follows then that, typically this information is not reasonably available to an applicant.

248. If the precise identities of the entities that may be public bodies are not reasonably available, then their characteristics and features also are not reasonably available to an applicant. This means that certain evidence relevant to the question of whether an entity "possesses, exercises or is vested with governmental authority" generally may not reasonably be available to an applicant, and instead, this evidence must be gathered by the investigating authority through the investigatory process. Even if the identities of some of the entities that may be public bodies are available, much of the evidence regarding the nature of those entities is not in the public realm and thus not available to an applicant.

249. At the same time, an investigation cannot be initiated on the basis of no evidence, or on the basis of simple assertion, unsubstantiated by relevant evidence. There must be some barrier to initiations, otherwise frivolous or unfounded investigations would overwhelm investigating authorities. The question for the investigating authority is therefore: what evidence is reasonably available to an applicant, and does it tend to indicate that the government or public bodies are providing financial contributions?

250. The answer will depend on the context and facts of each individual case, and will be discussed in detail below. However, in general, evidence of government ownership or control is in certain circumstances the only evidence that is reasonably available. Such reasonably available evidence of government ownership may take the form of publicly available financial

[302] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 310.
[303] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 353.

statements or other public statements about an entity's shareholders or owners. Evidence of government control might come from public information about the managers, directors or owners of a company. It could also come from news articles or press reports about government influence over an entity. Evidence of government authority may come in the form of government white papers discussing the goals and plans the government has for a particular industry. In fact, the issue of public bodies is an example of why the SCM Agreement includes the term "reasonably available."

251. To take a simple example, assume there is an allegation that public bodies in Country X are providing widgets for less than adequate remuneration to the respondent companies. The applicant provides information that some of the widget producers in Country X are owned or controlled by a government of Country X because it has access to publicly available information indicating the widget producers' ownership. However, further information regarding those widget producers, such as their board composition, financial statements, lenders, suppliers, etc, will frequently not be publicly available. Their precise relationship with the government, beyond ownership, is also not publicly available.

252. As described above, evidence of government ownership or control, even under the Appellate Body's reasoning in *US – Anti-Dumping and Countervailing Duties (China)*, is sufficient (*i.e.*, adequate) evidence tending to prove or indicating, or supporting a statement or belief, that widget producers are public bodies – that is, that they are entities possessing, exercising or vested with governmental authority and may be conferring a financial contribution. Accordingly, such evidence would satisfy the requirements of Article 11 of the SCM Agreement, and an initiation would be WTO-consistent. This conclusion is consistent with *US – Anti-Dumping and Countervailing Duties (China)*. There is sufficient evidence for the authority to continue to pursue the investigation.

253. Of course, sometimes an applicant will be able to obtain additional evidence – beyond evidence of government ownership or control – that an entity possesses, exercises or is vested with governmental authority. Perhaps an applicant will be able to obtain evidence that the alleged public bodies work to effectuate government policies, or that they have delegated authority from the government to fulfill public purposes. Every allegation and every case will be different. But the fact that sometimes such additional evidence will be reasonably available does not mean that in other situations, evidence of government ownership or control alone is insufficient under Article 11.

254. With these principles in mind, and as we will now demonstrate, it is clear that Commerce's initiations of investigations into whether public bodies were providing goods for less than adequate remuneration were not inconsistent with Article 11 of the SCM Agreement.

5. In Each of the Challenged Initiations, There Was Adequate Evidence Tending to Prove or Indicating That Public Bodies Provided Goods, and China Has Failed to Establish Otherwise

255. In each of the investigations at issue there was adequate evidence for the initiations tending to prove, or indicating, that public bodies provided goods. China, however, alleges that

"[i]n none of the applications at issue did the applicants present any evidence that would 'provide an indication' that the SOEs at issue are in fact public bodies."[304]

256. As noted above, China has not met its *prima facie* burden to establish, with respect to the actual facts of the specific determinations, that the evidence was inadequate for initiation. In the absence of such argumentation, any further rebuttal by the United States is both unnecessary, and difficult in that China has provided no case-specific arguments to rebut. Nonetheless, without relieving China of its burden of proof, in the subsections below, the United States will show that that there was in fact adequate evidence tending to prove, or indicating, that entities were public bodies in each of the challenged initiations.[305]

a. *Steel Cylinders*

257. In *Steel Cylinders*, there were allegations relating to the provision of five goods for less than adequate remuneration by public bodies that are at issue in this dispute: hot-rolled steel, seamless tube steel, welded tube steel, standard commodity steel billets and blooms, and high-quality chromium molybdenum alloy steel billets and blooms. All five of these products are steel products. Accordingly, we will discuss the allegations collectively.

258. The application contained a large amount of evidence demonstrating the Chinese government's ownership and control over steel producers in China. For example, there was evidence that:

> [E]ight of the ten largest Chinese steel groups are 100 percent owned and controlled by the Chinese government, while 16 of the top 20 steel groups are 100 percent owned and controlled by the government. In terms of production, the vast majority of the top 20 steel groups is subject to some level of state ownership. . . . This massive degree of state ownership allows the government to exercise extensive control over the steel industry and enables the government to direct steel producers to act in ways that further governmental aims, such as maximizing tax revenue and employment, rather than responding to market signals.[306]

The evidence also stated:

> The Chinese government continues to exercise extensive control over the development of the Chinese steel industry, not only through its ownership stakes, but also through a number of policy instruments which afford the government substantial leverage to direct the growth and evolution of the industry. In fact, since 2005, the government has issued a number of industrial plans and other policy directives specifically covering the steel industry that have *significantly increased* the government's pervasive control over the development of the industry. All three levels of the Chinese government – central, local, and

[304] China First Written Submission, para. 52.
[305] We note that in the *Solar Cells* investigation, Commerce declined to initiate an investigation into whether the respondent companies received water for less than adequate remuneration. *Solar Cells* Initiation of Countervailing Duty Investigation, 76 Fed. Reg. 70966 (Nov. 16, 2011) (CHI-104).
[306] *Steel Cylinders* Petition, Exhibit III-4 (May 11, 2011) (USA-19).

> provincial – have issued industrial plans that designate steel as a preferred industry and eligible for a wide variety of government subsidies and other benefits. Moreover, the Chinese government has pursued foreign investment restrictions, which provide yet another mechanism for the government to control the direction and development of China's steel industry.[307]

259. The application also referred to, and contained, the Chinese government's 2005 "Policies for Development of Iron and Steel Industry," commonly referred to as China's Steel Plan or Steel Policy.[308] The Steel Plan details the government's policies for the iron and steel industry as "an important basic industry" and stipulates that "[t]he state shall guide the iron and steel industry to develop in a sound, sustainable and harmonious manner through the development policies and the mid- and long-term development planning of the iron and steel industry."[309] The Steel Plan is further evidence of the government's control over the steel industry.

260. Additional evidence contained in the application indicated that the Chinese government considers production data of its state-owned steel producers to constitute "State secrets",[310] indicating that this information was not "reasonably available." The applicant alleged that this indicates that the Chinese government uses state-owned steel producers "as vehicles for the state's industrial policy . . . ."[311]

261. Upon receiving these allegations and this information, Commerce reviewed the accuracy and adequacy of the evidence, and concluded that, for initiation purposes, there was sufficient evidence indicating that public bodies had been providing the five named steel products to respondent steel cylinder manufacturers.[312] Commerce's initiation was consistent with Article 11 of the SCM Agreement. As described above, evidence of government ownership or control of an entity can be sufficient evidence to justify initiation of an investigation into whether entities are public bodies. The reasonably available evidence showed that steel producers were owned or controlled by the Chinese government. Accordingly, there was sufficient evidence to justify initiation of an investigation into whether these steel producers were public bodies.

b. *Solar Cells*

262. In *Solar Cells*, there were two allegations of the provision of goods by public bodies that are relevant to this dispute: the provision of polysilicon for less than adequate remuneration and the provision of aluminum for less than adequate remuneration.[313]

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[307] *Steel Cylinders* Petition, Exhibit III-4 at 10 (USA-19).
[308] *See Steel Cylinders Petition*, Exhibit III-9 (USA-20).
[309] *See Steel Cylinders Petition*, Exhibit III-9 at 1-2 (USA-20).
[310] *See Steel Cylinders Petition*, Exhibits III-62 (USA-21) & III-63 (USA-22).
[311] *See Steel Cylinders* Petition at 6 (US-19).
[312] *See High Pressure Steel Cylinders from the People's Republic of China*: Initiation Checklist (May 31, 2011) at 20-23 ("*Steel Cylinders* Initiation Checklist") (USA-24).
[313] It does not appear that China is challenging Commerce's initiation with respect to the provision of float glass for less than adequate remuneration. *See* China First Written Submission, notes 57, 61. Accordingly, we will limit our discussion to the provision of polysilicon and the provision of aluminum.

(1) The Provision of Polysilicon by Public Bodies

263. First, the applicant alleged that public bodies provide polysilicon to solar cell producers for less than adequate remuneration. The applicant provided evidence that numerous Chinese polysilicon producers are state-owned or state-controlled.[314]

264. Commerce reviewed the accuracy and the adequacy of this evidence and concluded that, for initiation purposes, there was sufficient evidence indicating that public bodies were providing polysilicon to solar cells producers.[315] The reasonably available evidence showed that polysilicon producers were owned or controlled by the Chinese government. Accordingly, there was sufficient evidence to justify initiation of an investigation into whether these polysilicon producers were public bodies.

(2) The Provision of Aluminum by Public Bodies

265. The applicant also alleged that public bodies provide aluminum to solar cell producers. The application contained evidence that Chinese aluminum producers are state-owned or state-controlled. Specifically, the application noted that state-owned companies accounted for nearly half of all aluminum production in China in 2008.[316] It also noted that one particular state-owned company, the Aluminum Corporation of China Limited, accounted for nearly one-fourth of China's aluminum output in 2008.[317]

266. The application also contained evidence that the Chinese government manages the aluminum industry consistent with industrial policy. Specifically, the applicant provided the Chinese government's "Notice of Guidelines on Accelerating the Adjustment of Aluminum Industry Structure."[318] These guidelines indicate that aluminum companies "conforming to the state's industrial policies" will receive funding from financial institutions; in other words, the guidelines set forth a means by which the Chinese government exerts control over aluminum producers to be consistent with government policy.[319]

267. Commerce then reviewed the accuracy and adequacy of this evidence and concluded that, for initiation purposes, there was sufficient evidence indicating that public bodies were providing aluminum to solar cells manufacturers.[320] Commerce's initiation was consistent with Article 11 of the SCM Agreement. As described above, evidence of government ownership or control of an

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[314] Specifically, the applicant detailed the government's ownership and control of the following polysilicon producers: China Silicon Corporation Ltd., LDK Solar Co. Ltd., CGL-Poly Energy Holdings Limited, Dongfang Electric Emei Semiconductor Material Co. Ltd., Sichuan Xinguang Silicon-Tech Co. Ltd., Jiangsu Zhongneng Polysilicon Technology Development Co. Ltd., Sichuan Chuantou Energy Co., Baoding Tianwei Baobian Electric Co. Ltd., Kunming Yeyan New Material Co. Ltd., and Yichang CSG Polysilicon Co. Ltd. *See Certain Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*: Petition for the Imposition of Antidumping and Countervailing Duties at 36-37 (Oct. 19, 2011) ("*Solar Cells* Petition") (USA-26) and exhibits cited therein.

[315] *See Certain Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*: Initiation Checklist at 11-12 (Nov. 8, 2011) ("*Solar Cells* Initiation Checklist") (USA-25).

[316] *See Solar Cells* Petition at 39-40 & Exhibits III-65 (USA-27) & III-66 (USA-28).

[317] *See Solar Cells* Petition at 40 & Exhibit III-67 (USA-29).

[318] *See Solar Cells* Petition, Exhibit III-69 (USA-30).

[319] *See Solar Cells* Petition, Exhibit III-69 (USA-30).

[320] *See Solar Cells* Initiation Checklist at 12 (USA-25).

entity can be sufficient evidence to justify initiation of an investigation into whether entities are public bodies. Here, the reasonably available evidence showed that aluminum producers were owned or controlled by the Chinese government. Additional evidence indicated that aluminum producers act consistent with Chinese government industrial policy. Accordingly, there was sufficient evidence to justify initiation of an investigation into whether these aluminum producers were public bodies.

c. *Wind Towers*

268. In *Wind Towers*, there were two allegations regarding the provision of goods by public bodies that are relevant to this dispute: the provision of hot-rolled steel for less than adequate remuneration and the provision of aluminum for less than adequate remuneration.

(1) The Provision of Hot-Rolled Steel by Public Bodies

269. The applicant alleged that public bodies provide hot-rolled steel to wind tower manufacturers for less than adequate remuneration. The applicant provided evidence that Chinese steel producers are owned or controlled by the government, as well as evidence that Chinese steel producers seek to advance governmental aims.[321] There was evidence stating:

> [E]ight of the ten largest Chinese steel groups are 100 percent owned or controlled by the Chinese government, while 19 of the top 20 groups are majority owned or controlled by the government. In terms of production, 91 percent of the production of the top 20 steel groups is state-owned or controlled. This degree of state ownership allows the government to exert considerable control over the steel industry and enables the government to direct steel producers to act in ways that further governmental rather than market aims, such as maximizing tax revenue and employment. In addition, as discussed below, the high levels of state ownership make it significantly easier to implement and enforce government policy relating to the steel industry.[322]

This same document also stated:

> The Chinese government exercises extensive control over the development of the Chinese steel industry not only through it ownership stake but also through a number of policy instruments which afford the government substantial leverage to direct the growth and evolution of the industry.[323]

270. The applicant also cited to prior findings by Commerce, in which Commerce has found extensive state ownership of the Chinese steel industry.[324]

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[321] *Utility Scale Wind Towers from the People's Republic of China*: Petition for the Imposition of Antidumping and Countervailing Duties (Dec. 29, 2011) ("*Wind Towers* Petition"), Exhibit III-22 at 10 (USA-31).
[322] *Wind Towers* Petition, Exhibit III-22 at 10 (USA-31).
[323] *Wind Towers* Petition, Exhibit III-22 at 12 (USA-31).
[324] *See Wind Towers* Petition at 35-37 (USA-32).

271. Commerce then reviewed the accuracy and adequacy of the evidence, and concluded that, for initiation purposes, there was sufficient evidence indicating that public bodies had been providing hot-rolled steel to wind towers manufacturers.[325] Commerce's initiation was consistent with Article 11 of the SCM Agreement. As described above, evidence of government ownership or control of an entity can be sufficient evidence to justify initiation of an investigation into whether entities are public bodies. Here, the reasonably available evidence showed that steel producers were owned or controlled by the Chinese government. Additional evidence indicated that steel producers seek to carry out governmental aims. Accordingly, there was sufficient evidence to justify initiation of an investigation into whether Chinese steel producers were public bodies.

(2) The Provision of Aluminum by Public Bodies

272. The applicant also alleged that public bodies provide aluminum to wind tower manufacturers for less than adequate remuneration. As with the allegation concerning steel, the application contained evidence that Chinese aluminum producers are state-owned or state-controlled. Specifically, the application noted that state-owned companies accounted for nearly half of all aluminum production in China in 2008.[326] It also noted that one particular state-owned company, the Aluminum Corporation of China Limited, accounted for nearly one-fourth of China's aluminum output in 2008.[327]

273. The application also contained evidence that the Chinese government manages the aluminum industry consistent with industrial policy. Specifically, the applicant provided the Chinese government's "Notice of Guidelines on Accelerating the Adjustment of Aluminum Industry Structure."[328] These guidelines indicate that aluminum companies "conforming to the state's industrial policies" will receive funding from financial institutions; in other words, the guidelines set forth a means by which the Chinese government exerts control over aluminum producers to act consistent with government policy.[329]

274. Commerce then reviewed the accuracy and adequacy of this evidence and concluded that, for initiation purposes, there was sufficient evidence indicating that public bodies were providing aluminum to wind tower manufacturers.[330] Commerce's initiation was consistent with Article 11 of the SCM Agreement. As described above, evidence of government ownership or control of an entity can be sufficient evidence to justify initiation of an investigation into whether entities are public bodies. The reasonably available evidence showed that aluminum producers were owned or controlled by the Chinese government. Accordingly, there was sufficient evidence to justify initiation of an investigation into whether these aluminum producers were public bodies.

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[325] *See Utility Scale Wind Towers from the People's Republic of China*: Initiation Checklist (Jan. 18, 2012) ("*Wind Towers* Initiation Checklist") at 14-15 (USA-33).
[326] *See Wind Towers* Petition at 38 (USA-32) & Exhibit III-40 (USA-34).
[327] *See Wind Towers* Petition at 38 (USA-32) & Exhibit III-41 (USA-35).
[328] *See Wind Towers* Petition, Exhibit III-43 (USA-36).
[329] *Wind Towers* Petition, Exhibit III-43 (USA-36).
[330] *See Wind Towers* Initiation Checklist at 15-16 (USA-33).

d. *Steel Sinks*

275. In *Steel Sinks*, the applicant alleged that public bodies provide stainless steel to steel sink manufacturers for less than adequate remuneration. The application contained evidence that the two largest stainless steel producers in China – Taiyuan Iron & Steel Group Co. and Shanghai Baosteel Group Corp. – are state-owned.[331] It more generally noted the "high levels of continued government ownership" of the Chinese steel industry.[332] It further noted that various levels of the Chinese government have enacted measures to increase the capacity of such state-owned steel producers, including their stainless steel capacity.[333]

276. The application also contained the Chinese government's 2005 Steel Plan.[334] As described above, the Steel Plan details the government's policies for the iron and steel industry as "an important basic industry" and stipulates that "[t]he state shall *guide* the iron and steel industry to develop in a sound, sustainable and harmonious manner through the development policies and the mid- and long-term development planning of the iron and steel industry."[335] The Steel Plan is evidence of the government's control over the steel industry.

277. Commerce then reviewed the accuracy and adequacy of this evidence and concluded that, for initiation purposes, there was sufficient evidence indicating that public bodies were providing stainless steel to steel sink manufacturers.[336] Commerce's initiation was consistent with Article 11 of the SCM Agreement. As described above, evidence of government ownership or control of an entity can be sufficient evidence to justify initiation of an investigation of whether certain entities are public bodies. The reasonably available evidence showed that stainless steel producers were owned or controlled by the Chinese government. Accordingly, there was sufficient evidence to justify initiation of an investigation into whether these stainless steel producers were public bodies.

XI. 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

278. China challenges Commerce's decision in *Seamless Pipe* and *Magnesia Carbon Bricks* to initiate investigations into export restraints imposed by China, in addition to Commerce's determination to countervail those export restraints after China refused to provide information necessary to the analysis. As demonstrated below, China's objections to these initiation decisions – objections which are crucial to China's case given that it failed to cooperate once the investigations were underway – are unfounded because they rely on China's flawed belief that

[331] *See Drawn Stainless Steel Sinks from the People's Republic of China*: Petition for the Imposition of Antidumping and Countervailing Duties (Mar. 1, 2012) ("*Steel Sinks* Petition"), Exhibits III-57 (USA-37), III-58 (USA-38) & III-59 (USA-39).
[332] *See Steel Sinks* Petition, Exhibit III-10 at 23 (USA-40).
[333] *See, e.g.*, *Steel Sinks* Petition, Exhibits III-13 (USA-41), III-55 (USA-42).
[334] *See Steel Sinks* Petition at Exhibit III-8.
[335] *Steel Sinks* Petition, Exhibit III-8 at 1-2 (emphasis added) (USA-43).
[336] *See Drawn Stainless Steel Sinks from the People's Republic of China*: Initiation Checklist at 23-24 (Mar. 21, 2012) (USA-44).

investigating authorities are prohibited from examining China's various export restraint schemes based on one WTO panel report.

279. As discussed below, Commerce's initiation of investigations into export restraints in the challenged investigations was not inconsistent with Articles 11.2 and 11.3 of the SCM Agreement, in spite of the *US – Export Restraints* panel's erroneous *obiter dicta* analysis of whether hypothetical export restraints could constitute a financial contribution. Furthermore, the United States will demonstrate that its decisions to countervail China's export quotas and export taxes on coke and magnesia are not WTO-inconsistent where they were based upon the use of facts available pursuant to Article 12.7 of the SCM Agreement. The use of facts available was required after China declined to provide necessary information based on its erroneous position that, as a legal matter, an export restraint cannot constitute a financial contribution encompassed by Article 1.1(a) of the SCM Agreement.

A. The Challenged Measures

280. The investigations of Chinese export restraint schemes in *Seamless Pipe* and *Magnesia Carbon Bricks* were initiated based on allegations supported by information that export restraints imposed by China were providing an unfair advantage to Chinese producers that relied upon inputs subject to such restraints. In both *Seamless Pipe* and *Magnesia Carbon Bricks*, China did not contest Commerce's finding that China imposed export restraints on coke and magnesia, inputs used in the production of seamless pipe and magnesia carbon bricks respectively. To the contrary, China freely acknowledged its imposition of export restraints.[337]

281. Export restraints such as these may result in increased domestic availability of the input covered by the export restraint, and accordingly, may benefit producers who receive inputs at a reduced price. Indeed, a report to the U.S. Congress demonstrated the dramatic effect that China's export restraints scheme for coke had on coke prices: in 2008, the world market price for coke reached as high as $750 per metric ton, while China's domestic price for coke was $350 per metric ton.[338]

1. China Failed to Make a *Prima Facie Case*

282. As with other claims it makes in this dispute, China's claim here relies on a "short-cut" approach: a single panel decision is said to invalidate all of Commerce's determinations, regardless of the specific contours of Commerce's findings. In order to meet its burden, China

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

[338] *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).

should have made an adequate legal argument for each of its claims based on the facts of the investigation.[339] Instead, China merely argues that the findings of a prior WTO dispute panel should be applied to the investigations at issue in the instant dispute. Both the legal arguments and evidence must be present for a panel to address a claim, because "when 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."[340]

283. Although the Panel should not reach these legal issues in the absence of any case-specific factual analysis by China, the United States nonetheless will show as follows that China's legal interpretations are unsupportable based on a review of the investigations.

2. Commerce's Decisions to Initiate Investigations Into China's Export Restraints on Coke and Magnesia Are Not Inconsistent With Articles 11.2 and 11.3 of the SCM Agreement.

284. China does not contest that it imposed export restraints on coke and magnesia. Instead, China challenges Commerce's investigations as inconsistent with Articles 11.2 and 11.3 of the SCM Agreement based on its erroneous argument that the U.S. domestic industry "did not 'provide an indication that a subsidy actually exists', because export restraints cannot, as a matter of law, constitute financial contributions."[341] To support this argument, China relies exclusively on the findings of the panel in *US – Export Restraints* and alleged "endorsement" of those findings in subsequent cases.

285. As the United States will demonstrate below: (1) in its application (or "petition" under U.S. law), the applicants provided "sufficient evidence of the existence of [ ] a subsidy;"[342] (2) Commerce properly determined that the information provided by the applicants was "sufficient to justify the initiation of an investigation;"[343] (3) an export restraint can constitute a financial contribution under Article 1.1 of the SCM Agreement; and (4) the lone WTO finding to address export restraints in the context of the SCM Agreement does not bar the United States from initiating an investigation into China's export restraint schemes in *Seamless Pipe* and *Magnesia Carbon Bricks*.

286. The standard for initiating an investigation is discussed in detail in Section X. In brief, an investigating authority reviews 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."[344] To justify initiation, "adequate evidence, tending to prove or indicating the existence of" a subsidy is required.[345] A panel does not conduct a *de novo* review of the

[339] *See Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134.
[340] *US – Gambling (AB)*, para. 281.
[341] China First Written Submission, para. 190.
[342] SCM Agreement, Article 11.2.
[343] SCM Agreement, Article 11.3.
[344] SCM Agreement, Article 11.3.
[345] *China – GOES (Panel)*, para. 7.55.

accuracy and adequacy of the evidence to reach its own conclusion as to the sufficiency of the evidence in the application.[346]

287. As we will demonstrate below, in the *Seamless Pipe* investigation, there was sufficient record evidence tending to prove or indicating the existence of a financial contribution from an export tax, export quota, and export licensing requirements imposed on coke to justify initiating an investigation into these measures. Similarly, there was sufficient record evidence tending to prove or indicating the existence of a financial contribution from an export tax, export quota and bidding policies imposed on magnesia to warrant initiating an investigation into these measures in the *Magnesia Carbon Bricks* investigation.

3. The *Seamless Pipe* and *Magnesia Carbon Bricks* Applications Contained Sufficient Evidence to Justify Initiation of the Investigations

a. *Seamless Pipe*

288. In *Seamless Pipe*, the following allegation and supporting information were on the record, constituting "sufficient information" concerning a financial contribution for purposes of initiating an investigation.

- *Allegation*: The export restraints imposed by China on the export of coke indirectly provides a financial contribution to the domestic industry by artificially increasing the domestic supply of coke and, as a result, suppressing the domestic price of coke, which constitutes a countervailable subsidy to Chinese steel producers, including seamless pipe producers that purchased coke.[347]

- *Supporting Information:*

  - Articles discussing the increases in export taxes in 2008 (the period of investigation) for coke from 15 percent to 25 percent, and then from 25 percent to 40 percent.[348]

  - Information demonstrating that China imposed export quotas for coke in 2008.[349]

  - Information demonstrating that China imposed restrictive export licensing requirements on the export of coke.[350]

  - Information indicating that China's export restraints resulted in declining coke prices domestically in China. Among the information domestic industry provided was a report stating, "[t]he effects of the export restrictions on pricing have been

[346] *China – GOES (Panel)*, para. 7.51.
[347] *Seamless Pipe* Petition at 120-124 (USA-48).
[348] *Seamless Pipe* Petition, Exhibits III-242, III-244, & III-246 (USA-49).
[349] *Seamless Pipe* Petition, Exhibits III-249 & III-250 (USA-50).
[350] *Seamless Pipe* Petition, Exhibit III-165 (USA-47).

> dramatic. In 2008, the world price for coke reached as high as $750 per [metric ton] at the same time that China's domestic price was $350 per [metric ton]."[351]

289. The application contained information about the export restraints imposed by China and included information that, as explained below, indicated that China's export restraints entrusted and directed entities to provide a financial contribution in the form of goods provided for less than adequate remuneration.[352] Based on the sufficiency of this evidence that a subsidy existed, Commerce initiated an investigation into export restraints on coke, referencing its investigation into export restraints on coke in the then on-going investigation of oil country tubular goods from China.[353]

b. *Magnesia Carbon Bricks*

290. In *Magnesia Carbon Bricks*, the following allegation and supporting information was on the record, constituting "sufficient information" concerning a financial contribution for purposes of initiating an investigation.

- *Allegation*: by restricting the exports of raw materials, China entrusts or directs domestic magnesia, magnesium and magnesium compound, and magnesite suppliers to sell magnesium and magnesite at suppressed prices to domestic consumers, thereby providing a good for less than adequate remuneration.[354]

- *Supporting Information:*

  - *Minutes of Coordination Meeting of Light-burnt and Dead-burnt Magnesia Successful Bidders* from January 14, 2002, submitted in the application, indicating that China imposes export quotas and bidding policies for export quotas for light-burnt and dead-burnt magnesia;[355]

  - An industry study, submitted in the application, finding that U.S. prices of Chinese-origin magnesia rose to unprecedented levels, in part due to incentives from China to reduce the export of raw materials; [356] and

  - An expert opinion, submitted in the application, that was prepared for an unrelated price-fixing dispute, finding that the "alleged misconduct" involving

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[351] *Seamless Pipe* Petition, Exhibit III-165 (USA-47).
[352] The petition also contained information about export restraints being part of a broader government policy of promoting the manufacture and export of higher-value goods to overseas markets such as the United States and export restraints achieving the aims of this policy through an increased domestic supply of lower-priced coke. *See, e.g., Seamless Pipe* petition, Exhibit III-109) at 5; and Exhibit III-54, at. 32, 145 (USA-71).
[353] *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure from the People's Republic of China*: Countervailing Duty Investigation Initiation Checklist (Oct. 06, 2009) ("*Seamless Pipe* Initiation Checklist") at 28 (USA-51).
[354] *Certain Magnesia Carbon Bricks from People's Republic of China*: Petition for the Imposition of Countervailing Duties at 22-23 (July 29, 2009) ("*MCB* Petition") (USA-52).
[355] *MCB* Petition, Exhibit I-29 (USA-53).
[356] *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 (Aug. 7, 2009) (USA-54).

> export constraints and other collusive behaviour among China and Chinese magnesium producers had a significant effect on prices charged for magnesium raw material, and suggesting that there is a significant price differential between Chinese-origin raw materials in the United States as compared to the Chinese market.[357]

291. The application contained information about the export restraints imposed by China and included information indicating that China's export restraints provided a financial contribution in the form of goods provided for less than adequate remuneration.[358] Based on the sufficiency of this evidence that a subsidy existed, and noting its decision to countervail export restraints on raw materials in an investigation of coated free sheet paper from Indonesia, Commerce initiated an investigation into export restraints on magnesia.[359]

4. The Evidence Described Above Provided "Sufficient Evidence" and, Therefore, Satisfied the Article 11 Standard for Initiating Investigations

292. In both *Seamless Pipe* and *Magnesia Carbon Bricks*, the applicants alleged that through the export restraints China imposed on coke and magnesia China indirectly provided a financial contribution.[360] These were not "simple assertions," but were substantiated by relevant evidence. The evidence provided is particularly noteworthy given the nature of indirect subsidies. The SCM Agreement anticipates that a government indirectly can confer a financial contribution. Specifically, Article 1.1 states that a subsidy will exist if "a government . . . entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii)" of Article 1.1(a)(1) of the SCM Agreement.

293. As the Appellate Body has recognized, "[i]t may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive."[361] Additionally, the Appellate Body has explained that, "[t]he determination of entrustment or direction will hinge on the particular facts of the case."[362] Here, Commerce had information in front of it that China was implementing measures that entrusted or directed private entities to change their behavior in a way that was providing goods to Chinese domestic entities at prices drastically lower than their foreign competitors. Consistent with this reasoning, based on the information contained in the applications, Commerce initiated investigations of export restraints, in accordance with the SCM Agreement, where Commerce received sufficient information of the existence of a subsidy, including that there was a financial contribution. Such

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[357] *MCB* Supplement to Petition, Exhibit S-5 (USA-55).
[358] The petition also contained information about export restraints being part of a broader government policy of promoting the export of higher value goods to overseas markets such as the United States and that the export restraints achieve the aims of this policy through an increased domestic supply of raw materials. *See, e.g., MCB* petition, Exhibit 23 at 36 (USA-73).
[359] *Certain Magnesia Carbon Bricks from People's Republic of China*: Countervailing Duty Investigation Initiation Checklist at 9-10 (Aug. 25, 2009) (USA-56); *Coated Free Sheet Paper from Indonesia:* Final Affirmative Countervailing Duty Determination (Oct. 25, 2007) (USA-57).
[360] *Seamless Pipe* Petition at 123 (USA-48); *MCB* Petition at 22-23 (USA-52).
[361] *US – DRAMs from Korea (AB),* para. 116.
[362] *US – DRAMs from Korea (AB),* para. 116.

initiations could enable Commerce to gather additional information to determine, based on the facts presented to it, whether the government of China's activities constituted a financial contribution through entrustment or direction. But China's refusal to provide the necessary information frustrated Commerce's attempt to examine this question.

294. For the reasons discussed above, Commerce's initiation of investigations was consistent with Article 11 of the SCM Agreement where, as in *Seamless Pipe* and *Magnesia Carbon Bricks*, there was "sufficient evidence" of the existence of a subsidy for Commerce to consider China's actions a financial contribution. This being the case, Commerce was warranted in investigating the export tax, export quota, and export licensing requirements by which China restricted the export of coke; and the export quota and an export tax by which China restricted the export of magnesia.

5. An Investigating Authority Examining Whether an Export Restraint Constitutes a Financial Contribution Is Fully Consistent With Article 1.1(A)(1)

295. China challenges Commerce's decisions to initiate investigations of, and countervail, certain export restraints imposed by the government of China, premised on its incorrect contention that export restraints cannot constitute a financial contribution through entrustment or direction for purposes of the SCM Agreement.[363] However, a determination that an export restraint scheme is a financial contribution is not *per se* inconsistent with Article 1.1 of the SCM Agreement as China contends. To the contrary, Article 1.1(a)(1)(iv) supports an interpretation that export restraints may constitute a financial contribution within the meaning of Article 1.1.

296. Pursuant to Article 1.1 of the SCM Agreement,

> [A] subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)(1);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or *entrusts* or *directs* a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the

[363] *See, e.g.*, China First Written Submission, para. 187.

> practice, in no real sense, differs from practices normally followed by governments. (Emphasis added)

297. In terms of context, each of the subparagraphs (i) through (iv) are worded broadly to encompass a wide spectrum of potentially actionable government behaviors. In *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body explained that while Article 1.1(a)(1) of the SCM Agreement provides an exhaustive list of the general types of *conduct* that constitute a financial contribution, the examples of *activities* that fall under such conduct are not exhaustive.[364] Viewed in this context, it is fully consistent with the text of Article 1.1(a)(1) for an investigating authority, in appropriate circumstances, to determine that an export restraint can constitute a financial contribution through entrustment or direction. As demonstrated below, an export restraint can be one of the activities that falls under the rubric of financial contribution from a private body that is entrusted or directed by the government to provide a good in the domestic marketplace.

298. The ordinary definitions of entrustment and direction provide support for the notion that export restraints can constitute a financial contribution such as a government provided good or service through entrustment or direction. The ordinary meaning of "entrust" is "invest with a trust; give (a person etc.) the responsibility for a task, a valuable object, etc."[365] The ordinary meaning of "direct" includes "cause to move in or take a specified direction; . . . Regulate the course of; guide with advice. . . ."[366] WTO panels have stated that entrustment "occurs where a government gives responsibility to a private body"[367] and direction "refers to situations where the government exercises its authority over a private body."[368]

299. Here, China exercises its authority over private entities through formal legal measures that induce them to change their economic behavior under penalty of law.[369] As a result of these explicit policies, the private entities are "caused to move in a specified direction"; if they are to continue the sales of their products, they must sell the good to the domestic market. Additionally, through these explicit measures, private entities are "invested with a trust" that they will sell the good to the domestic market. At a minimum, these policies represent a *prima facie* case of entrustment or direction of a private entity.

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[364] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para 613. "Subparagraphs (i) – (iv) exhaust the types of government conduct deemed to constitute a financial contribution . . . Some of the categories of conduct—for instance those specified in subparagraphs (i) and (ii) – are described in general terms with illustrative examples that provide an indication of the common features that characterize the conduct referred to more generally."
[365] *The New Shorter Oxford English Dictionary* at 831 (1993) (USA-79).
[366] *The New Shorter Oxford English Dictionary* at 679 (1993) (USA-80).
[367] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.
[368] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.
[369] *Regulation of the People's Republic of China on the Administration of the Import and Export of Goods* (Order of the State Council No. 332, adopted at the 46th executive meeting of the State Council on October 31, 2001, effective January 1, 2002) at Article 64 (USA-78). ("Any one [sic] who imports or exports goods… that are restricted from importation or exportation without approval or permission, shall be subject to criminal liabilities in accordance with provisions on the crime of smuggling in the Criminal Law; if the activities are not serious enough for assuming criminal liabilities, the offenders shall be punished in accordance with relevant provisions of the Customs Law; and the foreign trade department of the State Council may revoke their business licenses for foreign trade.").

300. The Appellate Body and previous panels have also contemplated the terms entrustment and direction and found that entrustment or direction need not be, and seldom is, explicit or formal.[370] Given the Appellate Body and panel findings that entrustment or direction is not necessarily explicit, it would seem apparent that Article 1.1(a)(1)(iv) of the SCM Agreement would permit, at a minimum, initiation of an investigation into export restraints to gather information concerning whether a Member government, through formal measures, is implicitly or informally "giv[ing] responsibility to" or "exercis[ing] its authority over" a private body that might be providing goods in a manner that is contemplated by Article 1.1(a)(1)(iii). Then, based on the information obtained in the investigation, an investigating authority might – or might not – find evidence of entrustment or direction through a particular export restraint, in a manner consistent with Article 1.1(a)(1).

301. Additionally, allowing a case-by-case analysis of whether an export restraint constitutes a financial contribution through entrustment or direction is consistent with the object and purpose of the SCM Agreement, which is 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."[371] Considered in this light, the SCM Agreement should not be construed in a manner that would allow governments to use indirect means to circumvent disciplines that clearly apply to direct government actions. Indeed, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision.[372] The Appellate Body recognized that "[p]aragraph (iv), in particular, is intended to ensure that governments do not evade their obligations under the *SCM Agreement* by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself."[373] Therefore, if the Panel were to declare categorically that, regardless of the relevant facts, 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 all-too-easy circumvention of obligations by Members. The Appellate Body previously has warned that this is an outcome to be avoided.[374]

302. In conclusion, export restraints can constitute a financial contribution under Article 1.1(a)(1)(iv). Through measures implementing export restraints, a government can entrust or direct private enterprises to provide a good to a domestic marketplace if they are going to sell it at all, in accordance with Article 1.1(a)(1)(iii). Examining China's export restraints to determine whether they constitute financial contributions through entrustment or direction is consistent with the object and purpose of the SCM Agreement, addressing the possibility of China accomplishing indirectly what it could be prohibited from, or sanctioned for, doing directly.

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[370] *Japan – DRAMs (Korea) (Panel)*, para 7.73; *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 110-11.
[371] *US – Softwood Lumber CVD Final (AB)*, para. 64.
[372] *US - Countervailing Duty Investigation on DRAMS*, para. 113; *US – Softwood Lumber CVD Final (AB)*, para. 52.
[373] *US - Countervailing Duty Investigation on DRAMS*, para. 113.
[374] *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").

B. China's Reliance on Certain Findings in *US – Export Restraints* Is Misplaced

303. China largely bases its interpretation of Article 1.1 and challenge to Commerce's decisions to initiate investigations of export restraints on the *US – Export Restraints* panel's unfounded and unnecessary interpretation of the terms "entrusts or directs."[375]

304. In *US – Export Restraints*, Canada alleged that aspects of U.S. law and hypothetical practice that required Commerce to treat export restraints as a subsidy. The panel disagreed as a matter of fact; it found that the challenged U.S. measures did not require Commerce to treat export restraints as a subsidy and, accordingly, the measures were not WTO inconsistent.[376]

305. Going beyond the analysis necessary to come to its decision, the panel found that a *hypothetical export restraint* "as defined in this dispute" by Canada, cannot constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement. The panel's conclusion in *US – Export Restraints* that a hypothetical export restraint, as defined in that proceeding, would not constitute a financial contribution is the only report to have analyzed the countervailability of an export restraint under the SCM Agreement, albeit in a hypothetical manner and in an *obiter dicta* statement. The Appellate Body has never addressed this issue.[377]

306. A subsequent Appellate Body finding calls into question the panel's analysis in *US - Export Restraints*. Specifically, the Appellate Body has clarified that the concept of entrustment and direction contemplated by Article 1 of the SCM Agreement is broader than the narrow definition applied by the panel in *US - Export Restraints*. China argues that subsequent WTO decisions "endorse" the *US – Export Restraints* decision,[378] and goes even so far as to say that these decisions "are dispositive" with respect to Commerce's "treatment of export restraints" in *Seamless Pipe* and *Magnesia Carbon Bricks*.[379] This is incorrect. The very panel and Appellate Body reports upon which China relies undermine China's arguments.

307. For example, China cites to *US – Countervailing Duty Investigation on DRAMS*. Yet, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body disagreed with the *US – Export Restraint* panel's finding that the words "entrust" and "direct" must "include some notion of "delegation" or "command," respectively.[380] The Appellate Body clarified that "the terms

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[375] China spends several paragraphs summarizing the *US – Export Restraint* panel's characterization of events leading up to the inclusion of the "financial contribution" requirement in the SCM Agreement. *See* China First Written Submission, paras. 169-71. While it is clear that there must be a financial contribution for a subsidy to be countervailable, there is no evidence to suggest that in the SCM agreement negotiating history it was intended for export restraints not to be considered a "financial contribution." In fact, as discussed elsewhere, section (iv) is actually intended for situations such as export restraints.

[376] *US – Export Restraints*, para. 8.131.

[377] Outside of the dispute settlement body context, the WTO Secretariat has examined export restraints as possible subsidies and concluded that, from an economic perspective, export restraints can be subsidies. The Secretariat explained that export restraints can, and are, used by governments to manipulate markets to provide a particular industry an input for less than adequate remuneration. *See* World Trade Organization, *Trade Policy Review - Indonesia - Report by the Secretariat*, WT/TPR/S/51 at 105 (Nov. 5, 1998) (USA-60) ("Restricting exports of the primary resource encourages downstream processing by providing, in effect, *an input subsidy to processors*.").

[378] China First Written Submission, paras. 180-184.

[379] China First Written Submission, para. 185.

[380] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 118; *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 7.31.

'entrusts' and 'directs' in Article 1.1(a)(1)(iv) are not limited to 'delegation' and 'command', respectively"[381] The Appellate Body 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."[382] Thus, contrary to China's reliance on it, the Appellate Body thus clarified that the *US – Export Restraints* panel's interpretation of entrusts or directs was too narrow and that actions with indirect, albeit intended, effects can be examined by investigative bodies. Thus, contrary to China's reliance on it, the Appellate Body's interpretation in *US – Countervailing Duty Investigation on DRAMS* does not provide China with any basis for asserting that, as a matter of law, no conceivable investigation could result in a determination that the export restraints China imposed on coke and magnesia might qualify as "other means by which government can give responsibility to or exercise authority over a private body," and thereby constitute a financial benefit within the meaning of Article 1.1(a)(1)(iv).

308. Similarly, other panels have rejected the *US – Export Restraints* panel's interpretation that "entrusts" or "directs" must be "an explicit and affirmative action".[383] For instance, in *Japan – DRAMs*, the panel recognized that, "the entrustment or direction of a private body will rarely be formal, or explicit."[384] Similarly, 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."[385]

309. Accordingly, the Panel should not rely on or adopt as its own this particular interpretation expressed in *US – Export Restraints*. Rather, the United States considers that subsequent Appellate Body and panel reports explaining that the proper interpretation of "entrusts or directs" is broader than the interpretation expressed in *US – Export Restraints* are persuasive.

310. China also cites to the panel reports in *US – A Large Civil Aircraft (2nd Complaint)* and *China – GOES* as "dispositive" with respect to the issue of export restraints.[386] However, these findings do not support China's challenge to Commerce's decision to initiate. The panel in *US – A Large Civil Aircraft (2nd Complaint)* did not examine entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. Instead, China relies on that case to support a position that a financial contribution refers to the action of the government rather than the indirect effects of, or reaction to, a government's actions.[387] Of course, *US – Large Civil Aircraft (2nd Complaint)* does not preclude Commerce's decisions to initiate investigations into export restraints on coke and magnesia in *Seamless Pipe* and *Magnesia Carbon Bricks*,

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[381] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 118.
[382] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 118.
[383] The *US – Export Restraints* panel stated that, "[t]o [their] minds, both the act of entrusting and that of directing . . . necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty." *US – Export Restraints*, para. 8.29. Based on its finding that entrustment or direction must be achieved through an "explicit and affirmative action of delegation or command," the panel found that an export restraint as defined in *US – Export Restraints* could not meet the subsection (iv) entrustment or direction standard for indirect subsidies.
[384] *Japan – DRAMs (Panel)*, para. 7.73.
[385] *Korea – Commercial Vessels*, para. 7.370.
[386] China First Written Submission, para 185.
[387] China First Written Submission, paras. 183 and 184.

respectively, where the applications contained sufficient information of a financial contribution and Commerce was, in fact, examining whether the Chinese government's actions, rather than the indirect effect of those actions, constituted a financial contribution. To the contrary, the report supports Commerce's decision to consider whether "the action[s] of the government" were structured to provide a financial contribution.[388]

311. The panel's findings in *China – GOES* similarly supports Commerce's decision to initiate in order to gather information to determine whether the export restraints were structured for the purpose of providing a financial contribution. In the *China – GOES* panel report, "according to China, the evidence that the [measures at issue] led to a transfer of wealth from steel purchasers to the United States steel industry 'might be seen as evidence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement given *the effect of the measure on private parties*, causing them to provide a transfer of funds in the form of higher prices.'"[389] In other words, China argued that the effect of the measure demonstrated financial contribution. The *China – GOES* panel disagreed, stating that "when the action of a private party is a *mere side-effect* resulting from a government measure, this does not come within the meaning of entrustment or direction under Article 1.1(a)(1)(iv)."[390] However, the question in the instant case is whether the measures at issue entrust or direct the provision of goods or whether the provision of goods was a "mere side-effect." Commerce initiated investigations to examine China's actions and whether or not they constituted a financial contribution. Accordingly, the findings in both *US – Large Civil Aircraft (2nd Complaint)* and *China – GOES* support Commerce's initiation.

312. The *US – Export Restraints* panel also recognized, and stated in no uncertain terms, that its analysis should be limited to the fact pattern in that specific case: "[w]e do not make any judgement as to the WTO consistency of any other measures that Members might label export restraints or that fall outside the bounds of the definition put forward by Canada."[391] Thus, the panel in that dispute made statements relating to a hypothetical set of facts, which, in any case, acknowledged that its statements were limited to the specific hypothetical fact pattern alleged in that dispute.

313. In light of the considerations that 1) the *Seamless Pipe* and *Magnesia Carbon Bricks* applications contained sufficient evidence tending to prove or indicating the existence of a subsidy; 2) an analysis of "entrustment or direction" necessarily requires an examination of the particular facts of a given case; 3) Article 1.1 of the SCM agreement supports an interpretation that an export restraint may constitute a financial contribution; 4) the concept of "entrustment or direction" is broader than the understanding reached by the *US – Export Restraints* panel; and 5) in any case, this Panel should not find persuasive the *US – Export Restraints* understanding because of numerous problems identified above, the Panel should conclude that Commerce's initiation of investigations into export restraints was not inconsistent with Articles 11.2 and 11.3 of the SCM Agreement.

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[388] *US – Large Civil Aircraft (2nd complaint) (Panel)*, para.7.1351 (quoting *US – Export Restraints*, para. 8.34).
[389] *China – GOES (Panel)*, para. 7.89 quoting China's response to Panel question 38, para. 2 in the *China – GOES* Panel proceeding (emphasis added).
[390] *China – GOES (Panel)*, para. 7.91 (emphasis added).
[391] *US – Export Restraints*, para. 8.76.

C. Commerce's Determinations That the Export Restraints Constituted a Countervailable Subsidy Was Not Inconsistent With the SCM Agreement

1. An Examination of Entrustment or Direction Includes an Analysis of the Facts of the Investigation

314. China failed to cooperate with Commerce's investigations into export restraints on coke and magnesia by refusing to answer questions that would have allowed Commerce to analyze the relevant facts concerning China's entrustment or direction in connection with the export restraints at issue. China concedes as much.[392] As a result of China's refusal to respond fully to Commerce's questions concerning the structure and purpose of the export restraints at issue, necessary information was missing from the records of both investigations and China prevented the United States from evaluating China's entrustment or direction. Accordingly, Commerce was required to rely on facts available pursuant to Article 12.7 of the SCM Agreement to determine whether China's export restraints constituted a countervailable subsidy.

315. As has been recognized, "[t]he determination of entrustment or direction will hinge on the particular facts of the case."[393] The Appellate Body has also recognized that, particularly in cases of entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement, circumstantial evidence can play an important role in an investigating authority's analysis.[394] The Appellate Body also has stated that, "strictly speaking, entrustment or direction is not a pure fact. It is, rather, a legal assessment based on a proven set of facts."[395] It was for these reasons that the information Commerce requested in each investigation describing the export restraints was of critical importance to whether there was entrustment or direction in connection with China's export restraints. For example, certain considerations may shed light on whether particular export restraints constitute entrustment or direction, including the reason for a particular export restraint, whether the investigated government had an objective of encouraging or supporting downstream production or such assistance was a mere "side-effect", whether the export restraints were imposed with some particular consequences in mind, whether there were WTO-consistent mechanisms that would allow a government to accomplish its goal, etc. – all considerations that are relevant to whether a government's actions in imposing export restraints constitute a financial contribution through entrustment or direction. China had every opportunity to provide information to address these questions, but declined to do so.

316. Not surprisingly, glossing over the details of its failure to respond to Commerce's questions concerning China's export restraints and obstruction of Commerce's investigation, China frames the issue as a legal question of whether the SCM Agreement permits Commerce to find that export restraints conceivably can constitute a financial contribution within the meaning of Article 1.1(a)(1)(iv). However, Commerce's decisions to countervail China's export restraints on coke and magnesia were based on facts available pursuant to Article 12.7. Because China refused to respond to questions that might answer whether its export restraint schemes involved entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement, this Panel has little evidence to even consider the matter.

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[392] China First Written Submission, para. 191.
[393] *US – Countervailing Duty Investigation on DRAMS (Panel)*, para. 116.
[394] *US – Countervailing Duty Investigation on DRAMS (Panel)*, note 277.
[395] *US – Countervailing Duty Investigation on DRAMS (Panel)*, note 277.

2. China's Failure to Provide Necessary Information Regarding Its Export Restraint Schemes Required That Commerce Apply Facts Available in Making its Determination

317. Article 12.7 of the SCM Agreement provides that, "[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

318. In both the *Seamless Pipe* and *Magnesia Carbon Bricks* investigations, Commerce relied on the facts available to arrive at its determinations to countervail China's export restraints because China did not provide necessary information and significantly impeded Commerce's investigation. Specifically, China declined to respond, claiming that Commerce's questions were "premature" and "irrelevant."

a. *Seamless Pipe*

319. During the course of the *Seamless Pipe* investigation, Commerce asked China about the export restraints it imposed on coke. For example, Commerce sought information to, among other things, understand China's export restraints and the reasons China selected an export quota and export tax to achieve its objectives.[396] Commerce also sought information to help it understand the relationship between the export restrictions and domestic consumption, production, and pricing and, thereby, examine whether China structured the export restraints to provide a financial contribution to downstream industries. Time and again, China either outright refused to answer some questions or failed to reply fully, stating "[t]he questions have no bearing on determining whether the nature of the measures is a subsidy; and the [government of China] believes that it is premature to answer them in the present form"[397] and calling Commerce's questions "irrelevant."[398]

b. *Magnesia Carbon Bricks*

320. In the *Magnesia Carbon Bricks* investigation, Commerce sought information that would help it understand how and why China imposed export restraints on magnesia,[399] about the factors China considered when determining that magnesia should be subject to an export quota,[400] and for information to help Commerce understand whether China structured its export

[396] *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).
[397] *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 Third Supplemental Questionnaire for Export Restrictions on Coke (Apr. 20, 2010) (USA-62).
[398] *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).
[399] *Certain Magnesia Carbon Bricks from the People's Republic of China:* Commerce's Supplemental Questionnaire (Dec. 8, 2009) (USA-64).
[400] *Certain Magnesia Carbon Bricks from the People's Republic of China:* Commerce's Supplemental Questionnaire (Dec. 8, 2009) (USA-64).

restraints to provide a financial contribution to domestic downstream industries.[401] China failed to respond fully to some of Commerce's questions[402] and flatly refused to answer other questions, stating that "it will no longer expend resources answering questions it believes are unwarranted under the SCM Agreement . . . ."[403] and that it "will not respond to the questions posed by [Commerce] with respect to its export restraints investigation."[404]

321. China refused to answer questions that were necessary and relevant to the very issue of whether it affirmatively structured its export restraints to provide a financial contribution or whether the financial contribution was a mere side-effect of China's export restraints. Based on China's refusal to provide requested information, as established above and acknowledged by China,[405] Commerce then relied on facts available under Article 12.7 of the SCM Agreement to determine that China's export restraints on coke constituted a financial contribution to Chinese producers of seamless pipe incorporating coke. Similarly, Commerce relied on facts available under Article 12.7 of the SCM Agreement to determine that China's export restraints on magnesia constituted a financial contribution to Chinese producers of magnesia carbon bricks incorporating magnesia. For the reasons discussed above and in Section XII, Commerce's use of facts available in these instances was not WTO-inconsistent.

D. Conclusion

322. As established above, the United States initiated its investigations into China's export restraints on coke and magnesia consistent with Articles 11.2 and 11.3 of the SCM Agreement. Commerce's decision to initiate investigations into, and ultimately countervail, China's export restraints is supported by a proper interpretation of Article 1.1 of the SCM Agreement. Furthermore, the *US – Export Restraints* panel's *obiter dicta* on whether a hypothetical export restraint as defined for purposes of that proceeding can constitute a financial contribution through entrustment and direction is unpersuasive, and subsequent WTO panel and Appellate Body reports have differed from that panel's interpretation of entrustment or direction. Based on WTO-consistent initiations, Commerce subsequently conducted investigations into China's export restraints on coke and magnesia, but because of China's refusal to provide necessary information, Commerce relied on facts available consistent with Article 12.7 of the SCM Agreement to determine that China's export restraints on coke and magnesia constituted countervailable subsidies. For all of the reasons discussed above, the Panel should find that Commerce's decisions to initiate investigations of China's export restraints on coke and magnesia and Commerce's determinations in these investigations that these export restraints constitute a countervailable subsidy are not WTO-inconsistent.

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[401] *Certain Magnesia Carbon Bricks from the People's Republic of China*: Commerce's Second Supplemental Questionnaire (Feb. 22, 2010) (USA-65).
[402] *Certain Magnesia Carbon Bricks from the People's Republic of China*: Government of China's Response to Commerce's Supplemental Questionnaire (Jan. 5, 2010) (USA-66).
[403] *Certain Magnesia Carbon Bricks from the People's Republic of China*: Government of China's First Response to Commerce's Second Supplemental Questionnaire (March 15, 2010) (USA-67).
[404] *Certain Magnesia Carbon Bricks from the People's Republic of China*: Government of China's Second Response to Commerce's Second Supplemental Questionnaire (March 22, 2010) (USA-68).
[405] *See, e.g.*, China First Written Submission, para. 191.

XII. COMMERCE'S USES OF FACTS AVAILABLE WERE CONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

323. Although China claimed in its Panel Request that "each" use by Commerce of "facts available" across 22 investigations is inconsistent with Article 12.7 of the SCM Agreement,[406] China's first written submission only addresses 48 such instances in 15 of the investigations, representing a fraction of the uses of adverse facts available within the scope of the panel request.[407] Moreover, China provides only a cursory description of two of its 48 alleged Article 12.7 claims, merely listing the remaining 46 instances in an attached exhibit that at best serves to identify China's claims, as China should have done in its Panel Request, with no explanation of the individual allegations. Not only has China failed to make a *prima facie* case with respect to its Article 12.7 claims – because it provides only a cursory discussion of the two claims that it does pursue in its first written submission and no description of the other 46 – but it also advances its arguments based on incorrect interpretations of the SCM Agreement and mischaracterizations of Commerce's determinations. As we demonstrate below, contrary to China's assertions, Commerce made its determinations based on facts available in the face of noncooperation on the part of interested parties in a manner consistent with Article 12.7 of the SCM Agreement.

A. China Has Failed to Make a *Prima Facie* Case With Respect to the Facts Available Determinations in the Challenged Investigations

324. As an initial matter, China has not even attempted to make a *prima face* case in support of the 48 alleged breaches of Article 12.7 of the SCM Agreement. As discussed *supra* at Section III, in order to make a *prima facie* case, China must present adequate legal arguments and adduce sufficient evidence with respect to each of the 48 facts available determinations to raise a presumption that a claim is true. However, aside from attaching an exhibit that provides citations to the location of the challenged facts available determinations and providing a brief description of two instances,[408] China merely advances theoretical arguments about the applicable legal standard and makes broad, conclusory allegations as to what Commerce did across 15 investigations and dozens of uses of facts available, each involving separate facts and circumstances. China has therefore not met its burden with respect to its 48 claims, and it is not for the United States or the Panel to supply the facts and analysis necessary to evaluate these claims. Because China has failed to make a *prima facie* case with respect to any of its 48

[406] *See* Panel Request at note 10; China's Response to the U.S. Preliminary Ruling Request, para. 7; Preliminary Ruling of the Panel, para. 4.5 ("[I]n our view, the panel request is clear that all 'instances' of the use of facts available will be challenged, and China confirms this in its submissions to the panel.").

[407] China First Written Submission, para. 146 & note 135. Despite its clear representation to the Panel that it would be challenging all instances of the use of facts available, China has not done so. For example, just one investigation – *Wire Strand* – involved 14 uses of facts available due to noncooperation. *See Wire Strand* IDM at 8-15, 39-42 (CHI-52). Taking this investigation as an approximation and multiplying across the 22 investigations which were the subject of the Panel Request, there would be as many as 308 instances of facts available. In anticipation of these panel proceedings, it was not feasible for the United States to adequately prepare for the defense of each of the hundreds of alleged Article 12.7 claims, nor was it possible for the United States to guess in advance which instances it should focus on in its preparation of its defense. As a result, the United States continues to object to the overly broad scope of China's "facts available" claim as set out in China's Panel Request.

[408] China First Written Submission, paras. 146-154 & CHI-2.

challenged facts available determinations made by Commerce, the Panel must reject those claims.

B. Commerce's Use of "Adverse Inferences" in Selecting From Among the Available Facts Is Fully Consistent With the SCM Agreement

325. Article 12.7 of the SCM Agreement provides:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

Thus, Article 12.7 allows for an investigating authority to use "facts available" when an interested Member or party fails to provide necessary information, or otherwise significantly impedes the investigation. China's assertion that the SCM Agreement prohibits the use of "adverse inferences" is based on a mischaracterization of how Commerce employs facts available in order to make determinations in countervailing duty investigations when interested parties have not cooperated. In particular, Commerce's uses of "adverse" facts available, or adverse inferences, *are* based on facts, as is described further below in Section XII.C. The "adverse" element is introduced when Commerce decides *which* available facts are appropriate to use when a responding party has provided no verifiable, substantiated information relevant to the determination at hand. As applied in particular determinations, Commerce's uses of "adverse inferences" with respect to "facts available" reflect that Commerce "may use an inference that is adverse to the interests of that party *in selecting from among the facts otherwise available*" if an interested party has failed to cooperate.[409]

326. Because Commerce's application of "adverse" facts available is, by its terms, based on facts available, its use is consistent with Article 12.7 of the SCM Agreement. Article 12.7 enables investigating authorities to make determinations when interested parties and Members have failed to provide necessary information. As the Appellate Body has observed, Article 12.7 is "intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation."[410] Moreover, a recent panel noted that the "facts available mechanism provided for in Article 12.7 of the SCM Agreement means that the work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties."[411] Nothing in Article 12.7 limits the application of facts available to those facts that are favorable to the interests of a Member or interested party who fails to supply information, nor does the ordinary meaning of the term "facts available" speak to *which* facts should be selected. Rather, the application of "the facts available" under Article 12.7 merely provides that an administering authority must apply facts that are "available", including those that are less favorable to an interested Member or party.

327. The AD Agreement provides useful context for the interpretation of Article 12.7 of the SCM Agreement. In particular, the analogous provision in Article 6.8 and Annex II of the AD

[409] *See, e.g., Wire Strand* IDM at 9 (emphasis added) (CHI-52).
[410] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293.
[411] *China – GOES (Panel)*, para. 7.296.

Agreement containing guidance on the application of facts available.[412] Like Article 6 of the AD Agreement, Article 12 of the SCM Agreement as a whole sets out evidentiary rules that apply throughout the course of the investigation.[413] Although the SCM Agreement does not include an Annex to Article 12.7, the Appellate Body has observed, "it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[414]

328. The text of Article 12.7 of the SCM Agreement is nearly identical to that of Article 6.8 of the AD Agreement with the exception of the reference to Annex II.[415] Annex II contains provisions related to the protection of the due process rights of interested parties with respect to the application of facts available and permits an investigating authority to disregard unverifiable submitted information, and to reach a result less favorable to noncooperating parties. In particular, paragraph 3 only provides that an authority "should" take into account "information which is *verifiable*, which is appropriately submitted," and paragraph 5 of Annex II requires an authority to use information provided that is not "ideal in all respects," but only "*provided* the interested party has acted to the best of its ability."[416] Paragraph 3 indicates that investigating authorities may disregard (1) unverifiable information, and paragraph 5 indicates that authorities may disregard (2) non-ideal information, if an interested party has not acted to the best of its ability. In addition, paragraph 7 anticipates that an investigating authority that is relying on information from a secondary source may reach a result "less favourable" to an interested party if that party "does not cooperate and thus relevant information is being withheld" from the authority.[417] Thus, Annex II of the AD Agreement reflects the fact that an investigating authority's ability to rely on facts less favorable to the interests of a noncooperating interested party is inherent in the discretion available under Article 6.8 of the AD Agreement, and by extension, under the identical provision of Article 12.7 of the SCM Agreement. This context provided by Annex II confirms the interpretation which is consistent with the ordinary meaning of Article 12.7 and "facts available" – that the reliance on an adverse inference when selecting from among the facts available, leading to a result that is less favorable to a noncooperating interested party, is not prohibited by that provision.

329. In addition to the ordinary meaning and context of Article 12.7, the practical result of an interpretation that prohibits an adverse inference in selecting from among the facts available demonstrates that this interpretation is incorrect and, instead, that the use of "adverse" facts available is permitted under the SCM Agreement. China appears to argue that when an interested party refuses to cooperate and supply necessary information with regard to a subsidy, the investigating authority must conclude that there is no such subsidy (or that it is not specific).

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[412] *See Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 290-91, 295.
[413] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 292.
[414] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 295.
[415] Article 6.8 of the AD Agreement states "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."
[416] AD Agreement, Annex II, paras. 3 & 5 (emphasis added).
[417] AD Agreement, Annex II, para. 7. *See also US – Hot-Rolled Steel*, para. 99 (discussing paragraph 7 of Annex II of the AD Agreement, and noting that non-cooperation on the part of an interested party may lead to an outcome that is less favorable to the interested party).

Under this interpretation, because determinative evidence often would be in the hands of the investigated industry and the Member country, the industry and relevant Member could refuse to respond, and the investigating authority would not be able to find a subsidy. Such a result would lead to a breakdown of the remedies provided for in the SCM Agreement, particularly with respect to investigations concerning Members whose trade regimes lack transparency.[418]

330. In fact, numerous WTO Members, including China, have interpreted Article 12.7 of the SCM Agreement and enacted specific legislation governing the use of facts available that provides for results that may be less favorable than if the party had cooperated. In particular, Armenia, Brazil, China, the European Union, Japan, Pakistan, Panama, Singapore, Thailand, Turkey, Ukraine, the United States, and most recently Australia, have all enacted specific legislation that provides for the use of adverse inferences or results less favorable where a party does not cooperate in providing the information requested.[419] Other Members whose legislative acts do not directly address the issue have followed the practice of using adverse facts available. For example, in its subsidy investigation of *Certain Aluminum Extrusions Originating In or Exported From the People's Republic of China*, Canada's administering authority, the Canada Border Services Agency, applied an adverse facts available to noncooperative exporters, applying "the highest amount of subsidy (Renminbi per kilogram) found for each of the 15 subsidy programs for the cooperative exporters located in China."[420]

331. China's reliance on the panel's decision in *China – GOES* to argue that Article 12.7 prohibits the reliance on adverse facts available is misplaced.[421] The findings of the *China – GOES* panel must be understood in the context of the facts in that dispute. Specifically, the panel found that China's investigating authority, MOFCOM, had ignored substantiated facts on the record in the application of a 100% subsidy utilization rate and that such a finding "was actually at odds with information on the record suggesting that a lesser rate of utilization should be applied."[422] For these reasons, the *China – GOES* panel concluded that MOFCOM failed "to establish any factual basis" for its facts available determination.[423] Accordingly, the primary

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[418] *See EC – Countervailing Measures on DRAM Chips*, at para. 7.61 ("Article 12.7 of the *SCM Agreement* is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority. If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile.") (citation omitted).

[419] *See* China: "MOFTEC may make its determination of subsidy and the amount of subsidy on the basis of facts available and *draw adverse inferences* with respect thereto." (G/SCM/N/1/CHN/1/Suppl. 1, Art. 21 at pt. 16) (emphasis added); *see also* Armenia (G/SCM/N/1/ARM/1, Art. 41, para 6); Brazil (G/SCM/N/1/BRA/2, Ch. III, Art. 79, sections 1, 7); European Union (G/SCM/N/1/EEC/2, Arts. 28.1, 28.6); Japan (G/SCM/N/1/JPN/2/Suppl.6, Art 12, para. 7); Pakistan (G/SCM/N/1PAK/2, Art. 28(6)); Panama (G/SCM/N/1/PAN/2/Suppl.1, Art. 157); Singapore (G/SCM/N/1/SGP/2/Suppl. 1, Art. 44, para 15); Thailand (G/SCM/N/1THA/4, Arts. 4, 27, 70); Turkey (G/SMC/N/1/TUR/3, Art. 26); Ukraine (G/SCM/N/1/UKR/1, Art. 30, para. 6).

[420] Canada Border Services Agency, *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 People's Republic of China*, para. 259 (Mar. 3, 2009) (USA-81).

[421] China First Written Submission, paras. 141-42.

[422] *China – GOES (Panel),* para. 7.310.

[423] *China – GOES (Panel),* para. 7.310.

issue in front of that panel was the investigating authority's unjustified rejection of substantiated facts on the record in favor of a conclusion that lacked any factual basis, and in fact contradicted what facts were available.[424] As discussed below, in contrast to the determination by MOFCOM, Commerce's determinations were based on a factual foundation and were not contradicted by substantiated facts.

C. Commerce's "Adverse Facts Available" Determinations Are Based on a Factual Foundation

332. China has failed to demonstrate that any of the 48 challenged determinations are not supported by the record evidence in each investigation. In fact, as with other sections of its brief, China barely discusses Commerce's determinations and instead makes broad, unsupported assertions. As discussed above, China's conclusory statements are not sufficient to make its *prima facie* case, and further, in each of the determinations China identifies in exhibit CHI-2, Commerce properly used facts available in order to arrive at its determinations. In particular, when weighing the facts before it, Commerce considered the extent to which China or an interested party cooperated with the agency, and in instances of non-cooperation,[425] reasonably relied on adverse inferences to select from among the facts available and reach a proper determination.

333. In all of the challenged determinations, Commerce relied on facts available, even though in some cases it used an "adverse inference" in selecting from among those facts. The use of an inference is defined as ""[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted."[426] Inferences are, therefore, grounded in facts. In the context of a countervailing duty investigation where a government or foreign producer has refused to cooperate, the facts available may be limited. Nonetheless, the inference that is drawn when adverse facts available are used has a basis in the factual information that is available. Thus, China's argument that the challenged adverse facts available determinations were devoid of a factual basis is simply incorrect.

334. The adverse facts available determination in *Magnesia Carbon* Bricks, discussed *supra* at paragraphs 290-291, demonstrates that China's broad generalizations fail to address the specific facts at issue in each "facts available" determination, and that as a result, China has failed to establish its *prima facie* case. The *Magnesia Carbon Bricks* determination is grounded in "facts available." In that investigation, Commerce requested information from the government of China, as the interested Member, regarding allegations about export restraints on raw materials.

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[424] China also mischaracterizes the U.S. position in *China – GOES*, quoted in part at paragraph 140 of its submission. Like the panel's statements in that dispute, the U.S. answers to questions must be understood in the context of the type of adverse inference that had been drawn by MOFCOM – i.e., one that involved the rejection of substantiated information that was provided by an interested party in favor of a conclusion that lacked any factual foundation whatsoever. *See* US Second Answers in China – GOES (DS414), paras. 38-39 (CHI-118). A further difference between the U.S. position in *China – GOES* and China's position in this dispute is that the United States maintained that the respondents *had cooperated* in the investigation at issue, while China does not challenge Commerce's findings of non-cooperation in the investigations at issue here. *See* China First Submission, para. 144.

[425] China does not contest Commerce's findings of non-cooperation in each of the challenged determinations. *See* China First Written Submission, para. 144.

[426] *Black's Law Dictionary* at 536 (1991) (USA-77).

From the outset, China objected to Commerce's questions with respect to export restraints, and despite the fact that Commerce issued China two supplemental questionnaires, China refused to respond, or respond fully, to Commerce's questions. In one response, China's stated that it "will not respond to the questions posed by [Commerce] with respect to its export restraints investigation."[427]

335. Commerce determined that China failed to cooperate to the best of its ability by refusing to provide information necessary to analyze the alleged subsidy program.[428] Because necessary information was not on the record, Commerce resorted to the facts available and employed an adverse inference in selecting from the facts available, based upon China's non-cooperation.[429] The factual basis that supported Commerce's adverse facts available determination in *Magnesia Carbon Bricks* included at least four sources of information: an industry study, an expert opinion, minutes of a meeting of successful bidders, and China's inability, or refusal, to provide any information rebutting this evidence.[430]

336. Based on these facts, Commerce made the determination that China was restraining the export of magnesia. China does not contest the fact that it failed to cooperate with respect to this determination, or any others. Nor does China dispute the fact that Commerce did not have determinative evidence regarding the existence of the subsidy *precisely because* China refused to provide the requested information, despite having been given multiple opportunities to do so. China's sole argument, that there was no factual basis for Commerce's determination, must fail because there were at least four sources of information on which Commerce's adverse facts available determination was based.

337. Contrary to China's argument, Commerce's adverse facts available determinations in *Line Pipe* and *OCTG* were similarly grounded in "facts available." In both investigations, Commerce did not have definitive evidence regarding the existence of the subsidy precisely because China failed to cooperate either by refusing to provide the requested information or by submitting unverifiable information.[431] Because necessary information was not on the record, Commerce resorted to the facts available and employed an adverse inference in selecting from the facts available, based upon China's noncooperation. Similar to *Magnesia Carbon Bricks*, the factual basis that supported Commerce's adverse facts available determinations in *Line Pipe* and *OCTG* included information from the application[432] and the fact that China failed to provide the requested information.

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[427] *Certain Magnesia Carbon Bricks from the People's Republic of China*: Government of China's Second Supplemental Questionnaire Response at 19 (Mar. 22, 2010) (USA-69).
[428] *Magnesia Carbon Bricks* IDM at 12-13 (CHI-59).
[429] *Magnesia Carbon Bricks* IDM at 12-13 (CHI-59).
[430] *See supra* at paras. 290-291.
[431] *Line Pipe* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation at 3-7, 19 (Nov. 17, 2008) (CHI-19); *OCTG* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation at 3-4, 58 (Nov. 23, 2009) (CHI-45).
[432] *Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China and the Republic of Korea*: Petition for the Imposition of Antidumping and Countervailing Duties at 103-05 (Apr. 3, 2008) (USA-75); *Certain Oil Country Tubular Goods from the People's Republic of China*: Petition for the Imposition of Antidumping and Countervailing Duties at 81-85 (Apr. 8, 2009) (USA-76).

338. The examples provided by *Magnesia Carbon Bricks*, *OCTG*, and *Line Pipe* illustrate that China has mischaracterized Commerce's facts available determinations and failed to establish a *prima facie* case. Further, they demonstrate that Commerce does in fact comply with the requirements of Article 12.7, as articulated by the Appellate Body in *Mexico – Rice*, regarding the use of "facts available":

> First, such recourse is not a licence to rely on only part of the evidence provided. *To the extent possible*, an investigating authority using the "facts available" in a countervailing duty investigation must take into account all the *substantiated* facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. Secondly, the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources.[433]

339. A further flaw in China's arguments is that it fails to identify what Commerce *should* have relied on in making its determinations, or any substantiated facts that contradict Commerce's determinations, as existed in the facts at issue in *China – GOES*. China's allegations beg the question: what "facts available" would it have been appropriate for Commerce to look to? As noted above, it appears that China would argue that, in the face of noncooperation, an investigating authority must make the inference *in favor* of the noncooperating party and find that there is no subsidy, or that it is not specific. Under this interpretation, interested Members and parties would have no incentive to cooperate by providing the necessary information to the investigating authority, and would in fact be rewarded for noncooperation with a favorable finding. Such a result would not only "render Article 12.7 of the SCM Agreement meaningless and inutile"[434] but would also "hinder an agency's investigation."[435] That cannot be the proper interpretation of the SCM Agreement. Rather, as demonstrated above, Article 12.7 of the SCM Agreement provides for the application of facts that may be unfavorable or adverse to the interests of parties who do not cooperate in the proceeding.

340. For these reasons, the Panel should reject China's arguments that the United States acted inconsistently with its obligations under Article 12.7 of the SCM Agreement.

XIII. CONCLUSION

341. For the foregoing reasons, the United States respectfully requests that the Panel reject China's claims.

[433] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 294 (emphasis added).
[434] *EC – Countervailing Measures on DRAM Chips*, para. 7.61.
[435] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293.