European Union – Countervailing Duties on Imports of Biodiesel from Indonesia

(WT/DS618)

RESPONSES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL TO THIRD PARTIES FOLLOWING THE FIRST SUBSTANTIVE MEETING

October 28, 2024

TABLE OF REPORTS

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China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – HP-SSST (AB)	Appellate Body Reports, *China - Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan and the European Union*, WT/DS454/AB/R;WT/DS460/AB/R adopted 28 October 2015
EC – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
EC – Tube or Pipe Fittings (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
Egypt – Steel Rebar (Panel)	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002

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Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
Mexico – Anti-Dumping Measures on Rice (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Coated Paper (Indonesia)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R, and Add.1, adopted 22 January 2018
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001

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US – Large Civil Aircraft (Second Complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, WT/DS353/AB/R, adopted Mar. 23, 2012
US – Softwood Lumber IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Softwood Lumber VI (Panel)	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004
US – Supercalendered Paper (Panel)	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add. 1, circulated 5 July 2018
US – Tyres (China) (AB)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011
US – Upland Cotton (Panel)	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R

TABLE OF EXHIBITS

Exhibit No.	Description
USA-04	Additional Definitions from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.) (excerpts)

1. In paragraph 7 of its oral statement, Canada acknowledges that where a financial contribution is a grant, the benefit will normally equal the amount of the grant. However, Canada submits that such reasoning may not apply where there is a direct transfer of funds conditioned on the provision of a good and the funds only account for a part of the total remuneration for that good. Canada states that the benefit calculation must therefore consider the total remuneration received by the recipient to properly assess whether in the absence of the financial contribution, the recipient is truly better off than it otherwise would be.

a. Does Canada's proposed approach require that the government providing the transfer of funds take title to the good in question?

b. If not, what is the basis for undertaking the benefit calculation suggested above by Canada when the goods in question are not directly supplied to the government?

c. If the funds provided are to facilitate the transaction for the provision of goods, but the government does not acquire the goods, how does that affect the benefit calculation suggested above?

U.S. Response:

1. The United States does not agree with Canada's position that the calculation of the benefit conferred by a grant should necessarily take into account the remuneration received from the separate provision of a good.[1] As relevant here, Article 1.1 of the SCM Agreement states that a subsidy exists when a government practice involves a direct transfer of funds, such as a grant, and a "benefit is *thereby* conferred".[2] The use of the word "thereby" in Article 1.1(b) indicates that the benefit at issue is the benefit conferred by the government's direct transfer of funds, or grant. A separate transaction involving the provision of a good by the recipient of the grant to another entity is not relevant, given the linkage in Article 1.1 of the benefit "thereby conferred" to the financial contribution listed immediately above.

2. Nor does Article 14 of the SCM Agreement support Canada's interpretation. Article 14 provides for the "calculation of the amount of a subsidy in terms of the benefit to the recipient." Although the guidelines in Article 14 of the SCM Agreement enumerate instances which shall not be considered as conferring a benefit, Article 14 lacks any "guideline" for a direct transfer of funds in the form of a grant. In the absence of any such text, a grant simply bestows a benefit to the recipient.

3. Previous panels have reached the same interpretation, including the panel in *EC –Large Civil Aircraft*, which reasoned that "where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same."[3] Accordingly, when the

[1] Canada's Third Party Oral Statement, para. 7.
[2] SCM Agreement, Article 1.1(b) (emphasis added).
[3] *See EC – Large Civil Aircraft (Panel)*, para. 7.1969, n. 5724.

direct transfer of funds is a grant, the amount of the financial contribution is the same as the amount of the benefit.

4. Indeed, the series of questions above concerning the implications of Canada's position in its oral statement reveals why Canada's position is problematic. That is, Canada suggests that the total remuneration received by the grant recipient from different sources in different transactions should be considered in the calculation of a separate transaction, that is, the grant. However, the fact that grant recipients may provide goods to petrofuel entities – not the government – supports the analysis that there are two separate transactions at issue: one concerning the grant recipients' provision of goods to petrofuel entities, and the other concerning the government's provision of funds to the grant recipient. To the extent that the provision of goods to the petrofuel entities is a condition for the receipt of the grant, as discussed further in the U.S. response to question 2, a condition does not preclude a transfer of funds from being considered a grant.

2. In paragraphs 12-16 of its oral statement, the United Kingdom submits that a condition attached to a payment does not preclude the payment from being a grant but argues that an assessment must be made as to whether the condition amounts to an "equivalent exchange" for the value of the grant.

a. Do we understand the United Kingdom's position (oral statement, paragraph 16) correctly to be that the condition to receive the OPPF payment is to provide documentation demonstrating the sale of biofuel, on market terms, to petrofuel entities, and if so, do you agree?

b. Should the fulfillment of this condition be considered in the assessment of an "equivalent exchange" by reference to the costs involved to supply the biofuel to the purchasing petrofuel entity?

U.S. Response:

5. With respect to part (a) of the question, the United States defers to the United Kingdom to explain its position in paragraphs 12 through 16 of its oral statement. Nonetheless, the United States observes that the EU details from paragraphs 59 through 62 of its first written submission the factual basis for its determination to conclude that the OPPF disbursements were considered grants. Relevant here, the EU cites to Article 18(5) of the Presidential Regulation No 61/2015, which details the requirements for biodiesel producers to obtain OPPF disbursements.[4]

6. With respect to part (b) of the question, the Panel appears to ask if a particular analytical approach proposed by a third party should apply as a general rule. A panel need not decide such

[4] EU's First Written Submission, para. 62 n. 81.

a question in order to make an "objective assessment of the matter before it," including an objective assessment of "the applicability of and conformity with the covered agreements" under Article 11 of the DSU. The United States does not consider the inquiry concerning "equivalent exchange" to be informative in the case at hand. The United Kingdom purports to generate the concept of "equivalent exchange" from the definition of "gift," a term used in the definition of "grant." However, the United States does not observe the phrase, "equivalent exchange" in the definition of "gift," either in the online version of the Oxford English dictionary provided by the United Kingdom,[5] or in the 1993 version of *The New Shorter Oxford English Dictionary*.[6] Rather, "gift" is defined as "giving," "the action or an act of giving," or "the voluntary transference of property without anything in return".[7] The concept of "equivalence" does not appear in the definition of "gift," and accordingly this line of inquiry is not of use to the analysis in this dispute. Rather, the question before the Panel is whether an unbiased and objective investigating authority could have reached the determination that the transfer of funds at issue was a grant, particularly where conditions were present for the bestowal of funds.

7. Both Japan and the United Kingdom have argued that conditions attached to a payment do not necessarily preclude it from being a grant.[8] The United States agrees with this view. The ordinary meaning of the term "grant" includes "a formal gift or legal assignment of money, privilege, etc.," or "the thing granted; *esp*. a sum of money given for a specific purpose".[9] Notably, then, the ordinary meaning of the term "grant" considers that money may be "given for a specific purpose" – that is, a condition.

8. The reasoning in *US – Large Civil Aircraft (2nd Complaint)* supports this interpretation. There, the report observed that, "[g]rants can take many forms. Some conditional grants, for example, require the recipient to use the funds for a specific purpose."[10]

9. Accordingly, the attachment of conditions to a payment of funds does not preclude an objective and unbiased investigating authority from reaching the conclusion that the transfer of funds is a grant within the meaning of Article 1.1(a)(1) of the SCM Agreement.

3. Is there a legal obligation in the SCM Agreement under which the European Commission would be required to offset or adjust the amount of benefit of the OPPF

[5] United Kingdom's Third Party Oral Statement, para. 16 n. 10.
[6] Definition of "gift" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1088 (Exhibit USA-04).
[7] Definition of "gift" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1088 (Exhibit USA-04).
[8] Japan's Third Party Oral Statement, paras. 5-6; Japan's Third Party Submission, paras. 6-9; United Kingdom's Third Party Oral Statement, para. 17.
[9] Definition of "grant" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1131 (Exhibit USA-01).
[10] *US - Large Civil Aircraft (Second Complaint) (AB)*, para. 617 n. 1292.

payments to take into account that export levies may have been paid by recipients of the OPPF funds? Should the situation be analyzed any differently than the payment of any other governmental tax or compliance with any other governmental fiscal measure?

U.S. Response:

10. No, there is no obligation in the SCM Agreement under which an offset or adjustment to the benefit of a grant is required. As discussed above in the U.S. response to question 1, Article 1.1(b) and Article 14 of the SCM Agreement contain the relevant provisions in assessing benefit. Nothing in the text of Article 1.1(b) or Article 14 requires an investigating authority to offset or adjust the amount of the benefit conferred by a grant such as the OPPF payments. Rather, as explained above, Article 1.1(b) of the SCM Agreement simply sets forth that a benefit must be conferred by the grant in question in order for a subsidy to exist. Article 14 does not provide any prescriptions regarding the calculation of the benefit in situations where the financial contribution takes the form of the grant. In the absence of any guideline, the benefit for a grant is simply the full amount of the financial contribution.

11. Although there is no legal obligation in the SCM Agreement to apply an offset or adjustment for a grant program, in this instance, the export levies, a Member may have national legislation or implementing regulations which provide for the calculation of a benefit to the recipient including offsets or adjustments for certain fees, payments or taxes.[11] In such cases, the investigating authority may follow the method prescribed by national legislation or regulations so long as the method is not inconsistent with a Member's WTO obligations, as informed by the guidelines found in subparagraphs (a) though (d) of Article 14.

12. Finally, the United States does not consider that the provisions of Articles 1.1(b) and 14 of the SCM Agreement should be analyzed in a different manner in the case of other governmental tax or fiscal measures. That is, the method for assessing benefit from a governmental tax or fiscal measure should not be inconsistent with the guidelines provided under Article 14.

4. The Commission's findings of *de jure* specificity in relation to the OPPF as well as in relation to the alleged provision of CPO for less than adequate remuneration refer to the *palm oil value chain* as the entities to which the alleged subsidies were specific (see recitals 73 and 202, Provisional Regulation, Exhibit IDN-1). In this regard, the Commission referred to the observation of the panel in *US – Upland Cotton* that the certain enterprises to which a subsidy is specific "may be generally referred to by the type of products that they produce".

[11] SCM Agreement, Article 14 ("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.").

(Recital 186, Definitive Regulation, Exhibit IDN-2). Please explain whether an investigating authority can properly identify the "certain enterprises" to which the subsidy is specific by referring to *an input consumed* by the enterprises at issue (in this case CPO). In this context, please also comment on the findings set out in paragraph 7.121 of the panel report in *US – Softwood Lumber IV*.

U.S. Response:

13. Article 1.2 of the SCM Agreement provides that a subsidy may be subject to countervailing measures only if it "is specific in accordance with the provisions of Article 2." Article 2.1 of the SCM Agreement sets out guiding principles to determine whether a subsidy is "specific" to "an enterprise, industry, or group of enterprises or industries," referred to in the SCM Agreement as "certain enterprises."[12] This text establishes that a subsidy may be specific where the recipient "enterprise" or "industry" is known or can be discerned, or a "group of enterprises or industries" is known or can be discerned.

14. The inquiry whether a subsidy is specific to certain enterprises is guided by "principles" articulated in subparagraphs (a) through (c) of Article 2.1. Relevant here, Article 2.1(a) identifies circumstances in which a subsidy is *de jure* specific. Specifically, Article 2.1(a) states, "[w]here 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."

15. For the reasons discussed below, the text of Article 2.1 supports an interpretation that an investigating authority may properly identify the "certain enterprises" to which the subsidy is specific by referring to an input consumed by the enterprises at issue.

16. First, in Article 2.1(a), the term "explicitly" modifies "limits." The term "explicitly" is defined as "distinctly expressing all that is meant; leaving nothing merely implied or suggested; unambiguous; clear."[13] Article 2.1(a) thus identifies a situation in which the granting authority limits in a clear and unambiguous manner *the access* to a subsidy to certain enterprises. Nothing in the text indicates that the "certain enterprises" have to be "explicitly" identified in any manner. In other words, a subsidy can be *de jure* specific without explicitly referencing eligible industries or enterprises by name.[14]

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[12] SCM Agreement, Art. 2.1. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 364.
[13] Definition of "explicit" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 888 (Exhibit USA-04). *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 372.
[14] *See also US – Carbon Steel (India) (AB)*, para. 4.365*; US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 373.

17. Second, the definition of "certain enterprises" also supports the interpretation that an investigating authority may identify them by referring to an input consumed by the enterprises at issue. As discussed above, the chapeau of Article 2.1 defines the term "certain enterprises" as "an enterprise or industry or group of enterprises or industries." The term "enterprise" means "[a] business firm, a company,"[15] and term "industry" means "[a] particular form or branch of productive labour; a trade, a manufacture."[16] Therefore, an enterprise or industry may be defined by its production of a particular product or its business activities in connection with that product. Likewise, an enterprise or industry within the meaning of Article 2.1 may also be defined in relation to the input consumed for the same reasons. Indeed, typically any reference to a group of industries or enterprises invariably includes a reference to the product, production, or business activities that they have in common.

18. The reasoning in prior panel reports also supports this interpretation. The panel in *US – Upland Cotton* reasoned that an industry, or group of industries, "may be generally referred to by the type of products they produce" and that "the concept of an 'industry' relates to producers of certain products."[17] Likewise, the panel report in *US – Softwood Lumber IV* similarly recognized that a group of enterprises or industries can be limited by the input product consumed by those enterprises or industries – in that case, standing timber.[18]

19. Therefore, depending on the facts of a case, an investigating authority can properly identify the "certain enterprises" to which the subsidy is specific by referring to the input consumed by the enterprises at issue. Ultimately, this is a fact specific determination.

5. Would the exercise of "free choice" by actors in the market, such as the choice for a CPO producer to sell CPO to biodiesel producers, but also to producers of other downstream products, or to export CPO, preclude a finding of direction or entrustment? Please explain what circumstances would be relevant to establish that free choice would not preclude such a finding.

[15] Definition of "enterprise" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 828 (Exhibit USA-04).
[16] Definition of "industry" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 1, p. 1356 (Exhibit USA-04).
[17] *US – Upland Cotton (Panel)*, para. 7.1142.
[18] *US – Softwood Lumber IV (Panel)*, para. 7.121. Although the specificity determination at issue in *US – Softwood Lumber IV* was made under Article 2.1(c) of the SCM Agreement, the term "certain enterprises" appears in both Articles 2.1(a) and 2.1(c), and therefore, is relevant to the issue here.

U.S. Response:

20. No, the exercise of "free choice" by actors in the market does not in and of itself preclude a finding of entrustment or direction. Such an interpretation would be contrary to the ordinary meaning of the terms "entrusts or directs" in Article 1.1(a)(1)(iv) of the SCM Agreement.

21. As the United States explained in its third party submission, "entrust" is defined, in relevant part, as "[i]nvest with a trust; give (a person, etc.) the responsibility for a task . . . [c]ommit the . . . execution of (a task) to a person."[19] This definition encompasses a range of actions. The word "entrust" implies that a degree of discretion is given to the person being entrusted. It is not necessary that the government spell out in minute detail how the task is to be carried out. Rather, the ordinary meaning of "entrust" captures situations in which the government leaves a certain amount of responsibility to the private body that is entrusted.

22. The definition of "direct" likewise also includes a wide range of actions that are not limited to commanding a person or entity to do something in particular. The definitions include, "Give authoritative instructions to; to ordain, order (a person) *to do*, (a thing) *to be done*; order the performance of, Regulate the course of; guide with advice," "Inform or guide (a person) as to the way; show or tell (a person) the way (to);" and "govern the actions ... of."[20]

23. Therefore, an interpretation that would preclude a finding of entrustment or direction as a result of the presence of so-called "free choice" by actors in the market would be contrary to the element of discretion in the meaning of "entrust" and the element of inform or guide in "direct."

24. Lastly, the United States observes that Canada's third party submission relied upon the panel report in *US – Supercalendered Paper*, for the finding, "the freedom of choice of market actors contradicts the existence of control".[21] However, the reliance on *US – Supercalendered Paper* as an example is misplaced and does not support a conclusion that the presence of "free choice" by market actors effectively extinguishes any finding of entrustment or direction. As discussed, the text of Article 1.1(a)(1)(iv) does not support an interpretation that would preclude a finding of entrustment or direction simply because of the presence of "free choice". While a government may entrust or direct by compelling behavior, a private actor may also retain discretion. For example, a private actor may be entrusted or directed to support a particular recipient or recipients *if* the private actor takes the step to *choose* to support any recipient or to engage in a type of transaction.

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[19] Definition of "entrust" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 831 (Exhibit USA-01).
[20] Definition of "direct" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 679 (Exhibit USA-01).
[21] Canada's Third Party Submission, para. 36 (citing *US – Supercalendered Paper (Panel)*, para. 7.64).

25. Second, *US – Supercalendered Paper* concerned a determination of entrustment or direction that primarily relied upon a singular piece of evidence for a finding of entrustment or direction.[22] Here, in contrast, the EU has detailed multiple elements that support its determination of entrustment or direction.[23]

26. Ultimately, a finding of entrustment or direction is a fact specific determination that should be made on a case-by-case basis. The presence of "free choice" does not in and of itself preclude a finding of entrustment or direction. To find otherwise would be contrary to the ordinary meaning of "entrusts or directs" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.

6. Can a set of measures taken by a government that provides *inducements* to a private body amount to an entrustment or direction for the purposes of Article 1.1(a)(1)(iv) of the SCM Agreement? Would the position be different if the set of measures provides an *incentive* to a private body?

U.S. Response:

27. This question appears to presume that these terms have a legal significance of their own; however, these terms reflect a characterization of specific facts that may or may not be relevant in the abstract. Certainly, either a set of measures taken by a government that provides inducements or incentives to a private body could be a basis for a determination of entrustment or direction. This is because a determination of entrustment or direction is a fact specific inquiry made on a case-by-case basis. Neither factor would preclude a finding of entrustment or direction.

28. The reasoning in *US – Countervailing Duty Investigation on DRAMS* illustrates this view. The report observed that, "[i]n most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction."[24] The report next went on to state, "[t]he determination of entrustment or direction will hinge on the particular facts of the case".[25] In other words, the means of entrustment or direction are not determinative.

29. Therefore, it is possible for either inducements or incentives by the government to be a basis for a determination of entrustment or direction. The inquiry for the Panel is to determine whether an objective and unbiased investigating authority could have properly reached the

[22] *US – Supercalendered Paper* (*Panel*), paras. 7.58, 7.62. The panel report in *US – Supercalendered Paper* has not yet been adopted by the DSB.
[23] EU's First Written Submission, paras. 267-273.
[24] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.
[25] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

determination before it based on the evidence that was available – evidence that may include measures that provide inducements and/or incentives to a private body.

7. Is actual past practice the only basis upon which to conclude that a function is "normally vested in the government"? If not, is it a relevant consideration? If actual past practice is not determinative, is it necessary that the practice is a permissible governmental function within the legal order of the particular government?

U.S. Response:

30. No, actual past practice is not the only basis upon which to conclude that a function is "normally vested in the government" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. Although actual past practice may be *a* relevant consideration, it is not determinative. Nor is it necessary for the practice to be a permissible governmental function within the legal order of the particular government at issue.

31. This is because the text of Article 1.1(a)(1)(iv) does not support such an interpretation. Specifically, Article 1.1(a)(1)(iv) refers to "one or more of the type of functions … which would normally be vested in the government."[26] Article 1.1(a)(1)(iv) does not refer to one or more of the type of functions which are vested in the government. The use of the term "would normally be" instead of the term "are" indicates that it is not necessary to establish that the government alleged to have entrusted or directed a private body actually performs or has performed the precise function carried out by the private body. Rather, it is sufficient to demonstrate that the government normally would perform that type of function.

32. The use of the phrase, "in no real sense, differs from the practices normally followed by governments" at the end of Article 1.1(a)(1)(iv) further supports the rejection of the question's premise. That is, the phrase "in no real sense" suggests that the practice of a private body need not necessarily be identical to a practice of the particular government at issue or even the practices normally followed by governments.

33. Therefore, a determination of entrustment or direction may involve consideration of both the types of functions that "*would* normally be vested in the government" alleged to have entrusted or directed a private body, and also the "practices normally followed by governments" other than that government. That is, while actual past practice and government functions within the legal order of a particular government may be relevant, such findings are not required to reach a determination of entrustment or direction. Ultimately, determinations of entrustment or direction will hinge on the particular facts of the case at issue.

[26] SCM Agreement, Art. 1.1(a)(1)(iv) (underline added).

8. The Appellate Body in *China – HP-SSST (EU)* noted at paragraph 5.180 of its report that, in establishing price undercutting, an investigating authority is to take into account "all relevant evidence *including, where appropriate, the relative market share of each product type*." (emphasis added). The Appellate Body disagreed with the panel "that [the investigating authority] was not required to assess the significance of price undercutting by the dumped imports in relation to 'the proportion of domestic production for which no price undercutting was found'". Can the price undercutting be "significant", where it results from the comparison of the prices of the imported product with the prices of 20% of the domestic producers' sales? What considerations determine the significance of price undercutting in such circumstances? Does the significance relate to the price undercutting margin or to the relative market shares, or both?

U.S. Response:

34. As an initial matter, the United States notes that this question appears to start with an assertion by the Appellate Body about an approach a Member "is to take", but does not appear to contain any reference to the relevant text of the SCM Agreement. Prior statements by the Appellate Body do not serve as the relevant starting point for an examination of conformity with the covered agreements.

35. The second sentence of Article 15.2 of the SCM Agreement provides:

> With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree.

36. Therefore, Article 15.2 explicitly recognizes three ways in which subject imports can have an effect on prices: through undercutting, through price depression, or through price suppression. Read in conjunction with Article 15.1 of the SCM Agreement, investigating authorities must also ensure narrow comparability between the domestic and subject products for which prices are being examined, namely by comparing products that are sold at the same levels of trade (or in this case, through similar channels of distribution), and by making adjustments where required to reflect any material differences.[27]

37. Further, for purposes of Article 15.2, the obligation for investigating authorities to "consider" whether there has been a significant price undercutting by the subject imports or whether the effect of such imports is otherwise to depress prices to a significant degree or to

[27] *China – GOES (AB)*, para. 200.

prevent price increases, which otherwise would have occurred, to a significant degree does not require an authority to make a definitive determination.

38. Relevant here, the phrase "price undercutting" is qualified by the adjective "significant," which the dictionary defines, in part, as "important, notable; consequential."[28] The term "price undercutting" requires an investigating authority to undertake a "dynamic assessment of price developments and trends in the relationship between the prices of the [subsidized] imports and those of domestic like products over the duration of the POI," whereas the qualifier "significant" requires an assessment of the "magnitude" of any price undercutting.[29] The plain text of Article 15.2 thus requires that an investigating authority consider whether there has been a significant, *i.e.*, "important, notable, consequential," undercutting by the subsidized imports.

39. The United States observes that Article 15 of the SCM Agreement does not prescribe a particular methodology or mandatory set of factors to be considered in an undercutting analysis by the investigating authority. In the context of an undercutting analysis, Article 15.2 directs an investigating authority to examine whether subject imports significantly undercut the prices of like domestic products. It does not impose specific obligations on how an investigating authority must conduct an undercutting analysis, nor prescribe a particular methodology or set of factors that must apply in such an analysis.

40. Determining whether price undercutting is "significant" is a fact intensive and case-specific inquiry. Neither the specific level of undercutting nor the relative market share necessarily dictate whether undercutting is "significant" under the circumstances of a particular case. In some investigations, undercutting trends may be significant; in other investigations, the sheer number of comparisons in which undercutting is present may be probative.

41. Moreover, there can be significant price effects under Article 15.2 of the SCM Agreement even if there is not any, let alone significant, undercutting. Indeed, with regard to the overall examination of the effects of subsidized imports for the purposes of examining whether there has been price depression or suppression, and the role of any price undercutting in depressing or suppressing domestic prices, it is fair to say this examination should encompass a "dynamic assessment of price developments and trends."[30] In performing such an assessment, an investigating authority may ascertain whether subject imports depressed or suppressed domestic like product prices to a significant degree, or whether subject import underselling led to a shift in market share from the domestic industry to subject imports. Factors other than underselling – for

[28] Definition of "significant" from *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993, 4th ed.), Volume 2, p. 2860 (Exhibit USA-04).
[29] *China – HP-SSST (AB)*, para. 5.161.
[30] *China – HP-SSST (AB)*, para. 5.159 (examining under AD Agreement but same rationale applies to SCM Agreement).

example, the existence of a "cost-price squeeze"[31] or evidence from purchasers confirming declines or foregone increases in prices offered by domestic producers in response to subject import competition – may also be used to demonstrate that subject imports significantly depressed or suppressed prices of the domestic like product irrespective of the undercutting margin or relative market share.

9. Is it permissible to rely on post-POI information in a threat of injury determination, and what is its probative value?

U.S. Response:

42. In making a threat of injury determination, an investigating authority has discretion to determine whether the degree to which particular record evidence, including post-POI information, is probative. While investigating authorities have discretion in how they weigh evidence, any analysis of the data must conform with the "positive evidence" and "objective examination" standards specified in Article 15.1. Indeed, the term "positive evidence" relates to "the quality of the evidence that an investigating authority may rely upon in making a determination, and requires the evidence to be affirmative, objective, verifiable, and credible."[32]

43. The text of Article 15.7 does not require an investigating authority to afford particular probative value to data referring to the entire period of investigation or any part thereof, including the most recent part or, by logical extension, post-POI record evidence.[33] An investigating authority's analysis must likewise conform with the standards of Article 15.5, which requires an authority to examine "all relevant evidence" before it.[34] An investigating authority may focus its analysis on a particular part of the period of investigation, including, by extension, post-POI, provided that there is a reasoned and justifiable reason to do so.[35] However, nothing in Articles 15.1, 15.5, and 15.7 specifically requires an investigating authority to do so.

44. The United States further observes that a threat determination necessitates making projections about the imminent future. While events that occurred during the period of

[31] A "cost-price squeeze" could be demonstrated where, due to subject import pricing, producers are unable to raise prices sufficiently to cover rising costs. *See, e.g., US – Tyres (China)* (AB), paras. 242-245 (example of assessment of "cost-price squeeze" in safeguards case under protocol of accession); *China – GOES (Panel)*, para. 7.546 (example of reliance on changes in the price-cost ratio to find price suppression in AD investigation).
[32] *China – GOES (AB)*, para. 126 (citing *US – Hot-Rolled Steel (AB)*, para. 192).
[33] *See EC – Tube or Pipe Fittings (Panel)*, para. 7.277.
[34] *See also Mexico – Anti-Dumping Measures on Rice (AB),* para. 188 (examining identical provision under Article 3.5 of the AD Agreement); *Mexico – Anti-Dumping Measures on Rice (Panel),* para. 7.787 (same).
[35] *See China – Broiler Products*, para. 7.195 (examining under the AD Agreement, but the same rationale applies to the SCM Agreement); *US – Coated Paper (Indonesia)*, para. 7.240; *Mexico – Anti-Dumping Measures on Rice (AB),* paras. 180-82 (same).

investigation inform an investigating authority's analysis of threat of material injury, those events do not necessarily limit the scope of projections regarding the imminent future.

45. The reasoning of prior panels also agrees with this interpretation. The panel in *Mexico – Corn Syrup* reasoned that "the investigating authorities will necessarily have to make assumptions relating to 'the occurrence of future events' since such *future* events 'can never be definitively proven by facts.'"[36] Further, the panel in *US – Coated Paper (Indonesia)* reasoned that "events that took place during the POI provide the background against which an investigating authority can evaluate the likely future events, but do not limit the scope of projections that the authority may make concerning future events."[37]

46. Lastly, the United States recalls the standard of review that applies to this dispute. In making its objective assessment under Article 11 of the DSU, the panel is not undertaking a *de novo* evidentiary review nor serving as "*initial trier of fact*," but is instead reviewing the action of the investigating authority to examine whether its determination was objective and based on positive evidence.[38] Accordingly, the Panel's task in this dispute is not to assess for itself the probative value or importance of certain data considered by the investigating authority, but rather whether the Commission properly established the facts and evaluated them in an unbiased and objective manner. Even if the Panel might have reached different conclusions regarding the probative value or importance of certain data, its task in this dispute still remains the same: to determine whether a reasonable, unbiased investigating authority, looking at the same evidentiary record as the Commission, could have – not would have – reached the same conclusions that the Commission reached.[39]

10. Under Article 15.7 of the SCM Agreement, "[t]he change in circumstances which would create a situation in which the subsidy would cause injury must be *clearly foreseen and imminent*" (emphasis added). At paragraph 612 of its first written submission, the European Union argues that "nothing in the text of the provision under analysis, prevents that the changes of circumstances has, in fact, already occurred." Can the event that already took place during the period of investigation represent a "change in circumstances" which is "clearly foreseen and imminent"?

[36] *Mexico – Corn Syrup*, para. 85 (examining under AD Agreement but same rationale applies to the SCM Agreement).
[37] *US – Coated Paper (Indonesia)*, para. 7.277.
[38] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 ("it is well established that the Panel must not conduct a *de novo* evidentiary review, but instead should 'bear in mind its role as *reviewer* of agency action' and not as '*initial trier of fact*'" (italics in original)).
[39] *See, e.g., US – Supercalendered Paper (Panel)*, para. 7.150; *US –Coated Paper (Indonesia),* para. 7.61, 7.83, 7.113, 7.193.

U.S. Response:

47. Yes, an event that occurred during the POI may represent a "change in circumstances" which is "clearly foreseen and imminent." Nothing in the text of Article 15.7 requires otherwise. Indeed, Article 15.7 merely requires for a threat of material injury to be based on "facts and not merely on allegation, conjecture or remote possibility." Further, a "change in circumstances" may "encompass a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports."[40] The fact that an event that occurred during the POI may represent the "change in circumstances" is also logical given that to determine whether there has been a change in circumstances, an investigating authority would have to first understand the starting point – that is, what has already occurred or what is occurring.

48. The reasoning in prior panels also supports this interpretation. The panel in *Egypt – Steel Rebar* reasoned that "it would seem necessary, in order to assess the likelihood that a particular change in circumstances would cause an industry to begin experiencing present material injury, to know about the condition of the domestic industry at the outset."[41] The panel in *U.S. – Softwood Lumber VI* likewise found that the investigating authority's discussion of the present condition of the domestic industry and the present impact of imports were part of its assessment concerning the "progression" of circumstances which would create a situation in which injury would occur in the near future.[42] Thus, an investigating authority's demonstration that adverse trends are likely to continue into the imminent future, resulting in injury, is sufficient to satisfy the "change in circumstances" language under Article 15.7. Further, such information may be based on events that occurred during the POI.

49. Importantly, an investigating authority is not limited to projections that reflect a continuation of trends that occurring during the POI. As the panel in *US – Coated Paper* recognized, "events that took place during the POI provide the background against which an investigating authority can evaluate the likely future events, but do not limit the scope of projections that the authority may make concerning future events."[43]

11. At recital 159 of the Definitive Regulation, the Commission noted:

> **[T]he questionnaires to independent CPO suppliers were part of the questionnaire addressed to the GOI, and therefore the responsibility to**

[40] *US – Coated Paper (Indonesia)*, para. 7.263.
[41] *Egypt – Steel Rebar (Panel)*, para. 7.91.
[42] *US – Softwood Lumber VI (Panel)*, para. 7.60.
[43] *US – Coated Paper (Indonesia)*, para. 7.277 (internal citations removed).

coordinate, collect and ensure the timely sending of complete replies lied entirely on the GOI.

In this regard, did the failure of the GOI to ensure the submission of information concerning entities unrelated to the GOI provide the Commission with a valid basis for resort to facts available under Article 12.7 of the SCM Agreement? In this context, please also comment on the findings of the Appellate Body set out in paragraph 105 of the Appellate Body Report in *US – Hot Rolled Steel* (DS184).

U.S. Response:

50. Please see the U.S. response to question 12, below.

12. In the first substantive meeting of the Panel with the parties, the European Union indicated that CPO suppliers unrelated to the GOI were not recognized by the Commission as "interested parties" in the sense of Article 12.9 of the SCM Agreement. At the same time, in recitals 120 and 148 of the Definitive Regulation, the Commission referred to "the lack of cooperation of CPO suppliers" as a part of the basis for the Commission's resort to facts available. Please explain whether the failure of an entity that was neither an "interested Member" nor an "interested party" to cooperate be a valid basis for an investigating authority's resort to facts available? Please explain referring to the text of Article 12.7 of the SCM Agreement.

U.S. Response:

51. The United States responds to questions 11 and 12 together.

52. 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."

53. Article 12.7 of the SCM Agreement does not contain language regarding the application of facts available to a particular Member or party. Instead, Article 12.7 simply states that "preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available," but conditions the resort to facts available on instances in which a party "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." Notably, Article 12.7 does not state whether the application of facts available is limited to the Member or interested party whose conduct gave

rise to the need to apply facts available. Article 12.7 generally is intended to ensure that the failure of a party "to provide necessary information does not hinder an agency's investigation."[44]

54. In some cases, the application of facts available by an investigating authority may only have an effect on the party or Member whose conduct gave rise to the need to apply facts available. However, there could also be cases in which an investigating authority applies facts available based on the conduct of a party or a Member, or even a non-party, but the *effect* of the facts available may implicate the other party or Member. Indeed, nothing in the text of Article 12.7 obligates the investigating authority to ensure that the effect of the application of facts available is limited to only the Member or party whose conduct gave rise to the need to resort to facts available in the first place.

55. Article 12.7 is practical and logical in the context of a CVD investigation where an investigating authority is typically gathering different information from different parties for different elements of its countervailable subsidy determination. For example, an authority would typically ask an interested Member for information pertaining to the operation of the subsidy and whether it is specific, and would typically ask an interested party producer or exporter for information on whether and to what extent it benefitted from the subsidy in question. To fully assess the extent of subsidization, an investigating authority may also ask a Member or party to obtain information from other entities, including, for instance, input suppliers.

56. If either a Member or party does not provide necessary information, this could impact the investigating authority's analysis of one or more elements of its CVD determination, which could, in turn, potentially have an effect on Members and parties that are not the Member or party that did not provide that information – for example where a producer has provided necessary information, but the subsidizing Member has decided to withhold necessary information that may impact the producer's countervailing duty rate. Similarly, where a Member or party does not obtain necessary information from an input supplier, this could also impact the investigating authority's analysis of the subsidy at issue.

57. Notably, the application of facts available as a result of a party or Member's inability to obtain information from a non-party is not inconsistent with Article 12.7, which provides for the application of facts available when a Member or interested party fails to provide the necessary information. That is, Article 12.7 does not limit the application of facts available to circumstances where the necessary information is within the possession of the Member or party from which the information is requested. Rather, Article 12.7 plainly states that facts available may be used when a Member or interested party "otherwise does not provide, necessary information." Although the earlier phrase "refuses access" in Article 12.7 might imply

[44] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 293; *see also China – GOES (Panel)*, para. 7.296 (Article 12.7 ensures that "the work of an investigating authority should not be frustrated or hampered by non-cooperation on the part of interested parties").

possession of the necessary information by the party or Member, "otherwise does not provide" does not necessarily imply possession. The phrase "otherwise does not provide" suggests that the party might be asked for information it does *not* possess, but could reasonably be expected to find or obtain access to.

58. In response to the Panel's request in question 11 to comment on the Appellate Body report in *US – Hot-Rolled Steel*, that report illustrates that an investigating authority may place a reasonable burden on an interested party to provide necessary information.[45] Ultimately, the determination to resort to facts available is a case-specific determination that is based on the specific facts at hand.

59. Therefore, the Panel should limit its consideration to the questions of: (1) whether the approach the Commission took in the underlying investigation relies on a permissible interpretation of Article 12.7 of the SCM Agreement; and (2) whether an unbiased and objective investigating authority could properly have reached the same conclusion on the basis of the specific evidence that was available to the Commission. In this regard, the United States observes that the EU details starting at paragraph 991 of its first written submission the factual basis upon which the EU determined to resort to facts available.[46]

13. Please explain whether the obligation in Article 12.4.1 of the SCM Agreement can be fulfilled through summaries provided by investigating authorities themselves (instead of summaries provided by the relevant interested parties)? Please comment in light of the reasoning adopted by the Appellate Body at paragraph 5.441 of its report in *Korea – Pneumatic Valves*.

U.S. Response:

60. Article 12.4.1 provides,

> The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Member or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

61. The text of Article 12.4.1 plainly states that "[t]he authorities shall require" interested parties to provide non-confidential summaries. Article 12.4.1 therefore imposes an obligation on

[45] *US – Hot-Rolled Steel (AB)*, paras. 105-110.
[46] EU's First Written Submission, para. 991 *et seq*.

investigating authorities to require interested Members or interested parties to furnish such summaries.

62. The text of Article 12.4.1 is silent as to the issue of whether an investigating authority may also furnish non-confidential summaries. Therefore, although the provision of such summaries by an investigating authority would not be inconsistent with Article 12.4.1, an investigating authority's provision of summaries would not fulfill the commitment in Article 12.4.1. That is, Article 12.4.1 imparts upon an investigating authority to require interested Members or interested parties to furnish non-confidential summaries.

63. The report in *Korea – Pneumatic Valves* at paragraph 5.441 reached a similar conclusion based in part upon the text of Article 6.5.1 of the Anti-Dumping Agreement, the text of which is identical to Article 12.4.1 of the SCM Agreement. To the extent that the report in *Korea – Pneumatic Valves* reached its findings based upon the text of Article 6.5.1 of the *Anti-dumping Agreement*, the United States agrees with the reasoning. Specifically, the Appellate Body and the panel reasoned that an investigating authority's furnishing of non-confidential summaries would not resolve the issue of whether the investigating authority had required the submission of a non-confidential summary.

64. However, the United States disagrees with the Appellate Body's reliance on "Appellate Body jurisprudence" in paragraph 5.441 of *Korea – Pneumatic Valves*. Although a prior report may be examined for its persuasive value, it would be incorrect to apply a particular observation from a prior report. The role of a WTO dispute settlement panel established by the Dispute Settlement Body ("DSB") is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In undertaking that examination, Article 11 of the DSU further specifies that a panel is to make an "objective assessment of the matter before it," including an objective assessment of "the applicability of and conformity with the covered agreements." That assessment is one of conformity with the covered agreements – not prior reports – whether or not adopted by the DSB. Article 3.2 of the DSU provides that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law." Accordingly, a WTO dispute settlement panel has no authority under the DSU or the WTO Agreement simply to follow or apply a panel or Appellate Body interpretation from a prior dispute.

65. The appropriate course for a WTO panel, as prescribed by Article 3.2 of the DSU, is to apply the "customary rules of interpretation of public international law." Those customary rules of interpretation, as reflected in Articles 31 through 33 of the Vienna Convention on the Law of Treaties ("VCLT"), do not assign any interpretive role to dispute settlement reports. Article 31

of the VCLT provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." As part of engaging in that interpretive exercise, a WTO panel may consider it appropriate to consider a prior report for the assistance it may give in properly understanding a WTO provision interpreted according to customary rules of interpretation – that is, a prior report may be examined for its persuasive value. However, relying on prior reports as "case law" or treating so-called DSB "adopted" interpretations as substantive rules would constitute serious legal error.