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UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to H to the Report of the Panel to be found in document WT/DS437/R.

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REQUEST FOR A PRELIMINARY RULING PARTIES AND THIRD PARTIES SUBMISSIONS OR EXCECUTIVE SUMMARIES THEREOF

ANNEX A-1

EXECUTIVE SUMMARY OF THE REQUEST OF THE UNITED STATES FOR A PRELIMINARY RULING

I. Introduction

1. The dispute outlined in China's panel request is one of the most extensive in the history of the World Trade Organization. China's request challenges the WTO-consistency of various aspects of 22 separate subsidy investigations, including 18 "public body" determinations; 18 determinations that the provision of inputs for less than adequate remuneration were specific; 18 determinations that subsidies conferred a benefit, as well as the investigating authority's calculation of that benefit; eight determinations that the provision of land and land-use rights for less than adequate remuneration were specific; and two determinations that export restraints provided a financial contribution. The panel request also presents 26 claims related to certain aspects of the initiation of investigations into particular subsidies.

2. In addition to all of these claims, China's panel request makes the general allegation that "each instance" of the investigating authority's use of facts available "to support its findings of financial contribution, specificity, and benefit in the investigations and determinations" across the 22 covered investigations breached the obligation under Article 12.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[1] This allegation is so broad and so vague as to fall well short of the requirement under DSU Article 6.2 that the panel request state the problem clearly.

3. The 22 investigations involve over 50 individual respondents, approximately 650 different subsidies, and potentially hundreds of separate applications of facts available in relation to contribution, specificity and benefit. China's description of its challenge as one based on "each instance in which the [investigating authority] used facts available" fails to indicate what are those instances China considers to be uses of facts available and which of the potentially hundreds of applications of facts available are of concern for purposes of the dispute. As a result, the Panel and the United States have no meaningful notice of China's facts available claims and no basis to discern the scope of the problem China wishes to present. Further, the United States cannot even begin to prepare a defense with respect to these claims. In these circumstances, the United States hereby requests that the Panel find at the outset of this dispute that China's facts available claims are so vague as to fail to meet the requirement in Article 6.2 of the DSU that a panel request must "present the problem clearly." As the Appellate Body recently explained in *China – Raw Materials*, if a panel request fails to provide a panel and the respondent the basis on which "to determine with sufficient clarity what 'problem' or 'problems' were alleged to have been caused by which measures," the claimant has "failed to present the legal basis for [the] complaint[] with sufficient clarity to comply with Article 6.2 of the DSU."[2]

4. Furthermore, in these circumstances, it is appropriate that this issue be dealt with as a preliminary matter. As the Appellate Body found in *China – Raw Materials*,[3] it is most appropriate for a panel to address the defects in a request at the outset of the dispute in sufficient time for the respondent to know the case to which it must reply and for the complaining party to determine what steps it may wish to take in response.

II. Overview of Article 6.2 of the DSU

A. General Requirements of Article 6.2 of the DSU

5. Article 6.2 of the DSU provides the following, in relevant part:

[1] Request for the Establishment of a Panel by China at note 1, WT/DS437/2, circulated 21 August 2012 ("Panel Request").

[2] *China – Raw Materials (AB)*, para. 231.

[3] *Id.* at para. 233.

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

6. The Appellate Body has observed that Article 6.2 of the DSU "serves a pivotal function in WTO dispute settlement and sets out two key requirements that a complainant must satisfy in its panel request"[4] – the requirement to identify the specific measures at issue" and the requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Appellate Body has repeatedly observed that these elements serve two purposes, namely: (i) "they form the basis for the terms of reference of panels" and (ii) "they ensure due process by informing the respondent and third participants of the matter brought before a panel."[5]

7. First, the identification of the specific measures at issue and the brief summary of the legal basis of the complaint sufficient to present the problem clearly "comprise the 'matter referred to the DSB,' which forms the basis for a panel's terms of references under Article 7.1 of the DSU."[6] As a result, "[f]ulfillment of these requirements is not a mere formality." Rather, "if either of them is not properly identified, the matter would not be within the panel's terms of reference."[7] Panels "are inhibited from addressing legal claims falling outside their terms of reference."[8] Further, "a defective panel request may impair a panel's ability to perform its adjudicative function within the strict timeframes contemplated in the DSU and, thus, may have implications for the prompt settlement of a dispute in accordance with Article 3.3 of the DSU."[9]

8. Second, the panel request serves "the *due process* objective of notifying the parties and third parties of the nature of a complainant=s case."[10] In particular, Article 6.2 requires that a complainant's claims "be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint."[11] Absent compliance with Article 6.2 a defending party may be prejudiced by the lack of clarity because it has not been "made aware of the claims presented by the complaining party, sufficient to allow it to defend itself."[12] Article 6.2 also serves the important function of notifying Members of the matter to be considered by the panel so that Members can make an informed decision as to whether they have a substantial interest in the dispute and therefore would want to become third parties.

9. For these reasons, "it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[13] Such compliance with Article 6.2 must be "demonstrated on the face"[14] of the panel request, considering the request "as a whole, and in light of the attendant circumstances."[15] In other words, the examination of the panel request requires a "case-by-case analysis"[16] considering the context and nature of the dispute. Further, because a panel request must be compliant with Article 6.2 "on its face", any deficiencies cannot be "cured" in subsequent submissions.[17] Rather, where a panel request fails to adequately identify a measure or specify a claim, such measure or claim will not form part of a panel's terms of reference.[18]

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[4] *Australia – Apples (AB)*, para. 416. *See also China – Raw Materials (AB)*, para. 219; *EC – Large Civil Aircraft (AB)*, para 786; *US – Carbon Steel (AB)*, para. 125.

[5] *Id. See also US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 108; *US – Continued Zeroing (AB)*, para. 161; *US – Carbon Steel (AB)*, para. 126; *EC – Bananas III (AB)*, para. 142; *China – Raw Materials (AB)*, para. 219.

[6] *US – Carbon Steel (AB)*, para. 125 (citing *Guatemala – Cement I (AB)*, paras. 69-76). *See also China – Raw Materials (AB)*, para. 219; *US – Continued Zeroing (AB)*, para. 160; and *US – Zeroing (Japan) (Article 21.5 B Japan) (AB)*, para. 107.

[7] *Australia – Apples (AB)*, para. 416.

[8] *EC – Hormones (AB)*, para. 156.

[9] *China – Raw Materials (AB)*, para. 220.

[10] *US – Carbon Steel (AB)*, para. 126 (emphasis in the original). *See also supra* note 5.

[11] *EC – Bananas III (AB),* para. 143.

[12] *Thailand – Steel (AB)*, para. 95.

[13] *EC – Bananas III (AB)*, para. 142.

[14] *US – Carbon Steel (AB)*, para. 127.

[15] *Id.*

[16] *China – Raw Materials (AB)*, para. 220.

[17] *US – Carbon Steel (AB)*, para. 127.

[18] *Id.*, para 171; *Dominican Republic – Cigarettes (AB)*, para. 120.

B. A Panel Request Must Provide a Brief Summary of the Legal Basis of the Complaint Sufficient to Present the Problem Clearly

10. As is explained above, "the 'measure' and the 'claims' made concerning the measure are the two distinct components of a panel request which together constitute the 'matter referred to the DSB' forming the basis for the panels terms of reference." It is clear from the text of the provisions that these two components impose somewhat different requirements on complaining parties. In particular, a party must "identify" the specific measures at issue; with respect to the legal basis of the complaint, a party must "provide a brief summary ... sufficient to present the problem clearly."

11. The Appellate Body explained, in *EC – Selected Customs Matters*, how complaining parties should address these two key requirements in a panel request:

> The 'specific measure' to be identified in a panel request is the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered agreement. In other words, the measure at issue is *what* is being challenged by the complaining Member. In contrast, the legal basis of the complaint, namely, the 'claim' pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated. A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This brief summary must be sufficient to present the problem clearly.[19]

As explained by the Appellate Body, the "legal basis" pertains to the provision of the covered agreement that is alleged to be violated, and the "brief summary" must address why or how the measure is alleged to violate that provision. In addition, the brief summary must present the problem clearly.

12. The Appellate Body in *Korea – Dairy* also emphasized the importance of the requirement to "present the problem clearly." The Appellate Body explained that a "claim" under Article 6.2 is "a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement," while distinguishing it from the "*arguments* adduced by a complaining party to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision."[20] In summary,

> Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'.[21]

Whether a party has in fact provided a brief summary that is sufficient requires a case-by-case analysis taking into account the context and scope of the panel request.[22]

III. China's Panel Request Fails to Comply with Article 6.2 of the DSU

13. In its panel request, China failed to present the problem clearly with respect to its "facts available" claims. In particular, China's "facts available" claims are so broad and so vague as to make it impossible for the Panel or the United States to know what problem China seeks to present. This makes it impossible for the Panel to understand what matters fall within its terms of reference, or for the United States to even begin preparing its defense. As a result, China's panel request is inconsistent with the requirements of DSU Article 6.2.

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[19] *EC – Selected Customs Matters (AB)*, para. 130.
[20] *Korea – Dairy (AB)*, para. 139 (emphasis in the original).
[21] *Id.* para. 120.
[22] *See, e.g.*, *China – Raw Materials (AB)*, para. 220.

A. Broad and Indeterminate Scope of the Facts Available Issues Raised in the Panel Request

14. China identifies the "Specific Measures at Issue" in Section A of the request, as "the preliminary and final countervailing duty measures identified in Appendix 1,"[23] which in turn lists 22 separate countervailing duty investigations conducted by the United States Department of Commerce (USDOC) between 2008 and 2012, as well as 44 *Federal Register* notices of initiation, preliminary determinations and final determinations. The narrative in Section A provides the following further description:

> The measures include the determination by the USDOC to initiate the identified countervailing duty investigations, the conduct of those investigations, any preliminary or final countervailing duty determinations issued in those investigations, any definitive countervailing duties imposed as a result of those investigations, as well as any notices, annexes, decision memoranda, orders, amendments, or other instruments issued by the United States in connection with the countervailing duty measures identified in Appendix 1.[24]

15. The panel request describes the "Legal Basis of the Complaint" at Section B, and in Subsection B.1, addresses "'As Applied' Claims."[25] The introductory paragraph to Subsection B.1 provides:

> 1. China considers that the initiation and conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, orders, and any definitive countervailing duties imposed pursuant thereto, are inconsistent, at a minimum, with the obligations of the United States specified below.[26]

Subparagraph (d), addressing the use of facts available, states the following:

> d. In connection with all of the identified countervailing duty investigations in which the USDOC has issued a preliminary or final countervailing duty determination:
>
> (1) Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, in manners that were inconsistent with that provision.[10]

[10] This claim arises in respect of *each instance in which the USDOC used facts available*, including "adverse" facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1.[27]

16. The phrase "all of the identified countervailing duty investigations" in the introduction to subparagraph d refers back to the "measures" that are "identified in Appendix 1", and described in the narrative of Section A of the panel request. In Appendix 1 and the narrative description, China identified preliminary countervailing duty determinations, final countervailing duty determinations, notices of initiation, definitive countervailing duty determinations, and virtually any other document or notice related to those investigations, as well as the "conduct" of the investigations.

17. Thus, the panel request appears to assert that each "instance" in which the investigating authority "used facts available" establishes a breach. It is not clear what China means by an "instance." Potentially it could mean any of the hundreds of the investigating authority's applications of facts available in support of its findings of financial contribution, specificity, and benefit at any stage of the investigation, wherever made, and whether that determination was preliminary or final in nature. And it is not possible to discern what are those "instances" in which

[23] Panel Request at 1.
[24] *Id.* at 2.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 4 (italics added).

China considers the investigating authority "used facts available"; these may or may not correspond to what are labeled "facts available" in the investigating authority's investigation.

18. As noted above, the Appellate Body has found that DSU Article 6.2 must be applied on a case-by-case basis. A consideration of the tremendous scope of this dispute is crucial for the necessary case-by-case analysis. The 22 investigations listed above involve over 50 individual respondents, and approximately 650 different subsidies. In the course of these investigations, the investigating authority considered that it applied facts available (of various types) hundreds of times. Yet China's panel request provides no information on what are the "instances" in which it considers facts available to have been used and which applications of facts available are the source of the "problem" (to use the term in Article 6.2) that China seeks to challenge.

19. The case-by-case analysis must also recognize that the individual investigations involved a number of disparate circumstances that warranted various applications of facts available. For example, in dozens of separate cases, the investigating authority applied facts available when respondents failed to respond at all to the authority's questionnaires. Each of these failures to respond in turn resulted in multiple applications of facts available with respect to each of the elements of a subsidy – financial contribution, specificity and benefit. In dozens of other cases, the investigating authority applied facts available with respect to individual subsidy programs, or with respect to an element of a program, where a respondent – though participating in the investigation – failed to respond, or only partially responded, to particular questions posed by the investigating authority.

20. The United States further notes that China's decision to present a panel request with an extremely broad scope in relation to the multiple stages of each proceeding also contributes to the panel request's lack of clarity. In addition to final determinations, the panel request includes within its scope each time facts available were applied in the preliminary determination, or at any other stage of the investigation. This dimension further increases the universe of "instances" of facts available that might be a source of the problem claimed by China.

21. Finally, the United States notes yet another source of ambiguity in China's panel request. China alleges a breach of Article 12.7 of the SCM Agreement. This provision contains a number of distinct obligations related to facts available. China's panel request, however, contains no information on which of those obligations the unspecified "instances" of the use of facts available have allegedly breached.[28] The United States does not assert that this lack of clarity, standing alone, necessarily renders this or any other panel request deficient. However, in the context of this massive panel request with unspecified challenges to potentially hundreds of uses of facts available, this absence of specificity further supports a finding that China has failed to present the problem clearly.

B. China Does Not Provide a Sufficient Summary of Its Complaint or Identify What is "At Issue" and Thus Fails to "Present the Problem Clearly"

22. As described above, the "facts available" section of China's panel request fails to notify the Panel, the United States, and other Members of the nature of the dispute with respect to the investigating authority's separate applications of facts available. The extremely broad scope of China's panel request together with its vague reference to "each instance in which [the investigating authority] used facts available" does not clearly present what are the "instances" in which China considers facts available to have been used and which applications of facts available are the "problem" which the Panel must examine. To use the terminology of the Appellate Body in the recent *Raw Materials* dispute, in light of the fact that the panel request does not provide any information on which of the uses of facts available – out of the potentially hundreds of uses of facts available at various stages of the 22 covered countervailing duty investigations – that China means to challenge, the panel request fails to "plainly connect" the cited WTO obligation (Article 12.7 of the SCM Agreement) and the measures listed in the panel request.

[28] For example, the panel request does not specify whether China alleges that: parties who failed to respond where not interested Members or interested parties; and/or that those parties did not "refuse access to" or otherwise "not provide" information; and/or that the information was not "necessary"; and/or that a "reasonable period" of time was not provided; and/or that respondents did not "significantly impede[] the investigation."

23. The Appellate Body has explained that in order to "present the problem clearly," a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[29] The Appellate Body found that this obligation was not met in *Raw Materials* because the panel request at issue did not make it clear "which allegations of error pertain[ed] to which particular measure or set of measures identified in the panel requests."[30] The ambiguity presented in this dispute is analogous to that in *Raw Materials*.

24. Here, one side of the ledger – the Member's actions that are the subject of the challenge – is obscured by the fact that China has essentially pointed to nearly every countervailing duty investigation undertaken by the United States with respect to China since 2008 that China has not previously challenged, including investigations that did not ultimately result in the imposition of countervailing duties, and said that Article 12.7 was violated somewhere in the course of those investigations. This description is not sufficient to "plainly connect" the 22 covered investigations with the alleged breach of Article 12.7. Accordingly, as in *Raw Materials,* China has failed to comply with the requirement to "provide a brief summary" of its claim "sufficient to present the problem clearly", as required by Article 6.2 of the DSU.

25. China's Panel Request also falls short of the articulation of the requirement to provide a "brief summary" of the legal basis "sufficient to present the problem clearly" given in the reports in *EC – Selected Customs Matters* and *Korea – Dairy.* As the Appellate Body found in its *Customs Matters* report*,* "A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This brief summary must be sufficient to present the problem clearly."[31] Here, by failing to indicate what portions of the various documents in the 22 covered investigations are the alleged breach of the facts available obligations in Article 12.7, China's panel request includes no explanation – succinct or otherwise – on how or why these measures violate Article 12.7. Accordingly, the panel request fails to present the problem clearly.

26. China's panel request likewise fails to satisfy the key requirement of Article 6.2 of the DSU to "identify" what is "at issue." China's panel request does not identify the specific "instances" (the term used in the panel request) of the use of facts available that are the source of the problem raised by China, but rather alludes to what would appear to be hundreds of "instances" (depending on what China means by that term) of the use of facts available. China then leaves it to the Panel, the United States, and other Members to speculate as to which of these instances or others China in fact considers to be "at issue." China knows what instances it considers to be at issue, but China declined to identify them. Thus, by failing to set out what is "at issue", China has obscured what is the problem rather than "present the problem clearly."

27. One of the main purposes of Article 6.2 is to safeguard the rights of defense of the responding party. As the Appellate Body has stated, "[a] defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defense," as are potential third-parties.[32] For this reason, the requirement of describing the legal basis of the complaint with sufficient clarity "is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings."[33] China's failure to present the problem clearly undermines the conduct of this proceeding.

28. Article 6.2 also protects the rights of other Members: both those Members that are considering whether to participate as third parties, as well as those Members that have become third parties. As noted above, consideration of each challenge to a use of facts available involves the establishment and analysis of its own set of facts, as well as an identification of the specific obligation in Article 12.7 that is the alleged source of the breach. Based on China's panel request, however, other Members will have no information on the issues involved until the time that China files its first written submission. For this reason also, China's panel request fails to present the scope and nature of the "problem" concerning facts available that China seeks to raise, and therefore does not provide the notice required under the DSU to permit Members to exercise their rights under DSU Article 10.

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[29] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 162. *See also China – Raw Materials (AB)*, para. 220.

[30] *China – Raw Materials (AB)*, para. 226.

[31] *EC – Selected Customs Matters (AB)*, para. 130.

[32] *Thailand – H-Beams (AB)*, para. 88.

[33] *Id.*

29. China has brought a broad, far-reaching dispute. Its panel request challenges a large number of countervailing duty investigations, each with a unique fact pattern and procedural history, including with respect to the use of facts available. The large scope of the panel request does not dilute China's responsibility "to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly," but rather enhances it. China has chosen to describe its "facts available" allegations in a general and completely vague manner. While, if accepted, this form of pleading would serve to preserve for China the maximum flexibility to assert which actions by the investigating authority were "instances" of using facts available and to select, or not select, certain uses of facts available, at the same time it provides no meaningful notice to the United States, to third parties, or to the Panel of the scope of the problem, much less the actual issues that will be addressed. Furthermore, this form of pleading seriously prejudices the United States, which cannot even begin to prepare a defense for a set of facts available claims potentially so large in scope as to eclipse the rest of an already massive dispute.

IV. The Panel Should Decide Whether China's Panel Request Complies with the Requirements of Article 6.2 before the Parties Submit their First Written Submissions

30. The United States respectfully requests the Panel to make a preliminary ruling (that is, before China makes its first written submission) on whether the panel request complies with the requirements of Article 6.2 of the DSU. A finding on this Article 6.2 claim will bring necessary clarity to the Panel's terms of reference. And knowledge of the terms of reference, of course, is fundamental to the task of the Panel and to the parties' participation in this proceeding. Thus, it is important to resolve this claim as a threshold issue.

31. A finding by the Panel at an early stage is also important to avoid serious prejudice to the United States. Without clarification on this issue, the United States will continue not to know what China may consider to be "instances" in which the investigating authority "used" facts available and which applications of facts available to review and to prepare to defend. Further, there is no need to delay a finding in order to obtain further information regarding the compliance of China's panel request with Article 6.2 of the DSU. As a general matter "compliance with the due process objective of Article 6.2 cannot be inferred from a respondent's response to arguments and claims found in a complaining party's first written submission,"[34] nor can they be "cured" in subsequent submissions.[35] Rather, "[i]n every dispute, the panel's terms of reference must be objectively determined on the basis of the panel request as it existed at the time of filing."[36]

32. A preliminary finding by the Panel on this request would also serve China's interests. A failure to present a panel request that meets the requirements of DSU Article 6.2 limits the scope of the matter within the Panel's jurisdiction. Therefore, early resolution of this procedural issue would give China clarity on the options available to it and permit China to act according to its interests, knowing the legal consequences of its choice.

V. Conclusion

33. For the reasons cited above, the United States respectfully requests that the Panel find that China's "as applied" challenge to "instances" in which the investigating authority's "used facts available" is not within its terms of reference. In order to save the time and resources of the Panel, the Secretariat, and the parties, and to avoid further prejudice to the United States, the United States also respectfully requests that the Panel issue its preliminary ruling as soon as possible, and in any event well before China's first submission is due.

[34] *China – Raw Materials (AB)*, para. 233.
[35] *US – Carbon Steel (AB)*, para. 127.
[36] *EC – Large Civil Aircraft (AB)*, para. 642.

ANNEX A-2

EXECUTIVE SUMMARY OF THE RESPONSE OF CHINA TO THE UNITED STATES REQUEST FOR A PRELIMINARY RULING

1. The U.S. request for a preliminary ruling is unfounded and should be rejected. Reduced to its essential feature, the U.S. request is based on the proposition that the large number of instances in which the United States Department of Commerce ("USDOC") used facts available in the determinations at issue required China to go beyond the ordinary requirement of connecting the challenged measures to the provision of the covered agreements claimed to have been infringed.[1] The United States cites no authority for this proposition, and the United States has failed to identify any respect in which China's statement of its claim is inconsistent with the requirements of Article 6.2 of the DSU.

2. The Appellate Body has observed that Article 6.2 of the DSU requires the complaining Member to "identify the specific measures at issue" and to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." There is no question that China has "identif[ied] the specific measures at issue" as required by Article 6.2. With respect to the single claim set forth in subsection (d)(1) of China's panel request, the relevant "specific measures at issue" are the nineteen final and three preliminary countervailing duty determinations listed in Appendix 1.

3. In order for a complainant's panel request to "present the problem clearly" within the meaning of Article 6.2, the Appellate Body has said that it must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed, so that the respondent party is aware of the basis for the alleged nullification or impairment of the complaining party's benefits."

4. China's claim under Article 12.7 of the SCM Agreement "plainly connects" the measures at issue with the provision of the covered agreements claimed to have been infringed. It is clear from subsection (d)(1) of the panel request that China's claim under Article 12.7 relates to "each instance" in which the USDOC used "adverse" facts available for the purpose of reaching a finding of financial contribution, specificity, or benefit. The legal basis of China's complaint under this subsection – *i.e.*, its "claim" – is that each instance in which the USDOC used "adverse" facts available for these purposes was inconsistent with the requirements of Article 12.7. The United States need only identify those instances in which the USDOC used "adverse" facts available for the purpose of reaching a finding of financial contribution, specificity, or benefit in the preliminary and final countervailing duty determinations listed in Appendix 1, and then read the plain language of subsection (d)(1) to know that China considers each of those instances to be inconsistent with Article 12.7.

5. In this respect, there is absolutely no reason why the United States cannot "discern" the instances in which the USDOC used "adverse" facts available for the purpose of reaching a finding of financial contribution, specificity, or benefit. The instances in which the USDOC used "adverse" facts available in respect of these findings are clearly identified in each I&D memo (in the case of final determinations) and Federal Register notice (in the case of preliminary determinations).

6. It is apparent that the United States' actual concern in this case relates not to its ability to *identify* the instances in which the USDOC used "adverse" facts available (which is as simple as reading the USDOC's own I&D memos), but rather to the *number of instances* in which the USDOC used "adverse" facts available in the determinations at issue. The U.S. complaint has no basis in law.

[1] China notes at the outset that although its claim under subsection (d)(1) of its panel request refers to the instances in which the USDOC "used facts available, including 'adverse' facts available", there are only a small number of instances in the determinations at issue in which the USDOC used anything other than "adverse" facts available (or "adverse inferences") for the purpose of reaching a finding of financial contribution, specificity, or benefit. As demonstrated below, this fact is apparent on the face of the relevant measures under challenge. For this reason, China will refer in this submission to the USDOC's use of "adverse" facts available when referring to the USDOC's use of facts available in support of its findings of financial contribution, specificity, and benefit.

7. A complaining Member is free to advance a claim in respect of numerous instances of what it considers to be the same violation of an identified provision of the covered agreements. Whether the claim involves one instance of a violation or hundreds of instances of the same violation, the complaining Member is required to connect the challenged measures to the provision(s) of the covered agreements claimed to have been infringed. China has fulfilled that requirement in its panel request by indicating that its claim under Article 12.7 of the SCM Agreement relates to *each* instance in the identified determinations in which the USDOC used "adverse" facts available to reach a finding of financial contribution, benefit, or specificity.

8. The fact that there are many instances in which the USDOC used "adverse" facts available for these purposes does not detract from the clarity and precision of China's claim. "Each" means "each". China had no "enhance[d]" obligation under Article 6.2 of the DSU to provide page citations to, or otherwise specify, the many instances in which the USDOC unlawfully used "adverse" facts available to reach a finding of financial contribution, benefit, or specificity in the determinations at issue. China considers all of these applications of "adverse" facts available to have been contrary to Article 12.7 of the SCM Agreement, and that claim is clearly presented in the panel request.

9. The only other assertion that the United States makes in its request for a preliminary ruling is that China's claim concerning the use of "adverse" facts available is somehow "vague". The suggestion, apparently, is that China was required to identify in its panel request the specific respects in which the USDOC's use of "adverse" facts available was inconsistent with Article 12.7.

10. The additional information that the United States claims was required in the panel request – such as whether China alleges that information was not "necessary", or that a "reasonable period" of time was not provided – would clearly amount to *arguments* as to why China considers Article 12.7 to have been violated. It is well established that a complainant is not required to present its arguments in its panel request.

11. One of the more striking features of the U.S. request for a preliminary ruling is its failure to identify any prior decision under Article 6.2 of the DSU that is even remotely analogous to what the United States is asking the Panel to find in this case. The United States contends that China's claim concerning the use of "adverse" facts available is similar to the provisions of the panel requests at issue in *China – Raw Materials*, which the Appellate Body found to be deficient under Article 6.2 of the DSU. China's claim in subsection (d)(1) of the panel request is nothing at all like the provisions of the panel requests at issue in *China – Raw Materials.*

12. China's claim is based on only one subparagraph of one provision of the covered agreements, Article 12.7 of the SCM Agreement, in contrast to the 13 different treaty provisions involved in *China – Raw Materials* involving a "wide array of dissimilar obligations". Similarly, while there were 37 disparate measures at issue in *China – Raw Materials*, ranging from "entire codes or charters … to specific administrative measures", the 22 measures at issue in this case are essentially identical in nature – all are preliminary or final countervailing duty determinations issued by a single agency, the USDOC. Unlike the circumstance in *China – Raw Materials*, there is no uncertainty about how the allegation of error set forth in subsection (d)(1) relates to the identified measures.

13. As China explained in its letter to the Panel dated 18 December, this dispute concerns recurring issues of law and legal interpretation that arise in U.S. countervailing duty investigations of Chinese products. China's claim concerning the USDOC's use of facts available is precisely the type of cross-cutting, horizontal issue of law at issue in this dispute. As is evident from the manner in which China drafted its claim in subsection (d)(1) of the panel request, China's principal concern with regard to the USDOC's resort to facts available is the notion of "adversity" on which these determinations are based. By referring to "so-called 'adverse' facts available" in the panel request, China clearly indicated that it considers the USDOC's concept of "adverse" facts available to be inconsistent with Article 12.7 of the SCM Agreement. China even went so far as to place the word "adverse" in quotes, plainly highlighting the concept of "adversity" as part of the subject matter of this claim.

14. China's claim in respect of "adverse" facts available should be one that is well understood by the United States and other Members, considering that the United States recently litigated this issue – successfully – against China. In *China – GOES*, the United States argued, and the panel

agreed, that Article 12.7 of the SCM Agreement does not permit an investigating authority to draw adverse inferences or reach conclusions that have no factual foundation in the record evidence. China is doing nothing more than bringing a claim under the same interpretation of Article 12.7 that the United States successfully advocated in *China – GOES*. By referring to "so-called 'adverse' facts available" in the panel request, China provided more than sufficient notice to the United States of what this claim entailed.

15. The U.S. request for a preliminary ruling is entirely unsupported by Article 6.2 of the DSU and by the panel and Appellate Body reports which have interpreted that provision. The Panel must therefore reject the U.S. request.

ANNEX A-3

COMMENTS OF THE UNITED STATES ON CHINA'S RESPONSE TO THE UNITED STATES PRELIMINARY RULING REQUEST

Table of Reports

Short Form	**Full Citation**
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/R, adopted 16 November 2012
China – Raw Materials (AB)	Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WTDS398/AB/R, adopted 22 February 2012
EC – Selected Customs Matters (AB)	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004

I. Introduction

1. China's response to the U.S. preliminary ruling request (the "Response") fails to demonstrate that China's panel request "provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly"[1] with respect to China's claims concerning the use of "facts available." Rather, China's Response provides further explanations of its facts available claims, and these explanations only serve to confirm that the actual descriptions of these claims in the panel request fail to identify the actions of the U.S. Department of Commerce ("Commerce") that China intends to challenge, and therefore do not "present the problem clearly." Even with China's attempts to clarify its panel request in its Response, the United States still does not know which of the hundreds of possible claims China will pursue. China also argues that some sort of a lower standard for describing the claim applies in this dispute because the United States should, somehow, anticipate the nature of China's claims. However, there is no basis for any lower standard in this dispute. In fact, because the dispute raised by China is of tremendous scope, it is particularly important for the panel request to present the problem clearly. Finally, China's Response both mischaracterizes the U.S. legal arguments, and misunderstands the Appellate Body's findings in *China – Raw Materials.* In doing so, China's Response fails to provide any support for its assertions that China has met its obligations under Article 6.2. Thus, China's Response only confirms that the Panel should grant the preliminary ruling request with respect to China's facts available claims.

II. The Explanations in China's Response of its "Facts Available" Claims Demonstrate that the Claims Actually set out in the Panel Request Fail to Present the Problem Clearly

2. In its Response, China recasts its "facts available" claims in three different ways. The fact that China, in responding to the U.S. request, provides new descriptions of its facts available claims only demonstrates that the claims, as actually described in the panel request, fail to present adequately the problem.

3. First, China states in its Response that the panel request is confined to those instances in which Commerce used facts available that are identified under "a section entitled 'Application of Facts Available, Including the Application of Adverse Inferences,' or a similar title to the same effect"[2] in the "Issues and Decisions Memoranda" ("I&D Memos") issued by Commerce in connection with final determinations for the 19 investigations where there has been a final determination, and the *Federal Register* notices announcing preliminary determinations for the three investigations where there has been no final determination.[3] This explanation is not something that can be drawn from the text of China's panel request. Instead, the panel request alleges violations, on an "as applied basis,"[4] with respect to "each instance in which [Commerce] used facts available . . . in the investigations and determinations"[5] at issue. Furthermore, even if a subsequent explanation could be used to cure a defective panel request (and it cannot), this explanation does not in fact provide much, if any, additional clarity. The I&D Memos and *Federal Register* notices are made up of hundreds if not thousands of pages, and the identification of uses of "facts available" (of which there are hundreds) is not limited to those sections of the I&D Memos identified by China.[6] It is noteworthy that, even though China can now define what it means by such an instance, China did not do so in its panel request. China's Response illustrates that its panel request was inadequate to present clearly what constituted the "instances" to which China referred.

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[1] Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 6.2.

[2] Response, para. 16.

[3] *Id*. paras. 16-17.

[4] Request for the Establishment of a Panel by China at 2, WT/DS437/2, circulated 21 August 2012 ("Panel Request") (using the header "As Applied Claims" with respect to the section containing the facts available claim).

[5] *Id.* at n. 10.

[6] Contrary to China's assertions, uses of "facts available" are described elsewhere than in the identified sections of the I&D Memos. *See, e.g.*, *Aluminum Extrusions I&D Memo* at 28 (identifying a use of "facts available" for an export rebate program not described in either the "Use of Facts Otherwise Available And Adverse Inferences" section or the comments section); *Thermal Paper I&D Memo* at 21-22 (identifying a use of "facts available" for land-use taxes and fee exemptions not identified in any "facts available" or "adverse facts available" section, or the comments section).

4. China's response also includes a second description of the "facts available" claims. In particular, China appears to explain that it intends to challenge an alleged practice or policy, "that it considers the USDOC's concept of 'adverse' facts available to be inconsistent with Article 12.7."[7] Nothing in the text of the panel request, however, could lead the reader to understand that China's facts available claims are tied to "a concept of adverse facts available." (Nor does that description itself provide much, if any, clarity.) Rather, the panel request frames the facts available claims as many individual challenges to "instances" of the use of facts available, whether "adverse" or not. China's evolving characterization of its claim demonstrates the inadequacy of the panel request and raises due process concerns.

5. Third, after stating that its "principal concern" is the "concept" of adverse facts available, the Response also notes that this concept is only "part of the subject matter of this claim,"[8] and that China's facts available claim "relates, at least in part," to the use of "'adverse' facts available."[9] Again, none of this information can be gleaned from the text of the panel request itself. Moreover, even China's new explanation does little, if anything, to present any problems clearly. China's statements that "part" of its facts available claim relates to the concept of "'adverse' facts available" begs the question of what other issues China would like to address. The fact that China's explanation of its own claims shifts from the challenge in the panel request to unspecified individual instances to a "concept", and then to other unknown aspects of the uses of facts available further demonstrates the failure of the panel request to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in compliance with Article 6.2.

III. China Has No Basis for its Argument that the Panel Request Does Not Need to Present the Problem Clearly

6. China argues that the nature of this dispute somehow enables China to meet its Article 6.2 obligation under a lower standard than has been applied in other disputes because its claim "should be one that is well understood by the United States."[10] China has no basis for this assertion. Moreover, China's argument would seem to imply that even China recognizes that the description of its facts available claim in the panel request fails to meet the standard set out in the DSU.

7. China's argument for some sort of lower standard seems premised on the assertion that its "facts available" claim is a "cross-cutting, horizontal issue of law."[11] There are two fundamental problems with this argument. First, even if China's panel request did address "cross-cutting, horizontal" issues, China would have no basis for claiming that the panel should apply any sort of lower standard. Regardless of whether the issues are fact-specific and individual, a panel request must "present the problem clearly."

8. Second, and equally important, nothing about the face of the panel request indicates that China's facts available claims are in fact "cross-cutting" or "horizontal." To the contrary, the panel request states that China is challenging "each instance" of the use of facts available on an "as applied" basis.

9. "Each instance," however, is anything but "cross-cutting "or "horizontal." To the contrary, there are a wide variety of types of applications of facts available involved in the investigations at issue in this dispute. These applications range, for example, from complete failures by respondents to provide information, to the provision of partial information, to the provision of inaccurate information. By way of illustration, in *Aluminum Extrusions*, there was a total lack of participation by the three mandatory respondents, who all failed to respond to Commerce's initial questionnaire.[12] In *Lawn Groomers*, the accuracy of China's questionnaire responses regarding the hot-rolled steel industry could not be confirmed during Commerce's on-site verification.[13] In both these cases, Commerce applied facts available because the interested parties significantly impeded the investigation or refused access to necessary information. There are also determinations in

[7] Response, para. 41.
[8] *Id.*
[9] *Id.* para. 43.
[10] *Id.* para. 42.
[11] *Id.* para. 41.
[12] *Aluminum Extrusions I&D Memo* at 9-10.
[13] *Lawn Groomers I&D Memo* at 13-14.

which Commerce applied the facts available when Commerce had incomplete information. For example, in *Thermal Paper*, there was insufficient information on the record, and Commerce applied facts available, to calculate the benefit conferred in a manner that raised no objection by the cooperating respondent.[14] In *Drill Pipe*, China did not provide the requested information about the green tubes industry, and Commerce applied facts available to make its determination.[15] As these examples demonstrate, the determinations made by Commerce based on facts available varied from investigation to investigation. Although China may claim that there are common issues of law, any analysis of an authority's application of Article 12.7 must involve an examination of issues of fact. This can be seen from the panel's consideration of **one** of the **two** uses of "facts available" at issue in *China – GOES* where the factual analysis consumed the vast majority of the twelve pages of discussion the panel dedicated to that claim.[16] For these reasons, it is clear that China's "facts available" claims are not "cross-cutting" or "horizontal," but rather must be examined on a case-by-case basis.

10. China also argues that the United States should have understood that China's facts available claim relates to the use of "adverse" facts available.[17] Even if that were the case, the request still would not be limited to "cross-cutting" or "horizontal" issues – adverse facts available, just like other uses of facts available, can arise from a wide variety of factual situations. But regardless, China has no basis for its contention that the panel request reveals the fact that China is principally challenging Commerce's use of "adverse" facts available.

11. China argues that the United States should be able to discern the content of China's facts available claims, based on the content of the U.S. claim against China in *China – GOES.* This argument is inexplicable. The claims in *GOES* have no relationship to the claims brought by China in this dispute. In particular, *GOES* certainly involved no challenge to any "concept of adverse facts available." Rather, the U.S. made two facts available claims – one addressing MOFCOM's rejection of necessary information submitted by respondents, and one addressing MOFCOM's determination of rates for exporters that were not known at the time of the investigation. In short, nothing in the *GOES* dispute in any way is instructive in construing the vague panel request that China submitted in the current dispute.

12. Moreover, the description of claims brought under Article 12.7 in the U.S. panel request in *GOES* provides a contrast to the description provided by China in this dispute. The *GOES* panel request describes two claims related to two uses of facts available by MOFCOM:

> Article 12.7 of the SCM Agreement, because China improperly made its subsidy rate determinations based on the facts available. In particular, China was not entitled to reject necessary information submitted by respondent producers. The respondent producers submitted the necessary information in a reasonable period of time, and did not significantly impede the investigation. In addition, China applied facts available in a punitive manner, and disregarded its own findings in doing so.
>
> . . .
>
> Article 12.7 of the SCM Agreement, because China improperly applied facts available in determining the duty rate applicable to exporters that were not known at the time of the investigation, including potential "new shippers" and exporters that were not given notice of the information required by the investigating authority. In addition,

[14] *Thermal Paper I&D Memo* at 21-22.
[15] *Drill Pipe I&D Memo* at 10, 23.
[16] *China – GOES (Panel)*, paras. 7.266-7.310.
[17] China explains its reasoning as follows:
China's principal concern with regard to the USDOC's resort to facts available is the notion of 'adversity' on which these determinations are based. By referring to "so-called 'adverse' facts available" in the panel request, China clearly indicated that it considers the USDOC's concept of "adverse" facts available to be inconsistent with Article 12.7 of the SCM Agreement. China even went so far as to place the word "adverse" in quotes, plainly highlighting the concept of "adversity" as part of the subject matter of this claim.
Response, para. 41.

> China applied facts available in a punitive manner, and disregarded its own findings in doing so.[18]

In contrast, China's panel request describes its claim involving potentially hundreds of uses of "facts available" as follows:

> Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, in manners that were inconsistent with that provision.[19]

China alleges that Commerce takes a "cookie cutter" approach to countervailing duty investigations,[20] but it is China's panel request that has taken such an approach. The result is that China's claim related to the use of "facts available" has been obscured, and not presented clearly in compliance with Article 6.2.

IV. China's Response Mischaracterizes the Arguments in the Preliminary Ruling

13. In its Response, China mischaracterizes two of the arguments made by the United States in its preliminary ruling request. First, contrary to China's assertions,[21] the United States does not dispute China's right to bring a claim against a large number of instances of the use of facts available. Rather, the United States maintains that China must provide some identification, in the panel request, of the "instances" in order to "plainly connect"[22] the challenged action to the legal provision it has cited and meet the standard imposed by Article 6.2 to "present the problem clearly."

14. China also mischaracterizes the U.S. preliminary ruling request as asserting that China must set forth its argument in its panel request.[23] To support this characterization, China points to an observation in the U.S. request that Article 12.7 of the SCM Agreement contains a number of distinct obligations.[24] Even though the United States explains that it "does not assert that this lack of clarity," regarding which obligations the United States is supposed to have breached "standing alone, necessarily renders this or any other panel request deficient,"[25] China spends two pages in its Response rebutting one paragraph and a footnote.

V. The Appellate Body's Findings in *China – Raw Materials* Support a Finding that China's Panel Request is Deficient

15. In its preliminary ruling request, the United States made an analogy between the instant dispute and *China – Raw Materials.* In its Response, China essentially argues that because the facts here are different than those in *Raw Materials*, the Panel must come to the opposite conclusion as the Appellate Body did in that dispute.[26] China's response simply misses the point of the U.S. citation to *Raw Materials*, and thus China has failed to provide any meaningful rebuttal. The U.S. request did not contend that the facts in *Raw Materials* are exactly the same as in the present dispute; rather, the United States explained that the ambiguity presented by China's panel request in this dispute is analogous to that identified in *Raw Materials*, and that the Appellate Body's findings in *Raw Materials* thus support a finding that China's facts available claims as set out in the panel request do not meet the Article 6.2 standard.

16. The analogy between this dispute and *Raw Materials* is described in the preliminary ruling request as follows:

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[18] Request for the Establishment of a Panel by the United States at 2, WT/DS414/2, circulated 14 August 2011.

[19] Panel Request at 4-5.

[20] Response, para. 40.

[21] *See id.* paras. 19-22.

[22] *See, e.g.*, Preliminary Ruling Request of the United States, paras. 23-24 (citing *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 162). *See also China – Raw Materials (AB)*, para. 220.

[23] *See* Response, paras. 23-29.

[24] *Id.* at paras. 24-25 & n. 16.

[25] Preliminary Ruling Request of the United States, para. 22.

[26] *See* Response, paras. 34-37.

> The Appellate Body has explained that in order to "present the problem clearly," a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed". The Appellate Body found that this obligation was not met in *Raw Materials* because the panel request at issue did not make it clear "which allegations of error pertain[ed] to which particular measure or set of measures identified in the panel requests." The ambiguity presented in this dispute is analogous to that in *Raw Materials*.
>
> Here, one side of the ledger – the Member's actions that are the subject of the challenge – is obscured by the fact that China has essentially pointed to nearly every countervailing duty investigation undertaken by the United States with respect to China since 2008 that China has not previously challenged, including investigations that did not ultimately result in the imposition of countervailing duties, and said that Article 12.7 was violated somewhere in the course of those investigations. This description is not sufficient to "plainly connect" the 22 covered investigations with the alleged breach of Article 12.7. Accordingly, as in *Raw Materials,* China has failed to comply with the requirement to "provide a brief summary" of its claim "sufficient to present the problem clearly", as required by Article 6.2 of the DSU.[27]

In other words, the United States does not allege that China's panel request suffers from the exact same defect as the panel request in *Raw Materials*, but rather that its failure to adequately identify the actions ("instances") at issue results in a similar inability to "plainly connect" the 22 investigations to the claim.

17. Furthermore, China's Response not only fails to rebut the U.S. citation to *Raw Materials,* but confirms the U.S. position. China states that the "22 challenged measures identified in Appendix 1" are "plainly connect[ed]" to the legal provision at issue, Article 12.7.[28] China's panel request, however, failed to provide any identification of the "instances" of the use of facts available, which are the type of action subject to the facts available claim, pointing instead generally to the 22 investigations, which together contain hundreds of instances. China's Response also states that China is challenging the "concept of adverse facts available," which only further obscures the necessary connection between the challenged measure and the covered agreements. China's arguments related to *China – Raw Materials* therefore only confirm that China has failed to present the problem clearly in compliance with Article 6.2.

18. In addition, China fails to respond to the standard articulated in the various other reports of the Appellate Body cited in the U.S. request. As stated in the U.S. request:

> China's Panel Request also falls short of the articulation of the requirement to provide a "brief summary" of the legal basis "sufficient to present the problem clearly" given in the reports in *EC – Selected Customs Matters* and *Korea – Dairy.* As the Appellate Body found in its *Customs Matters* report*,* "A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This brief summary must be sufficient to present the problem clearly."[29]

China does not attempt to dispute the U.S. reliance on these statements by the Appellate Body because China's panel request reveals essentially nothing about how or why the measures at issue have breached Article 12.7. For this reason, China has failed to meet the standard in Article 6.2.

VI. Conclusion

19. For the reasons set out above and in its request for a preliminary ruling, the United States respectfully requests that the Panel find that China's "as applied" challenge to "each instance" in which the investigating authority "used facts available" is not within the Panel's terms of reference.

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[27] Preliminary Ruling Request of the United States, paras. 24-25 (footnotes omitted).

[28] Response, para. 35.

[29] Preliminary Ruling Request of the United States, para. 26 (citing *EC – Selected Customs Matters (AB)*, para. 130).

Further, the United States also respectfully requests that the Panel issue its final determination on this matter on February 1, rather than defer a decision until some later point in the proceeding.

20. The United States thanks the Panel for its consideration of this request, and would welcome the opportunity to respond to any questions it may have, whether in oral argument or in writing.

ANNEX A-4

COMMENTS OF CHINA ON THE UNITED STATES REQUEST FOR A PRELIMINARY RULING

Table of Reports Cited in this Submission

Short Title	Full Report Title and Citation
China – GOES	Panel Report, China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States, WT/DS414/R, circulated to WTO Members 15 June 2012
China – Raw Materials	Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WTDS398/AB/R, adopted 22 February 2012
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, 2805
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, 2741
US – Oil Country Tubular Goods Sunset Review	Appellate Body Report, United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/AB/R, adopted 17 December 2004

I. Introduction

1. China demonstrated in its response to the U.S. request for a preliminary ruling that the United States had failed to show that subsection (d)(1) of China's panel request does not "present the problem clearly" as required by Article 6.2 of the DSU. Contrary to the U.S. assertion that China's claim under Article 12.7 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") was too "broad" and "vague", that claim on its face unambiguously relates to each instance in the identified determinations in which the USDOC used "adverse" facts available to reach a finding of financial contribution, benefit, or specificity.[1] China's panel request "presents the problem clearly" because it "plainly connects" the challenged measures to the single provision of the covered agreements claimed to have been infringed.[2]

2. In its comments on China's response (the "Comments"), the United States has merely confirmed that its request for a preliminary ruling is unfounded. The United States effectively abandons its argument that China's claim in subsection (d)(1) is impermissibly "vague" because China did not explain which "aspects" of Article 12.7 China considers the United States to have violated.[3] In relation to its claim that China's panel request is overly "broad", the United States "does not dispute China's right to bring a claim against a large number of instances of the use of facts available."[4] Nor does the United States continue the pretence of being unable to "discern" those instances within the measures at issue in which the USDOC used "adverse" facts available for the purpose of making findings of financial contribution, specificity, and benefit.[5]

3. The sole source of the U.S. complaint, as is evident from the Comments, is that China's panel request "fail[s] to identify the actions of the U.S. Department of Commerce ("Commerce") that China intends to challenge."[6] According to the United States, "China must provide some identification, in the panel request, of the 'instances' [at issue] in order to 'plainly connect' the challenged action to the legal provision it has cited and meet the standard imposed by Article 6.2 to 'present the problem clearly.'"[7] Because of this alleged failure, the United States asserts that it "still does not know which of the hundreds of possible claims China will pursue".[8]

4. China is baffled by these assertions. The United States repeatedly acknowledges that China is challenging "each instance" in which the USDOC used "adverse" facts available for the purpose of making findings of financial contribution, specificity and benefit.[9] The ordinary meaning of "each" when used as an adjective is "every".[10] By identifying "each instance" in which the USDOC used "adverse" facts available to support these findings, China has provided more than "some identification" of the relevant instances – it has identified these instances with unambiguous precision.

5. Contrary to the United States' assertion that China has used its response to "recast" its claim in subsection (d)(1), China's claim was, and remains, that the United States acted inconsistently with Article 12.7 of the SCM Agreement in respect of each (*i.e.*, every) instance in which the USDOC used facts available, including "adverse" facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1 of China's panel request. The United States apparently believes that Article 6.2 required China to provide page citations to each instance in the determinations at issue in which the USDOC used adverse facts available, but no such obligation exists.

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[1] As China explained in footnote 1 of its response to the U.S. request for a preliminary ruling, there are only a small number of instances in the determinations at issue in which the USDOC used anything other than "adverse" facts available (or "adverse inferences") for the purpose of reaching a finding of financial contribution, specificity, or benefit. The United States does not dispute this fact. Accordingly, China refers to the USDOC's use of "adverse" facts available when referring to the USDOC's use of facts available in support of its findings of financial contribution, specificity, and benefit.

[2] *See* Appellate Body Report, *US – Oil Country Tubular Goods Sunset Review*, para. 162.

[3] U.S. Comments, para. 14.

[4] U.S. Comments, para. 13.

[5] *See* Part 0, *infra*.

[6] U.S. Comments, para. 1.

[7] U.S. Comments, para. 13. *See also id*., para. 16 (asserting that China's panel request fails "to adequately identify the actions ('instances') at issue").

[8] U.S. Comments, para. 1.

[9] U.S. Comments, para. 30.

[10] New Shorter Oxford English Dictionary, (Oxford: Clarendon Press, 1993), p. 773.

II. China Has Not "Recast" Its Claim in Subsection (d)(1) of Its Panel Request

6. The United States claims that China's response to the U.S. preliminary ruling request "recasts" its claim in subsection (d)(1) of the panel request in three ways, thereby demonstrating that "the claims actually set out in its panel request fail to present the problem clearly".[11] China will address each of the U.S. arguments in turn, in order to demonstrate that China's claim is unchanged from the face of its panel request.

7. First, the United States argues that China has "confined" its panel request to those instances in which the USDOC used facts available and identified that use in a specific section of the Issues and Determinations Memoranda ("I&D memos") or the Federal Register notices (for preliminary determinations).[12] In essence, the United States asserts that China has somehow narrowed its claim by referencing the I&D memos and Federal Register notices. China has done no such thing.

8. China cited the USDOC's I&D memos and Federal Register notices to rebut the preposterous U.S. assertion that it could not "discern" the specific instances in which the USDOC used "adverse" facts available for the purpose of reaching a finding of financial contribution, specificity, or benefit in the determinations at issue. China explained that each of the relevant determinations cited in Appendix 1 of the panel request contains a section entitled "Application of Facts Available, Including the Application of Adverse Inferences", or a similar title to the same effect.[13] China further explained that in this "AFA section", the USDOC identifies the instances in which it uses "adverse" facts available and often sets forth or elaborates upon its rationale for using "adverse" facts available in the section of the I&D memo that addresses specific comments raised by interested parties during the course of the investigation.[14]

9. In so doing, China did not "confine" its Panel Request to those instances of "adverse" facts available identified in the "AFA section" of the I&D memos and Federal Register notices. China referenced the structure of the USDOC's I&D memos and Federal Register notices to demonstrate that the United States should have no trouble identifying the relevant instances in which the USDOC used "adverse" facts available, because the USDOC generally acknowledges such use in the "AFA section". Notably, the United States does not dispute that the I&D memos and Federal Register notices do, in fact, identify all instances in which the USDOC used "adverse" facts available in making findings of financial contribution, specificity and benefit. It is only quibble, apparently, that there are some limited instances in which the USDOC relies on "adverse" facts available in its determinations, but discusses that reliance in a section of the I&D memo other than the "AFA section". But China never argued otherwise. Moreover, as the United States amply demonstrates in footnote 6 of its Comments, it had no difficulty identifying instances in which the USDOC used facts available anywhere in the I&D memo, even not in a specific section. Contrary to its earlier protestations, it is evident that the United States is, in fact, perfectly capable of reviewing the USDOC's own determinations and "discern[ing]" those instances in which the USDOC used "adverse" facts available.

10. Second, the United States argues that China has "recast" its claim by "appear[ing] to explain that it intends to challenge an alleged practice or policy" of using "adverse" facts available, which China considers to be inconsistent with Article 12.7.[15] According to the United States "[n]othing in the text of the panel request … could lead the reader to understand that China's facts available claims are tied to 'a concept of adverse facts available.'"[16]

11. This is sophistry. Subsection (d)(1) of China's panel request states that China is challenging "each instance" in which the USDOC used facts available, "including so-called 'adverse' facts available" in making findings of financial contribution, specificity, and benefit. The reference to "each instance" makes clear that China is presenting an "as applied" claim, and not challenging some "alleged practice or policy" of the USDOC "as such". Moreover, the term "adverse" appears on the face of the panel request (in quotation marks, no less), plainly highlighting that the subject matter of China's claim includes the consistency of the USDOC's use of "adverse" facts available with Article 12.7. The notion that "[n]othing in the text of the panel request … could lead the

[11] U.S. Comments, Header II.
[12] U.S. Comments, para. 3.
[13] China's Response, para. 16. China will refer to this section as the "AFA section".
[14] China's Response, para. 16.
[15] U.S. Comments, para. 4.
[16] U.S. Comments, para. 4.

reader to understand that China's facts available claims are tied to 'a concept of adverse facts available'" is belied by the plain language of the request.[17]

12. Finally, in a similar vein, the United States argues that China has recast its claim by stating that its "principal concern" is the concept of "adverse" facts available, "while also stating that this concept is only 'part of the subject matter of this claim'".[18] The United States argues that "none of this information can be gleaned from the text of the panel request itself."[19]

13. Without wanting to beat a dead horse, China's panel request states on its face that it is challenging "each instance in which the USDOC used facts available, including 'adverse' facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1". "Each instance" means just what it says. As it turns out, virtually all of the instances in which the USDOC used facts available involved the use of "adverse" facts available – a fact manifestly evident on the face of the determinations at issue. This is why the USDOC's use of "adverse" facts available is China's principal concern. The United States should have had no trouble "glean[ing]" this information from the plain language of China's claim.

III. China's Responsibility to "Present the Problem Clearly" Under Article 6.2 Is Neither "Enhance[d]" Nor "Lowered" By the Nature of China's Claim in Subsection (d)(1)

14. In its request for a preliminary ruling, the United States suggested that China had an "enhance[d]" responsibility under Article 6.2 to "provide a brief summary of the legal basis of the complaint" in light of the large number of instances in which the USDOC used "adverse" facts available in the identified determinations.[20] The United States cited no authority to support this proposition, and does not purport to do so in its Comments.

15. Instead, the United States now seeks to change the subject by asserting that China has argued that "some sort of lower standard" applies to its panel request,[21] and that, as a result, China does not need to "present the problem clearly".[22] China has made no such argument.

16. As China explained in its initial response, whether a claim involves one instance of a violation or hundreds of instances of the same violation, a complaining Member has the same obligation under Article 6.2 – to "plainly connect" the challenged measures to the provision(s) of the covered agreements claimed to have been infringed.[23] China has fulfilled that requirement in its panel request by indicating that its claim under Article 12.7 of the SCM Agreement relates to "each instance" in the identified determinations in which the USDOC used "adverse" facts available to reach a finding of financial contribution, benefit, or specificity. China considers all of these applications of "adverse" facts available to have been contrary to Article 12.7 of the SCM Agreement, and that claim is clearly presented in the panel request.

17. Despite the clear connection between the measures at issue and China's claim under Article 12.7, the United States continues to argue that China has failed to "plainly connect" the challenged measures to Article 12.7, in a manner "analogous" to the deficient panel requests at issue in *China – Raw Materials*.[24]

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[17] As China discussed in its earlier response, the United States was plainly aware of the issue of whether it is consistent with Article 12.7 of the SCM Agreement to use "adverse" facts available, given that it had litigated the same issue in *China – GOES* only several months prior to the filing of the panel request in the present dispute. The U.S. response to this point is incoherent. If "[t]he claims in *GOES* have no relationship to the claims brought by China in this dispute", as the United States contends in paragraph 11 of its Comments, how, then, did the panel in that dispute make a finding that it is inconsistent with Article 12.7 for an investigating authority to use "adverse inferences" or make findings that have no basis in the record evidence? The question of whether Article 12.7 permits the use of "adverse" facts available was very much at issue in that dispute, just as it is clearly at issue in this dispute based on the plain language of the panel request.

[18] U.S. Comments, para. 5.

[19] U.S. Comments, para. 5.

[20] U.S. Preliminary Ruling Request, para. 30.

[21] U.S. Comments, para. 7.

[22] U.S. Comments, Header III.

[23] China's Response, para. 21.

[24] U.S. Comments, para. 15.

18. China explained at length in Part III.D of its initial response that the panel requests in *China – Raw Materials* are not remotely "analogous" to China's panel request in this dispute, and in fact have nothing in common.[25] While the United States reluctantly acknowledges that the facts in *China – Raw Materials* are not "exactly the same as in the present dispute",[26] it persists in arguing that China's "failure to adequately identify the actions ('instances') at issue results in a similar inability to 'plainly connect' the 22 investigations to the claim."[27] The only reasoning that the United States provides in support of this conclusory assertion is a *verbatim* quotation of the same two paragraphs from its request that China has already demonstrated to be baseless precisely because the facts in this case bear no resemblance to those in *China – Raw Materials*.[28]

19. China is at a loss to know what more can be said on this issue, and will not repeat in full all of the reasons why *China – Raw Materials* provides no support whatsoever for the U.S. assertion that China's panel request is inconsistent with Article 6.2. In the first instance, the failure of the complainants in *China – Raw Materials* to "plainly connect" the challenged measures with the numerous legal instruments identified in the panel requests has no analogy to the panel request in the present dispute. The panel requests in *China – Raw Materials* failed to provide any connection at all between the 37 identified measures and the 13 identified treaty provisions. It was unclear, for example, if each measure violated a single treaty provision, violated some of the treaty provisions, or violated all of the treaty provisions. In contrast, in subsection (d)(1) of China's panel request in this dispute, China has identified 22 measures and exactly <u>one</u> treaty provision that is set forth in a single sentence. Accordingly, the United States should have no problem determining which treaty provision has been violated by the measures in Appendix 1.[29]

20. Moreover, the U.S. argument that China has failed to "plainly connect" the 22 measures at issue to its claim in subsection (d)(1) is premised on the idea that China "fail[ed] to adequately identify the actions ('instances') at issue". As explained above, the United States apparently cannot countenance the idea that China has challenged "<u>each instance</u>" in which the USDOC resorted to "adverse" facts available to reach a finding of financial contribution, benefit, or specificity, so the United States insists that China has failed to adequately identify the "instances" at issue. But no amount of insisting will change the fact that China has, with the requisite precision and clarity, identified exactly which "instances" of the use of "adverse" facts available are at issue in this dispute.

IV. Conclusion

21. As China demonstrated in its initial response to the U.S. request for a preliminary ruling and in the comments above, the United States has failed to show that subsection (d)(1) of China's panel request is inconsistent with Article 6.2 of the DSU. The U.S. Comments make clear that the source of the U.S. complaint is that China's panel request "fail[s] to identify the actions of the U.S. Department of Commerce ("Commerce") that China intends to challenge."[30] This claim has no merit. By challenging "<u>each instance</u>" in which the USDOC resorted to "adverse" facts available to reach a finding of financial contribution, benefit, or specificity, China has specifically identified "the actions of the U.S. Department of Commerce" that are at issue. The Panel should therefore reject the U.S. request.

22. China welcomes the opportunity to respond to any questions posed by the Panel in connection with the U.S. request, and is prepared to participate in whatever other procedures the Panel considers appropriate. China thanks the Panel for its consideration of this matter.

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[25] *See* China's Response, paras. 30-37.

[26] U.S. Comments, para. 15.

[27] U.S. Comments, para. 16.

[28] U.S. Comments, para. 16.

[29] As China discussed in its response to the U.S. request for a preliminary ruling, the small number of instances in which panels or the Appellate Body have found a claim to be inconsistent with the requirement in Article 6.2 to "present the problem clearly" have involved instances in which the complaining Member alleged that one or more measures were inconsistent either with *multiple provisions* of the covered agreements or with a single provision containing multiple obligations, without providing any explanation as to how the multiple provisions and obligations alleged to have been violated related to the measures identified as the source of the violation. *See, e.g.*, Panel Report, *Japan – DRAMs (Korea)*, para. 7.21; Panel Report, *Thailand – H-Beams*, paras. 7.27-7.31.

[30] U.S. Comments, para. 1.

ANNEX A-5

THIRD PARTY COMMENTS OF BRAZIL ON THE UNITED STATES REQUEST FOR A PRELIMINARY RULING

TABLE OF CASES

Short Title	Full Case Title and Citation
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167.
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817.
China – Raw Materials	Appellate Body Reports*, China – Measures Related to the Exportation of Various Raw Materials,* WT/DS394/AB/R/ WT/DS395/AB/R/ WT/DS398/AB/R, adopted 22 February 2012
Colombia – Ports of Entry	Panel Report*, Colombia – Indicative Prices and Restrictions on Ports of Entry,* WT/DS366/R and Corr.1, adopted 20 May 2009. DSR 2009:VI, 2535.
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367.
EC – Fasteners	Appellate Body Report, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/R, adopted 28 July 2011.
EC – Large Civil Aircraft	Appellate Body Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/AB/R, adopted 1 June 2011.
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791.
EC — Trademarks and Geographical Indications (US)	Panel Report, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States, WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, 3499.
Korea – Dairy	Appellate Body Report, Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3.
Thailand – H-Beams	Appellate Body Report, Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701.
US – Carbon Steel	Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779.
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology,* WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, 1291.

1. Brazil welcomes the opportunity to present its views on the issues raised by the United States in its request for a preliminary ruling. The comments advanced by both parties within these proceedings touch upon fundamental questions concerning the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU") and, in this sense, are of great concern for Brazil.

2. With this consideration in mind, and without prejudice to other issues that it may raise further on in this case, Brazil would like to avail itself of this opportunity to offer its comments on the interpretation and scope of two key aspects of Article 6.2 of the DSU concerning the requirements for the establishment of a panel, in order to try to contribute with the Panel's work regarding the preliminary matter before it.

3. Article 6.2 of the DSU sets out that "The request for the panel shall (…) identify the *specific measures at issue* and provide a *brief summary of the legal basis of the complaint* sufficient to present the problem clearly".[1] Thus, in order to fulfill the conditions set out in this provision the request must meet two requirements, namely, the identification of the measures targeted in the dispute and the provision of a brief summary and legal basis of the claims. Together, as the Appellate Body confirmed in the *China – Raw Materials* "these two elements constitute the 'matter referred to the DSB', so that, if either of them is not properly identified, the matter would not be within the panel's terms of reference."[2]

4. As Panels and the Appellate Body have frequently underscored, these two requirements fulfill an important role in the proceedings established under the DSU.[3] Not only they set the limits of the WTO adjudicating bodies jurisdiction, by defining the precise claims at issue, but also they are meant to provide the parties, and third parties, sufficient information concerning the claim in order to allow them an opportunity to respond to the complainant's case.[4]

5. Given its importance both in terms of due process and for the definition of the Panel's jurisdiction, the language in Article 6.2 of the DSU has generated a significant amount of discussion that, in due time, helped to streamline the debate thereon. In this regard, in Brazil's view, the fundamental question in this procedure is whether the panel request submitted by China satisfies the objective of providing notice to the defendant and to third parties regarding the precise nature of the dispute.

6. At the outset, Brazil would like to highlight that nothing in the text of Article 6.2 of the DSU imposes a stringent obligation on the complaining party to develop in the panel request the legal arguments that support its claims. Nor does it require a panel request to contain detailed explanation as to *why* and *how* the measures that are being challenged are inconsistent with the provisions of the relevant WTO Agreements.[5] As put forward by the Appellate Body in *EC–Selected Customs Matters*[6]*,* for the purposes of Article 6.2 of the DSU, it suffices that the panel request sets out the "claims" with enough precision to allow the responding party to understand with clarity the allegedly violations presented against it.

7. In the light of the above, and having in mind that such an analysis must be done in a case-by-case basis, the Panel, in order to properly address the questions raised by the United States in its request for a preliminary ruling, will have to assess whether the complainant, in its request for a panel, was able to clearly identify the measures at stake and to define with sufficient precision the allegedly breaches of the covered agreements.

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[1] Emphasis added.

[2] *China – Raw Materials* (Appellate Body Report, paragraph 219).

[3] Among others, *Brazil – Desiccated Coconut* (Appelate Body Report, paragraph 22); *China – Raw Materials* (Appellate Body Report, paragraphs 220 and 233).

[4] As the Appellate Body has said in *EC–Large Civil Aircraft* (Appellate Body Report, paragraph 640), the panel request provides notice not only to the respondent but also to third parties, inasmuch as to fundament due process in the dispute.

[5] See *Canada-Wheat Exports and Grain Imports* (Panel Report, paragraph 6.10).

[6] "[t]he "specific measure" to be identified in a panel request is the object of the challenge, namely, the measure that is alleged to be causing the violation of an obligation contained in a covered agreement. In other words, the measure at issue is what is being challenged by the complaining Member. As for the legal basis of the complaint, namely the "claim", it pertains to the specific provision of the covered agreement that contains the obligation alleged to be violated." (*EC – Selected Customs Matters:* Appellate Body Report, paragraph 130 – original emphasis).

8. With respect to the first requirement, it must be noted that, although China's submission refers indeed to a large number of complex measures, they all seem to be discernible not only by their content[7] (instances in which the investigating authority used facts available as the basis for its decision), but also by their respective legal instruments, including their number and date of adoption. In this regard, the measures appear to have been framed with sufficient particularity so as to allow the defendant to identify their "nature and the gist of what is at issue", which, accordingly to the Appellate Body in *US – Continued Zeroing*, should be sufficient to fulfill the requirement of the identification of a measure within the meaning of Article 6.2 of the DSU.[8]

9. As for presenting a brief summary of the legal basis of the complaint, Brazil shares the view that the mere listing of provisions of the relevant covered agreements allegedly violated may not satisfy the standard of Article 6.2 of the DSU in all cases, since this provision calls for sufficient clarity with respect to the legal problem identified by the complainant, so as to enable the other party to begin preparing its defense. That is a condition that cannot always be met by simply referring to a provision of a covered agreement, with no further information thereon. This is particularly the case when a treaty provision embodies multiple obligations.

10. In this specific case, however, the language of Article 12.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM") raises no doubt regarding the legal problem identified by China in its assessment of the measures brought before the Panel. Article 12.7 of the SCM specifically requires that, whenever any interested Member or interested party refuses access to or otherwise does not provide necessary information or impedes a countervailing duty investigation, preliminary and final determination must be made on the basis of the facts available. By challenging a set of measures adopted by the defendant on the basis of Article 12.7 of the SCM, the complainant seems to fairly indicate the legal problem it envisaged to address in the proceeding. In this sense, read in its entirety, the panel request put forward by China seems to be sufficiently clear to identify the matter referred to the Panel.

11. Brazil does not dispute, however, that greater precision and clarity in panels request would contribute to better define the boundaries of the Panel jurisdiction, to the great benefit of both parties. And it certainly does not advocate that permissive standards of specificity should prevail in the DSU proceedings. On the contrary: in Brazil's view, in order to respect the letter and the spirit of Article 6.2 of the DSU, a careful analysis of the requirement of specificity is due in each and every case submitted to a Panel, in order to ensure the proper functioning of the dispute settlement mechanism.

12. Nonetheless, as it stands now, it is clear that Article 6.2 of the DSU does not impinge upon the complainant an obligation to provide length details, at this early stage of the procedure, on how and why the measure at stake should be considered inconsistent with a particular disposition of the Covered agreements.[9] As long as the challenged measure is discernible in the panel request and the legal basis of the complaint is clearly identified there seems to be no solid reason to

[7] See *EC — Trademarks and Geographical Indications (US)* (Panel Report, paragraph 7.2.11): "The Panel considers the ordinary meaning of the terms of the text in Article 6.2 of the DSU, read in their context and in the light of the object and purpose of the provision, to be quite clear. They require that a request for establishment of a panel 'identify the specific measures at issue'. They do not require the identification of the 'specific aspects' of these 'specific measures'."

[8] *US – Continued Zeroing* (Appellate Body Report, paragraphs 168 – 169): "[…] the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request […]. Moreover, although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 need be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."

[9] The Appellate Body has consistently distinguished the "claims" of a party from "arguments" presented in support of those claims. In *Dominican Republic – Import and Sale of Cigarettes* (Appellate Body Report, paragraph. 121), the Appellate Body stated that "[c]laims, which are typically allegations of violation of the substantive provisions of the WTO Agreement, must be set out clearly in the request for the establishment of a panel. Arguments, by contrast, are the means whereby a party progressively develops and support its claims. These do not need to be set out in detail in a panel request; rather, they may be developed in the submissions made to the panel." In *Korea – Dairy* (Appellate Body Report (DS98), paragraph 139), the Appellate Body further clarified what it understood by "claim": "[…] By 'claim' we mean a claim that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement." Also in *EC – Selected Customs Matters* (Appellate Body Report (DS315), paragraph 153), the Appellate Body reiterates that "[a]rticle 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly." (original emphasis).

dismiss the request and impede the procedure to take its course, where the specifics arguments put forward by both parties should entail an objective assessment of the case by the Panel.

13. In Brazil's view, in light of the principles embodied in Article 3.3 of the DSU, the threshold examination of the panel request, relating to its "due process" and "jurisdictional" functions, should not be conflated with the substantive analysis of the complainant's claims, which should take into account the arguments and the evidence produced by the parties later on in the proceedings. In this connection, Brazil recalls that whereas defects in panel requests cannot be "cured" by later clarification, panels are entitled to rely on the parties written submissions in order to interpret the panel request and define the precise scope of its jurisdiction.[10]

14. Brazil appreciates the opportunity to comment on the issues at stake in these proceedings, and hopes the viewpoints furthered hereby may assist the Panel in examining the matter before it.

[10] See *Colombia – Ports of Entry* (Panel Report, paragraph 7.33), *Thailand – H-Beams* (Appellate Body Report, paragraph 95) and *US – Carbon Steel* (Appellate Body Report, paragraph 127).

ANNEX A-6

EXECUTIVE SUMMARY OF THIRD PARTY COMMENTS OF THE EUROPEAN UNION ON THE UNITED STATES REQUEST FOR A PRELIMINARY RULING

Table of Contents

I. INTRODUCTION

1. The European Union provides these comments on the US request for a preliminary ruling because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, in particular the *Agreement on Subsidies and Countervailing Measures* (the *SCM Agreement*) and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the *DSU*).

II. THE RIGHT OF THIRD PARTIES TO BE HEARD ON PRELIMINARY RULING REQUESTS

2. The European Union refers to the Panel's communication of 21 January 2013, which refers to the *Parties agreement* that the Third Parties be given an opportunity to comment on the US preliminary ruling request, and the Panel's agreement, *without prejudice* to the arguments advanced by the Third Parties to that effect. The European Union considers that, subject to any issues of *confidentiality*, the Third Parties have a right to be heard on the US preliminary ruling request *before* the Panel makes any decision with respect to it (acceptance, rejection or deferral), which right flows directly from Article 10 of the DSU, and is not subject to the agreement of the Parties or the Panel.

3. In the evolving practice of preliminary rulings, which are not expressly provided for in the DSU, but would appear to be a (legitimate) example of the exercise of the inherent jurisdiction that WTO adjudicators have to deal with matters arising during a particular dispute, some issues still remain to be clarified.

4. On one view, such documents are not in the nature of binding and irreversible judicial determinations when they are made or issued. It is only when they are incorporated in the panel report (and eventually adopted by the DSB) that they acquire that status. In the meantime, they are rather in the nature of guidance to the parties and third parties about how to organise their briefs in the most efficient manner. Indeed, sometimes, a panel merely issues the ruling without any reasoning, deferring the reasoning to the panel report.

5. This means that, in theory, a panel could change its mind between making such a preliminary ruling and the final panel report. Thus, having previously found a particular matter to be within the scope of the proceedings, and required briefing on it from the parties and third parties, a panel could nevertheless change its mind in the panel report and decide that, after all, such matter should be considered outside the scope of the proceedings. This would not appear to be particularly problematic from a due process point of view, or otherwise. Panels are free to make whatever determinations they wish in their reports, including with respect to the scope of the proceedings. Conversely, this would imply that a panel could find a matter outside the scope of the proceedings in a preliminary ruling, but change its mind and bring it back into the scope at a later stage. Obviously, this would raise due process issues. Parties and third parties would have to be given an opportunity to be heard on the enlarged substance, and this would likely delay the proceedings.

6. Consistent with this model, the right to appeal a preliminary ruling arises only with the circulation of the final report and expires 60 days later. Also consistent with this model, it would not matter if third parties were heard only *after* the preliminary ruling (or guidance) would have been issued because, in theory, a panel could always change its mind. This model also implies that a panel should bear in mind the risk that its preliminary ruling could be reversed on appeal, and consider making any additional factual findings that the Appellate Body might eventually require to complete the analysis.

7. A different view is that the preliminary ruling is decisional in nature when made, notwithstanding the fact that the panel may have the possibility of revising such ruling at a later date. Based on the proposition that the substance rather than the form of a document is determinative as to its nature, that could imply that it should be considered for adoption by the DSB or appealed within 60 days. This approach would be consistent with the proposition that it is desirable, in terms of the efficiency of dispute proceedings, that preliminary issues be definitively and *finally* settled at an early stage. It would alleviate panels from the need to make additional factual findings to cover the eventuality of preliminary rulings embedded in panel reports being reversed by the Appellate Body. It would imply that third parties must be heard *before* any ruling would be issued.

8. For the time being, the WTO dispute settlement system appears to be continuing to operate on the basis of the first model outlined above. However, there are elements of the recent Appellate Body ruling in *Raw Materials* that emphasise the desirability of settling preliminary issues at an early stage, where possible. This appears to be reflected in developments in some panel proceedings. For example, in the present proceedings, the panel has timetabled two sets of briefs from the Parties on the preliminary issue, and has also *expressly timetabled its intention to issue a communication on the US preliminary ruling request* (acceptance, rejection or deferral) *before* the time limit provided for Third Parties to file their written submissions on the substance.

9. The European Union's view is that, even if the WTO dispute settlement is, for the time being, continuing to operate on the basis of the first model outlined above, nevertheless, *for all practical purposes*, the guidance provided by panels in preliminary rulings remains essentially unchanged in final reports. The European Union is not aware of any case in which a panel has changed its mind about a preliminary ruling. In these circumstances, panels should provide third parties with an opportunity to be heard on the preliminary issues before a communication (acceptance, rejection, deferral) is issued, in line with the requirements of Article 10 of the DSU. Otherwise, *de facto*, a third party would stand little if any chance of persuading a panel to change its mind. And in any event the panel would have lost the opportunity to reflect the views and arguments of third parties in perhaps more subtle ways in the reasoning of its preliminary ruling. This would inevitably mean that third party rights would, in effect, be *diminished*. In this respect, the European Union would point to the term "fully" in Article 10.1 of the DSU, which also features in the jurisprudence relating to third party rights on compliance proceedings (they have the right to receive all submissions to the first and only hearing). The European Union considers that effectively *diminishing* third party rights (by hearing third parties only after the horse has, for all practical purposes, left the stable) would not be consistent with the requirement that the interests of third parties should be *fully* taken into account. This is particularly so since there does not as yet appear to be any firm clarification of what types of issue are fit for preliminary adjudication. WTO disputes settlement leads to a *multilateral* clarification of the covered agreements, and in order to justify that description as a matter of *substance* and not just as a formal label, it is imperative that Members wishing to participate as third parties retain their full and effective right to be heard on all matters decided by a panel.

10. The European Union recognises that, pursuant to Article 10.2 of the DSU, this means that the submissions of the third parties on the preliminary issues must be reflected *in the panel report*. This is a burden for the Secretariat and may require some additional time. Nevertheless, it is a burden that may be to a considerable extent alleviated by the practice of requesting and receiving executive summaries from third parties, including with respect to their comments on any preliminary issues. Having regard to the need to find a reasonable balance between the interest of prompt settlement and the role of third parties, the European Union would not understand that, at this stage of the development of the dispute settlement system, the views of the third parties on the preliminary issues must necessarily be reflected *in the preliminary ruling itself*, provided that they are reflected in the panel report.

III. THE SUBSTANCE OF THE US PRELIMINARY RULING REQUEST

11. The European Union is not persuaded that the mere fact that the scope of a particular proceeding is broad, in the sense that it refers to a relatively large number of measures, is particularly relevant to the discussion. The number of measures is not necessarily a matter for which the complaining Member is responsible. It may equally be a function of the number of WTO inconsistent measures that the defending Member has chosen to adopt. If the defending Member has adopted twenty WTO inconsistent measures, then it does not appear unreasonable for the complaining Member to seek review of those twenty measures. Nor would it appear particularly efficient or desirable for the complaining Member to commence twenty separate panel proceedings. Although Article 9 of the DSU refers to situations where there is more than one complaining Member, at least by analogy, it indicates a preference for efficiency where possible in the conduct of DSU proceedings, including the use of a single panel.

12. For similar reasons, the European Union is not particularly persuaded that the fact that each measure might contain more than one instance of inconsistency is particularly relevant to the discussion. The complaining Member does not have to start a panel proceeding for each instance of inconsistency. Rather, it may start one panel proceeding, referring to the measure, and referring to each instance of inconsistency.

13. The European Union considers that, when referring to more than one instance of inconsistency in a measure, there may be different ways of complying with the requirements of Article 6.2 of the DSU. One approach might be to cite to the page, paragraph number, line, column, etc. where the instance of inconsistency is to be found. That appears to be what the United States would have preferred in this case, and the European Union does have some sympathy with that observation, insofar as one may reasonable ask why China did not do that in its panel request. On the other hand, there might be other reasonable ways of directing the defending Member to the instances of inconsistency without citations. For example, if all the instances of inconsistency would be associated with the term "adverse", as essentially appears to be the case here (the other instances are further discussed below), then it would appear to be a relatively simple matter for the defending Member to review the measure or measures and identify the instances where that term is used. Current software contains search functions that substantially facilitate that process. For these reasons, the European Union considers that, whilst it might have been preferable for China to provide citations, this is not expressly required by Article 6.2 of the DSU, provided that some other method has been used that reasonably directs the defending Member to the instances of inconsistency.

14. Claims that do not relate to the use of facts available may be relatively less complex. They may involve pointing at one particular statement in the measure at issue and a particular WTO obligation, from which the alleged inconsistency may more or less speak for itself, and thus be susceptible to brief summary in a panel request. On the other hand, one of the difficulties with respect to claims regarding the use of facts available is that, in order to adjudicate the claim, it may be necessary to have a thorough overview of the relevant investigation and measure, including the procedural context. A number of different but related factors may need to be taken into consideration. The European Union does not consider that Article 6.2 of the DSU requires a panel request to set out *all* these factual and procedural matters that might be relevant to such a claim.

15. On the other hand, as the United States observes, there are different issues that might arise under Article 12.7 of the *SCM Agreement* in connection with the use of facts available or adverse facts available. For example, it might be alleged that the entity was not an interested Member or party; that it did not refuse access to or otherwise not provide – either because it was not asked or asked precisely enough or did in fact provide; that the information was not necessary; that the time provided was not reasonable; that the set of facts used was under or over inclusive; that the inferences drawn were excessively attenuated; or that there is no a basis in that provision for drawing adverse inferences. One might have thought that, if the complaining Member would have already at the time of its panel request itself worked out which of these issues best describes the problem (and there might be more than one) it might indicate that in its panel request.

16. That said, looking at China's panel request, it is clear that China did expressly refer to the issue of adversity. Thus, it seems that, on the one hand, the instances of inconsistency (labelled with the term "adverse") have been identified, and, on the other hand, the nature of the problem under Article 12.7 of the *SCM Agreement* (adversity) has also been identified. The United States complaint therefore appears to reduce to the point that China should have somehow connected these two elements in its panel request. And yet China's panel request does contain the term "because". In other words, it appears to result from China's panel request that China is complaining about each instance where the term "adverse" is used *because* this is inconsistent with Article 12.7 of the *SCM Agreement*. Since China's point is that this is something that is not provided for in Article 12.7 of the *SCM Agreement*, it is not clear why China would have been expected to refer to other elements of that provision in its panel request. In these circumstances, the European Union would have some difficulty to reach the conclusion that China's panel request is inconsistent with Article 6.2 of the DSU.

17. The position with respect to the use of facts available other than adverse facts available, of which China states there are some instances, is slightly different. Here, the European Union considers that the United States may have a point. Even if the United States would be able to identify the instances of inconsistency in the measures at issue (perhaps a slightly more difficult but certainly not impossible task), nevertheless, the question remains, which element or elements of Article 12.7 of the *SCM Agreement* best encapsulates the problem? As indicated above, the European Union does not consider that China should have set out all the facts and procedural context. Nevertheless, some further effort to specify the problem, in the light of the language of Article 12.7 of the *SCM Agreement* might have been reasonable, assuming that China had itself

already formed a view on this issue, and having regard to the interest of the United States to prepare its defence.

IV. WHETHER OR NOT THESE ISSUES ARE RIPE FOR A PRELIMINARY RULING

18. The European Union notes that Article 6.2 DSU issues are fairly typical preliminary issues, relating as they do to a jurisdictional question, and a document that is usually of manageable length. As indicated above, in cases involving facts available, some caution may need to be exercised as to whether a matter is ripe for a preliminary ruling, one way or the other.

19. However, in this particular case, and taking into account the recent guidance from the Appellate Body in *Raw Materials*, the European Union considers that the Panel is in a position to rule. The European Union considers that, whilst the Parties have engaged in some somewhat spirited exchanges, it is tolerably clear that the instances of use of adverse facts available may be located by the United States, and that China's complaint is clear enough. On the other hand, it is also tolerably clear that, with respect to the use of facts available other than adverse facts available, China has not done all it might reasonably have done, having regard to the terms of the provision pursuant to which it is making its claims.

ANNEX A-7

RESPONSE OF THE UNITED STATES TO THIRD PARTY COMMENTS ON THE UNITED STATES REQUEST FOR A PRELIMINARY RULING

1. The United States received comments from Australia, dated January 24, 2013, and from Brazil, dated January 25, 2013. The United States does not have any response to Australia's communication, but will take the opportunity to briefly address the comments of Brazil.

2. In its submission, Brazil correctly calls for a careful analysis of the panel request and emphasizes the importance of the panel request for providing notice to the other party(ies) and other Members of the matter that is the subject of the dispute.

3. As a third party, Brazil cannot be expected to have the same level of understanding of the facts involved in the dispute as the Panel and the parties. Accordingly, Brazil's statement that the "large number of complex measures" referenced in China's panel request "seem" to be "discernible not only by their content … but also by their respective legal instruments"[1] understandably does not reflect a full appreciation of the facts presented. For the reasons that have been set out in the prior submissions of the United States, China's panel request does not present the problem clearly given the broad scope of the measures referenced in the panel request (which include determinations to initiate investigations; the conduct of investigations; any preliminary or final countervailing duty determinations, as well as "any notices, annexes, decision memoranda, orders, amendments or other instruments issued" in conjunction with the 22 investigations)[2] as well as the lack of any description of the claim.[3] As the United States has explained, China's reference to 22 investigations, containing hundreds of "uses" of facts available does not identify the "problem" which is the subject of the panel request. For that reason, the panel request fails to meet the standard set out in Article 6.2.

[1] Brazil's Comments on the U.S. Request for a Preliminary Ruling, para. 8.
[2] Panel Request at 2.
[3] Id. at 4-5.

ANNEX A-8

COMMUNICATION FROM THE PANEL
PRELIMINARY RULING

UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

COMMUNICATION FROM THE PANEL

The following communication, dated 14 February 2013, was received from the Chairperson of the Panel with the request that it be circulated to the Dispute Settlement Body ("DSB").

On 14 December 2012, the United States submitted to the Panel a request for a preliminary ruling concerning the consistency of China's request for the establishment of a Panel (WT/DS437/2) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

On 8 February 2013, the Panel issued the enclosed preliminary ruling to the parties. The preliminary ruling will become an integral part of the Panel's final report, subject to any changes that may be necessary in the light of comments received from the parties during Interim Review.

After consulting the parties to the dispute, the Panel decided to inform the DSB of the content of its preliminary ruling. Therefore, I would be grateful if you would circulate the body of this letter and the enclosed preliminary ruling as document WT/DS437/4.

COMMUNICATION FROM THE PANEL
PRELIMINARY RULING

1 PROCEDURAL BACKGROUND

1.1. On 14 December 2012, the United States submitted to the Panel a request for a preliminary ruling concerning the consistency of China's request for the establishment of a Panel (WT/DS437/2) with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

1.2. The United States requested that the Panel rule on the preliminary issue before the filing of first written submissions. In contrast, China argued that the Panel should rule on the preliminary request at a later stage of proceedings. Ultimately, the Panel decided it would issue a communication to the parties on the preliminary ruling request prior to the filing of first written submissions. As a result of this decision, some third parties communicated concerns to the Panel about their rights to participate in the preliminary ruling process. The Panel sought the views of the parties on this issue, and both the United States and China supported third parties being given the opportunity to comment during the preliminary ruling process.

1.3. The Panel decided to allow third parties the opportunity to comment on the preliminary ruling request. In reaching this decision, the Panel reasoned that, while Article 10.2 of the DSU provides third parties with an "opportunity to be heard", it does not explicitly state whether this extends to commenting on a preliminary review process, in circumstances where a panel has decided to make its ruling prior to the receipt of the first written submissions of the parties and third parties. Therefore, the Panel was of the view that it had some discretion in this regard. The Panel decided to exercise its discretion in favour of the third parties in this dispute for a number of reasons. In particular, the Panel noted that neither party had objected to this course of action. Further, the Panel was of the view that the jurisdictional issue before it was a systemic one and that the consequences of the Panel accepting the United States' request not to assume jurisdiction on a particular issue would be serious.[1] Finally, in the particular circumstances of this dispute, the Panel noted that one of the United States' arguments in its preliminary ruling request was that Article 6.2 protects the rights of third parties, and that these third party rights had been prejudiced due to China's allegedly deficient panel request.[2] In the Panel's view, given that the issues of substance relate to third party rights, it was particularly important that third parties be given the opportunity to comment on the preliminary ruling request.

1.4. Finally, although the United States proposed that the Panel meet with the parties to consider the preliminary ruling request, the Panel did not consider this necessary.

2 ARGUMENTS OF THE PARTIES

2.1 United States

2.1. The United States requests the Panel to find that China's "as applied" challenge to "instances" in which the United States Department of Commerce ("USDOC") "used facts available" is not within its terms of reference because China's panel request does not meet the requirements of Article 6.2 of the DSU.

2.2. The United States' request relates to the section of China's panel request that sets out the "legal basis of the complaint" in relation to China's "as applied" claims. This section of the panel request commences with the following paragraph:

> China considers that the initiation and conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, orders, and any definitive countervailing duties imposed pursuant thereto, are inconsistent, at a minimum, with the obligations of the United States specified below.

[1] In this regard, see also Panel Report, *Canada – Wheat Exports and Grain Imports,* para. 6.6.
[2] United States' preliminary ruling request, para. 29.

2.3. The United States' position is that subparagraph (d), following the above introductory paragraph, does not satisfy Article 6.2 of the DSU. It provides:

> In connection with all the identified countervailing duty investigations in which the USDOC has issued a preliminary or final countervailing duty determination:
>
> (1) Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, in manners that were inconsistent with that provision.[10]
>
> _____
>
> [10] This claim arises in respect of each instance in which the USDOC used facts available, including "adverse" facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1.

2.4. The United States' principal complaint is that China's panel request does not adequately identify the "instances" of the use of facts available by USDOC that China is challenging and consequently, does not present the problem clearly. According to the United States, the reference to each "instance" in which facts available were used could refer to any of the hundreds of applications of facts available by USDOC in support of its findings of financial contribution, benefit and specificity, at any stage of the investigation, wherever made, and whether the determination was preliminary or final in nature. The United States contends that China's decision to present a panel request with an extremely broad scope in relation to the multiple stages of each investigation contributes to the panel request's lack of clarity.

2.5. The United States variously complains that China has failed to "plainly connect" the cited WTO obligation and the measures listed in the panel request[3]; has failed to "provide a brief summary" of the legal basis of its claim "sufficient to present the problem clearly"[4]; and has failed to explain "how or why" the measure at issue is considered by China to be inconsistent with Article 12.7 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[5] The United States contends that each of these deficiencies in the panel request arises because of the failure to identify the "instances" of the use of facts available challenged by China.

2.6. We note that in its preliminary ruling request, the United States submits that an explanation of "how or why" the measures at issue violates Article 12.7 of the SCM Agreement required China to "indicate what portions of the various documents … are the alleged breach of the facts available obligations in Article 12.7".[6] However, in response to a Panel question, the United States adds that in order to explain "how or why" a measure has breached Article 12.7, a complainant could state, for example, that "a Member has breached Article 12.7 because it improperly rejected necessary information provided by an importer in an investigation".[7]

2.7. The United States also refers to "another source of ambiguity in China's panel request", namely that China did not specify which of the obligations found within Article 12.7 of the SCM Agreement USDOC is alleged to have breached.[8] However, in its preliminary ruling request, the United States "does not assert that this lack of clarity, standing alone, necessarily renders this or any other panel request deficient".[9]

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[3] United States' preliminary ruling request, paras. 23 and 25 and United States' comments on China's response to the preliminary ruling request, paras. 13 and 16.

[4] United States' preliminary ruling request, paras. 3, 23, 25, 26 and 27 and United States' comments on China's response to the preliminary ruling request, paras. 1, 3 and 17.

[5] United States' preliminary ruling request, para. 26 and United States' comments on China's response to the preliminary ruling request, para. 18.

[6] United States' preliminary ruling request, para. 26.

[7] United States' response to Panel question 4, para. 7.

[8] United States' preliminary ruling request, para. 22.

[9] United States' preliminary ruling request, para. 22. In response to China's rebuttal about whether it needed to specify which obligations under Article 12.7 of the SCM Agreement it is challenging, the United States again reiterates that it does not assert the "lack of clarity" surrounding the obligations at issue

2.8. Finally, in relation to China's submissions on the preliminary ruling request, the United States argues that China provides new descriptions of its facts available claims, which only serve to demonstrate that the claims, as described in the panel request, fail adequately to present the problem. The United States also refutes the suggestion from China that it should be able to discern the content of the facts available claims on the basis of the content of the United States' claims in *China – GOES*. According to the United States, the claims in *China – GOES* have no relationship to China's claims in this dispute.

2.2 China

2.9. China argues that the United States' preliminary ruling request is essentially based upon the proposition that the large number of instances in which USDOC used facts available in the determinations at issue imposed an enhanced obligation under Article 6.2 of the DSU. China contends that the United States has no authority for this proposition. Rather, China's position is that the instances in which USDOC used facts available are identified within each of the determinations at issue. Further, the panel request plainly states that "each" such instance is inconsistent with Article 12.7 of the SCM Agreement. Therefore, China has met its obligations under Article 6.2 of the DSU.

2.10. In its first submission to the Panel, many of China's submissions refer to USDOC's use of "adverse" facts available. However, in its second submission, China clarifies that its position is that the panel request states that China is challenging "each instance" in which USDOC used facts available, "including so-called 'adverse' facts available". However, virtually all of the instances in which USDOC used facts available involved the use of "adverse" facts available, as is evident on the face of the determinations at issue. This is why it is China's principal concern.

2.11. According to China, the specific instances in which USDOC used "adverse" facts available are simple to discern. The only measures at issue in which USDOC would have used "adverse" facts available for any purpose are the 19 final determinations and the three preliminary determinations listed in Appendix 1 to the panel request. China notes that USDOC releases an "Issues and Decision Memorandum" and a Federal Register notice to explain its reasoning in relation to final and preliminary determinations respectively. These documents set forth USDOC's rationale for the use of facts available, including "adverse" facts available. Therefore, China argues that it is preposterous for the United States to argue that "it is not possible to discern" the "instances" in which China considers USDOC to have used facts available.

2.12. According to China, it is apparent that the United States' actual concern is not its ability to *identify* the instances in which USDOC used "adverse" facts available, but rather the *number of instances* in which USDOC did so. However, China notes that regardless of the number of instances of a violation involved in a claim, a Member is only ever required to connect the challenged measures to the provision of the covered agreements claimed to have been infringed. China has fulfilled this requirement by indicating that "each instance" of the use of "adverse" facts available infringes Article 12.7 of the SCM Agreement, where the ordinary meaning of "each" is "every".

2.13. China asserts that it was not required to explain in its panel request which *aspects* of Article 12.7 it considers the United States to have violated. This would amount to *arguments,* which are not required in a panel request.

2.14. According to China, the United States fails to identify any prior decision under Article 6.2 of the DSU that is even remotely analogous to what the United States is requesting from the Panel in this case. Further, China submits that the United States should understand China's "adverse" facts available claim, given that it recently successfully litigated the same issue against China in *China – GOES.* Therefore, it should have been obvious to the United States that China's claim in subsection (d)(1) of the panel request relates, at least in part, to the issue of whether an investigating authority may resort to "adverse" facts available under Article 12.7 of the SCM Agreement.

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under Article 12.7 necessarily renders the panel request inconsistent with Article 6.2 of the DSU (United States' comments on China's response to the preliminary ruling request, para. 14).

3 ARGUMENTS OF THE THIRD PARTIES

3.1 Australia

3.1. In Australia's view, due process requires that responding parties receive details about the complaint that are sufficient to enable them to frame their response, particularly in the light of the tight timeframes associated with panel proceedings.

3.2 Brazil

3.2. Brazil contends that in order for a panel request to comply with Article 6.2 of the DSU, it must identify the measure targeted in the dispute and must provide a brief summary of the legal basis of the claims. There is no obligation under Article 6.2 for the complaining party to develop in the panel request the legal arguments that support its claims or to provide a detailed explanation of why and how the measures at issue are inconsistent with a provision of a covered agreement. However, Brazil does not advocate that permissive standards of specificity should prevail in DSU proceedings and notes that greater precision and clarity in panel requests would contribute to better define the boundaries of a panel's jurisdiction.

3.3. In Brazil's view, China's panel request identifies the measures at issue with sufficient particularity to allow the defendant to identify their "nature and the gist of what is at issue".[10] Brazil notes that merely listing the provisions of the covered agreements allegedly violated may not always satisfy Article 6.2 of the DSU. However, in the circumstances of this case, the language of Article 12.7 of the SCM Agreement raises no doubt regarding the legal problem identified by China.

3.3 European Union

3.4. The European Union provides detailed submissions regarding why, in its view, third parties have a right to be heard on a preliminary ruling request before any communication on the request is issued by the panel.

3.5. Regarding the substance of the preliminary ruling request, the European Union notes that it is not persuaded that the mere fact that the scope of a particular proceeding is broad is relevant to the analysis under Article 6.2 of the DSU.

3.6. The European Union observes that there are different issues that might arise under Article 12.7 of the SCM Agreement in connection with the use of facts available. According to the European Union, if at the time of submitting the panel request the complaining member has already worked out which of the issues best describes the problem, it might indicate this in the panel request. In relation to China's panel request, the European Union notes that China expressly referred to the use of "adverse" facts available and indicated that this was inconsistent with Article 12.7. Therefore, in the European Union's view, China's challenge to the use of adverse facts available falls within the Panel's jurisdiction. However, with respect to the use of facts available other than the use of adverse facts available, the European Union is of the view that "some further effort to specify the problem … might have been reasonable".[11]

4 EVALUATION BY THE PANEL

4.1 The provision at issue

4.1. Article 6.2 of the DSU provides, relevantly:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

[10] Brazil's comments on the preliminary ruling request, para. 8.
[11] European Union's comments on the preliminary ruling request, para. 17.

4.2 The measures at issue

4.2. At the outset, we note that the "specific measures at issue" in relation to China's claims under Article 12.7 are identified in the panel request. While the introduction to the "as applied" section of China's panel request refers to the initiation and conduct of investigations, the determinations, orders and definitive duties, it is clear that for the purposes of a facts available claim under Article 12.7 of the SCM Agreement, the only measures in which USDOC could have applied facts available are the final and preliminary countervailing duty determinations. Therefore, the "specific measures at issue" are the 19 final and the three preliminary countervailing duty determinations listed in Appendix 1 to the panel request.

4.3 Did China adequately identify the "instances" of the use of facts available that it is challenging?

4.3. The United States' principal complaint is that China's panel request does not adequately identify the "instances" of the use of facts available by USDOC that China is challenging and therefore does not "present the problem clearly". The United States variously complains that China has failed to "plainly connect" the cited WTO obligation and the measures listed in the panel request[12]; has failed to "provide a brief summary" of the legal basis of its claim "sufficient to present the problem clearly"[13]; and has failed to explain "how or why" the measure at issue is considered by China to be inconsistent with Article 12.7 of the SCM Agreement.[14] The United States contends that each of these deficiencies in the panel request arises because of the failure to identify the "instances" of the use of facts available that are challenged by China.

4.4. The Panel notes that the measures at issue in relation to the facts available claims include the Issues and Decisions Memoranda and Federal Register Notices, which are incorporated by reference into the final and preliminary determinations respectively.[15] The Panel has examined the memoranda and notices which are incorporated into the determinations listed in Appendix 1 to the panel request, and which are publicly available. In our view, in these documents the "instances" in which USDOC applied facts available are readily identifiable. Consequently, we are not persuaded by the United States' argument that "it is not possible to discern what are those 'instances' in which China considers the investigating authority used facts available".[16]

4.5. The United States' complaint that China did not adequately identify the "instances" of the use of facts available at issue appears to be premised upon an assumption that China is not intending to challenge *every* application of facts available by USDOC. For example, the United States argues that China fails to indicate "which of the potentially hundreds of applications of facts available are of concern for purposes of the dispute".[17] However, the panel request states that China will challenge "each" instance of the use of facts available and China insists that this should be read literally. In particular, China argues that it will challenge "each", in the sense of "every", use of facts available by USDOC.[18] If the panel request were to state that China challenges "some" or "numerous" applications of facts available, we would consider the United States to have a valid argument. However, in our view, the panel request is clear that all "instances" of the use of facts available will be challenged, and China confirms this in its submissions to the panel.

4.6. Therefore, in our view, it is possible to identify the specific aspects of each measure that will be challenged by China under Article 12.7 of the SCM Agreement, namely, all instances of the use of facts available, as found in the relevant Issues and Decisions Memoranda and Federal Register notices. Although the number of applications of facts available is indeed large, as argued by the

[12] United States' preliminary ruling request, paras. 23 and 25 and United States' comments on China's response to the preliminary ruling request, paras. 13 and 16.
[13] United States' preliminary ruling request, paras. 3, 23, 25, 26 and 27 and United States' comments on China's response to the preliminary ruling request, paras. 1, 3 and 17.
[14] United States' preliminary ruling request, para. 26 and United States' comments on China's response to the preliminary ruling request, para. 18.
[15] The panel request expressly states that the preliminary and countervailing duty measures include "any notices [and] decision memoranda … issued by the United States in connection with the … measures" ("WT/DS437/2, p.1, part A).
[16] United States' preliminary ruling request, para. 18.
[17] United States' preliminary ruling request, para. 3.
[18] See China's response to the United States' preliminary ruling request, para. 4.

United States, this does not prevent the United States, third parties and the Panel from being able to identify all of the "instances" in which USDOC applied facts available.

4.7. The Panel is not convinced that the situation before the Panel is equivalent to that before the Appellate Body in *China – Raw Materials.* In that case, it was not clear on the face of the panel request which of the listed measures allegedly violated which of the listed provisions of the covered agreements. However, in the case before the Panel, it is clear that every final and preliminary determination listed in Appendix 1 to the panel request is alleged to be inconsistent with a single provision of the SCM Agreement, namely 12.7. Therefore, in our view, the panel request "plainly connects" the measures to the provision at issue.

4.4 Did China otherwise "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly"?

4.8. In its preliminary ruling request and its comments on China's response to the request, the United States' argument that China did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" is based upon the contention that China did not adequately identify the "instances" of the use of facts available that are at issue. For example, the United States' reliance on the Appellate Body's statement in *EC – Selected Customs Matters,* namely that Article 6.2 of the DSU requires a succinct explanation of "how or why" the measure at issue is considered to be violating the WTO obligation in question, is rather limited.[19] It does not suggest that, in order to explain "how or why" the measure was inconsistent with Article 12.7 of the SCM Agreement, China was required to include further details of which aspects of the obligations under Article 12.7 it would be challenging in the dispute. Rather, the United States argues that "by failing to indicate what portions of the various documents in the 22 covered investigations are the alleged breach of the facts available obligations in Article 12.7, China's panel request includes no explanation - succinct or otherwise - on how or why these measures violate Article 12.7".[20]

4.9. However, in response to a Panel question, the United States perhaps presents a broader view of how the "instances" of application of facts available could have been identified. In particular, the United States notes that:

> China might have described the uses of facts available (e.g., the specific proceeding, respondent, and type of fact) that it wished to challenge and the bases for challenging those uses. Or, perhaps China could have described a specific class or type of facts available determination that it intended to challenge and the basis for that challenge.[21]

Further, in responding to a Panel question regarding the distinction between, on the one hand, "how and why" a measure violates a WTO obligation and, on the other hand, the arguments supporting a claim of violation, the United States argues:

> A complaining party bringing a facts available claim could summarize it in a number of ways, depending on the facts and legal theories at issue. For example, a complainant could state that a Member has breached Article 12.7 because it improperly rejected necessary information provided by an importer in an investigation, or because it applied facts available to an importer who was not a respondent in an investigation. Such a description would explain how or why a Member is alleged to have breached Article 12.7 but does not involve argumentation.[22]

4.10. The United States' responses to these panel questions appear to be related to the United States' submission in its preliminary ruling request in which it refers to "another source of ambiguity in China's panel request", namely that China did not specify which of the obligations found within Article 12.7 of the SCM Agreement USDOC is alleged to have breached.[23] However,

[19] United States' preliminary ruling request, para. 26 and United States' comments on China's response to the preliminary ruling request, para. 18.
[20] United States' preliminary ruling request, para. 26.
[21] United States' response to Panel question 3, para. 6.
[22] United States' response to Panel question 4, para. 7.
[23] United States' preliminary ruling request, para. 22.

this argument is not forcefully pursued by the United States. In particular, the United States "does not assert that this lack of clarity, standing alone, necessarily renders this or any other panel request deficient".[24]

4.11. We note that the Appellate Body has articulated various means by which a panel request is able to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In particular, the Appellate Body has noted that a panel request must "plainly connect" the challenged measures with the provisions of the covered agreements at issue.[25] Further, the Appellate Body has stated that a brief summary of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[26] However, the Appellate Body has consistently held that "Article 6.2 of the DSU requires that the *claims*, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel".[27] Finally, the Appellate Body has noted that whether a particular panel request meets the requirements of Article 6.2 must be assessed on a case-by-case basis.[28]

4.12. While the Appellate Body has articulated these broad statements, the precise manner in which they should be applied is not entirely clear. In particular, it is not always clear how a summary of claims should be distinguished from arguments in support of a claim. In our view, some guidance on the application of these statements, and the requirement to "provide a brief summary of the legal basis of a complaint" can be found by examining the Appellate Body's own application of Article 6.2 in specific cases.

4.13. In *US – Carbon Steel,* the Appellate Body noted that whether merely listing a treaty provision is sufficient to constitute a brief summary of the legal basis of the complaint under Article 6.2 of the DSU "will depend on the circumstances of each case, and in particular on the extent to which mere reference to a treaty provision sheds light on the nature of the obligation at issue".[29] In *US – Certain EC Products,* the panel request stated that the "European Communities considers that this US measure is in flagrant breach of…Article 23 of the DSU".[30] The Appellate Body held that this was sufficient to include a claim of violation of Article 23.2(a) of the DSU within the panel's terms of reference. The Appellate Body reasoned that there is a close link between the all the obligations listed in the sub-paragraphs of Article 23, in that they all concern the obligation on WTO members not to have recourse to unilateral action, and so concluded that the general reference to Article 23 of the DSU was sufficient to include a claim under Article 23.2(a) of the DSU within the panel's jurisdiction.[31] Therefore, it seems the Appellate Body accepted the reference to the "flagrant breach of Article 23" as sufficient to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Similarly in *Thailand – H-Beams,* both the Panel and the Appellate Body held the panel request at issue to be consistent with Article 6.2 of the DSU. The panel request provided, relevantly, that "Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of … Article 5 … of the Anti-Dumping Agreement".[32] Ultimately, Poland's claims under Article 5 were brought under Articles 5.2, 5.3 and 5.5 of the Anti-Dumping Agreement. However, the Appellate Body held that due to the "interlinked nature of the obligations in Article 5, we are of the view that, in the facts and circumstances of this case, Poland's reference to 'the procedural…requirements' of Article 5 was sufficient to meet the minimum requirements of Article 6.2".[33]

4.14. In a more recent case, *EC – Fasteners (China),* the Appellate Body held that although a complainant need not provide arguments in a panel request, in the circumstances of the case before it, it did not consider the mere listing of Articles 6.2 and 6.4 of the Anti-Dumping

[24] United States' preliminary ruling request, para. 22 and United States' comments on China's response to the preliminary ruling request, para. 14.
[25] Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews,* para. 162 and *China – Raw Materials,* para. 220.
[26] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.
[27] See, for example, Appellate Body Report, *EC – Bananas III,* para. 143.
[28] See, for example, Appellate Body Report, *Korea – Dairy,* para. 127.
[29] Appellate Body Report, *US – Carbon Steel,* para. 130.
[30] See, Appellate Body Report, *US – Certain EC Products,* para. 109.
[31] Appellate Body Report, *US – Certain EC Products,* para. 111.
[32] See Appellate Body Report, *Thailand – H-Beams,* para. 89.
[33] Appellate Body Report, *Thailand – H-Beams,* para. 93.

Agreement as adequate to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The Appellate Body reasoned that the obligations in Articles 6.2 and 6.4 of the Anti-Dumping Agreement are "relatively broad in scope and apply on a continuous basis throughout an investigation".[34]

4.15. Therefore, the Appellate Body has held that merely listing the provision that forms the legal basis of the complaint will not always be sufficient to meet the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint, but that in some circumstances it may be. We note that many panels have made similar statements and in certain circumstances have found that the listing of a provision is sufficient to satisfy the obligations encompassed in Article 6.2 of the DSU.[35]

4.16. In the circumstances of this case, we note that China has provided more detail than the complainants in, for example, *US – Certain EC Products* and *Thailand – H-Beams,* in that it has not merely listed the Article at issue, but has referenced the specific sub-paragraph of Article 12 under which it brings its claim (namely, 12.7 of the SCM Agreement). In our view, in the circumstances of this case, the reference to Article 12.7 sheds sufficient "light on the nature of the obligation at issue" to satisfy Article 6.2 of the DSU.[36] Article 12.7 sets out a relatively limited range of circumstances in which it is permissible for an investigating authority to apply "facts available". In addition, the panel request indicates that China will challenge the manner that USDOC resorted to and used facts available. It also provides a higher level of precision with respect to one aspect of its claim, namely that China will challenge USDOC's use of "adverse" facts available.

4.17. While we have some sympathy for the United States' position, namely that more detail could have been provided in the panel request regarding what in particular about the manner in which the United States resorted to and used facts available is allegedly inconsistent with Article 12.7 of the SCM Agreement, we are not convinced that Article 6.2 of the DSU requires this. We also note that the United States itself concedes that this is not necessarily required under Article 6.2.[37] Our analysis of the application of Article 6.2 in previous cases seems to suggest that relatively general summaries of the "legal basis of complaint" have been accepted as sufficient to "present the problem clearly". Further, providing more precise details regarding what aspects of the resort to and use of facts available are challenged under Article 12.7 of the SCM Agreement could perhaps best be characterized as the arguments in support of the claim, rather than the summary of the claim itself.

4.18. We note that Article 6.2 of the DSU has been characterized by the Appellate Body as serving the due process objective of notifying the parties and third parties of the nature of the complainant's case[38]. We concur with this view and believe that Article 6.2 serves an important function in this regard. In the circumstances of this case, in our view, China has met the minimum requirements to fulfil this due process objective. While more precision in the panel request may have allowed the United States to prepare a detailed defence prior to receiving China's first written submission, we are of the view that the summary of the legal basis of the complaint provided by China was sufficient to put the United States on notice of the case against it to allow the United States to "begin" preparing its defence.[39] Therefore, we are not convinced that the United States' ability to defend itself has been prejudiced.

4.19. Finally, we note that the Appellate Body in *EC – Selected Customs Matters* held that the summary of the legal basis of the complaint "aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".[40]

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[34] Appellate Body Report, *EC – Fasteners (China),* paras. 597-598.

[35] See, for example, Panel Reports, *EC – Approval and Marketing of Biotech Products,* para. 7.47 (sub-paragraphs 51-86) and *EU – Footwear,* para. 7.50.

[36] Appellate Body Report, *US – Carbon Steel,* para. 130.

[37] United States' preliminary ruling request, para. 22 and United States' comments on China's response to the preliminary ruling request, para. 14.

[38] See, for example, Appellate Body Reports, *US – Carbon Steel,* para. 126 and *EC – Selected Customs Matters,* para. 130.

[39] See, for example, Appellate Body Report, *Thailand – H-Beams,* para. 88. In particular, in our view the United States was in a position to "begin" preparing a defence to an allegation that the manner in which it applies "adverse" facts available is inconsistent with Article 12.7 of the SCM Agreement and to consider the consistency of its other uses of facts available with Article 12.7.

[40] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.

In our view, this is merely one articulation of a way in which a complainant can provide a brief summary of the legal basis of the complaint under Article 6.2 of the DSU and does not add a new element to the Article 6.2 obligation. For the foregoing reasons, we are of the view that China has indeed provided an adequate summary of its complaint.

4.20. Consequently, we conclude that China was not required under Article 6.2 of the DSU to provide more precision about its challenge to the United States' use of and resort to facts available in order to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

5 CONCLUSION

5.1. While we do not endorse a cursory approach to panel requests and acknowledge the important due process objectives served by Article 6.2 of the DSU, in the circumstances of this case, we are of the view that China has met the minimum requirements of the provision. For the foregoing reasons, we reject the United States' preliminary ruling request and conclude that China's panel request, as it relates to the facts available claim under Article 12.7 of the SCM Agreement, is consistent with Article 6.2 of the DSU.

6 DISSENTING OPINION ON WHETHER CHINA PROVIDED A SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY

6.1. While I agree with the Panel majority that China adequately identified the "instances" of the use of facts available that it is challenging, in my view, China did not provide a summary of the legal basis of the complaint sufficient to present the problem clearly.

6.2. The Appellate Body has repeatedly noted that the identification of the specific measures at issue and the provision of a brief summary of the legal basis of the complaint sufficient to identify the problem clearly under Article 6.2 of the DSU are two "key" requirements because they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[41] It has explained further that these are distinct requirements that should not be confused.[42] Moreover, the fulfilment of these requirements is not a mere formality because a panel request forms the basis for the terms of reference of the panel and, serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case. Compliance with these two requirements is therefore *central* to defining the scope of the dispute.[43] Consequently, a panel "must scrutinize carefully the language used in the panel request".[44]

6.3. In the circumstances of this case, the United States does not contest that China has identified the specific measures at issue in its panel request. However, the United States alleges that China failed to present the problem clearly with respect to its "facts available" claims.

6.4. Since it is not contested that China has listed the measures at issue, we must ascertain, in light of the circumstances of this case:

a. if China has done more, by way of providing a brief summary of the legal basis of the complaint; and

b. if so, whether that brief summary is sufficient to present the problem clearly; or

c. whether the mere listing of the measures provides a brief summary sufficient to present the problem clearly.

6.5. The Appellate Body explained in *Korea – Dairy* that "Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint"[45]. In fact, what Article 6.2 demands is a "*brief summary*" which suggests that it can be minimal, but not insignificant. A summary is

[41] Appellate Body Report, *US – Carbon Steel,* para. 125.
[42] Appellate Body Report, *EC – Selected Customs Matters,* para. 132.
[43] Appellate Body Report, *China – Raw Materials,* para. 219.
[44] Appellate Body, *China – Raw Materials,* para. 220.
[45] Appellate Body Report, *Korea - Dairy,* para. 120.

already brief — a *brief* statement or account of the main points of something; an abstract, abridgment, or compendium of facts or statements — and Article 6.2 requires that the summary of the legal basis of the complaint contained in the request for the establishment of a panel be *brief*. However, the summary cannot be insignificant because it must be sufficient to present the problem clearly.

6.6. Article 6.2 requires a brief *summary* of the legal basis of the complaint; not simply that the legal basis of the complaint *be stated*. In other words, Article 6.2 requires *more* than simply stating the legal basis of the complaint or, put in other terms, *more* than simply stating the claim. Because Article 6.2 expressly requires a *summary* - albeit a brief one - it would be contrary to the principle of effectiveness (*ut res magis valeat quam pereat*) to strip that word of its meaning and equate the requirement to provide *a brief summary* of the legal basis of the complaint to a requirement to provide *a statement* of the legal basis of the complaint. Nonetheless, the Appellate Body has suggested that, depending on the circumstances of a case, a mere listing of the provisions of the covered agreement alleged to have been violated might serve as a brief summary of the complaint sufficient to explain the problem clearly. Thus, it would appear that in certain circumstances the Appellate Body would accept that stating the claim might also serve as a brief summary of the complaint sufficient to present the problem clearly. In my view, these must be rare cases and, per force, a model of clarity, in order to avoid depriving the words "brief summary" of any meaning, contrary to the principle of effectiveness. Thus, if there is doubt as to whether the mere listing of the provisions alleged to be breached constitutes a brief summary of the legal basis of the complaint sufficient to present the problem clearly, in my view the conclusion would have to be that it does not.

6.7. In this case, China specifically claims:

> China considers that the initiation and conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, orders, and any definitive countervailing duties imposed pursuant thereto, are inconsistent, at a minimum, with the obligations of the United States…
>
> > (d) In connection with all of the identified countervailing duty investigations in which the USDOC has issued a preliminary or final countervailing duty determination:
> >
> > (1) Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, in manners that were inconsistent with that provision.[10]

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[10] This claim arises in respect of each instance in which the USDOC used facts available*,* including "adverse" facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1.

6.8. China's specific complaint is not a model of clarity. The chapeau is a general statement that serves to introduce all of China's claims, but the elements that it contains do not necessarily apply to all of them. In the instant case, for example, the reference to the "initiation … of the identified countervailing duty investigations" obviously does not apply to China's "facts available claim", because the resort to, and use of, facts available by the investigating authority would only come later in the investigation.

6.9. Thus, in order to scrutinize and fully understand China's claim, it would appear that it could be rephrased as follows:

> The conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, and any definitive countervailing duties imposed pursuant thereto, are inconsistent with Article 12.7 of the SCM Agreement, insofar as in each instance in which USDOC resorted to facts available, and used facts available,

> including so-called "adverse" facts available, it did so in a manner that was inconsistent with that provision.

6.10. It should be noted that China's claim is circular: in essence, its allegation is that the identified measures are inconsistent with Article 12.7 because certain actions of USDOC - the resort to, and use of, facts available, including so-called "adverse" facts available - are inconsistent with that provision. The footnote simply adds that this is the case of each instance in which the USDOC used (or resorted to) facts available. Thus, it appears that China is essentially stating its claim: in each instance that USDOC resorted to, and used, facts available, including so-called "adverse" facts available, it acted inconsistently with Article 12.7 of the SCM Agreement and, therefore, the identified measures are inconsistent with that provision.

6.11. A review of Appellate Body reports addressing Article 6.2 of the DSU reveals that in general there are three elements that the complaining party must meet to satisfy the second "key" requirement in Article 6.2 of the DSU (unless in the circumstances of the case the mere reference to the provision(s) alleged to be breached would suffice):

a. it must state "the legal basis of the complaint" or, put another way, state its claim that an obligation contained in a specific provision of a covered agreement has been violated[46];

b. it must provide a brief summary of the legal basis of the complaint, which is *more* than simply stating the claim as it requires the complaining party to explain succinctly how or why the measure at issue is considered to be violating the WTO obligation in question[47]; and

c. the brief summary must be sufficient to present the problem clearly, by plainly connecting the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.[48]

6.12. In the circumstances of this case, China has certainly stated its claim: it alleges that the obligation contained in Article 12.7 of the SCM Agreement has been violated in each instance in which USDOC used or resorted to facts available. China has also plainly connected the challenged measures with Article 12.7 of the SCM Agreement, as found by the Panel majority. The question is whether in the circumstances of this case, by plainly connecting the challenged measures with Article 12.7 China has satisfied the requirement to "explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".

6.13. 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.

6.14. It contemplates different situations that may justify making affirmative or negative preliminary and final determinations on the basis of facts available:

a. an interested Member or an interested party may refuse access to necessary information within a reasonable period;

b. an interested Member or an interested party may otherwise not provide necessary information within a reasonable period; or

c. an interested Member or an interested party may significantly impede the investigation.

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[46] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.
[47] Appellate Body Report, *EC – Selected Customs Matters,* para. 130.
[48] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews,* para. 162.

6.15. With reference to the Appellate Body's decision in *EC – Fasteners (China),* I note that Article 12.7 of the SCM Agreement is not as broad in scope as Articles 6.2 and 6.4 of the Anti-Dumping Agreement. However, Article 12.7 does contemplate several situations and applies on a continuous basis throughout an investigation.[49]

6.16. In light of this: is China's statement in item B(1)(d) of its panel request, including the reference to Article 12.7 of the SCM Agreement, a brief summary of the claim sufficient to present the problem clearly?

6.17. Having carefully examined the Appellate Body cases, I find it difficult to conclude that China's statement that the identified measures are inconsistent with Article 12.7 of the SCM Agreement is anything other than simply stating the claim; and, in the light of the content of that provision, in my view that is not enough to serve as a summary of the legal basis of the complaint sufficient to present the problem clearly. I would add that in this respect, China's claim concerning facts available is different from the other claims included in its request for the establishment of the panel.

6.18. Consequently, I disagree with the Panel majority regarding whether China's panel request provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In my view, China's panel request is not sufficient in this regard.

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[49] Appellate Body Report, *EC – Fasteners (China),* para. 598.

ANNEX B

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST
WRITTEN SUBMISSION OF CHINA

I. Introduction

1. This dispute concerns 17 countervailing duty investigations of Chinese products that the United States Department of Commerce ("USDOC") initiated between 2007 and 2012. These investigations were initiated after the four countervailing duty investigations at issue in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379). In DS379, the panel and Appellate Body found that the USDOC's affirmative subsidy determinations were inconsistent in multiple respects with the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"). Unfortunately, the United States has continued to engage in the same unlawful conduct in subsequent countervailing duty investigations of Chinese products, even after the adoption of the Appellate Body report in DS379.

2. This dispute largely entails the application of the findings in DS379, as well as other well-settled jurisprudence, to the countervailing duty measures that China identified in its panel request. As demonstrated in this submission, China's claims in this dispute are based on issues of law and legal interpretation that panels and the Appellate Body have addressed in prior disputes. The application of those prior interpretations to the measures at issue leads to the conclusion that the United States has continued to act inconsistently with the SCM Agreement in its investigations of Chinese products. The United States has even taken actions that it has openly acknowledged in other disputes to be inconsistent with the SCM Agreement. It is the systematic and ongoing failure of the United States to adhere to its obligations under the SCM Agreement that has forced China to bring the present dispute.

3. China has decided to focus its claims in this dispute on the alleged provision of inputs for less than adequate remuneration. These alleged "input subsidies" are the foundation of the USDOC's unlawful approach to imposing countervailing duties on Chinese products. In the 14 input subsidy investigations at issue, the USDOC found that Chinese state-owned enterprises ("SOEs") sold various types of industrial inputs, such as steel and chemicals, to downstream producers of the product under investigation. In nearly every instance, the USDOC found that SOEs sold these inputs to downstream producers at prices that were lower than a benchmark price selected by the USDOC. The countervailing duty margins that the USDOC calculated for these alleged input subsidies often represented the largest portion of the total countervailing duty margin for the product under investigation.

4. China has decided to focus this dispute on the alleged input subsidies because they are, by far, the most unlawful and unfounded of all the subsidies that the USDOC has claimed to identify in respect of Chinese products. As China will demonstrate in this submission, the USDOC's input subsidy determinations are inconsistent with the rules of the SCM Agreement with respect to each of the three elements of an actionable subsidy – financial contribution, benefit, and specificity.

II. The USDOC's Input Subsidy Determinations in Each of the CVD Investigations Under Challenge Were Based on "Public Body" Determinations That Are Facially Inconsistent with the Legal Standard Established in DS379

5. Article 1.1 of the SCM Agreement provides that "a subsidy shall be deemed to exist if … there is a financial contribution by a government or any public body within the territory of a Member … and a benefit is thereby conferred." In its report in DS379, the Appellate Body addressed an important issue of first impression: the meaning of the term "public body" in Article 1.1(a)(1). The Appellate Body's interpretation of this term in DS379 is dispositive of the claims that China has raised under Article 1.1 of the SCM Agreement in the present dispute.

6. In the four investigations at issue in DS379, none of the financial contributions deemed to confer countervailable input subsidies were provided by the Government of China or any of its organs. Rather, they were made by SOEs, *i.e.*, corporate entities with separate legal personality,

owned in part or in whole, directly or indirectly, by the Government of China. The sales at issue were garden-variety transactions between suppliers and producers involving the purchase and sale of basic inputs – steel, rubber, and petrochemicals. They were the kind of ordinary commercial transactions that occur countless times in every industry, in every country, all over the world.

7. The USDOC nonetheless concluded that all of the SOEs at issue in the four investigations were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. The USDOC reached this conclusion by applying a "rule of majority government-ownership". Under this approach, if a state-owned entity was majority-owned by the Government of China or another state-owned entity, the USDOC found that entity to be a "public body" on the grounds that majority ownership demonstrated government control over the entity. Accordingly, the USDOC determined that each sale of inputs by these majority government-owned SOEs was a "financial contribution" within the meaning of Article 1.1(a)(1).

8. The Appellate Body categorically rejected the USDOC's approach. After a comprehensive interpretative analysis, the Appellate Body determined that "being vested with, and exercising, authority to perform governmental functions" is the "core feature" that defines a public body. Under this standard, evidence of government ownership "cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function". Likewise, "control of an entity by a government, by itself, is not sufficient to establish that an entity is a public body". Accordingly, the Appellate Body concluded that the USDOC's public body determinations in respect of SOEs in the investigations at issue were inconsistent with Article 1.1(a)(1).

9. Since the completion of the investigations at issue in DS379, the USDOC has conducted numerous additional CVD investigations involving allegations that Chinese producers received inputs for less than adequate remuneration, 14 of which are under challenge in this dispute. In all of these investigations, as was true in DS379, none of the alleged inputs was provided by the Government of China or any of its organs. Rather, in each case, the inputs deemed to confer subsidies were sold to downstream producers of subject merchandise by SOEs, which the USDOC concluded were public bodies using the same "majority ownership" control-based test that the Appellate Body rejected in DS379. These determinations are thus inconsistent, as applied, with Article 1.1(a)(1) of the SCM Agreement for the same reasons that the Appellate Body identified in its report in DS379.

10. The USDOC's stated "policy" underlying the majority of these determinations is also inconsistent with the covered agreements, "as such". Shortly after the investigations at issue in DS379, the USDOC explained that in order to deal with the "recurring issue" of whether an entity is an "authority" in investigations involving imports from China, its "policy" would be to apply "a rebuttable presumption that majority-government-owned enterprises are authorities". This "rebuttable presumption" is inconsistent with the covered agreements, "as such", because it is a rule of general and prospective application that is inconsistent with the legal standard established by the Appellate Body in DS379. Under that standard, neither government control of an entity nor government ownership of an entity alone is sufficient to support a finding that an entity is a public body. It necessarily follows that a "rebuttable presumption" that an entity is an authority based solely on government ownership is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

11. The USDOC has refused to abandon this "rebuttable presumption" even after the Appellate Body held in DS379 that a "rule of majority ownership" is inconsistent with Article 1.1(a)(1). The USDOC has deemed it unnecessary to change its unlawful approach to "public body" determinations on the grounds that "the decisions of the panel and the appellate body regarding whether a producer is an authority (a "public body" within the WTO context) were limited to those four investigations [at issue in DS379]." The USDOC has refused to acknowledge that the Appellate Body's report in DS379 established a definitive interpretation of the term "public body" that the USDOC (and other Members) were required to apply in all subsequent countervailing duty investigations in which the issue arose.

12. True to its word, in the investigations that the USDOC initiated *after* the issuance of the Appellate Body report in DS379, the USDOC did not require petitioners to present any evidence relevant to whether the SOEs at issue had been vested with and were exercising authority to perform governmental functions. The USDOC's decision to initiate investigations with respect to petitioners' claims that SOEs provided inputs for less than adequate remuneration, in the absence

of *any* additional evidence indicating that these entities were "public bodies" under the proper legal standard, is in violation of Articles 11.2 and 11.3 of the SCM Agreement.

III. The USDOC's Determinations That SOEs Provided Inputs for Less Than Adequate Remuneration Are Inconsistent, as Applied, with Articles 1.1(b) and 14(d) of the SCM Agreement in Each of the Cases Under Challenge

13. China has demonstrated above that the USDOC's financial contribution determinations in the input subsidy investigations are inconsistent with the SCM Agreement, because they are all predicated on unlawful public body determinations. These unlawful public body determinations also taint the USDOC's benefit findings in the input subsidy investigations at issue, because they serve as the essential factual predicate for the USDOC's near-constant recourse to out-of-country benchmarks in its benefit calculations.

14. Notwithstanding the Appellate Body's assessment that recourse to an outside benchmark is permissible only under "very limited" circumstances, the use of an out-of-country benchmark has become standard practice for the USDOC in investigations involving imports from China. In all 14 investigations at issue in this case in which the USDOC concluded that SOEs provided inputs for less than adequate remuneration, the USDOC's benefit determination was based on the use of an out-of-country benchmark. Without these contrived benchmarks, the alleged input subsidies would not exist at all.

15. In each of these cases, the USDOC applied the same framework for evaluating whether market prices for a particular input in China are distorted: it inquires whether the government provides the majority, or even a "substantial portion" of the market for a good, and if the answer is affirmative, it concludes that the government is playing a "predominant role" in the market, and on that basis alone concludes that private prices are distorted.

16. The fundamental flaw in the USDOC's framework is that the USDOC's finding that the "government" is playing a "predominant" role in the market for a good is based exclusively on the percentage of the relevant input produced by SOEs. In each investigation at issue, the USDOC found that SOEs provided at least a "substantial portion" of the market for the input, and on that basis, concluded that private prices in the Chinese market for that input were distorted due to the government's "predominant" role in the market, hence justifying recourse to an outside benchmark.

17. The USDOC's equation of SOEs with the government was premised, in the investigations under challenge, on the USDOC's flawed determination that entities majority owned or controlled by the Government of China constitute public bodies. On the basis of this determination, the USDOC deemed the market share held by SOEs equivalent to the market share held by the government itself. As discussed above, however, government ownership or control is insufficient evidence on which to base a finding that an SOE is a public body.

18. Accordingly, in the 14 input subsidy investigations under challenge, the mere fact that SOEs provided a "substantial" portion of the relevant input provides an insufficient basis on which to conclude that the government played a "predominant role" in those markets. Therefore, the USDOC had no lawful basis for rejecting Chinese prices as a benchmark. For this reason, the USDOC's use of an out-of-country benchmark and the resulting benefit determinations in these investigations are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

IV. The USDOC's Affirmative Determinations of Specificity in Respect of the Alleged Input Subsidies Are Inconsistent with Article 2 of the SCM Agreement

19. As China has demonstrated above, the first fiction in the USDOC's input subsidy determinations is that the sale of an input by a commercial entity in China is a "financial contribution" if that entity is majority-owned by the Government of China. The second fiction is that these alleged "financial contributions" confer a benefit, a conclusion premised in each instance on a "distortion" finding that is based on the USDOC's erroneous interpretation of the term "public body". The third fiction, to which China now turns, is that these "subsidies" are specific to certain enterprises or industries within the meaning of Article 2 of the SCM Agreement.

20. The centrepiece of the USDOC's flawed approach to specificity is to imagine that each type of allegedly subsidized input is provided pursuant to its own "program", such as the "hot-rolled steel for less than adequate remuneration program". The USDOC has provided no evidence whatsoever to demonstrate that these programmes actually exist. Having imagined these input-specific programmes into existence, the USDOC then finds that the "users" of each non-existent programme are "limited in number". On this basis, the USDOC concludes that each input-specific programme is "use[d] … by a limited number of certain enterprises" within the meaning of Article 2.1(c) of the SCM Agreement, and that the subsidies provided pursuant to the programme are therefore specific.

21. The circularity of the USDOC's approach should be apparent. By assuming that the non-existent subsidy programme is limited to a specific type of input, the USDOC can then find that the users of the programme constitute "a limited number of certain enterprises". The USDOC's self-identification of the programme determines who the users of the programme are, which, in turn, determines whether the USDOC considers the users of the programme to represent "a limited number of certain enterprises." The USDOC first summons the financial contribution and the benefit into existence in order to find a "subsidy", and then it summons the "program" into existence in order to find that the "subsidy" is specific. The USDOC's identification of a non-existent, input-specific subsidy programme serves one purpose and one purpose only – to support an affirmative determination of specificity. It has no basis in reality.

22. The USDOC's approach suffers from four major flaws:

- First, in all of the determinations at issue, the USDOC has failed to identify who the relevant "granting authority" is in respect of the alleged input subsidies. Without knowing who the relevant granting authority is, it is impossible to undertake the basic inquiry of Article 2.1, *i.e.*, to determine whether the alleged subsidy "is specific to an enterprise or industry or group of enterprises or industries … *within the jurisdiction of the granting authority*".
- Second, the USDOC has failed to follow the order of analysis prescribed by Article 2.1. In all of the determinations at issue, the USDOC has proceeded directly to the "other factors" under Article 2.1(c) without first identifying a subsidy that is facially non-specific under the principles of Articles 2.1(a) and 2.1(b). The USDOC's failure to follow the correct order of analysis corrupts its entire approach to the issue of specificity. The inquiry under the first factor of Article 2.1(c) is whether a facially *non-specific* subsidy programme is, in practice, "use[d] … by a limited number of certain enterprises". The USDOC has never identified a facially non-specific subsidy programme relating to the provision of inputs. Instead, it has taken the first of the "other factors" under Article 2.1(c) entirely out of context and used it as a vehicle for evaluating specificity based exclusively on the end uses of specific types of inputs. This is plainly inconsistent with the purpose of Article 2.1(c) within the broader framework of Article 2.1.
- Third, even if the USDOC had followed the proper order of analysis under Article 2.1, it has failed to demonstrate the existence of any "programme" to provide input subsidies in China, either with regard to specific types of inputs (as the USDOC has assumed, but not demonstrated) or with regard to all types of inputs sold by Chinese SOEs. Having failed to demonstrate the existence of a relevant subsidy programme, it is impossible for the USDOC to evaluate properly whether a subsidy programme is "use[d] … by a limited number of certain enterprises" within the meaning of Article 2.1(c).
- Finally, in all of the specificity determinations at issue, the USDOC has failed to take into account "the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation." These are mandatory considerations under Article 2.1(c). Thus, even if the USDOC otherwise had a proper basis to evaluate specificity under Article 2.1(c) – which it didn't – its determinations are facially inconsistent with this requirement.

23. Each one of these flaws, by itself, renders the USDOC's input specificity determinations inconsistent with Article 2. Collectively, they reveal an approach to specificity that is completely out of alignment with the structure, purpose, interpretation, and proper application of Article 2.

24. Furthermore, the USDOC's initiation of countervailing duty investigations in respect of the alleged provision of inputs for less than adequate remuneration, in the absence of sufficient evidence in the petition to support an allegation that any such subsidy would be specific under Article 2 of the SCM Agreement, and in absence of a sufficient review of the petition by the USDOC in respect of this allegation, is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement in the input subsidy investigations at issue.

V. The USDOC's Use of "Adverse Facts Available" Is Inconsistent with Article 12.7 of the SCM Agreement Because the USDOC Uses "Adverse Inferences" Instead of "Facts Available"

25. The USDOC's legal analysis with respect to financial contribution, benefit, and specificity bears no resemblance to that envisioned in the SCM Agreement. In the majority of the investigations at issue, however, the USDOC does not even apply its flawed legal framework to the facts on the record. Instead, the USDOC resorts to so-called "adverse facts available" ("AFA"), and bypasses factual analysis altogether. Once the USDOC finds that there is non-cooperation by a respondent, the USDOC uses this finding as an excuse to simply pronounce the ultimate legal conclusion that is supposed to be at issue.

26. The USDOC's use of AFA is completely divorced from the application of "facts available" envisioned by the SCM Agreement. The Appellate Body has interpreted Article 12.7 to permit "the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination." In other words, as the panel in *China – GOES* recently emphasized, recourse to facts available requires the use of "facts on record", and does not permit an investigating authority to reach a subsidization determination without any support in the record evidence.

27. But the USDOC does exactly that. After making a threshold finding of non-cooperation, the USDOC jumps to the legal conclusion that was the entire point of the inquiry. The USDOC has interpreted the gap-filling provision in Article 12.7 as providing it with blanket authority to draw legal conclusions that have no factual support. This practice is plainly inconsistent with Article 12.7.

28. Exhibit CHI-2 identifies all of the uses of AFA that are the subject of China's claim under Article 12.7 of the SCM Agreement. There are 48 such instances across 15 different investigations. Most of these instances relate to the USDOC's findings of financial contribution, benefit, and specificity in respect of the alleged input subsidies. It is not surprising that the USDOC frequently relies upon AFA in connection with the alleged input subsidies, since the USDOC is seeking information from respondent parties about subsidies that do not actually exist. Unable to demonstrate the existence of these alleged subsidies on the basis of information on the record, the USDOC resorts to AFA to assume that the subsidies do exist. In some instances, the USDOC's entire subsidy analysis in the case of the alleged input subsidies is premised on a series of AFA-based findings.

29. The USDOC has recognized in some of its investigations that its AFA-based conclusions are without factual support, because it has sought to "corroborate" those conclusions. This is where the systemic flaw in the USDOC's use of AFA becomes evident, because the USDOC "corroborates" its findings on the basis of AFA findings in other investigations. In sum, when the United States applies AFA, it is resorting to "adverse inferences", and its resulting determinations are without a factual foundation. These baseless determinations are then used to bolster other baseless determinations, such that the USDOC's subsidy findings have become entirely separated from the facts.

30. The Appellate Body explained that "Article 12.7 of the SCM Agreement permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization … and injury." When the United States resorts to AFA, it does not do so to "fill in gaps" in the information necessary to reach a conclusion. Instead, the United States uses its AFA findings to arrive at sweeping legal conclusions that have no factual basis. For these reasons, the Panel should find that the USDOC's use of adverse facts available in the investigations identified in CHI-2 is inconsistent with the obligations of the United States under Article 12.7 of the SCM Agreement.

VI. The USDOC's Regional Specificity Findings Are Inconsistent with Article 2 of the SCM Agreement

31. Article 2.2 of the SCM Agreement provides that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific." As explained by the Appellate Body in DS379, "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both."

32. The USDOC's regional specificity findings with respect to the provision of land use rights for less than adequate remuneration are all inconsistent with Article 2.2 of the SCM Agreement, because in none of these determinations did the USDOC demonstrate that either the financial contribution or the benefit was "limited to certain enterprises located within a designated geographical region". Instead, the USDOC based its findings on the same flawed logic that the USDOC relied on in the *Laminated Woven Sacks* investigation, and its findings suffer from the same deficiency identified by the panel in DS379.

33. The panel in DS379 found fault with the USDOC's regional specificity determination, because the USDOC's finding was based on the fact that the land at issue was physically located inside the industrial park. The panel explained that pursuant to the U.S. regional specificity analysis, the provision of land-use rights in China would always be regionally specific "given that land is by definition always limited by and to its geographic location."

34. The USDOC's regional specificity determinations with respect to the provision of land use rights for less than adequate remuneration have continued to suffer from the same circular reasoning identified by the panel in DS379. In each investigation, the USDOC determined that respondents were provided land-use rights by the government within an industrial park or economic development zone. Frequently citing its determination in *Laminated Woven Sacks*, the USDOC found that the provision of land-use rights was regionally specific in each investigation because "the land is in an industrial park located within the seller's (e.g., municipality's or county's) jurisdiction". For the same reasons cited by the panel in DS379, the Panel should find that the USDOC's regional specificity findings in these determinations are inconsistent with Article 2 of the SCM Agreement.

VII. The USDOC's Decisions to Initiate Countervailing Duty Investigations into Allegations that Export Restraints Confer a Countervailable Subsidy, and its Determinations that Export Restraints Provide a Financial Contribution, Are Inconsistent with Articles 11 and 1.1 of the SCM Agreement, Respectively

35. China's final claim in this proceeding concerns the USDOC's decision in *Magnesia Bricks* and *Seamless Pipe* to initiate countervailing duty investigations into allegations that export restraints imposed by China on certain raw material inputs (magnesia and coke) confer a countervailable subsidy, and its subsequent determinations that such restraints provide a financial contribution in the form of the provision of goods.

36. In *US – Export Restraints*, the panel addressed whether an export restraint could be deemed to constitute a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement. For purposes of its analysis, it defined an export restraint as "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports."

37. After a comprehensive interpretative analysis, the panel concluded that an export restraint does not constitute a financial contribution within the meaning of Article 1.1(a) of the SCM Agreement. Nothing in the ten years of intervening WTO jurisprudence has undermined the persuasiveness of the panel's decision. To the contrary, both panels and the Appellate Body have frequently endorsed the reasoning that the panel employed in reaching its conclusion, as well as the central legal holding in that case.

38. The export restraints at issue in *Magnesia Bricks* and *Seamless Pipe* fall within the definition of an export restraint relied upon by the panel in *US – Export Restraints*. It follows that the USDOC acted inconsistently with Articles 11.2 and 11.3 when it decided to initiate investigations into petitioners' allegations that these export restraints confer a countervailable subsidy, and further acted inconsistently with Article 1.1 when it determined that such export restraints provided a financial contribution in the form of the provision of goods.

ANNEX B-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION
OF THE UNITED STATES

I. INTRODUCTION

1. In this dispute, which is one of the largest in the history of the WTO, China advances claims with respect to 97 individual alleged breaches of the SCM Agreement concerning 17 different CVD investigations, and involving 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. China asserts that its claims "largely entail the application of the findings in DS379, as well as other well-settled jurisprudence." In fact, this dispute involves several novel interpretations of the SCM Agreement that were not addressed in DS379, or any other dispute. Additionally, China inappropriately relies on the findings of other panels relating to the facts of *other disputes*. China declines to include in its submission virtually any discussion of the facts at issue in the determinations it challenges. Accordingly, China's claims have no merit, as it (1) has failed to establish its *prima facie* case with respect to its claims and (2) China's legal arguments lack support in the text of the SCM Agreement.

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

2. 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. 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. 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.

III. CHINA HAS FAILED TO ENGAGE IN THE CASE-SPECIFIC ANALYSIS REQUIRED TO ADVANCE CLAIMS

3. China's submission lacks legal arguments and evidence sufficient to establish China's *prima facie* case. 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 for each of the 97 alleged breaches of the relevant provisions of the WTO agreements. It has failed to do so.

4. China must demonstrate, with evidence, that Commerce's determinations in each investigation were inconsistent with the SCM Agreement. Despite the fact that China advances 97 individual claims that Commerce's findings were inconsistent with the SCM Agreement, it barely discusses Commerce's determinations at all, providing a few cursory descriptions as examples, and leaving the task of explaining how each one of these "as applied" claims violates the SCM Agreement to the Panel. In addition, China fails to link its legal challenges to the facts and evidence of each of the investigations it challenges. 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."

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

5. Interpreted according to the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU, "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own.

6. 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" that is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." These definitions 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.

7. The context of the term "public body" reveals that it is indeed government ownership or control that is central to a proper interpretation, for these elements mean that the government can use the entity's resources as its own. In Article 1.1(a)(1), "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" and "any public body" – to identify the two types of entities that can directly provide a financial contribution. 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, and "public body" cannot be interpreted in a manner that would render it redundant.

8. The use of "a", "any", and "or" in Article 1.1(a)(1) suggests that there might be different *types* of public bodies. Some entities 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.

9. The use of the term "government" as a shorthand reference does not require a narrow interpretation of "public body." While the terms "government" and "public body" are related, the question is: what is the nature of their relationship? 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."

10. The context provided by the term "private body" in Article 1.1(a)(1)(iv) 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. 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*."

11. The context provided by "financial contribution" in Article 1.1(a)(1) 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. 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" or also through entities that it controls.

12. Further context in Article 1.1(a)(1), such as "payments to a funding mechanism," supports this understanding of the scope of transactions that are "financial contributions." When a financial contribution 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) is designed to capture such flows within its definition of "financial contribution."

13. The context provided by the "entrusts or directs" language in Article 1.1(a)(1)(iv) 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. 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. 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 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.

14. Additionally, the 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" 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). 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.

15. The Working Party Report on China's WTO accession also provides relevant context. China's acceptance in the Working Party Report that actions by its state-owned enterprises constitute financial contributions is recognition that Chinese state-owned enterprises are "public bodies" within the meaning of Article 1.1(a)(1).

16. The object and purpose of the SCM Agreement support an interpretation of "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. Interpreting "public body" in this way 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. In any event, such an interpretation is consistent with the broad range of meanings suggested by the ordinary meaning of "public" and "body," and reading "public body" in context supports that interpretation.

17. When interpreting Article 1.1(a)(1), it is not necessary to take into account the ILC Articles, because they are not relevant rules of international law applicable in the relations between the parties. Even assuming *arguendo* that the ILC Articles can be considered "applicable," they 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 there was some question about whether the action of Commerce is attributable to the United States.

18. We note that three prior WTO dispute settlement panels – in Korea – Commercial Vessels, EC and certain member States – Large Civil Aircraft, and US – Anti-Dumping and Countervailing Duties (China) – have interpreted "public body" and concluded that a "public body" is an entity controlled by the government. 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." And three prominent participants in the Uruguay Round negotiations have penned an article in the Journal of World Trade raising concerns about the Appellate Body's findings with respect to the interpretation of the term "public body."

19. 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. 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.

20. Finally, because China's as applied claims are premised on a flawed interpretation of Article 1.1(a)(1) and China has advanced no arguments supporting the conclusion that the United States has breached Article 1.1(a)(1), as that provision is correctly interpreted, China has failed to make a *prima facie* case, and the Panel should reject China's claims.

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

21. 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 and, thus, China has not established that the Kitchen Shelving discussion is a "measure." Accordingly, China's "as such" challenge must fail.

22. 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.

23. 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. 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. 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. China's allegations of repetition do not transform the discussion in *Kitchen Shelving* into a measure that can be challenged. Not having established that the *Kitchen Shelving* discussion is a measure, China has also failed to show that that discussion can result in an "as such" breach of the SCM Agreement.

VI. 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

24. China has failed to make a *prima facie* case for its out-of-country benchmark claims because its claims are based on generalizations instead of the specific facts of the determinations at issue and improper legal interpretations of the SCM Agreement.

25. There can be no question that an investigating authority may rely on out-of-country benchmarks in certain circumstances. Additionally, it should come as no surprise to China that an investigating authority might rely on out-of-country benchmarks as 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.

26. 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.

27. Commerce's public body determinations in the investigations challenged here were not WTO-inconsistent. In any event, the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* demonstrates that a WTO-inconsistent public body determination does not mean that a 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 appropriate, is also WTO-inconsistent.

28. 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. 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.

29. 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.

30. China also 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. 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.

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

31. China's claims that Commerce's specificity determinations are inconsistent with the SCM Agreement are without merit. China appears to challenges 17 different specificity determinations in 15 investigations. Each determination was based on the specific facts and circumstances of the relevant proceeding, and China must address those facts and circumstances. China has failed to do so, instead relying on broad, inaccurate characterizations of the measures at issue. The Panel should reject its claims for that reason. In addition, China proposes unsupportable legal interpretations of the SCM Agreement discussed below.

32. First, 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 the *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 analysis. China argues that Commerce's identification of such 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." China is incorrect in its interpretation of Article 2, because neither the text of Article 2 nor any other provision of the SCM Agreement requires a subsidy or "subsidy program" to be implemented pursuant to a formally instituted "plan or outline". Accordingly, China's argument has no textual support in Article 2.1(c).

33. China's interpretation must be understood within the context of Article 2 and the SCM Agreement. China's interpretation would negate the distinction between Article 2.1(c), relating to subsidies that are *de facto* specific, and Article 2.1(a), relating to subsidies that are *de jure* specific. China's interpretation of Article 2.1(c) would incorrectly focus a *de facto* specificity inquiry on the existence of a formal plan or outline, and not on whether or not there are a limited number of users, the inquiry which is the subject of Article 2.1(c). This interpretation is not only unsupported by the text of the Agreement, but would also allow Members to circumvent the disciplines of the Agreement by avoiding the creation of an identifiable plan or outline, thereby frustrating the ability of investigating authorities to countervail otherwise actionable subsidies.

34. Second, China's assertion that an investigating authority must examine a subsidy under Articles 2.1(a) and 2.1(b) before examining Article 2.1(c) in every case has no basis in the text of the SCM Agreement. The ordinary meaning of Article 2.1 makes clear that 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. Because China's arguments are inconsistent with the ordinary meaning and context of the provisions of the SCM Agreement, the Panel must find there is no order of analysis requirement in Article 2.1.

35. Third, China is incorrect to assert that the SCM Agreement requires investigating authorities to conduct a separate analysis identifying the granting authority as part of its Article 2.1 evaluation. China points to no language within Article 2.1(c) or the SCM Agreement as a whole which would support such an argument. Accordingly, China's argument that Commerce was required in every specificity determination to analyze and identify the "granting authority" is without merit.

36. Fourth, China argues that Commerce was required to address expressly the diversification of China's economy and the length of time inputs had been provided for less than adequate remuneration in each challenged determination. A specificity determination involves a fact-based analysis, made on a case-by-case basis. 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. The factors were not relevant to the investigations at issue, and China's submission does not allege that the factors would have impacted the analysis in the investigations at issue. Thus, China's argument is 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 2.1.

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

37. China appears to challenge determinations made by Commerce in seven CVD investigations that the provision of land-use rights in China was specific within the meaning of Article 2 of the SCM Agreement. 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 Agreement, 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.

IX. 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

38. 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 with respect to these claims. 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.

39. 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. Further, 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 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." China has failed to demonstrate that Commerce's determinations were inconsistent with this standard.

40. With respect to specificity, Commerce's initiations were justified because evidence pertaining to the subsidies themselves indicated that the provisions of the inputs in question for less than adequate remuneration were specific. Further, the applications provided additional evidence regarding specificity, including past final determinations regarding the same or similar inputs. Under the standard above, this evidence was sufficient to initiate investigations into the alleged subsidies

41. With respect to the sufficiency of evidence regarding the existence of public bodies, in many situations, much of the evidence of government control may not be available before the initiation of an investigation, particularly with respect to entities alleged to be state-owned. Accordingly, the only reasonably available information to an applicant may be general evidence of government control over an industry or sector.

42. Even under China's interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, Article 11 would only require adequate evidence tending to prove or indicating that an entity possesses, exercises, or is vested with governmental authority, not definitive proof of such. The relevant question would therefore be 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. China argues that evidence of government ownership or control is insufficient for initiation purposes. China is mistaken.

43. 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 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, as required by Article 11 of the SCM Agreement.

44. Further, when assessing the sufficiency of evidence, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant. 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. 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. 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? In general, evidence of government ownership or control is in certain circumstances the only evidence that is reasonably available. In fact, the issue of public bodies is an example of why the SCM Agreement includes the term "reasonably available."

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

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

46. China failed to make a *prima facie* case. Additionally, 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.

47. Notwithstanding the erroneous panel report, examining whether an export restraint constitutes a financial contribution through entrustment or direction is fully consistent with Article 1.1(a)(1). Additionally, the United States decisions to countervail China's export restraints 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.

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

48. China provides only a cursory description of two Article 12.7 claims, merely listing the remaining instances in an exhibit. For this reason, China failed to make a *prima facie* case with respect to these claims. In addition, China's Article 12.7 claims are based on incorrect interpretations of the SCM Agreement and mischaracterizations of Commerce's determinations.

49. Commerce's use of an adverse inference in selecting from among the available facts is fully consistent with the SCM Agreement, confirmed by the ordinary meaning of the provision, as well as the context provided by the SCM Agreement as a whole and the parallel provision in the AD Agreement. Further, China's interpretation of Article 12.7 would lead to a breakdown of the remedies provided in the SCM Agreement, as interested parties and Members would have no incentive to participate in an investigation. Finally, 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. The panel found that China's investigating authority had ignored substantiated facts on the record and that its determination "was actually at odds with information on the record." In contrast, Commerce's determinations were based on a factual foundation and were not contradicted by substantiated facts.

50. Finally, China has failed to demonstrate that any of the 48 challenged determinations are not supported by the record evidence in each investigation. Commerce's facts available determinations are based on the factual information available on the record of each investigation. Thus, China's argument that the challenged adverse facts available determinations were devoid of a factual basis is simply incorrect.

XII. CONCLUSION

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

ANNEX C

THIRD PARTIES WRITTEN SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

ANNEX C-1

THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

I. INTRODUCTION

1. Australia considers that these proceedings initiated by China under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant issues of legal interpretation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

2. In this submission, Australia addresses a number of issues relating to the interpretation of the provisions of the SCM Agreement, with a particular focus on:

(a) the meaning of the term "public body" in Article 1.1(a)(1) of the SCM;

(b) the use of out-of-country benchmarks to calculate the benefit to the recipient under Article 14(d) of the SCM Agreement; and

(c) whether export restraints can constitute a countervailable subsidy under the SCM Agreement.

3. Australia reserves the right to raise other issues in the third party hearing with the Panel.

II. THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT

A. THE MEANING OF THE TERM "PUBLIC BODY"

4. A material issue in this matter is the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM. In *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, the Appellate Body reversed the Panel's finding that the term "public body" in Article 1.1(a)(1) of the SCM Agreement means "any entity controlled by a government". The Appellate Body considered that this interpretation of "public body" lacked a proper legal basis.[1]

5. Australia notes that China's submission states that after a comprehensive interpretative analysis, the Appellate Body determined that "being **vested** with, **and exercising**, authority to perform governmental functions" is the "core feature" that defines a public body.[2] However, while the Appellate Body did make a statement similar to this, that statement was made as part of its analysis, following which it stated its conclusion that "a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that **possesses**, **exercises or** is **vested** with governmental authority".[3]

6. As such, Australia's view is that the Appellate Body's conclusion is broader than is indicated in China's submission. Australia considers that the Appellate Body's conclusion suggests that a public body must meet one of three descriptions – an entity that **possesses** governmental authority, an entity that **exercises** governmental authority, or an entity that is **vested** with governmental authority. These descriptions appear to be alternatives to one another.

7. However, as part of its analysis in forming this conclusion, the Appellate Body made a number of statements that require further analysis.

8. For example, a statement was made by the Appellate Body that "being **vested** with, **and exercising**, authority to perform governmental functions is a core feature of a public body in the sense of Article 1.1(a)(1)".[4] It is not clear whether **possessing** government authority is included in this description of "a core feature of a public body". This statement also appears to suggest that

[1] Appellate Body Report, *US – AD/CVDs,* para. 322.
[2] China's first written submission, para. 15. (emphasis added)
[3] Appellate Body Report, *US – AD/CVDs,* para. 317. (emphasis added)
[4] Appellate Body Report, *US – AD/CVDs,* para. 310. (emphasis added)

in order to meet this description, an entity must both **be vested with**, **and exercise**, authority to perform governmental functions, whereas the Appellate Body's conclusion, as noted above, expressed these features as alternatives to each other.

9. In the same paragraph, the Appellate Body also made a statement that "being **vested** with government authority is the key feature of a public body".[5] It is not clear whether **possessing** government authority, or **exercising** government authority are also included in this description of "the key feature of a public body".

10. Australia's view is that the discussion of core and key features does not fully explain what the other features of a public body might be, and whether an entity might be considered a public body if it has other features of a public body even if not the core or key feature.

11. Another statement made by the Appellate Body in its analysis in forming its conclusion, was that in order for an entity to be able to give responsibility to a private body (entrustment), it must itself be **vested** with such responsibility.[6] This appears to suggest that in order to give responsibility to a private body (entrustment), it may not be sufficient if an entity **possesses** and/or **exercises** such responsibility. Rather, it must be **vested** with it.

12. Australia considers that it may be useful for the Panel in this dispute to carefully examine again the term "public body". Australia would not support a view that an entity must be **vested** with governmental authority in order to be regarded as a "public body". This is because Australia considers that public bodies have government authority (without having to be **vested** with it). Australia is concerned to ensure that a focus on the idea of entities being **vested** with government authority is not used to artificially transpose the test for "entrustment or direction" onto the definition of "public body".

B. THE USE OF OUT-OF-COUNTRY BENCHMARKS TO CALCULATE THE BENEFIT TO THE RECIPIENT UNDER THE SCM AGREEMENT

13. Australia notes the view of the United States that the use of out-of-country benchmarks is not inconsistent with Article 14(d) of the SCM Agreement.[7]

14. Australia agrees with this statement. In *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, the Appellate Body acknowledged that Article 14(d) allows investigating authorities to use a benchmark other than private prices in that market.[8]

15. However, Australia notes that the Appellate Body also made the statement that "we emphasise once again that the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited."[9]

16. Australia agrees with both the United States and China that when the Appellate Body reaffirmed these interpretative findings in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* it emphasised the case-by-case nature of the distortion inquiry.[10]

C. WHETHER EXPORT RESTRAINTS CAN CONSTITUTE A FINANCIAL CONTRIBUTION UNDER ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

17. In its submission, the United States has argued that "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 enterprise 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)."[11]

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[5] Appellate Body Report, *US – AD/CVDs,* para. 310. (emphasis added)
[6] Appellate Body Report, *US – AD/CVDs,* para. 294.
[7] United States' First Written Submission, para. 146.
[8] Appellate Body Report, *United States – Softwood Lumber IV,* para. 101.
[9] Appellate Body Report, *United States – Softwood Lumber IV,* para. 102.
[10] Appellate Body Report, *United States – AD/CVDs,* para. 446.
[11] United States' first written submission, para. 302.

18. The United States' submission further argues that "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".[12]

19. In relation to Article 1.1(a)(1)(iv), Australia notes the arguments made by the United States that entrustment or direction is not necessarily explicit.[13]

20. However, even if the arguments of the United States are accepted, Australia notes that Article 1.1(a)(1)(iv) requires that a private body is entrusted or directed by a government "to carry out one or more of the type of functions illustrated in (i) to (iii)". While the United States has referred briefly to the function illustrated in Article 1.1(a)(1)(iii), this element is not analysed and the focus has been on the "entrustment or direction" element. Australia does not rule out the possibility that an export restraint may constitute a financial contribution, but notes that in order for an export restraint to constitute a financial contribution under Article 1.1(a)(1)(iv), both elements of Article 1.1(a)(1)(iv) must be satisfied.

III. CONCLUSION

21. Central to this dispute are important issues of legal interpretation concerning aspects of the SCM Agreement, principally the meaning of the term "public body" as used in Article 1.1(a). Australia is of the view that an entity should not be required to be **vested** with governmental authority in order to be regarded as a public body, but notes that the broad conclusion reached by the Appellate Body in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* can accommodate Australia's view. Australia has also commented on a number of other issues of interpretation, including whether export restraints can be regarded as a financial contribution under Article 1.1(a)(1).

[12] United States' first written submission, para. 299.
[13] United States' first written submission, para. 300.

ANNEX C-2

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF BRAZIL

1. In its written submission, Brazil focused its comments on the concept of public body under Article 1.1(a)1 of the Agreement on Subsidies and Countervailing Measures (SCM) Agreement and the predominance analysis under Article 14(d) of the mentioned Agreement.

I. THE CONCEPT OF "PUBLIC BODY" IN ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT SHOULD BE BASED ON THE AUTHORITY OF THE ENTITY ON EXERCISING GOVERNMENTAL FUNCTIONS

2. Brazil highlighted that, as it has been already firmly established by the Appellate Body, in the core of the concept of "public body", in the text of Article 1.1 of the SCM Agreement, is the "performing functions of a "governmental" character, that is, to "regulate", "restrain", "supervise" or "control" the conduct of private citizens",[1] in other words, the "exercise of lawful authority". In this sense, governmental ownership of an entity per se does not necessarily prove it has the authority inherent of a public body.

3. In Brazil's view nothing in the SCM Agreement authorizes investigation authorities to establish a presumption (be it rebuttable or not) that, if an entity is owned by the government, it can be considered, without further scrutiny, as a public body. On the contrary, the Appellate Body has made quite clear that the conduct of corporate bodies "is presumptively not attributable to the State",[2] and investigating authorities should conduct "a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense"[3] in order to define whether the entity under investigation is a public body for the purposes of the application of Article 1.1 of the SCM Agreement.

II. THE PREDOMINANCE ANALYSIS UNDER ARTICLE 14(D) OF THE SCM AGREEMENT SHOULD BE CARRIED OUT ON A CASE-BY-CASE BASIS

4. In Brazil's view, the mere fact that there is a significant provision of goods or services or purchase of goods by a government does not, in and of itself, establish a presumption of market distortion for the calculation of the amount of subsidy conferred in Part V of the SCM Agreement. According to the established "predominance test", an investigating authority may exclude in-country benchmarks only when the "government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods".[4] In this sense, the concept of "predominance" "does not refer exclusively to market shares, but may also refer to market power."[5]

5. The Appellate Body made it clear that the mere fact that a government is a significant supplier does not allow for the investigative authority to presuppose price distortion and deviate from domestic prices.[6] Brazil is of the view that Governments may play different roles in the market, including as an economic agent, when it is subject to "the prevailing market conditions" and, according to Article 14(d) of the SCM Agreement, would not confer a benefit within the provisions pertaining countervailing duties. Thus, however significant the market share of the government acting as an economic agent, it would not be using its power to influence price, and in-country benchmarks should not, for this reason alone, be discarded.

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[1] *Canada – Dairy* (Appellate Body Report, paragraph 97).
[2] *US – Countervailing Duty Investigation on DRAMS* (Appellate Body Report, footnote. 179).
[3] *US – Anti-dumping and Countervailing Duties (China)* (Appellate Body Report, paragraph 317). Emphasis added.
[4] *US – Softwood Lumber IV* (Appellate Body Report, paragraph 100).
[5] *US – Anti-dumping and Countervailing Duties (China).* (Appellate Body Report, paragraph 444).
[6] *US – Anti-dumping and Countervailing Duties (China).* (Appellate Body Report, paragraphs 442-443).

ANNEX C-3

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. Canada is participating in this panel proceeding because it has a substantial systemic interest in the interpretation of WTO subsidy rules.

II. PUBLIC BODY

2. In the panel and Appellate Body proceedings in *US – Anti-Dumping and Countervailing Duties (China)*, Canada, a third party in that dispute, argued that the appropriate interpretation of the term "public body" is that it is an entity controlled by the government. Such an interpretation is consistent with the context of Article 1.1(a)(1) and the object and purpose of the SCM Agreement.

3. Canada's interpretation gives sense to the reference to "public body" in Article 1.1(a)(1) because it maintains the *effet utile* of the term and distinguishes it from a "private body" entrusted or directed by a government in Article 1.1(a)(1)(iv). This interpretation also ensures that the disciplines of the SCM Agreement are given a sufficiently broad scope in terms of the entities to which they apply and as such prevents the creation of loopholes allowing for the circumvention of the disciplines of the Agreement.

4. The panel endorsed this interpretation in *US – Anti-Dumping and Countervailing Duties (China)*. Regrettably, the Appellate Body reversed the panel's findings. Nevertheless, Canada acknowledges the importance of security and predictability in the dispute settlement system, as contemplated in Article 3.2 of the DSU.

III. USE OF OUT-OF-COUNTRY BENCHMARKS

5. In Canada's view, an investigating authority may use out-of-country benchmarks where the investigating authority establishes that private prices are distorted because of the predominant presence of government-controlled entities in the domestic market and provided that such benchmarks reflect prevailing conditions in the country of provision.

6. In *US – Softwood Lumber IV* the Appellate Body indicated that an investigating authority may reject the use of in-country private transaction prices for a good where private prices are distorted because of the government's predominant role in the market as a provider of the same or similar goods.

7. Price distortion may arise not only where the government itself is a supplier of the good, but also where the suppliers of the good are owned and controlled by the government. Where a government owns and controls SOEs, it is able to interfere with the companies' pricing decisions by virtue of its control. Through the SOEs, the government can affect prices in the market for the good as if it acted itself. Where SOEs are predominant suppliers in a market, they can affect prices by private suppliers and thus have the same ability to create market distortion as the government acting directly.

8. Government-owned and controlled entities, such as SOEs, do not need to be public bodies under Article 1.1(a)(1) of the SCM Agreement to be in a position to distort private prices in the market and for these prices to constitute improper benchmarks as a result.

9. This is confirmed by the Appellate Body decision in *US – Antidumping and Countervailing Duties (China)*, where the Appellate Body held that certain SOEs could not be considered "public bodies" under Article 1.1(a)(1) merely because they were government-owned and controlled. However, the Appellate Body treated the fact that government-owned and controlled SOEs supplied 96.1 percent of the hot-rolled steel produced in the Chinese market as equivalent to

a 96.1 percent market share of the government. The Appellate Body confirmed, on this basis, the panel's finding of "predominant supplier".

IV. SPECIFICITY

10. With respect to specificity, Canada considers that first, Article 2.1 of the SCM Agreement does not mandate a specific order of analysis of subparagraphs (a) to (c). The first paragraph of Article 1 sets out several *principles* that assist in determining whether a subsidy is specific because of its limitation to "certain enterprises". Determining the weight that should be given to each principle will depend on the facts of the case and requires a certain amount of flexibility. That includes the question whether a principle may or may not be relevant to the specificity analysis at all. In *US – Antidumping and Countervailing Duties (China)* the Appellate Body held that there may be instances where evidence unequivocally directs the specificity analysis to one specific subparagraph of Article 2.1.

11. Second, Canada considers that the identification of a formal subsidy program is not required in all cases. A subsidy may be provided pursuant to a formal program or not. When there is a formal program under which a subsidy appears to be broadly available, it may be necessary to consider all the recipients under the program in order to determine, notably by applying factors listed in Article 2.1(c), whether a given subsidy is, in fact, specific. In such circumstances, the identification of a formal subsidy program may be necessary.

12. When there are no indications that there is a formal program, the key issue is whether the subsidies are limited to certain enterprises. The conduct of this analysis does not require the identification of a formal subsidy program.

V. THE USE OF FACTS AVAILABLE AND ADVERSE FACTS AVAILABLE UNDER ARTICLE 12.7 OF THE SCM AGREEMENT

13. Canada considers that Article 12.7 of the SCM Agreement allows an investigating authority to make determinations based on "facts available" to it. In some situations, facts available will include facts that are less favourable to a party than the facts that the party would have submitted itself, if it had responded in a timely and complete manner.

14. Reading Article 12.7 in the context of Annex II to the Antidumping Agreement, as suggested by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, confirms that the use of facts that are detrimental to the respondent is permissible.

15. An investigating authority should also be permitted to draw adverse conclusions, or inferences, under certain circumstances. Where a party withholds information, a reasonable and objective investigating authority may find that a party should not benefit from a lack of cooperation and use facts on the record in a way that is not favourable to a party.

16. This interpretation of Article 12.7 and Annex II is supported by the findings of the panel in *EC – Countervailing Measures on DRAM Chips*, which found that an investigating authority may be justified in drawing adverse inferences from the failure to cooperate of a party.

VI. INITIATION STANDARDS

17. Canada considers that an investigating authority should be permitted, when reviewing the sufficiency of evidence under Articles 11.2 and 11.3, to take into account that access to relevant information may be limited in a country.

18. The text of Article 11.2 itself reveals what a reasonable and objective investigating authority should conclude when reviewing whether evidence is sufficient. On the one hand, "[s]imple assertions unsubstantiated by relevant evidence" are insufficient, on the other hand, the application shall contain "information as is reasonably available" to the applicant.

19. Governments are in possession of much of the information regarding subsidies. The information about a subsidy that is reasonably available to an applicant will depend on transparency and access to information within the domestic system of the subsidizing Member. What is reasonably available will vary widely amongst Members. It will depend, *inter alia*, on

general record keeping and publication requirements for a government, on the existence of access to information laws and on company reporting and publication requirements.

20. Canada submits that a subsidizing Member should not be able to evade its obligations under the SCM Agreement because it is in a position to make information relating to subsidies inaccessible, or "unavailable", thus effectively impeding applicants' ability to adduce evidence for an application to initiate a countervailing duty investigation.

VII. EXPORT RESTRAINTS DO NOT CONFER SUBSIDIES

21. A financial contribution by a government, a public body or a private body entrusted or directed by a government is a necessary element of a subsidy under Article 1.1(a)(1) of the SCM Agreement. Subparagraphs (i) to (iv) of Article 1.1(a)(1) set out an exhaustive list of the types of government conduct that can constitute a financial contribution. Export restraints are not a listed type of government conduct.

22. The panel in *US – Export Restraints* examined the question whether export restraints can constitute government "entrustment" or "direction" to a private body, in the sense of Article 1.1(a)(1)(iv), to provide goods. The panel found that restrictions on exporting a product and an instruction to sell that product domestically are not "functionally equivalent". Export restraints do not constitute a financial contribution because the existence of a financial contribution cannot be determined merely based on the effects, or the result, of a government action.

23. Although the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* broadened the interpretation of "entrustment" and "direction", it is clear that export restraints are not covered by Article 1.1(a)(1)(iv) and that the findings of the panel in *US – Export Restraints* in this regard remain relevant.

24. Export restraints are a form of governmental regulation of exports that may have different effects, since, where the government restricts the exportation of certain goods, it is up to manufacturers and other market operators to decide how to react.

25. The reports by the Appellate Body and the panel in *US – Softwood Lumber IV* and the Appellate Body Report in *US – Countervailing Duty Investigation on DRAMS* confirm, in relevant parts, the interpretation by the panel in *US – Export Restraints* of Article 1.1(a)(1)(iv) that not every market intervention by a government constitutes "entrustment" or "direction".

26. Canada considers that the imposition of export restraints is one of many instances of government regulation of a market where there is no immediate link between the regulatory measure and the actions that private entities may or may not take based thereon. Such measures are outside the coverage of government "entrustment" or "direction" to a private body and do not constitute a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement.

ANNEX C-4

EXECUTIVE SUMMARY OF THE THIRD PARTY
WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. PUBLIC BODY

1. China uses the term "definitively" to describe the interpretation of Article 1.1(a)(1) provided by the AB in *DS379*. It is not clear what China might mean. The AB Report must be unconditionally accepted by the parties and is part of the *acquis* of the WTO dispute settlement system, implying that, absent cogent reasons, the same legal question will be resolved in the same way in a subsequent case. However, simply because a legal provision has been interpreted in one AB Report certainly does not preclude the possibility that it may be the subject of further, complementary, clarification in subsequent AB Reports.

2. China uses the term "facially" when claiming that the measures are inconsistent with Article 1.1(a)(1). It is not clear what China might mean. In order to determine if the measure is consistent, it is simply necessary to examine the terms of the relevant measure, including the facts and evidence on the record of the investigation, as well as the procedural conduct of that investigation.

3. The AB Report in *DS379* is a closely reasoned assessment, and care needs to be exercised in considering any one particular statement out of context. The AB endeavoured to strike a balance between the US position, with its emphasis on *ownership and control* in general terms and China's position, with its emphasis on governmental *authority* and *function*, which approach the AB considered to coincide with and correspond to the *attribution* rules in the ARSIWA.

4. The Parties agree with the AB that the core issue is *attribution*. They disagree about the circumstances in which a conclusion about attribution can be reached in general terms, with respect to a set of one or more measures, based on a characterisation of the author of such measures as a "public body". The EU remains of the view that when the US casts the abstract test (leaving aside what the particular circumstances might be) in terms of the *possibility* of control *through whatever means*, if understood literally, that is too broad. Through their powers of regulation and taxation governments can control all of the resources subject to their jurisdiction. The US is on stronger ground when it focusses on *a more specific link* between the *conduct* in question and the *government*.

5. China focuses its argumentation on the interpretative part of the AB Report in *DS379*, rather that the part in which the law was applied to the facts, in which the AB also attached importance to whether or not USDOC *asked for information, other than ownership information*. The Panel should determine whether or not the fact patterns of these 14 measures, on the issue of public body, are indeed the same for all relevant purposes to the fact patterns of the measures in *DS379*.

6. Depending on the fact patterns in the cases in question, including whether USDOC asked for information, other than ownership information, and whether such information was provided, or available to USDOC, the Panel will need to determine how USDOC assessed such information as a whole, and whether or not such assessment was consistent with Article 1.1(a)(1). If other information was requested *but not provided*, then the Panel will need to determine what *inferences* USDOC may or may not have drawn and/or what *other available facts it might have relied on*, leading ultimately to the relevant determination of "public body", and whether or not such assessment was consistent with Article 1.1(a)(1). Specifically, if USDOC relied not only on evidence of government ownership and control in general terms, but also on something more as a basis for establishing that the entity is a public body, then the Panel will need to consider how these various factors have been weighed, and whether or not the assessment as a whole is consistent with the *ASCM*. For the purposes of this dispute, the EU takes no position on the conclusions and findings that the Panel should eventually reach.

7. China explains that, in framing a claim against the alleged rebuttable presumption "as such", it is seeking to respond to alleged recidivism on the part of the US. According to China, this approach is directed towards cessation by the US of such behaviour in the future. Instead of having to proceed against each individual "as applied" measure, China would wish to see all such future instances caught by any eventual compliance or arbitration proceedings. In assessing China's claims and arguments concerning the rebuttable presumption "as such", the EU considers that the Panel should pay close attention to the question of *whether or not China has demonstrated the existence and precise content of the measure at issue*. The Panel may also seek to strike a reasonable balance between the objective of *prompt settlement*, which might militate in favour of the existence of the alleged measure, and the principle of *due process*. In making its assessment, the Panel may also wish to take into account the nature of the alleged measure in this case as a rebuttable presumption. Thus, the measure is not a rule of substance, but rather a rule about evidence, and specifically about where the burden of proof is to lie. Given its character as a rule of evidence, it may be difficult to dissociate the alleged measure in this case (that is, the alleged rebuttable presumption) in abstract terms from a particular procedural context. This need to take into account the specific procedural context may need to inform a consideration of *whether or not the complaining Member has identified the existence and precise content of the measure at issue*.

8. The ARSIWA refer expressly to cessation and *non-repetition*. It provides that the State responsible for an internationally wrongful act is under an obligation to cease the act and to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. The ARSIWA also suggest that a "systematic" breach of an obligation may be "serious"; that other States should co-operate to bring serious breaches to an end; and that they should not recognise as lawful a situation created by a serious breach, nor render aid or assistance in maintaining that situation. The EU does not expect either Party, in this or other cases, to fall prey to the temptations of recidivism, or for that matter self-help, neither of which serves the interests of other WTO Members, or the WTO system.

9. The EU considers that the information that a complainant might be expected to adduce in support of a request for initiation of an investigation must be a function of the availability of such information in the public domain. Information and evidence concerning the types of additional factors, over and above ownership and control, that the AB has indicated may be relevant to the assessment, may (or may not) be of a similar type. This could mean that evidence of ownership and control, together with some other relevant and reasonable inference or available fact, could be sufficient for the purposes of initiation, if no other information is available to the complainant.

10. China does not explain the relationship between its claims on the substantive question of public body, and its procedural claims concerning initiation. Notably, China does not explain whether success with the first set of claims would allow the Panel to exercise *judicial economy* with respect to the second set of claims. In other words, China does not explain what the value added of its claims with respect to initiation might be. China does not argue that a defective initiation would require termination of the measure in compliance proceedings, and does not seek any suggestion from the Panel.

II. BENEFIT

11. This claim is consequential on the preceding claim. If China is correct that the benefit determinations rest upon the public body determinations, and if the public body determinations are WTO inconsistent, then China's claim would be well-founded. If, on the other hand, China has failed to demonstrate that the public body determinations are WTO inconsistent, or if China has failed to demonstrate that the benefit determinations rest upon the public body determinations, then the Panel should reject China's claims. *The role of government market share or predominance is not therefore per se at issue in this dispute*.

III. SPECIFICITY OF INPUT SUBSIDIES

12. Article 2 has recently been clarified by the AB. In *DS379*, the AB observed that the chapeau of Article 2.1 offers interpretative guidance on the scope and meaning of the rest of the provision, and frames the central enquiry as a determination of whether a subsidy is specific to certain enterprises within the jurisdiction of the granting authority, applying the principles in sub-paragraphs (a)-(c), no one of which may be determinative. Eligibility is a common and critical

feature of sub-paragraphs (a) (which relates to specificity) and (b) (which relates to non-specificity), and appropriate consideration must be accorded to both principles. In cases of the appearance of non-specificity, a measure may still be specific in fact pursuant to sub-paragraph (c). The principles are to be applied concurrently, although it may not be necessary to consider all sub-paragraphs in all cases, and caution should be exercised when applying one sub-paragraph if the potential for the application of the others is warranted on the facts of a particular case. The term "explicitly" in sub-paragraph (a) refers to something express, unambiguous or clear and not something implied or suggested. The phrase "an enterprise or industry or group of enterprises or industries" in the chapeau involves a certain amount of indeterminacy at the edges and needs to be applied on a case-by-case basis. It is not necessary for the purposes of sub-paragraph (a) that the limitation on access be demonstrated with respect to both the financial contribution and the benefit.

13. In *EC – Large Civil Aircraft* there was an EC Framework Programme for R&TD, with sector-specific programmes, including for aeronautics. The Panel found the subsidies granted to Airbus *de jure* specific under Article 2.1(a) based on the fact that specific funding was reserved for specific sectors, including aeronautics. The EU appealed on the grounds that, viewed at the level of the EC Framework Programme, there was no specificity. The AB rejected the appeal, considering that an *explicit* limitation to enterprises in one sector *would not be rendered non-specific* by virtue of the fact that other groups of undertakings in other sectors had access to other pools of funding.

14. In *US – Large Civil Aircraft*, the AB considered the issue of whether the allocation of patent rights under the contracts and agreements between NASA/DOD and Boeing were specific. The AB considered that, whilst the question of eligibility is critical, a "granting authority" could consist of multiple granting authorities, and the terms "granting authority" and "the legislation pursuant to which the granting authority operates" are not mutually exclusive. The Panel did not therefore err by considering the overall US legal framework for the allocation of patent rights under government R&D contracts, and had made an explicit finding that the allocation of such patent rights is uniform in all sectors. However, the Panel did err by failing to consider the EU arguments under Article 2.1(c), although the AB was unable to complete the analysis. In this context, the AB confirmed that the principles in Article 2.1 must be applied concurrently, and that the provision suggests a sequence in which the application of sub-paragraphs (a) and (b) *normally* precedes sub-paragraph (c). The AB also considered a US appeal against the Panel's finding under Article 2.1(a) that the reduced rates of Washington B&O tax for commercial aircraft were specific, because they should have been assessed as part of a broader scheme. The AB rejected the appeal, agreeing with the Panel that, if multiple subsidies are to be considered as part of the same subsidy scheme, one would expect to find *links or commonalities* between those subsidies, and such evidence was not on the record. Finally, the AB considered, and rejected, a US appeal against the Panel's finding under Article 2.1(c) that subsidies provided by Industrial Revenue Bonds (IRBs) of the City of Wichita were *de facto* specific because a disproportionately large percentage were granted to Boeing.

15. The EU suggests that the Panel consider the issues before it in light of the clarifications provided by these three cases. For example, China complains that the granting authority has not been identified, and yet, as outlined above, the AB has clarified that the core issue is one of eligibility. So the question for the Panel may be whether or not the evidence demonstrates a limitation of eligibility with respect to the measure described by the investigating authority. Similarly, China complains about the sequence of analysis, and yet, as outlined above, the AB has merely stated that an analysis under sub-paragraph (c) *normally* follows one under sub-paragraphs (a) and (b). So the question for the Panel may be: in what circumstances is it permissible to resort directly to sub-paragraph (c), and could this include the situation in which it is evident that no *de jure* specificity is present? Finally, China claims that the impugned measures are available outside the alleged programme, and yet, as outlined above, the AB has indicated that one might expect there to be *links and commonalities* between allegedly related measures, and that the Member asserting such matters may need to adduce evidence to that effect. In particular, the EU notes that, since each of the investigations in question normally concerned a single input product, it would be up to China to provide evidence that different public bodies in different industries provide diverse inputs as part of a single subsidy "programme". It appears from the information provided so far that this was not done. In the absence of such a demonstration, and since Article 2.1 does not appear to require the identification of a "subsidy programme" in the first place, it would seem that the US is entitled to base its finding of *de facto* specificity under Article 2.1(c) on the limitations inherent in the use of the input product in question.

IV. ADVERSE FACTS AVAILABLE

16. The appropriate use of facts available under Article 12.7 is a vital tool with which to counteract non-cooperation and the withholding of information by interested parties in CVD investigations. One of the key decisions to be made when having recourse to this provision is which inferences may be drawn from non-cooperation and which facts may be available to support a determination.

17. Inference involves determining a fact (fact C), of which there is no direct evidence, from other facts (facts A and B), of which there is direct evidence. Inference is a routine and necessary part of all economic law determinations, indeed, of daily life. How attenuated an inference may be is a function of all the surrounding facts and circumstances, including the procedural context. The procedural context includes the situation in which questions have been properly put, and interested parties afforded an opportunity to respond and comment. When an inference is drawn about fact C it is by definition not possible to be sure how it compares to the situation in which fact C would have been directly evidenced, precisely because fact C is not directly evidenced. Insofar as the inference differs from reality it may well be "adverse" to one or other interested party. WTO law permits appropriate authorities to put appropriate questions and draw inferences if full responses are not forthcoming. The system could not function without such a rule.

18. In drawing inferences, the authority is not permitted to identify two different equally possible inferences, and then select the inference that is more adverse to the interests of a particular interested party, *solely because it is more adverse* (for example, in order to "punish" non-cooperation). Rather, the authority must draw the inference that best fits the facts. However, there are no facts that are *per se* excluded from *the set of facts to be taken into consideration for this purpose*: so they *include* such things as the precise question that has been put; the procedural circumstances; the availability of the evidence being sought; and all the circumstances surrounding the absence of the requested information from the record. Thus, the behaviour of an interested party can colour the inferences that it may or may not be reasonable to draw. The more uncooperative a party is, the more attenuated and extensive the inferences that it may be reasonable to draw. Whether or not a particular inference is reasonable is something that can only be considered on a case-by-case basis.

19. The concept of facts available is related. It refers to the situation in which direct evidence of the investigated fact (fact C) is not provided, but there is another fact on the record that may be used. The concept of facts available may also involve inference of a fact not provided (fact C) from other facts on the record (facts A and B). The same principles apply.

20. Whether a Member acts inconsistently with Article 12.7 might depend less upon the particular label that has been used, and more upon a specific examination of all the surrounding facts and procedural context. China complains *in general terms* about the use of the term "adverse" in the measures at issue, and yet it remains unclear whether or not this term refers to a possible outcome of the process (the inference or fact may be adverse, we simply do not know) or whether it refers to a particular methodology (the intentional selection of a particular inference or fact solely because it is adverse to a particular interested party). The EU would rather expect to see China's claims set out with specific reference to each instance, and all the surrounding facts and procedural context. To the extent that China has failed to proceed in that manner, it may have failed to make a *prima facie* case.

V. REGIONAL SPECIFICITY WITH RESPECT TO LAND USE RIGHTS

21. The EU recalls that this issue was addressed by the panel (paras. 9.127 – 9.144) and, to a limited extent, by the AB (paras. 402 – 424), in *DS379*. A similar issue was examined by the panel in *EC – Large Civil Aircraft* (paras. 6.231 and 7.1220 – 7.1237). The Panel may follow a similar approach in this case.

VI. INITIATION WITH RESPECT TO EXPORT RESTRAINTS

22. The panel in *US-Export Restraints* considered that the determination of whether there is a "financial contribution" under Article 1.1(a)(1) should focus on the *nature* of the government action, rather than on the *effects* or the *results* of the government action, and concluded that an export restraint, as described in that dispute, cannot satisfy the entrusts or directs standard. Other panels and the AB have agreed with the panel report in *US – Export Restraints* that what matters in determining whether there is "financial contribution" under Article 1.1(a)(1)(iv) is the *nature* of the specific government action at issue, as necessarily implying that the producers of the product subject to export restraints are "directed" to sell locally (i.e., by effectively eliminating the free choice of private operators in that market). To which extent producers subject to export restraints have other options than selling domestically and reduce their prices has to be examined in the specific circumstances of each case. In this respect, evidence of the government's intention to support the downstream industry, or the existence of other government measures ensuring a particular result on the market (e.g. an export restraint together with a government measure preventing operators subject to those restraints from stocking their products), may be relevant to determine the existence of a "financial contribution". Whether there was sufficient evidence in this case, as contained in the petitions or otherwise available to the US, that the export restraints at issue were accompanied by other specific sets of measures aiming at increasing domestic supply of the products subject to export restraints, and whether the US was legitimately entitled to rely on such evidence in view of China's lack of cooperation in the investigations, are factual matters on which the EU does not take a position. Should the Panel conclude that there was sufficient evidence before the USDOC for initiating the investigations under Article 11, the EU considers that China's apparent lack of co-operation with the investigation would appear to justify the use of best facts available in reaching a definitive determination.

ANNEX C-5

THIRD PARTY WRITTEN SUBMISSION OF NORWAY

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TABLE OF CASES CITED IN THIS SUBMISSION

Short Title	**Full Case Title and Citation**
US –Anti-Dumping and Countervailing Duties	Appellate Body report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R
US –Anti-Dumping and Countervailing Duties	Panel report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R
US – DRAMS CVD	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea,* WT/DS296/AB/R
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints as Subsidies,* WT/DS194/R and Corr.1
US — Stainless Steel (Mexico)	Appellate Body report*, United States — Final Anti-dumping Measures on Stainless Steel from Mexico,* WT/DS344/AB/R

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this case concerning a disagreement between China and the United States as to the conformity with the covered agreements of 17 countervailing duty investigations of Chinese products initiated by the United States between 2007 and 2011.

2. Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss the criteria for defining a "public body" under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").

II. DETERMINATION OF "PUBLIC BODY" IN ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

A. Introduction

3. For a measure to constitute a subsidy according to article 1 of the SCM Agreement it must entail a financial contribution or income or price support by a government or a public body and it must confer a benefit.

4. China claims that the United States has incorrectly found that state owned enterprises (SOEs) were "public bodies" within the meaning of Article 1.1(a)1 of the *SCM Agreement,* by focussing only on majority ownership by the government.[1] China further claims that the "Rebuttable Presumption" is, as such, inconsistent with the proper legal standard for determining whether an entity is a "public body", as established by the Appellate Body in *US – Anti-Dumping and Countervailing Duties*.[2]

5. The United States claims that 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.[3] The United States rejects China's "as such" claim amongst others on the basis that the *Kitchen Shelving* discussion does not necessarily result in a breach of the SCM Agreement.[4]

B. Interpretation of the term "public body"

a) Introduction

6. In the dispute *US – Anti-Dumping and Countervailing Duties*, the Appellate Body conducted a thorough interpretation of the concept of "public body", within the meaning of Article 1.1(a)1 of the *SCM Agreement*. The ruling of the Appellate Body in this case has provided a number of important and useful clarifications regarding the concept of "public body", within the meaning of Article 1.1(a)1 of the *SCM Agreement*. These clarifications are relevant also in the case at hand.

7. The United States asserts that 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". However, the United States also submits that "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" and that "the Panel may proceed on this basis."[5]

8. In light of this and before going into the specifics of the interpretation of the term "public body" in Article 1.1(a)1 of the *SCM Agreement* in *US – Anti-Dumping and Countervailing Duties*, Norway would like to remind the Panel that the Appellate Body has held that:

> "the legal interpretation embodied in adopted panel and Appellate Body reports become part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in

[1] *China, First Written Submission ("China FWS"),* see esp. paras. 12-58.
[2] *China FWS,* paras. 32-44.
[3] *United States, First Written Submission* (*"US FWS"),* see, eg., para. 29.
[4] *US FWS,* paras 127-137.
[5] *US FWS, para. 121.*

article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way as in a subsequent case".[6]

9. It is Norway's view that it follows from the very construction of the WTO dispute settlement system that adopted panel and Appellate Body reports create legitimate expectations that Members must be able to rely on. Thus, it is not, as insinuated by the United States, up to the parties in any one dispute to agree otherwise, and request the panel in that particulate dispute to "proceed on that basis".

b) A «Public body» must be an Entity that Possesses, Exercises or is Vested with Governmental Authority

10. Regarding the interpretation of Article 1.1(a)(1) of the *SCM Agreement,* the United States submits that the Panel should conclude that the term "public body" in this provision means "an entity controlled by the government such that the government can use the entity's resources as its own. It is Norway's opinion that the Panel should reject the suggested interpretation by the United States for the reasons set out below.

11. The Appellate Body has already found that interpreting the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* to mean "any entity controlled by a government" is wrong. In the following, Norway will set out some of the reasons why the Appellate Body's interpretation is correct and the United States' reasoning is flawed.

12. In *US – Anti-Dumping and Countervailing Duties*, the Appellate Body concluded that:

"We see the concept of "public body" as sharing certain attributes with the concept of "government". A public body within the meaning of Article 1.1.(a)(1) of the *SCM Agreement* must be an entity that possesses, exercises or is vested with governmental authority."[7]

13. The Appellate Body's interpretation of the term "public body" in *US –Anti-Dumping and Countervailing Duties* entails that each case must be looked at separately, giving careful consideration to all relevant characteristics, with particular attention to whether an entity exercises authority on behalf of a government. The drafters of the WTO Agreements recognized and accepted that many types of public ownership coexist with private ownership, and focussed on whether there was proof of government intention to influence trade.

14. Norway agrees with the Appellate Body's assessment that the phrase "a government or any public body" entails two concepts with distinct meanings; "government" in the narrow sense and "government or any public body", as "government" in the collective sense.[8] These two concepts are closely linked and share a number of essential characteristics. The view that the use of the collective term "government" does not have a meaning besides facilitating the drafting of the Agreement, as advocated in the Panel report in *US –Anti-Dumping and Countervailing Duties*[9], would in our view not be in line with the principle of effective treaty interpretation.[10]

15. Norway believes that it is important to read the reference to "government or any public body" also in light of Article 1.1(a)(1)(iv) and its reference to situations where the government "entrusts or directs a private body to carry out one or more of the type of functions ... which would normally be vested in the government ..." (emphasis added). Article 1.1(a)(1)(iv) provides in our view important context to the interpretation of "public body" in Article 1.1(a)(1).

16. The purpose of Article 1.1(a)(1)(iv) is to avoid circumvention of the obligations in Article 1.1(a)(1), by providing the financial contribution through non-governmental bodies.[11] By focussing on situations where a private body has been "entrusted or directed" to perform functions that would normally be vested in the government, the provision gives a clear indication of the

[6] *US — Stainless Steel (Mexico)*, para. 160.
[7] Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, para. 317.
[8] Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, paras. 286-288.
[9] Panel report, *US –Anti-Dumping and Countervailing Duties*, especially paras. 8.65 and 8.66.
[10] Similarily, Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, para. 289.
[11] Panel Report, *US – Export Restraints,* para. 8.49; Appellate Body Report, *US – Drams CVD,* para. 113.

dividing line between the "public bodies" (included in the concept of "government" in the collective sense under Article 1.1(a)(1)) and the "private bodies". This dividing line is not based on an ownership criterion, but on a functional delimitation based on whether the entity in question performs governmental functions or not. If the entity in question possesses, exercises or is vested with the authority to perform governmental functions, then it is covered by Article 1.1(a)1 directly when it acts in that capacity when it provides subsidies.

17. The United States seems to interpret this provision in an antithetic way, implying that the interpretation above must entail that it is a prerequisite for all "organs of Member governments" that they have the authority to perform the concrete functions listed in Article 1.1(a)(1)(iv).[12] This, however, is an interpretation that cannot be supported. The purpose of Article 1.1(a)(1)(iv) is, as stated above, to avoid circumvention of the obligations in Article 1.1(a)(1), by providing the financial contribution through non-governmental bodies. The purpose is not to define what "organs of Member governments" are. However it provides important context to drawing the line between "public bodies" and "private bodies" for the purpose of Article 1.1(a)(1).

18. Norway finds further support for its interpretation in paragraph 5(c) of the GATS Annex on Financial Services, where the term "Public Entity" is defined in the following manner:

> "(c) "Public entity" means:
>
> (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
>
> (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions." (emphasis added)

19. The definition in the GATS Annex on Financial Services applies the essential criterion that the entity in question must be "*engaged in carrying out governmental functions or activities for governmental purposes*". Ownership or control by a government is not sufficient in itself. Norway recognizes that the interpretation of this term is not directly applicable in a subsidy context as it is from another agreement, and the wording is not necessarily identical in all respects, but it sheds light on the intent of the Members when considering conduct that should be attributable to the governments.

20. The US claims that the term "public body" cannot be interpreted to mean an entity that performs functions of a governmental character. Were this to be the case, the US asserts, the term "public body" would be equivalent with "a government" or a part of "a government" and there would be no reason to include the term "public body" in Article 1.1(a)(1).[13] Norway begs to differ with this interpretation. In our view, this reasoning illustrates the difference between the use of "government" in the narrow and the collective sense. A public body is not a "government" in the narrow sense just because it is vested with the power to exercise certain governmental functions. It is, however, to be considered a part of government in the collective sense, and thus also subject to the restrictions in Article 1.1(a)(1) of *the SCM Agreement.*

c) Which Functions may be considered as Governmental Functions?

21. In assessing whether an entity is a "public body", the focus must be on whether the entity in question possesses, exercises or is vested with the authority to perform governmental functions when providing the financial contribution in question. This requires a factual analysis of the functions the particular entity performs, where government ownership is not dispositive in itself.

22. The context of Article 1.1(a)(1)(iv) is of relevance with regard to clarifying which functions may be considered as governmental functions. Reference is made to the phrase "which would

[12] *US FWS*, paras. 84-85.
[13] *US FWS,* paras. 50 and 57.

normally be vested in the government" in subparagraph (iv). Regarding this, the Appellate Body has stated that:

> "As we see it, the reference to "normally" in this phrase incorporates the notion of what would ordinarily be considered part of governmental practice in the legal order of the relevant Member. This suggests that whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body. The next part of that provision, which refers to a practice that, "In no real sense differs from practices normally followed by governments", further suggests that the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies."[14]

23. Thus, both what would ordinarily be considered part of governmental practice in the legal order of the relevant Member and the classification and functions of entities within WTO Members generally are of relevance when the scope of governmental functions is addressed.

d) Assessing whether an Entity Possesses, Exercises or is Vested with Governmental Authority

24. In the analysis of whether an entity possesses, exercises or is vested with governmental authority, it is vital to consider *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved.[15] In this regard we would like to direct the attention once more to the Appellate Body ruling in *US – Anti-Dumping and Countervailing Duties,* where the Appellate Body pointed out that:

> "Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense." [16] (emphasis added)

25. The United States asserts that Article 1.1(a)(1) of the *SCM Agreement* must be interpreted to mean that 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. Norway fails to see that the arguments put forward by the US should lead to this conclusion. In our view, this interpretation lacks support in the *SCM Agreement.* Rather, the focus must be on whether the entity in question possesses, exercises or is vested with the authority to perform governmental functions when providing the financial contribution in question. This requires a factual analysis of the functions the particular entity performs, where government ownership is not dispositive in itself. Where the entity does not perform governmental functions, it is not a "public body" within the meaning of Article 1.1(a)(1).

III. CONCLUSION

26. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

[14] Appellate Body report, *US – Anti-Dumping and Countervailing Duties*, para. 297.
[15] Appellate Body report, *US – Anti-Dumping and Countervailing Duties*, para. 318.
[16] Appellate Body report, *US – Anti-Dumping and Countervailing Duties*, para. 317.

ANNEX C-6

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION
THE KINGDOM OF SAUDI ARABIA

I. INTRODUCTION

1. Saudi Arabia's participation in this dispute addresses fundamental issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement). These issues are of systemic importance to all WTO Members. Saudi Arabia takes no position on the merits of the claims as they pertain to the particular facts of this dispute.

II. A "PUBLIC BODY" MUST POSSESS, EXERCISE OR BE VESTED WITH GOVERNMENTAL AUTHORITY

2. The SCM Agreement requires a finding that a public body possesses, exercises or is vested with "governmental authority". The "governmental authority" standard derives from the structure of Article 1.1(a)(1)(iv) of the Agreement: a public body must have the power to entrust or direct a private body to act. Based on this structure and the defining elements of "government", the Appellate Body has ruled that a public body must possess the ability to compel, command, control or govern a private body. Government ownership or control of an entity is not sufficient to establish that the entity exercises governmental authority, and no other factor is dispositive.

3. Exercising governmental authority is distinct from being controlled by the government. A government-controlled entity might be a public body, but only if it exercises governmental authority. If it does not, then the entity is properly understood to be a "private body", and any finding of financial contribution must be based on the entrustment or direction standard of Article 1.1(a)(1)(iv). To disregard this distinction would, as the Appellate Body stated, undermine "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".

4. The SCM Agreement imposes affirmative obligations on investigating authorities when determining whether an entity is a public body. The Agreement requires the authorities – in every case – to analyze thoroughly the legal status and actions of the entity in question, examine all evidence on the record without unduly emphasizing any one factor (for example, state ownership), and point to positive evidence *establishing* – not merely implying – that an entity possesses, exercises or is vested with governmental authority. If positive evidence of such authority does not exist, then the entity may not be found to be a public body, and an investigating authority would fail to meet its obligations where it found governmental authority based solely on evidence of government ownership or control.

5. No single fact (or combination thereof) can automatically fulfill the positive evidence standard that must support a finding of governmental authority. This is especially so with respect to government ownership or control, which relates only indirectly to the possession or exercise of governmental authority. Governmental authority and government ownership or control are two distinct concepts, and the latter is not a proxy for the former. Thus, a public body standard that systematically relies on evidence of government ownership or control would result in an impermissible interpretation of Article 1.1(a)(1) of the SCM Agreement. The Kingdom respectfully requests that the Panel ensure that any evidentiary weight given by an investigating authority to government ownership or control does not undermine the governmental authority standard established by the Appellate Body.

III. DOMESTIC PRICE BENCHMARKS MAY NOT BE REJECTED MERELY BECAUSE STATE-OWNED ENTERPRISES ARE A SIGNIFICANT DOMESTIC SUPPLIER

6. The SCM Agreement prohibits an authority from rejecting private in-country price benchmarks to determine whether the government provision of a good confers a benefit merely because state-owned enterprises are a significant domestic supplier of that good. In particular,

multiple Appellate Body rulings establish that (i) alternative benchmarks may be used only where it has been established that domestic prices of the good at issue are distorted; (ii) the government's predominant role as a supplier of that good in the home market is not a *per se* proxy for price distortion; and (iii) government predominance may not be found simply because state-owned industries sell the good and have a significant share of the home market.

7. Domestic private prices are foremost among the "prevailing market conditions" enumerated in Article 14(d) and are the first reference point to determine whether the government's provision of a good confers a benefit. The Appellate Body has emphasized that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is *very limited*" – to where there is evidence of "market distortion". When such "very limited" circumstances arise, it is the Kingdom's view that a cost-based benchmark is preferable because, unlike international market or third-country prices, it reflects the exporting Member's "prevailing market conditions" and is less likely to nullify that Member's natural comparative advantages.

8. Price distortion *might* exist where the government is a "predominant" supplier of the good at issue in the domestic market. However, the Appellate Body has confirmed that actual price distortion must be proven in every case, and that evidence of government predominance cannot serve as a *per se* proxy for such distortion.

9. The SCM Agreement sets forth precise legal definitions for "government predominance". The text of Article 14(d) and related jurisprudence establish that the same standard for defining "government" or "public body" under Article 1.1(a)(1) must apply when determining whether the "government" is the predominant supplier of a good. Under this standard the domestic sales of a "government" may serve as evidence of price distortion only where they are "predominant", which is properly defined as the ability of the government to exercise "influence on prices". Significant market share alone is insufficient to establish government predominance, much less price distortion.

10. Thus, an investigating authority may not find "government predominance" and thereby resort to alternative benchmarks based solely on the fact that a state-owned entity (or several state-owned entities) has a large domestic market share. The authority must determine (i) that the entity is a public body, (ii) who is the predominant supplier in the market, and (iii) that prices are actually distorted due to that predominance.

IV. DETERMINATIONS OF *DE FACTO* SPECIFICITY MUST TAKE INTO ACCOUNT A MEMBER'S ECONOMIC DIVERSIFICATION

11. Article 2.1(c) of the SCM Agreement requires investigating authorities to undertake an examination of the extent of diversification of economic activities in the exporting country when determining *de facto* specificity. Accordingly, any *de facto* specificity determination will depend on the unique economic conditions of the Member at issue. Facts that might indicate *de facto* specificity in a more diversified economy might not justify a finding of specificity where a Member's economy is relatively less diversified. Applying a rigid *de facto* specificity standard to less diversified countries would penalize such economies, which predominate in developing countries, for simply being less diversified. That is not what was intended by Article 2.1, and it is exactly what the economic diversification requirement of Article 2.1(c) was designed to prevent.

V. REGIONAL SPECIFICITY UNDER ARTICLE 2.2 MUST BE SUBJECT TO A LIMITING PRINCIPLE

12. The Kingdom is of the view that Article 2.2 is subject to the same limiting principle governing all of Article 2, which precludes a legal standard whereby *any* geographic limitation on access to a subsidy would establish regional specificity.

13. Given the limited jurisprudence on Article 2.2, it would be useful for the Panel to provide guidance on what may constitute a "designated geographical region" and thus regional specificity. Consistent with analogous precedent under Article 2.1, regional specificity must be subject to some "limiting principle", meaning a point at which a certain area to which a granting authority provides a subsidy is so large or widespread as to render the subsidy non-specific under Article 2.2.

14. Several WTO panels and the Appellate Body have acknowledged that the specificity requirement of Article 2 is limited, and, as such, "the relevant question is not whether access to the subsidy is limited in any way at all, but rather where it is sufficiently limited for the purpose of Article 2". Although these cases addressed Article 2.1, basic logic would necessitate similar limits on Article 2.2. Without such a limiting principle, regional specificity determinations could apply to almost *any* subsidy that mentions a Member's geography, including those that are clearly "sufficiently broadly available throughout the economy as to be non-specific".

15. The Kingdom is of the view, in line with prior jurisprudence, that regional specificity under Article 2.2 should be determined on a case-by-case basis, and that a geographically limited subsidy should nonetheless be found to be non-specific where it has been demonstrated, with positive evidence, that the subsidy has been provided to a "sufficiently broad" geographic region. Because the precise point at which a subsidy becomes non-specific would "modulate according to the particular circumstances of a given case", any such standard should require an investigating authority to consider the unique geography, governmental structure and economy of the Member at issue.

VI. EXPORT RESTRAINTS MAY NOT CONSTITUTE A SUBSIDY BECAUSE THERE IS NO "FINANCIAL CONTRIBUTION"

16. An export restraint does not constitute a subsidy because there is no financial contribution by the government, as defined under Article 1.1(a)(1) of the SCM Agreement. Where a government restricts exportation of a certain good, it does not thereby entrust or direct a private producer of those goods to provide them to domestic purchasers.

17. "Entrustment or direction" requires an affirmative demonstration of the link between the government and the specific conduct – in particular, evidence relating to the intent and involvement of the government in the transactions at issue. The Appellate Body has ruled that entrustment or direction "does not cover 'the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market'".

18. In *US – Export Restraints*, the panel found that an export restraint does not constitute the government-entrusted or government-directed provision of goods. This is consistent with the views enunciated by the Appellate Body. First, an export restraint does not constitute the government's involvement in the specific conduct at issue (i.e. a private body's domestic sales of the good). Second, an export restraint "may or may not have a particular result" because its effect would depend on the factual circumstances and choices made by market actors. As such, an export restraint fails to meet the Appellate Body's standards for "entrustment or direction".

VII. CONCLUSION

19. Saudi Arabia respectfully urges the Panel to consider the Kingdom's positions on these important systemic issues.

ANNEX D

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING

ANNEX D-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA AT THE FIRST MEETING OF THE PANEL

Introduction

1. In the interest of moving promptly to the Panel's questions, I will limit my opening remarks to certain aspects of five key issues in this dispute: (1) public body; (2) benchmark "distortion"; (3) input specificity; (4) "adverse" facts available; and (5) export restraints. Before turning to the specific issues that I intend to discuss, however, I would like to address one of the principal themes of the U.S. first written submission, namely, that China has failed to establish a *prima facie* case with respect to its claims. This contention is based on a backwards understanding of what it takes to establish or rebut a legal claim.

2. In its first written submission, China demonstrated that Commerce's application of incorrect legal standards is evident on the face of Commerce's own determinations. That is all that China needed to establish in order to substantiate its claims. If the U.S. interpretations of the SCM Agreement are incorrect, then the only "fact" that matters is the fact that Commerce applied those incorrect legal interpretations in the investigations at issue – a fact that China has demonstrated by reference to Commerce's own determinations.

3. Commerce has initiated countervailing duty investigations, conducted those investigations, and reached final determinations in those investigations based on the application of incorrect understandings of its obligations under the SCM Agreement. It is on the basis of the rationales set forth in those determinations that the Panel must evaluate China's claims. As China has demonstrated, those determinations were self-evidently based on an improper interpretation and application of the relevant provisions of the SCM Agreement.

Financial Contribution

4. I would like to begin by discussing the relevance to this dispute of the Appellate Body's legal interpretation of the term "public body" in *US – Anti-Dumping and Countervailing Duties (China)* ("DS379").

5. The Appellate Body has stated that "following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same". This expectation supports "a key objective of the dispute settlement system", namely, "to provide security and predictability to the multilateral trading system." In contrast, not acknowledging the hierarchical structure contemplated in the DSU would "undermine[] the development of a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements". For these reasons, the Appellate Body has stated that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."

6. In accordance with the Appellate Body's holdings concerning the relevance of its prior legal interpretations, China expects the Panel to follow the Appellate Body's ruling in DS379 that a public body is an entity that is vested with and exercises authority to perform governmental functions. In China's view, it should be a non-controversial proposition that merely advancing arguments that the Appellate Body has already considered and rejected cannot justify departing from a legal interpretation embodied in a prior adopted Appellate Body report. This is particularly true in a dispute, such as this one, that involves the same litigants, the same types of measures, and the same claims that were at issue in the prior dispute.

7. If the Panel agrees with China that the Appellate Body's interpretation of the term "public body" in DS379 must be applied here, China's "as applied" claims are open and shut. The excerpts from Commerce's Issues and Decision Memoranda identified in CHI-1 establish on their face that, in each investigation, Commerce applied the same majority ownership, control-based standard

that the Appellate Body rejected in DS379. It follows that all of Commerce's public body findings referenced in CHI-1 are inconsistent with Article 1.1(a)(1).

8. These "as applied" public body determinations were made pursuant to an explicit "policy" that Commerce announced in *Kitchen Shelving* to address the "recurring issue" of how to analyse whether particular entities are public bodies. China demonstrated in its first written submission that this "policy" is "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement because it is based on the notion that government control of an entity, by itself, is sufficient to establish that an entity is a "public body".

9. The United States makes a half-hearted attempt to argue that the policy articulated in *Kitchen Shelving* is not a "measure", but rather mere "administrative practice" that cannot be challenged in WTO dispute settlement. In advancing this argument, the United States simply ignores the Appellate Body jurisprudence holding that "any act or omission attributable to a WTO Member" can be challenged before a WTO panel, and that the legal status of such acts or omissions within a Member's domestic legal system is not relevant to the question whether they may be challenged in WTO dispute settlement.

10. The United States is on equally weak ground in arguing that because the policy established in *Kitchen Shelving* "does not commit Commerce to any future course of action" it does not "necessarily" result in a breach of Article 1.1(a)(1). Appellate Body jurisprudence clearly establishes that non-mandatory measures may be challenged "as such", which *per force* means that on the merits, measures of this type may be found, and indeed have been found, to be "as such" inconsistent with the relevant provisions of the covered agreements. In none of those cases did the Appellate Body suggest that Commerce's ability to abandon the challenged measures at some point in the future was relevant, let alone determinative, to the analysis of whether those measures were inconsistent with the covered agreements.

11. I will now turn to China's initiation claims under Article 11 of the SCM Agreement. The United States concedes that under the Appellate Body's interpretation of the term "public body", Article 11 would require "adequate evidence tending to prove or indicating that an entity possesses, exercises, or is vested with governmental authority". The United States does not assert, nor could it, that Commerce actually applied this standard when evaluating the adequacy of the evidence of a financial contribution in each of the four cases at issue.

12. China submits that this should be the beginning and end of the Panel's inquiry. When an investigating authority initiates a subsidy investigation on the basis of an incorrect legal standard, it necessarily has acted inconsistently with Article 11.3 of the SCM Agreement. A Member may not then seek to salvage the flawed initiation decision in a panel proceeding through *ex post* rationalizations to the effect that had the investigating authority applied the correct legal standard, it still could have found the evidence adequate to initiate the investigation. Yet that is precisely what the United States is seeking to do here. In essence, the United States is asking this Panel to evaluate the consistency of Commerce's initiation decisions with the SCM Agreement based not on what Commerce *actually* did, but on what it *might* have done. China respectfully submits that this is not a proper role for a Panel to undertake.

Benefit

13. China's benefit claims in this dispute raise an important question of legal interpretation: namely, whether the standard for defining what constitutes "government" for purposes of the financial contribution inquiry under Article 1.1(a)(1) must also apply when determining whether "government" is a predominant supplier for purposes of the distortion inquiry under Article 14(d). In China's view, the text of the SCM Agreement as well as prior Appellate Body decisions require an affirmative answer to this question.

14. The Appellate Body held in DS379 that government ownership and control alone are an insufficient basis on which to conclude that the provision of goods by a state-owned entity is the conduct of "government", *i.e.*, a financial contribution. In China's view, it must follow as a matter of law that government ownership and control alone are an insufficient basis on which to conclude that the provision of goods by a state-owned entity is the conduct of a "government" supplier for purposes of the distortion inquiry.

15. The only justification that the United States offers for its view that "government" means one thing for purposes of the financial contribution inquiry and something else for the distortion inquiry is the assertion that the Appellate Body implicitly endorsed this counterintuitive outcome in DS379. This argument is without merit. In DS379, the Appellate Body neither addressed nor decided the question of legal interpretation presented by China's distortion claims in the present dispute for the simple reason that they were not properly before it.

16. Stripped of its misguided reliance on the Appellate Body's decision in DS379, the United States is left with nothing to counter the proposition that the same legal standard for defining what constitutes "government" for purposes of the financial contribution inquiry must also apply when determining whether "government" is a predominant supplier for purposes of the distortion inquiry. Notably, until this case, even Commerce apparently agreed with China's interpretation. In every case cited in CHI-1, Commerce's finding that the "government" played a predominant role in the market was based exclusively or primarily on equating SOEs with "government" suppliers, *solely* on the grounds that SOEs are owned and/or controlled by the government. All of Commerce's distortion findings therefore lack a lawful basis. It follows that all of Commerce's benefit determinations in the 14 cases under challenge must be found inconsistent with Articles 1(b) and 14(d) of the SCM Agreement.

Specificity

17. I will now turn to Commerce's specificity determinations under Article 2 of the SCM Agreement with regard to the alleged provision of subsidized inputs to downstream producers of finished products.

18. My first substantive point concerns the relationship between Article 2.1(c) and the prior two subparagraphs of Article 2.1. Article 2.1(c) states that "***if***, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors ***may be considered***." This is unquestionably a conditional statement – an investigating authority "may" consider the "other factors" under Article 2.1(c) "if" there is an "appearance of non-specificity resulting from" a prior examination of the principles set forth under subparagraphs (a) and (b). If the prior condition is not satisfied, the authority to "consider" the "other factors" under Article 2.1(c) does not arise.

19. This straightforward language led the Appellate Body to conclude in DS379 that Article 2.1(c) "applies only when there is an 'appearance' of non-specificity" resulting from the application of subparagraphs (a) and (b). The United States agreed with this interpretation in *EC – Aircraft*, observing that Article 2.1(c) "presumes that a specificity analysis already has occurred under subparagraphs (a) and (b)".

20. In the absence of an "appearance of non-specificity resulting from the application of" subparagraphs (a) and (b), Commerce lacked an essential predicate for its analysis of specificity under Article 2.1(c). In addition to this error, Commerce's failure to identify a relevant "subsidy programme" relating to the provision of inputs for less than adequate remuneration constitutes a separate and independent reason for the Panel to find that Commerce's specificity determinations were inconsistent with Article 2.

21. The first factor under Article 2.1(c) refers to the "use of a subsidy *programme* by a limited number of certain enterprises". As the United States explained in *EC – Aircraft*, a "subsidy programme" is a "plan or outline of subsidies or a planned series of subsidies". The United States was emphatic in its understanding that a subsidy programme "is not just any series of subsidies … but a planned series of subsidies". The panel correctly found in *EC – Aircraft* that "the starting point" for any analysis of specificity under the first factor of Article 2.1(c) "should be the identification of the relevant subsidy programme", *i.e.*, the identification of the "planned series of subsidies" that may, in practice, have been used by only a "limited number of certain enterprises".

22. Notwithstanding it position in the *Aircraft* cases, the United States now contends that the first factor under Article 2.1(c) does not require the identification of *any* "subsidy programme". The United States appears to interpret the term "subsidy programme" as synonymous with the term "subsidy", thereby ignoring the express language of Article 2.1(c), its own prior positions, and the unappealed findings of the panels in the two *Aircraft* cases. This simply is not credible.

23. For these reasons, as well as the reasons set forth in China's first written submission, Commerce's determinations of specificity in regards to the alleged input subsidies were plainly inconsistent with Article 2. Moreover, because Commerce initiated its investigations into these alleged input subsidies on the basis of the same erroneous understanding of Article 2.1(c) that it applied in the final determinations, Commerce's initiations of these investigations were inconsistent with Article 11.3 of the SCM Agreement.

"Adverse Facts Available"

24. I will now turn to Commerce's use of so-called "adverse facts available" under Article 12.7 of the SCM Agreement. In its first written submission, the United States does not disagree with the proposition that Article 12.7 requires the investigating authority to apply *facts* that are *available*. Instead, it asserts that "[b]ecause Commerce's application of 'adverse' facts available is, by its terms, based on facts available, its use is consistent with Article 12.7". The assertion that Commerce's AFA-based conclusions were actually based on record evidence is exactly that – an assertion. It has no basis in Commerce's actual determinations, and is nothing more than an *ex post* attempt by the United States to justify these unlawful findings.

25. In the 48 instances that China has identified in CHI-2, Commerce follows a consistent pattern. Commerce explains that the respondent has "failed to act to the best of its ability", and consequently, that an "adverse inference is warranted" in making the relevant finding, and/or that it is "assuming adversely" the relevant finding. Notwithstanding Commerce's repeated assertions that it is applying facts available, the "facts" are conspicuously absent from its analysis.

26. In *Print Graphics*, Commerce explained its use of "adverse facts available" as follows: "When the government fails to provide requested information concerning the alleged subsidy program, the Department, as AFA, typically finds that a financial contribution exists under the alleged program and that the program is specific." No amount of semantic gymnastics can turn Commerce's use of "assumptions" and "inferences" into the use of "facts available" within the meaning of Article 12.7. For this reason, the 48 AFA-based determinations that China has identified in CHI-2 are inconsistent with Article 12.7 of the SCM Agreement.

Export Restraints

27. The final issue I would like to address this morning relates to Commerce's decision in *Magnesia Bricks* and *Seamless Pipe* to initiate investigations into allegations that export restraints imposed by China on magnesia and coke confer a countervailable subsidy. China's claims are based on the proposition that an export restraint cannot, as a matter of law, constitute government entrusted or directed provision of goods within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.

28. In *Magnesia Bricks* and *Seamless Pipe*, the petitioners alleged that China imposed export restraints on magnesia and coke through a combination of quotas, taxes, and licensing requirements. These fall squarely within the definition of export restraints that the panel addressed in *US – Export Restraints*. In each case, the sole basis for petitioners' claims that the export restraints constituted a financial contribution was their assertion that through the export restraints, *and through those measures alone*, China was providing a financial contribution by entrusting or directing domestic suppliers to provide these inputs to downstream producers of subject merchandise. And in each case, Commerce initiated its investigations based solely on petitioners' evidence and assertions concerning the existence of the export restraints and their purported *effect* on the prices at which downstream consumers purchased raw material inputs.

29. The Panel here is thus confronted with the identical question of legal interpretation that the panel faced in *US – Export Restraints*. In that regard, China's claims do not raise, and the Panel need not decide, the issue of whether export restraints "accompanied by other specific sets of measures aiming at increasing domestic supply of the products subject to export restraints" might constitute a financial contribution. In *Seamless Pipe* and *Magnesia Bricks*, it is undisputed that no measures other than the export restraints themselves were alleged to constitute a financial contribution.

30. Accordingly, the only question for this panel to resolve is whether it agrees with the interpretative reasoning that led the panel in *US – Export Restraints* to conclude that the types of export restraints addressed by that panel, which include those at issue in these two investigations, do not constitute a financial contribution as a matter of law. If the Panel agrees with that legal interpretation, Commerce's decisions to initiate investigations in *Magnesia Bricks* and *Seamless Pipes* must be found inconsistent with Article 11.3.

ANNEX D-2

OPENING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. On behalf of the U.S. delegation, I would like to thank you for agreeing to serve on this Panel. This dispute raises the question whether WTO rules are adequate to counter subsidization taking place in one of the world's most important economies, causing profound distortions not only in that economy but throughout the world trading system generally. While it is every WTO Member's right to decide the degree of intervention in its own economy, it is equally the case that every WTO Member has agreed that subsidies that cause injury are subject to WTO rules. These WTO rules create effective disciplines and permit Members to counter injurious subsidization. The claims brought by China, however, seek to convert the WTO rules into a means to shield China's subsidization from scrutiny. China's reading of the WTO rules would make it more difficult, if not impossible, to ensure that firms in other Members do not have to compete against the financial resources of the Chinese government. The choice China has made about the structure of its economy does not excuse China from the rules that apply to all WTO Members.

2. This dispute is also one of the largest in the history of the WTO. China has advanced claims with respect to 97 individual alleged breaches of the SCM Agreement, concerning 17 different CVD investigations, and involving 31 initiations of investigations, preliminary or final determinations. Yet, at each step in this case – first the consultations request, then the panel request, and, most importantly, in its first written submission – China has taken shortcuts in its claims, discussion of the facts, and arguments. China relies on sweeping factual generalizations instead of presenting the facts and legal arguments for each challenged investigation necessary to sustain China's burden of proof. China must make its own case, and it has failed to do so.

3. China attempts a shortcut when it asserts that its claims "largely entail the application of the findings in DS379, as well as other well-settled jurisprudence." In fact, this dispute involves several novel interpretations of the SCM Agreement that were not addressed in *US – Anti-Dumping and Countervailing Duties (China)* (DS379), or any other dispute. It is important to recall that in DS379 neither the panel nor the Appellate Body found any general regulations or other measures of the United States WTO-inconsistent "as such", but rather, evaluated certain determinations by the U.S. Department of Commerce ("Commerce") on an as applied basis in four CVD investigations. China inappropriately relied on the findings of *US – Anti-Dumping and Countervailing Duties (China)*, declining to include in its first written submission virtually any discussion of the facts at issue in the determinations it challenges here. Accordingly, for each of China's claims, China has failed to establish a *prima facie* case.

4. China must demonstrate, with specific evidence from the investigations challenged, how Commerce's determinations in each investigation were inconsistent with the requirements of the SCM Agreement. China must link its legal arguments to the facts and evidence of each of the investigations it challenges. However, despite advancing dozens of individual claims that Commerce's findings were inconsistent with the SCM Agreement, China barely discusses Commerce's determinations at all, simply providing a few cursory descriptions as examples. In doing so, China has attempted another shortcut. China seems to ask the Panel to fill in the blanks and answer the questions China has not addressed. Of course, it is not proper for China to ask this of a panel, and China should be mindful of the Appellate Body's caution that asking a panel to make findings "in the absence of evidence and supporting arguments," is to ask a panel to act inconsistently with its obligations under Article 11 of the DSU."[1] China must make its own case, and it has failed to do so.

5. In the remainder of our opening statement – without repeating in full the arguments we have made in the U.S. first written submission – we would like to touch on each of the issues in this dispute to highlight China's failure to make its case, both as a matter of evidence and as a matter of law.

[1] *US – Gambling (AB)*, para. 281.

I. CHINA'S PUBLIC BODY CLAIMS ARE FOUNDED ON AN ERRONEOUS INTERPRETATION OF THE SCM AGREEMENT

6. First, with respect to the interpretation of the term public body, China's claims are without merit. China has offered the Panel an erroneous interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, and has failed to demonstrate that Commerce's public body determinations are inconsistent with the requirements of the SCM Agreement, when its terms are properly interpreted.

7. With respect to the definition of the term "public body," the Panel must undertake its own interpretations of that term by applying the customary rules of interpretation of public international law, taking due account of previous interpretations of that term. As explained in the U.S. first written submission, the proper conclusion that flows from such an analysis is that a public body is an entity controlled by the government such that the government can use the entity's resources as its own. We note that the interpretation we have set forth in the U.S first written submission accords with the ordinary meaning of the terms of the SCM Agreement, read in their context, in light of the object and purpose of the agreement.

8. Three WTO dispute settlement panels – in *Korea – Commercial Vessels, EC and certain member States – Large Civil Aircraft*, and *US – Anti-Dumping and Countervailing Duties (China)*[2] – have agreed that a "public body" is an entity controlled by the government. The Appellate Body, in one report, arrived at a different conclusion. However, as explained in the U.S. first written submission, the Appellate Body's interpretation leaves open questions that, when resolved, support the conclusion that a public body is an entity controlled by the government such that the government can use the entity's resources as its own.

9. Contrary to China's suggestion in its first written submission, it simply is not necessary for an entity to be vested with, possess, or exercise "governmental authority" to "'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority" for that entity to provide a financial contribution that confers a benefit; that is, for that entity to provide a subsidy.

10. Indeed, of the activities described as financial contributions in Article 1.1(a)(1), only the indirect reference to taxation in Article 1.1(a)(1)(ii) appears to even have a remote connection to what the Appellate Body described in *Canada – Dairy* as the "essence" of government. When the term "government" in Article 1.1(a)(1)(ii) is read in the collective sense, as it must be, that provision actually refers to "government [or any public body] revenue ... foregone or not collected," and so is not limited to taxation at all. Hence, as the Appellate Body suggested in *US – Anti-Dumping and Countervailing Duties (China)*, the types of conduct listed in all of the subparagraphs of Article 1.1(a)(1) could be carried out by governmental as well as nongovernmental entities, and "governmental authority" – in the sense of controlling or supervising individuals, or otherwise restraining their conduct – is not necessary to undertake any of them.

11. China is asking the Panel to go beyond the Appellate Body's findings in *United States – Anti-Dumping and Countervailing Duties (China)*. China seeks a finding from the Panel that all public bodies must have the power to regulate, control, supervise, and restrain individuals. Such power simply is unrelated to and unnecessary for the purpose of providing a subsidy, and there is no textual support in the SCM Agreement for the conclusion that all public bodies must possess such power.

12. What is necessary, in order for a subsidy to be attributable to a Member, is that the Member's government can control the entity providing the financial contribution such that the government can use the entity's resources as its own. When the government has that kind of control over an entity, there is no logical distinction between a financial contribution that flows directly from the government and a financial contribution that flows from the entity – the public body – over which the government has control.

[2] *See Korea – Commercial Vessels*, para. 7.50. *See also id.*, paras. 7.172, 7.353, and 7.356; *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.1359; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.94.

13. The SCM Agreement is intended to discipline the use of subsidies by governments so as to permit economic actors to compete in the international marketplace without the effects of subsidies distorting the outcome of that competition. An understanding of "public body" as reaching financial contributions flowing from an entity that is controlled by the government such that the government can use that entity's resources as its own supports that goal. To find otherwise would permit a government to provide the same financial contribution with the same economic effects and escape the definition of a "financial contribution" merely by changing the legal form of the grantor from a government agency to, for example, a wholly government-owned corporation. A correct interpretation of the "public body" avoids such an outcome.

II. CHINA'S CLAIM REGARDING THE *KITCHEN SHELVING* DISCUSSION HAS NO MERIT

14. Next we move on to the issue of China's "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. This argument fails for two reasons: First, the *Kitchen Shelving* discussion is simply a discussion of the past practice and is not a "measure." Second, even if that discussion somehow could be construed a measure, it would not result in a breach of a WTO obligation.

15. Even aside from the proper interpretation of the term "public body," the *Kitchen Shelving* discussion is not a "measure." WTO panels have consistently found that administrative practice does not have independent operational status such that it gives rise to a breach of WTO obligations. A repeated practice does not create a breach of WTO obligations, as the practice can be departed from. In light of these findings, a discussion of past practice likewise cannot amount to a "measure" for the purposes of dispute settlement proceedings.

16. Further, in order for China's "as such" claim to be successful, China must show that the *Kitchen Shelving* discussion – if somehow construed as a "measure" – will necessarily result in a determination that is inconsistent with the U.S.' WTO obligations. Such an assertion, however, is not supportable. 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 of the factors and relevant information that Commerce takes into account when determining whether a firm is an authority. It does not commit Commerce to any future course of action. Moreover, it is well-established that as a matter of U.S. domestic law that Commerce must evaluate each case on its own merits, and is not bound by past practice. Accordingly, a discussion of past practice does not dictate the outcome in any future proceeding.

III. 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

17. Next we will address China's claims regarding out-of-country benchmarks. First, China has failed to make a *prima facie* case for its out-of-country benchmark claims because it has failed to conduct the case-by-case analysis necessary to show why a reasonable and objective investigating authority could not reach the conclusion that in-country private prices were unreliable benchmarks.

18. There can be no question that an investigating authority may rely on out-of-country benchmarks in certain circumstances. 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. China's generalization that Commerce relies exclusively on the share of government-produced goods in the market in each investigation to determine that distortion exists is incorrect, as Commerce relies on other factors as well. So even if, *arguendo*, Commerce could not rely on government market share *alone* to find distortion in the in-country market, China's arguments fail.

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

19. Next, China's claims that Commerce's specificity determinations are inconsistent with the SCM Agreement are without merit. China appears to challenge 17 different specificity determinations in 15 investigations. As an initial matter, China has failed to make a *prima facie* case with respect to its claims under Article 2. Each determination was based on the specific facts and circumstances of the relevant proceeding, and China must address those facts and circumstances. China has failed to do so, instead relying on broad, inaccurate characterizations of the measures at issue. The claims should be rejected for that reason alone.

20. With respect to its legal arguments, China advances novel interpretations of Article 2 which would impose formalistic requirements on investigating authorities that lack any basis in the agreement. Article 2 is, essentially, about determining whether a subsidy is specific. China's interpretations would substantially impede an investigating authority's ability to find the *de facto* provision of goods for less than adequate remuneration, a type of subsidy explicitly contemplated by Articles 1.1(a)(1)(iii) and Article 14(d), to be specific. China's approach frustrates the operation of the SCM Agreement.

21. First, 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 the *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 analysis. China argues that Commerce's identification of such 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. China is incorrect in its interpretation of Article 2, because neither the text of Article 2 nor any other provision of the SCM Agreement requires a subsidy or "subsidy program" to be implemented pursuant to a formally instituted "plan or outline." Accordingly, China's argument has no textual support in Article 2.1(c).

22. China's interpretation, inserting the requirement that a formal "subsidy program" must be identified, runs counter to the text of Article 2 and the SCM Agreement. In particular, this interpretation would negate the distinction between Article 2.1(c), relating to subsidies that are *de facto* specific, and Article 2.1(a), relating to subsidies that are *de jure* specific because of a limitation on access is explicitly laid out in legislation or elsewhere. China's interpretation of Article 2.1(c) would incorrectly focus a *de facto* specificity inquiry on the existence of a formal plan or outline, and not on whether or not there are limited numbers of users, the inquiry which is the subject of Article 2.1(c). This interpretation is not only unsupported by the text of the Agreement, but would also allow Members to circumvent the disciplines of the Agreement by avoiding the creation of an identifiable plan or outline, thereby frustrating the ability of investigating authorities to countervail otherwise actionable subsidies.

23. Second, China's assertion that an investigating authority must examine a subsidy under Articles 2.1(a) and 2.1(b) before examining Article 2.1(c) in every case has no basis in the text of the SCM Agreement. The ordinary meaning of Article 2.1 makes clear, and the Appellate Body has confirmed, that 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.[3] As a result, China's arguments are inconsistent with the ordinary meaning and context of the provisions of the SCM Agreement.

24. Third, China is incorrect to assert that the SCM Agreement requires investigating authorities to conduct a separate analysis identifying the granting authority as part of its *de facto* specificity analysis. China points to no language within Article 2.1(c) or the SCM Agreement as a whole which would support such an argument. As the Appellate Body has explained, "the analysis under 2.1 focuses on ascertaining whether … the subsidy in question is limited to a particular class of eligible recipients.[4] Accordingly, China's argument that Commerce was required in every specificity determination to analyze and identify the "granting authority" is without merit.

[3] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 873.
[4] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 756.

25. Fourth, China argues that Commerce was required to address expressly the diversification of China's economy and the length of time inputs had been provided for less than adequate remuneration in each challenged determination. A specificity determination involves a fact-based analysis, made on a case-by-case basis. Thus, the relevance of either (1) the length of time a subsidy has been in place or (2) the economic diversification in the Member 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. These factors were not relevant to the investigations at issue, and China's submission does not allege that the factors would have impacted the analysis in the investigations at issue. Thus, China's argument is 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 2.1.

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

26. China appears to challenge determinations made by Commerce in seven investigations that the provision of land-use rights in China was specific within the meaning of Article 2 of the SCM Agreement. 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 Agreement, China has failed to make a *prima facie* case of any of these alleged breaches. For that reason, China's claims with respect to regional specificity fail.

VI. 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

27. 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 with respect to these claims because it has failed to discuss the evidence presented in each application. Furthermore, in all cases, Commerce's decision 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.

28. 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. Further, 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 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." China has failed to demonstrate that Commerce's determinations were inconsistent with this standard.

29. With respect to specificity, Commerce's initiations were justified because evidence pertaining to the subsidies themselves indicated that the provisions of the inputs in question for less than adequate remuneration were specific. Further, the applications provided additional evidence regarding specificity which was reasonably available to the applicants, including citations to past final determinations regarding the same or similar inputs. Under the standard for initiations under Article 11, this evidence was sufficient to initiate investigations into the alleged subsidies.

30. With respect to the sufficiency of evidence regarding the existence of public bodies, in many situations, much of the evidence of government control may not be available before the initiation of an investigation, particularly with respect to entities alleged to be state-owned. Accordingly, the only reasonably available information to an applicant may be general evidence of government control over an industry or sector.

31. Even under China's proposed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, Article 11 would only require adequate evidence tending to prove or indicating that an entity possesses, exercises, or is vested with governmental authority, not definitive proof of such. The relevant question would therefore be 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. China argues that evidence of government ownership or control is insufficient for initiation purposes. China is mistaken.

32. If, as DS379 allows, 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 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, as required by Article 11 of the SCM Agreement.

33. Further, when assessing the sufficiency of evidence, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant. 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. 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. 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? In general, evidence of government ownership or control is in certain circumstances the only evidence that is reasonably available. In fact, the issue of public bodies is an example of why the SCM Agreement includes the term "reasonably available."

VII. 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

34. 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. China's objections to those 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 investigating authorities are prohibited from examining China's various export restraint schemes based on the *US – Export Restraints* panel report. 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 *Export Restraints* panel's analysis of whether hypothetical export restraints could constitute a financial contribution.

35. Examining whether an export restraint constitutes a financial contribution through the entrustment or direction of private entities is fully consistent with Article 1.1(a)(1). The U.S. decisions to countervail China's export restraints 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 can never constitute a financial contribution encompassed by Article 1.1(a) of the SCM Agreement.

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

36. As an initial matter, the United States would point out that China, in its pursuit of its facts available claims, failed in its panel request to summarize the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2 of the Dispute Settlement Understanding. Its vaguely drafted panel request describing hundreds of facts available claims, which it apparently never intended to pursue. After incorrectly stating that it was pursuing all of those claims, China has advanced claims only with respect to 48 instances of the use of facts available. China's defective approach to its Article 12.7 claims made it impossible for the Panel to understand what

matters fell into its terms of reference, and for the United States to begin to prepare its defense. The United States is disappointed by China's approach to the proceedings.

37. On the substance, China's first submission provides only a cursory description of its claims with respect to two investigations, merely listing the remaining instances in an exhibit. This approach is insufficient to establish a *prima facie* case with respect to these claims. In addition, China's Article 12.7 claims are based on incorrect interpretations of the SCM Agreement and mischaracterizations of Commerce's determinations.

38. Commerce's use of an adverse inference in selecting from among the available facts is fully consistent with the SCM Agreement, confirmed by the ordinary meaning of the provision, as well as the context provided by the SCM Agreement as a whole and the parallel provision in the AD Agreement. Further, China's interpretation of Article 12.7 would lead to a breakdown of the remedies provided in the SCM Agreement, as interested parties and Members would have no incentive to participate in an investigation if their refusal would mean that an investigating authority would have insufficient information to make a finding of a specific subsidy. Finally, China's reliance on the panel's findings in *China – GOES* to argue that Article 12.7 prohibits the reliance on adverse facts available is misplaced. The panel found that China's investigating authority had ignored substantiated facts on the record and that its determination "was actually at odds with information on the record." In contrast, Commerce's determinations are based on a factual foundation and were not contradicted by substantiated facts.

39. Finally, China has failed to demonstrate that any of the 48 challenged determinations are inadequately supported by the record evidence in each investigation. Commerce's facts available determinations are based on the factual information available on the record of each investigation. Thus, China's argument that the challenged adverse facts available determinations were devoid of a factual basis is simply incorrect.

IX. CONCLUSION

40. As we have demonstrated in our first written submission and again this morning, China has failed to make its case in this dispute, both as a matter of evidence and as a matter of law. Accordingly, the United States respectfully requests the Panel to reject China's claims.

41. Mr. Chairperson, members of the Panel, this concludes our opening statement. We would be pleased to respond to your questions.

ANNEX D-3

CLOSING STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

1. The United States has only a few brief closing comments. We have observed before that this dispute is incredibly large, involving around 100 individual alleged breaches of various provisions of the SCM Agreement. Despite the enormity of the dispute that China has chosen to bring before you, China included in its first written submission only sweeping generalizations and references to the facts of other disputes.

2. During the past two days, China has done little to remedy the deficiencies of its first written submission, instead insisting repeatedly that it has done enough. Today, though, we perhaps saw a crack in China's resolve, as it began to dribble out, in a piecemeal fashion, some new exhibits containing particularized references to Commerce's determinations. This is the kind of information that would have been most useful for the Panel if it had been included in China's first written submission, so that the United States was provided a full opportunity to respond to it in the U.S. first written submission. It is disturbing that China appears to intend to wait until its rebuttal submission to include still more information and argumentation of this nature.

3. Ultimately, this dispute is like all WTO disputes. It is about the meaning of the SCM Agreement and whether the measures at issue here are inconsistent with the obligations in that agreement. China's continued refusal to engage with the facts deprives the Panel of the argumentation necessary for the Panel to do its work in assessing whether the challenged measures are inconsistent with the SCM Agreement. Moreover, the legal interpretations China advances – including its assertion that the Panel is bound simply to follow prior Appellate Body reports without undertaking its own interpretative analysis under the customary rules of interpretation – lack support in the SCM Agreement and the DSU.

4. The Panel should make its own interpretative analysis under the customary rules, and it must assess for itself whether China has presented sufficient argument related to the facts to support its claims. We, of course, believe that China has failed in that task.

5. The United States recognizes that the Panel is only at the beginning of its work, and we hope that our first written submission and our presentation over these past two days have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavor to provide responses that bring clarity and understanding to the many complex issues in this dispute. Ultimately, we seek to aid the Panel in arriving at the correct conclusions, based on proper interpretations of the covered agreements. We are confident that, if we are successful in that effort, the Panel will find in our favor and dismiss China's claims.

6. Once again, the United States thanks the Panel members, and the Secretariat staff, for their time and attention to this matter.

ANNEX E

THIRD PARTIES ORAL STATEMENTS AT THE FIRST MEETING OF THE PANEL

ANNEX E-1

THIRD PARTY ORAL STATEMENT OF AUSTRALIA AT THE FIRST MEETING OF THE PANEL

1. Thank you for the opportunity to present Australia's views in this dispute.

2. Australia has provided a written submission identifying some key issues of systemic and legal interest. I will not repeat the arguments set out in Australia's submission. Rather, I would like to highlight one of the key questions before the Panel in this dispute: 'what is a public body?'

3. Australia considers there may be benefit in this Panel helping to further clarify the meaning of the term 'public body' following the 2011 Appellate Body finding in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*. In that dispute, the Appellate Body said that a public body 'must be an entity that possesses, exercises **or** is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case' (emphasis added).[1] On that basis, we consider each of the indicia to be alternative considerations. The test for 'public body' is not a three stage cumulative test.

4. The Appellate Body has made clear that government ownership or control of an entity is not a proxy for governmental authority. In Australia's opinion **government ownership**, in and of itself, is not evidence of meaningful control of an entity by a government and cannot, **without more**, serve as a basis for establishing that the entity possesses, exercises, or is vested with authority to perform a governmental function.

5. However, Australia considers that governmental control over an entity is dispositive as to whether it is a public body. Government ownership of an entity can be distinguished from governmental control of such entity.

6. Australia is concerned that in order to meet the Appellate Body's test, if the test were to be cumulative, the evidentiary burden for investigating authorities in determining whether an entity possesses, exercises **and** is vested with authority to perform a government function would extend beyond the ordinary interpretation of Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). Australia considers this interpretation is flawed because, amongst other things, it conflates the inquiry relevant to Article 1.1(a)(1) in relation to public bodies with the test of whether a **private body** is entrusted or directed by a government under Article 1.1(a)(1)(iv).

7. Australia considers that one element of an appropriate test for whether an entity 'possesses or exercises governmental authority' could be to look to governmental control over the entity. In our view, this is a multi-faceted issue where considerations such as how the entity is managed, the degree of Ministerial approval and whether a government issues instructions to the entity may all be relevant considerations, whether by *de jure* or *de facto* means. In Australia's view, the relevant inquiry under Article 1.1(a)(1) of the SCM Agreement is: '**to what extent** does the government control the entity'?

8. In Australia's view, an approach which looks at the extent of governmental control of an entity is consistent with the object and purpose of Article 1.1 which is to ensure that a subsidy provided by **any** public body within the meaning of Article 1.1 is captured by the SCM Agreement.

9. Further, Australia considers that it is not imperative for an entity to be vested with governmental authority, but also notes that the Appellate Body has recognized this as one potential consideration.

[1] Appellate Body Report, *US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 317.

Conclusion

10. Finally, we would like to note that although Australia's written submission and this oral submission do not address every issue raised by the parties in this dispute, this should not be regarded as an indication that Australia considers that the issues it has not addressed are not important. Nor does it indicate agreement, or otherwise, with any particular argument of the participants or other third parties in this dispute.

11. Australia thanks the Chairman and Members of the Panel for this opportunity to present its views in this dispute.

ANNEX E-2

THIRD PARTY ORAL STATEMENT OF BRAZIL AT
THE FIRST MEETING OF THE PANEL

1. Brazil welcomes the opportunity to present this Oral Statement as a Third Party in the current proceedings. While not delving into the specific facts regarding the dispute and not assessing the specific circumstances of the Chinese enterprises under dispute, in its Oral Statement Brazil wishes to further the arguments presented in its Third Party Submission regarding the concept of "public body" in Article 1.1(a)(1) of the SCM Agreement and the concept of "market power" under Article 14(d) of the same agreement.

I. The concept of "public body" in article 1.1(a)(1) of the SCM agreement is based on the authority of the entity on exercising governmental functions

2. Given the long-standing jurisprudence regarding the concept of "public body", Brazil does not consider necessary to further develop the meaning of "government" and "public body". We would like to recall that, as well established by the Appellate Body in *Canada – Dairy*, "the exercise of lawful authority" is a fundamental element for the definition of the "essence of 'government'"[1] and, thus, of a "public body". Furthermore, in order to find if a public body is vested with such authority, it is necessary to verify whether the entity performs functions and exercises attributions that are typical of government, "that is to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens".[2]

3. This analysis, as we have highlighted in our written submission, can only be achieved in a case-by-case evaluation of the core features of the entity under scrutiny, going beyond the mere identification of the existence of its formal links to the Government.[3] The *mere link of ownership* is not sufficient to prove said functions and attributions of a public body.

4. In this sense, nothing in the SCM Agreement seems to authorize investigating authorities to establish any presumption (rebuttable or not) that, if an entity is owned by the government, it can be considered, without further scrutiny, a public body, within the meaning of Article 1.1 of the mentioned Agreement. In fact, according to the Appellate Body in *US – Countervailing Duty Investigation on DRAMS*, it is quite the opposite: the conduct of corporate bodies "is presumptively not attributable to the State."[4]

II. The "predominance test" under article 14(d) of the SCM Agreement should refer to the "market power" of the government in the market

5. Based upon the rules established for the investigating authorities on the SCM Agreement, the same case-by-case analysis should apply in order to analyze an in-country benchmark in the benefit analysis of Article 14(d) of the SCM Agreement, taking into account both the Government's market share and its "market power", with due regard to the prevailing market conditions.

6. In its written submission Brazil proposed that this approach should be done qualitatively as well as quantitatively as expressed by the Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)* in discussing the "predominance of the government in the market", understanding that the concept "does not refer exclusively to market shares, but may also refer to market power."[5]

7. A possible definition for "market power", put forth in the Dictionary of Trade Policy Terms, establishes that market power is "based on the view that firms may have the ability to increase their prices without suffering a decrease in their sales. Antitrust laws are aimed at ensuring the

[1] *Canada – Dairy* (Appellate Body Report, paragraph 97).
[2] *Canada – Dairy* (Appellate Body Report, paragraph 97).
[3] *US – Anti-dumping and Countervailing Duties (China)* (Appellate Body Report, paragraph 317).
[4] *US – Countervailing Duty Investigation on DRAMS* (Appellate Body Report, footnote. 179).
[5] *US – Anti-dumping and Countervailing Duties (China)* (Appellate Body Report, paragraph 444).

existence of price competition in the market."[6] Thus, as to what regards Article 14(d) of the SCM agreement, it could be possible to conceive that an agent has "market power" when it is detached from price constraints of market logic and that such leverage is a strong indicator of government intervention subsidizing the dominant position of that agent in the market.

8. In other words, even if an agent has a large market share, but is still submitted to the prevailing market conditions, its position in the market may most likely reflect its own market efficiency and will not be harmful to competition. If, however, an agent is dominant in the market because it is largely unrestrained by its prices, its power then will most likely derive not from its efficiency but from an external source that provides for it. There would thus be a strong indication that a government might be conferring a benefit to it. In this case there would probably be some significant distortion and harmful impacts in the market.

9. This conclusion seems also to be in line with the decision of the Appellate Body in *US — Anti-Dumping and Countervailing Duties (China)*, which defined that "an investigating authority may reject in-country private prices if it reaches the conclusion that these are too distorted due to the predominant participation of the government as a supplier in the market, thus rendering the comparison required under Article 14(d) of the *SCM Agreement* circular. It is, therefore, price distortion that would allow an investigating authority to reject in-country private prices, not the fact that the government is the predominant supplier *per se.*"[7]

10. In Brazil's view, without going into the specific situation of the Chinese enterprises under scrutiny, when there is no analysis of the "market power" in a specific market, it is very difficult to determine *a priori* if the prevailing market conditions are distorted merely because of the participation of the government as a provider of goods and services, under Article 14(d) of the SCM Agreement.

11. Mr. Chairman, distinguished members of the Panel, this concludes Brazil's oral statement. We thank you for your attention and welcome any questions that you may have.

[6] GOOD, Walter. *Dictionary of Trade Policy Terms*. Cambridge: Cambridge University Press, 2003. p. 224.

[7] *US – Anti-dumping and Countervailing Duties (China)* (Appellate Body Report, paragraph 446).

ANNEX E-3

THIRD PARTY ORAL STATEMENT OF CANADA AT
THE FIRST MEETING OF THE PANEL

TABLE OF CASES REFERRED TO IN THIS SUBMISSION

SHORT FORM	FULL CASE TITLE AND CITATION
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Softwood Lumber IV	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, DSR 2004:II, 641
US – Upland Cotton	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, DSR 2005:II, 299

I. INTRODUCTION

1. Canada thanks the Panel for the opportunity to present its views in this important dispute.

2. In this oral statement we will briefly elaborate on two issues raised in Canada's Written Submission to the Panel, namely the use of out-of-country benchmarks to calculate an amount of benefit and specificity.

3. In our written submission, we addressed the issues of public body, use of adverse facts, initiation standards and export restraints as subsidies. We will not address them here.

II. THE USE OF OUT-OF-COUNTRY BENCHMARKS

4. Where a government provides a subsidy through the provision of goods, an investigating authority may use out-of-country benchmarks instead of in-country prices to calculate the benefit to the recipient under Article 14(d) only in very limited circumstances.[1]

5. Out-of-country prices can only be used if it is established that market prices are distorted and the distortion is due to the presence of the *government* in the domestic market as a provider of the same or similar goods. In *US – Antidumping and Countervailing Duties (China)*, the Appellate Body stated that price distortion must be established on a case-by case-basis and that even where evidence indicates that the government is a predominant supplier of goods, evidence other than government market share must be considered.[2]

6. In its written submission, Canada also argued that out of-country prices can be used where in-country market prices are distorted and the distortion is due to the predominant role of *government-controlled entities* in the market.[3]

7. In every case, the benchmarks used must reflect prevailing market conditions in the country of provision.

8. Canada considers that there cannot be a finding of market distortion simply because a government is an important player in a market as a provider of goods. In the absence of other supporting evidence, the sole fact that a government has a significant or predominant presence in the market does not in itself prove that a government is the price setter. There are economic models that effectively establish ground-rules for government participation in markets, even what some might consider predominant participation, without distorting market values.

III. SPECIFICITY

9. Canada will now turn to the issue of specificity to comment on two points, the relevance of the criteria in the last sentence of Article 2.1(c) on *de facto* specificity and whether Article 2.1 requires that the authority granting a subsidy must always be identified.

10. Regarding the application of the criteria in the last sentence of Article 2.1(c), Canada considers that the state of diversification of the economy may be significant for the determination of *de facto* specificity in some cases. In other cases, however, the economy of an exporter may be known to be highly diversified. Where it is well-established that an economy is highly diversified, this fact is likely "taken into account" by an investigating authority in its analysis of *de facto* specificity.[4] There should not be an obligation on the investigating authority to mechanically address this issue in its written determination.

11. Finally, Canada submits that the focus of the analysis under Article 2.1 is on determining whether a subsidy is limited to specific recipients, rather than on identifying the particular entity that constitutes the "granting authority". Canada points to the statement of the Appellate Body in *US – Large Civil Aircraft* that "[…] the analysis under Article 2.1 focuses on ascertaining whether access to the subsidy in question is limited to a particular class of eligible *recipients*".[5]

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[1] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[2] See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[3] Canada's first written submission, para. 18
[4] Panel Report, *US – Softwood Lumber IV*, para. 7.124.
[5] Appellate Body Report, *US – Large Civil Aircraft*, para. 756.

12. The identification of the granting authority may not be required in some cases when conducting a specificity analysis. In this case, China did not explain the relevance of identifying a particular granting authority. In such circumstances, there may not be a strict necessity for the investigating authority to identify which particular entity granted the subsidy.

13. Mr. Chairman, distinguished members of the Panel, this concludes Canada's oral statement. We thank you for your attention and would be pleased to answer any questions that you might have.

ANNEX E-4

THIRD PARTY ORAL STATEMENT OF INDIA AT
THE FIRST MEETING OF THE PANEL

I. Introduction

1. India welcomes this opportunity to present its views in the present dispute. India has systemic interest in the issues raised by China in the present dispute and intervenes to provide its view for the proper interpretation and application of the SCM Agreement. India considers that the manner in which the United States has conducted the countervailing duty investigations and the manner, in which the United States responds to certain issues raised by China, undermine the basic foundation of the SCM Agreement.

2. In this third party oral statement, India will focus on two key issues arising in the present dispute, namely, (i) the interpretation of the term 'public body'; and (ii) the use of 'adverse facts available' standard by the United States.

II. The interpretation of the term 'public body'

3. India considers that pursuant to Article 1.1(a)(1) of the SCM Agreement, a subsidy can exist only if a 'financial contribution' is provided either by the 'government', or 'any public body' or a "private body entrusted or directed" by such government or public body.

4. Contrary to the assertions made by the United States in its written submission, India is of the view that the Appellate Body's interpretation of the term 'public body' in *US – Anti-Dumping and Countervailing Duties (China)* (DS379) is indeed dispositive.

5. In the present case, the United States attempts to re-interpret the term 'public body' by selectively relying on the decision of Panel and Appellate Body in DS379. In fact, the United States has gone on record to state that the Appellate Body's approach was flawed. However, while doing so, the United States completely ignores that the Appellate Body was unequivocal in deciding the core issue that a mere majority shareholding by a Government in an entity is insufficient to confer the status of 'public body' to that entity. In the present dispute the United States has failed to produce any evidence to establish that it considered factors other than government ownership in reaching its determinations.

6. It is noteworthy that the reliance placed by United States on dictionary meaning, contextual interpretation, the Working Party Report to accession protocol of China and the relevance of ILC Draft Articles, were all argued before and considered by the Appellate Body in DS379. Therefore, any attempt to revisit or review the decision of Appellate Body is against the established jurisprudence in this regard. The Appellate Body in *US – Continued Zeroing*, while relying on previous Appellate Body Reports, has held that Appellate Body reports adopted by the DSB are binding and must be unconditionally accepted by the parties to the particular dispute; such reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute; and that such reports become part and parcel of the *acquis* of the WTO dispute settlement system. The Appellate Body further observed that "ensuring 'security and predictability' in the dispute settlement system, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[1] India is of the view that the issue raised in the present dispute about the interpretation of the term 'public body' is identical to the issue before the Appellate Body in DS379 and the United States has not provided any 'cogent' reasons different than those argued in DS379. Therefore, the Panel must interpret this issue in a consistent manner.

[1] Appellate Body Report, *US – Continued Zeroing*, para. 362 relying on Appellate Body Report, *US – Softwood Lumber V*, paras. 109-112; Appellate Body Report, *US –Shrimp (Article 21.5 – Malaysia)*, para. 97; Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 12-15, DSR 1996:I, 97, at 106-108; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188; and Appellate Body Report, *US – Stainless Steel (Mexico)*, paras. 160-161.

7. The Appellate Body, referring to the definition of 'government' in the ordinary dictionary sense[2], found that the essence of 'government' is that it enjoys the effective power to "*regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority*".[3] The Appellate Body also reiterated that this finding was derived, in part, from the *functions* performed by a government and, in part, from the government having the *powers and authority* to perform those functions.[4]

8. Based on the above definition of the term 'government', the Appellate Body in DS379 held that "performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are the core commonalities between government and public body".[5]

9. In this context, it is relevant that not only must the alleged public body be performing a *governmental function*, but that body must also have the *power and authority* to perform those functions.[6] It is submitted that 'governmental function' is not about what a government itself may engage in; rather it involves regulating, controlling, or supervising individuals, or otherwise restraining their conduct, through the exercise of lawful authority. As is evident from the *Canada – Dairy* case, the mere fact that one of the perceived interests of the State was being promoted did not per se transpose any economic activity into a 'governmental function'.

10. India is of the view that being *vested with the authority to perform a governmental function* presupposes a special nature of intervention different from the ordinary relations between private entities; it presupposes a vertical relationship, rather than a horizontal one, and one which may involve *power* flowing from a superior source to unilaterally impose rights / duties / obligations on itself or on third parties.

11. Further, in light of observations of the Panel in *Canada-Dairy*[7], India submits that over and above the presence of a governmental framework, there has to be an express delegation of ***power*** to *regulate, control, or supervise individuals, or otherwise restrain conduct* and that this power must flow from the 'governmental' source, as is understood in the traditional narrow sense, such that it differs from the ordinary relations between private entities.

12. Similarly, after noting that under Article 1.1(a)(1)(iv) of the SCM Agreement, a 'public body' as well as a 'government' in the narrow sense could 'direct or entrust' a 'private body', the Appellate Body in *DS379* took the view that a 'public body' would have the authority, including the power of compulsion, over a private body (in order to be able to 'direct' such private body) as well as be able to grant responsibility to a private body (in order to be able to 'entrust' a private body).[8] These were, according to the Appellate Body, another set of characteristics that were common to both 'government' in the narrow sense and a 'public body'.[9] The kind of authority or responsibility that the alleged 'public body' must be able to exercise or be vested with, must be the type "which would normally be vested in the government".[10]

13. Therefore, for an entity to be a public body, that entity must be able to entrust or direct a private body, namely, have the power to give 'responsibility' to a private body or exercise 'authority' over a private body. Viewed from this perspective, mere shareholding by the government in an entity will not make it a public body.

14. The evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice.[11] Similarly, on the question of governmental control, the Appellate Body held that *the majority shareholder of an entity does not*

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[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*,para. 290 (referring to the Shorter Oxford English Dictionary).
[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.
[4] Ibid.
[5] Ibid.
[6] Appellate Body Report, *Canada – Dairy*,para. 101.
[7] Panel Report, *Canada – Dairy*, fn. 433.
[8] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para.294.
[9] Ibid.
[10] Ibid.paras.295-297.
[11] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para.318.

demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with *governmental authority*.[12]

15. In other words, majority shareholding in and of itself is insufficient to prove that the entity is exercising governmental authority. It is important to emphasize that the Appellate Body was dealing with the question as to how shareholding by the government *may act as evidence* in order to *prove* vesting of *governmental authority*. It is submitted that the language and tenor of the decision of the Appellate Body suggests that the "governmental control" was only intended as an indicia or evidence in determining the key question: whether the entity has been vested with "governmental authority". Therefore, the determination by the United States of a 'public body' *solely* on the basis of ownership is inconsistent with Article 1 of the SCM Agreement.

III. The use of 'adverse facts available'

16. A bare textual reading of Articles 12.1 and 12.7 of the SCM Agreement shows that an investigating authority is permitted to resort to "facts available" only when an interested Member or interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. The purpose behind Article 12.7 of the SCM Agreement is *only* to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation.[13] The United States admits that it "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 and argues at length to support such an interpretation. However, India is of the view that while interpreting Article 12.7, it is equally important to place emphasis on what Article 12.7 *does not*, *express verbis*, provide for- "adverse facts available" or to "draw adverse inferences" from "facts available".

17. The Appellate Body in *Mexico-Beef and Rice* identified the similarity between Article 12 of the SCM Agreement and Article 6 of the Anti-Dumping Agreement, inasmuch as both the provisions are intended to "*set out [the] evidentiary rules that apply throughout the course of the … investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' throughout … an investigation*".[14] While Article 6.8 permits an investigating authority to rely on the "facts available", placing emphasis on the fact that Annex II of the Anti-Dumping Agreement, which forms a mandatory part of Article 6.8 of the Anti-Dumping Agreement, is titled "*Best Information Available in Terms of Paragraph 8 of Article 6*", the WTO Panel in the *Mexico – Beef and Rice* observed that the discretion to employ "facts available" is not unlimited.[15] The Appellate Body in *Mexico-Beef and Rice* expressly affirmed this ruling of the Panel.[16]

18. The United States also relying on Article 6.8 and Annex II of the AD Agreement, argues that an investigating authority may rely on facts which may lead to results less favourable. However, the United States, in fact, disregards facts (from secondary sources) that may in fact lead to better results and chooses only those secondary facts that lead to the least favourable result. In other words, the pick and choose approach mandatorily applied by the United States forecloses the possibility of considering facts from secondary sources which may lead to better results.

19. As seen earlier, the purpose behind Article 12.7 is to ensure that the non-cooperation by an interested party does not impede the investigation; the purpose is not to punish an allegedly non-cooperating member by granting a right to draw adverse conclusions. Established jurisprudence makes it evident that Article 12.7 places an obligation on the United States to employ the "best information available", after engaging in an "*evaluative, comparative assessment*" of the evidence available. As a logical corollary, it is submitted that Article 12.7 cannot be interpreted as granting the *right* to draw adverse consequences / inferences in all cases of non-cooperation. This is also

[12] Ibid.

[13] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para.293 ("Thus, the provision permits the use of facts on record *solely* for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination.").

[14] Appellate Body Report, *Mexico-Anti-dumping Measures on Rice*, para.292 (citing Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138).

[15] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166.

[16] Appellate Body Report, *Mexico – Anti-dumping Measures on Rice*, para.289.

recognized by findings of various panels.[17] As recently as in 2012, the panel has held that non-cooperation "*does not justify the drawing of adverse inferences*" under Article 12.7[18].

20. In summary, it is submitted that Article 12.7 *places a restraint* on the investigating Member to only apply those facts that are *most fitting or most appropriate*. At the same time, it *places a positive obligation* on the investigating Member to arrive at this *most fitting or most appropriate information*, after engaging in an "*evaluative, comparative assessment*" of all the available evidence. Thirdly, the investigating Member is prohibited from using the "facts available" standard in a punitive manner so as to draw adverse consequences / inferences against a non-cooperating party.

21. India strongly considers that drawing adverse inferences by *choosing from among the various "facts available"*, even where the adverse inference so drawn is not the *most fitting or most appropriate*, is not consistent with the provisions of Article 12.7 of the SCM Agreement.

IV. Conclusion

22. India strongly feels that the interpretation of the term 'public body' given by the United States and the application of 'adverse facts available' standard by the United States are inconsistent with the relevant provisions the SCM Agreement. Mr. Chairman and Members of the Panel, thank you for the opportunity to present India's views on this dispute. India would be pleased to provide responses to any questions that the Panel may have.

Thank you.

[17] Panel Report, *EC- Countervailing Measures on DRAMs*, paras.7.80, 7.100 and 7.143.
[18] Panel Report, *China -GOES*, para. 7.302.

ANNEX E-5

THIRD PARTY ORAL STATEMENT OF JAPAN AT THE FIRST MEETING OF THE PANEL

1. Japan wishes to express its appreciation to this opportunity to be heard by the Panel in this third party session of the Panel's First Substantive Meeting. In this statement, Japan will focus on the issue of "public body" in Article 1.1(a) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. At the outset, Japan wishes to make it clear that it takes no position as to the Appellate Body's findings on the issue of "public body" in *US – AD/CVD (China)* (DS379) which have been discussed extensively by the parties to this dispute in their first written submissions. However, Japan does have concerns about the certain interpretive approach the Appellate Body took in that report.[1] For example, in its analysis, the Appellate Body relied on the ILC Articles on *Responsibility of States for Internationally Wrongful Acts*. In our view, the ILC Articles are irrelevant and the Appellate Body's reliance was wholly unnecessary.

3. That being said, Japan wishes to offer the following observation.

4. Japan finds it significant that the SCM Agreement juxtaposes a "government" and a "public body", on the one hand, with a "private body" used in Article 1.1(a)(1)(iv), on the other. Japan understands that one of the distinctive attribute of a "private body" is that it usually acts on its own interests. In the case of a business enterprise, its objective is to seek profits, and as such the entity operates on market considerations.

5. A business enterprise normally seeks profits, *not* from each single transaction, *but* from its overall business activities for a certain length of time period in accordance with the relevant ordinary market practices or principles. Accordingly, a business entity is normally unable to continue selling products bearing losses beyond a reasonable period of time; if it does, it will go bankrupt, and thus, exit out of the market. Thus should the entity be able to continue making losses for a sustained period of time, this ability must have been artificially created, for example, because a government has provided it with a financial basis for the ability. This may be suggestive that the entity is seeking something other than profits (presumably to advance public policy goals set by the government) and is not acting on market considerations.

6. The panel in *US – AD/ CVD (China)*, citing the finding of the panel on *Korea – Commercial Vessels*, stated that "it is the government's control of an entity that gives that entity the *potential* to intervene in markets so as to advance public policy goals without seeking profit, by providing financial contributions on better-than-market terms".[2] However, a mere majority shareholding in a stock corporation by a government would not be enough to give this potential to that corporation; it may require deeper involvement of a government to enable the corporation to have this potential "to advance public policy goals" by continuing business activities while bearing losses, not in a single transaction or some transactions, but for a long period of time.

7. In Japan's view, the examination of the aforesaid ability of an entity or an underlying financial basis backed by a government to advance certain public policy goals may often be a useful, *albeit* not decisive, tool to examine the governmental or "public" nature of that entity under the SCM Agreement. This could be the case where a state owned enterprise continues selling products below costs, thus bearing losses, for a sustained period of time. Japan notes that this does not render the "benefit" requirement meaningless since this examination is conducted on whether a government-guaranteed financial basis is present, or the inquiry of whether the entity continues existing while bearing losses, in an unreasonably sustained manner, rather than the inquiry of each transaction in light of the relevant market benchmark. In order to find an existence and amount of "benefit" in one or more particular "financial contributions", made by a "public

[1] See Minutes of Meeting of the Dispute Settlement Body, held on 25 March 2011 (WT/DSB/M/294).
[2] Panel Report, *US – AD/CVD (China)*. para. 8.80.

body" under the SCM Agreement, an independent examination of a "benefit", for example, using a relevant market benchmark, is needed for particular "financial contributions" in question.

8. Since such a financial basis can be provided in various forms, the examination of whether an entity has such ability is a case-by-case analysis based on various factors. Such factors could include, but not limited to, a type of business the entity is engaged in, the design, structure, content and application of the relevant laws and regulations that govern the entity, the government's commitment or responsibility to inject additional capital to rescue that entity in bankruptcy, the proportion of government's ownership, the observance of corporate governance principles, and the applicability of the bankruptcy law. Further, the fact that an entity may be allowed to operate in a monopolistic or oligopolistic market with excess capacities without any discipline under the competition law may be a positive indicia for the financial basis. Japan notes that a majority shareholding in an entity by a government is not sufficiently suggestive of such a financial basis for that entity.

9. In short, Japan observes that the government-sponsored financial basis that can be found on the aforesaid examination, not a mere governmental majority shareholding, may suggest, depending on the relevant facts and circumstances, that the entity in question is not seeking its own interest or profits, as it would be able to continue its operation to advance public policy goals while sustaining accumulated losses unreasonably.

10. This concludes Japan's statement.

ANNEX E-6

THIRD PARTY ORAL STATEMENT OF KOREA AT THE FIRST MEETING OF THE PANEL

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party in this dispute. In this dispute, China challenges more than a dozen countervailing duty ("CVD") investigations conducted by the United States Department of Commerce ("USDOC") during the period of 2007 to 2012. As with other recent disputes concerning the SCM Agreement, the present dispute also raises a series of important systemic issues regarding the interpretation and application of key provisions of the Agreement.

2. In the interest of brevity, Korea would like to focus on the following three issues and share its views with the Panel. They are (i) the "public body" determination, (ii) the benefit calculation, and (iii) the regional specificity analysis of the USDOC in the challenged CVD investigations.

3. First of all, let us turn to the issue of "public body." This very issue was extensively discussed in the previous dispute of *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS379) ("*U.S. - AD/CVD*"), in which the Appellate Body found that the USDOC's public body determination based on the so-called "majority government-ownership" methodology was inconsistent with Article 1.1(a)(1) of the SCM Agreement.[1] The Appellate Body in *U.S. - AD/CVD* rejected the notion that the government ownership, by itself, translates into the confirmation of "public body."

4. More specifically, what was at issue in that dispute was whether State-Owned Enterprises ("SOE"s) of China were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement by the mere fact of government ownership in those entities. The Appellate Body found that the USDOC's application of a rebuttable presumption standard, under which entities with government ownership are presumed to be public bodies, is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

5. In the CVD investigations challenged in the present dispute, the evidence on the record seems to prove that the USDOC has applied basically the same methodology in finding "public bodies." To the extent that the USDOC continues to apply its government ownership-determinative methodology in its public body analysis, Korea views that the USDOC fails to apply the legal standard as established by the Appellate Body in contravention of Article 1.1(a)(1) of the SCM Agreement.

6. In light of this, we request the Panel to confirm and apply the legal standard established by the Appellate Body in *U.S.-AD/CVD* to the facts of this case. Although we do not have access to all the information on the record, we have not yet found any persuasive reason to disturb the clearly articulated jurisprudence of the Appellate Body in this regard.

7. We now move on to the second issue: finding benefit and confirming a market benchmark. A correct analysis of benefit under the SCM Agreement hinges upon the selection of a correct and proper market benchmark. A benchmark should reflect the prevailing market condition of an alleged subsidizing Member, so it should be sought in the domestic market of the Member as much as feasible, unless the market is disqualified by proven distortion. This is clear under Article 14 (d) of the SCM Agreement and the jurisprudence interpreting this provision.

8. In terms of disqualifying the domestic market, the Appellate Body has warned against a finding of distortion simply because of the government's alleged predominant role in the market. The Appellate Body stated that "an investigating authority cannot, based simply on a finding that

[1] *See* Appellate Body Report, *U.S. – AD/CVD*, para. 346 ("[mere government ownership] cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function"); para. 320 ("control of an entity by a government, by itself, is not sufficient to establish that an entity is a public body").

the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share."[2]

9. In this dispute, Korea looks forward to the Panel's examination of the USDOC's benefit analysis and benchmark selection based on the Appellate Body jurisprudence, in particular whether and how the evidence on the record proves that the domestic market of China was distorted as to be disqualified by the investigating authority. At the same time, we would like to ask the Panel to be mindful of the fact that the USDOC's benefit analysis was almost entirely hinged upon its government ownership-determinative public body finding. In other words, if the public body finding in the USDOC's countervailing duty determinations is overturned, as discussed above, it seems that its benefit finding cannot stand either. We would like to bring the Panel's attention to this close relationship between the two findings.

10. Finally, let us briefly touch upon the regional specificity issue. Any subsidy should be specific to certain enterprises or industries, within the meaning of Article 2 of the SCM Agreement, to be condemned under the SCM Agreement. In this respect, Korea asks the Panel to carefully review, in accordance with Article 2.2 of the SCM Agreement, the regional specificity finding of the USDOC with respect to the alleged provision of land use rights.

11. Regarding the regional specificity, the Appellate Body explained that "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both."[3] It is critical therefore that an investigating authority demonstrates that either the financial contribution or the benefit was "limited to certain enterprises located within a designated geographical region." In other words, the terms "limitation" and "designation" are the key concepts in finding a regional specificity. Mere reference to a geographical element in the general scheme of a widely available national policy may not satisfy the "limitation" and "designation" requirements.

12. To conclude, in our view, this dispute, as with *U.S. - AD/CVD,* starts and ends with the issue of public body. The Panel should carefully review whether the USDOC's public body finding is indeed consistent with the jurisprudence of the Appellate Body, which has also incorporated the established jurisprudence of public international law, as articulated in the 2001 U.N. Draft Articles on State Responsibility. The gist of the jurisprudence established by both the Appellate Body and other international tribunals is that the government ownership by itself cannot be a sufficient basis for turning an entity into a public body or a governmental entity. Based on the parties' arguments, Korea is of the view that the evidence on the record indicates that the USDOC's finding of public body focused on the government ownership. If so, we view that the USDOC's public body finding is not consistent with the established jurisprudence. It follows that the benefit finding also cannot be sustained. We ask the Panel to carefully examine the factual record and apply the proper legal standard.

13. Again, Korea appreciates this opportunity to present its view and would be happy to take questions you might have. Thank you.

[2] Appellate Body Report, *U.S. – AD/CVD*, para. 446.
[3] Appellate Body Report, *U.S. – AD/CVD*, para. 378.

ANNEX E-7

THIRD PARTY ORAL STATEMENT OF NORWAY AT
THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings.

2. In its written statement, Norway addressed some interpretative issues raised by the US and China. Norway focused on the criteria for defining a "public body" under Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"). Norway maintained that a public body must be an entity that possesses, exercises or is vested with the authority to perform governmental functions, when providing the financial contribution in question. This requires a factual analysis of the functions the particular entity performs, where government ownership is not dispositive in itself.

3. Today, Norway would like to address two additional elements in the interpretation of "public body" and the relevance of the International Law Commission's (ILC) Articles on *Responsibility of States for Internationally Wrongful Acts.*

4. First, we note that a question has been raised regarding the interpretation of the criteria laid down by the Appellate Body in *US – Anti-Dumping and Countervailing Duties.* In this case, the Appellate Body stated that a public body must be "an entity that possesses, exercises or is vested with governmental authority". In our view, the different ways in which an entity may come to have governmental authority are multiple. The criteria laid down by the Appellate Body; to possess, exercise or be vested with, do not necessarily represent a preemptive listing of the ways in which an entity may come to have governmental authority.

5. Indeed, in *US – Anti-Dumping and Countervailing Duties*, the Appellate Body itself underscored this, as it stated that:

> "There are many different ways in which government in the narrow sense could provide entities with authority. Accordingly, different types of evidence may be relevant to showing that such authority has been bestowed upon a particular entity."[1]

6. Here, the Appellate Body itself uses yet other words to describe the action of giving governmental authority to an entity; *inter alia* "provide … with" and "bestowed upon". This illustrates that the labeling is only a tool to help determine when an entity has governmental authority. This assessment requires a factual analysis of the functions the particular entity performs. Where the entity does not perform governmental functions, it is not a "public body".

7. Furthermore, concern has been expressed that the focus on the idea of entities being vested with governmental authority, may transpose the test for "entrustment or direction" onto the definition of "public body". In our view this would not be the case. Rather than moving this test into the public body definition, we see a distinction between the definition of a public body on the one hand and the action this body performs when it is entrusting or directing a private body on the other. This follows from the very wording of Article 1.1(a)(1)(iv) of the SCM Agreement. The reference to governmental authority being "vested" or in other ways given to an entity, should thus not be seen as interfering with the entity's subsequent entrustment or direction of a private body.

8. Finally, we would like to briefly address the reference to the ILC Articles on *Responsibility of States for Internationally Wrongful Acts.* In *US – Anti-Dumping and Countervailing Duties,* the Appellate Body found that Article 5 of the ILC Articles supported the analysis of "public body" in

[1] *US – Anti-Dumping and Countervailing Duties*, para. 318.

the SCM Agreement.[2] Norway shares this assessment, and we are of the view that this should also be taken into account when interpreting Article 1.1(a)(1) of the SCM Agreement.

9. Mr. Chairman, distinguished Members of the Panel, this concludes Norway's statement today.

Thank you for your attention.

[2] *US – Anti-Dumping and Countervailing Duties*, para. 311.

ANNEX E-8

THIRD PARTY ORAL STATEMENT OF THE KINGDOM OF SAUDI ARABIA AT THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. Thank you, Mr. Chairman. The Kingdom of Saudi Arabia would like to take this opportunity to affirm all of the positions set out in its Third Party submission. Today, Saudi Arabia will summarize its views on three of the systemic issues relating to the interpretation of the Agreement on Subsidies and Countervailing Measures.

II. A "PUBLIC BODY" MUST POSSESS, EXERCISE OR BE VESTED WITH GOVERNMENTAL AUTHORITY

2. The first issue concerns the Panel's "public body" determination. The Appellate Body in DS379 set out the authoritative standard that a Panel must use to determine whether an entity is a public body. The Appellate Body stated in that decision that the SCM Agreement requires a finding that a public body possesses, exercises or is vested with "governmental authority". The "governmental authority" standard derives from the text of the Agreement: a public body must have the power to entrust or direct a private body to act. Based on this structure and the defining elements of "government", the Appellate Body has ruled that a public body must possess the ability to compel, command, control or govern a private body. It follows, then, that government ownership or control of an entity is not sufficient to establish that the entity exercises governmental authority, and no other factor is dispositive.

3. As it is clear, exercising governmental authority is distinct from being controlled by the government. A government-controlled entity might be a public body, but only if it exercises governmental authority. If it does not, then the entity is properly understood to be a "private body", and any finding of financial contribution must be based on the entrustment or direction standard. To disregard this distinction would, as the Appellate Body stated, undermine "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".

4. The SCM Agreement imposes affirmative obligations on investigating authorities when determining whether an entity is a public body. The Agreement requires the authorities – in every case – to analyze thoroughly the legal status and actions of the entity in question, examine all evidence on the record without unduly emphasizing any one factor, and point to positive evidence *establishing* – not merely implying – that an entity possesses, exercises or is vested with governmental authority. An investigating authority would fail to meet its obligations if it were to find governmental authority based solely on evidence of government ownership or control.

5. In our view, no single fact can automatically fulfill the positive evidence standard that must support a finding of governmental authority. This is especially so with respect to government ownership or control, which relates only indirectly to the possession or exercise of governmental authority. Governmental authority and government ownership or control are two distinct concepts, and the latter is not a proxy for the former. Thus, a public body standard that systematically relies on evidence of government ownership or control would result in an impermissible interpretation of the SCM Agreement. The Kingdom respectfully requests that the Panel ensure that any evidentiary weight given by an investigating authority to government ownership or control does not undermine the governmental authority standard established by the Appellate Body.

III. DOMESTIC PRICE BENCHMARKS MAY NOT BE REJECTED MERELY BECAUSE STATE-OWNED ENTERPRISES ARE A SIGNIFICANT DOMESTIC SUPPLIER

6. The second issue is benchmarks. The SCM Agreement prohibits an authority from rejecting private in-country price benchmarks to determine whether the government's provision of a good

confers a benefit merely because state-owned enterprises are a significant domestic supplier of that good. Three well-established legal principles require the Panel to come to this conclusion.

7. First, alternative benchmarks may be used only where it has been established that domestic prices of the good at issue are distorted. The Appellate Body has emphasized that the circumstances in which investigating authorities may consider a benchmark other than domestic private prices are "*very limited*" – to where there is evidence of "market distortion". Such distortion *might* exist where the government is a "predominant" supplier of the good at issue in the domestic market. However, the Appellate Body has confirmed that actual price distortion must be proven in every case.

8. Second, the government's predominant role as a supplier of that good in the home market is not a *per se* proxy for price distortion. Thus, an authority may not use evidence of government predominance to deem price distortion to exist.

9. Third, government predominance may not be found simply because state-owned industries sell the good and have a significant share of the home market. The SCM Agreement and related jurisprudence establish precise legal definitions for "government predominance". Most importantly, the same standard for defining "government" or "public body" under Article 1 of the SCM Agreement must apply when determining whether the "government" is the predominant supplier of a good. Any other approach would not only run afoul of the Agreement's text and clear statements by the Appellate Body, but also undermine the sole reason for permitting alternative benchmarks in the first place.

10. Moreover, the domestic sales of a "government" may serve as evidence of price distortion only where they are "predominant", which is properly defined as the ability of the government to exercise "influence on prices". Significant market share alone is insufficient to establish government predominance, much less price distortion.

11. In Saudi Arabia's view, these principles establish that an investigating authority may only reject private, in-country benchmarks due to "government predominance" where it has determined, first, that the government or a public body is the predominant supplier in the market and, second, that prices are actually distorted due to that predominance. Only then may the investigating authority resort to alternative benchmarks.

IV. REGIONAL SPECIFICITY UNDER ARTICLE 2.2 MUST BE SUBJECT TO A LIMITING PRINCIPLE

12. Finally, Saudi Arabia would like to address the regional specificity issue. Given the limited jurisprudence on Article 2.2 of the SCM Agreement, the Kingdom is of the view that it would be useful for the Panel to provide guidance on what may constitute a "designated geographical region" and thus regional specificity. In this regard precedent under the specificity provisions of Article 2.1 of the SCM Agreement provide a helpful analogy. These precedents support the conclusion that regional specificity must be subject to some "limiting principle", meaning a point at which a certain area to which a granting authority provides a subsidy is so large or widespread as to render the subsidy non-specific under Article 2.2.

13. Several WTO panels and the Appellate Body have acknowledged that the specificity requirement of Article 2 of the SCM Agreement is limited, and, as such, "the relevant question is not whether access to the subsidy is limited in any way at all, but rather where it is sufficiently limited for the purpose of Article 2". Although these cases addressed Article 2.1 of the SCM Agreement, basic logic would necessitate similar limits on Article 2.2. Without such a limiting principle, regional specificity determinations could apply to almost *any* subsidy that mentions a Member's geography, including those that are clearly "sufficiently broadly available throughout the economy as to be non-specific". This cannot be what was intended by the regional specificity requirement and could result in an overbroad interpretation of Article 2.2 of the SCM Agreement which is biased against exporting nations and discourages basic economic development and diversification initiatives.

14. The Kingdom is of the view, in line with relevant Article 2 jurisprudence, that regional specificity should be determined on a case-by-case basis, and that a geographically limited subsidy should nonetheless be found to be non-specific where it has been demonstrated, with positive

evidence, that the subsidy has been provided to a "sufficiently broad" geographic region. Because the precise point at which a subsidy becomes non-specific would "modulate according to the particular circumstances of a given case", any such standard should require an investigating authority to consider the unique geography, governmental structure and economy of the Member at issue.

V. CONCLUSION

15. Mr. Chairman, the Kingdom urges the Panel, when considering the systemic issues raised in this dispute, to preserve the SCM Agreement's carefully negotiated balance of interests between WTO Members. That "delicate balance" requires the consistent application of the multilateral disciplines of the SCM Agreement, which all WTO Members have accepted.

16. This concludes the Kingdom's statement. Thank you for your attention.

ANNEX E-9

THIRD PARTY ORAL STATEMENT OF TURKEY AT
THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Turkey, I thank you for giving us the opportunity to express our views in this dispute.

2. Our participation as a third party is based on our systemic interest in the correct interpretation of several provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), discussed in this case. The panel's findings in this dispute will have consequences for the future interpretation and application of the subsidy disciplines. Turkey will not address all of the issues upon which there is a disagreement between the parties to the dispute. Rather, Turkey would like to confine itself by presenting its view on the interpretation of *"public body"* in Article 1.1(a)(1), use of *"out-of-country benchmarks"* in Article 14 and *"standard for the initiation of countervailing duty investigations"* in Article 11 of the SCM Agreement.

II. DETERMINATION OF PUBLIC BODY

3. Considering the legal essence of the submissions of the Republic of China and the United States of America, the discussion concerning the context of the "public body" predominantly concentrates on the issue on how the link between the government and entity, alleged to be a public body, will be established. Thus, the focus is on the rules of "attribution".

4. In its third party submission in "*US-Anti-Dumping and Countervailing Duties (China)"* Turkey underscored government ownership as the most important decisive indicator showing control on the entity in question. Turkey would like to reiterate its position also in this legal dispute and express that an entity controlled by a government should constitute a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.

5. Turkey believes that the Panel in *"Korea-Measures Affecting Trade in Commercial Vessels (EC)"* provided a proper criterion for determination of "public body". In relevant part of its Report the Panel stated that,

> *"an entity will constitute a "public body" if it is controlled by the "government" (or other public bodies". If 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(1)(1) of the SCM Agreement*."[1]

6. In the light of the latest ruling of the Appellate Body in *US-Anti-Dumping and Countervailing Duties (China)*, Turkey highlights that factors other than "shareholder ownership" can be considered as useful indicators in the analysis. Such instruments, however, do not prejudice the significance of "government ownership" in the conclusion whether the entity in question is a public body.

7. In addition to this the Appellate Body's interpretation of the term "public body" in *US - Anti-Dumping and Countervailing Duties (China)* entails that each case must be looked at separately, giving careful consideration to all relevant characteristics, with particular attention to whether an entity exercises authority on behalf of a government.

8. In line with the legal interpretation of Article 1.1(a)(1) of the SCM Agreement under the rules of Article 31 of the Vienna Convention on the Law of Treaties, Turkey is of the view that the context of "government" is different from "public body". This distinction has been clearly identified in the wording of the Article 1.1 of the SCM Agreement. Accordingly, a benefit conferring financial contribution has to be channeled to the recipient either by *government or* by any *public body*.

[1] *Korea – Commercial Vessels*, Panel Report, Para. 7.50.

9. In light of these arguments it is clear that "public body" differs from "private body". While the analysis whether an entity is a public body depends primarily on the shareholder power of the government and secondarily, if needed, on other facts such as the percentage of government-appointed members in the board or whether the government induces the working plans of the entity, *"private body"* has different peculiarities. Depending on *argumentum e contrario* interpretation it would be right to express that *"private body"* is an entity that is neither a government organization nor a public body. Thus, it is not controlled by the government and is owned, organized and managed by private individuals or other companies. Such an interpretation finds support in the wording of Article 1.1(a)(1)(iv) of the SCM Agreement which stipulates that the link of "entrustment" or "direction" is imperative to conclude that a private body can be held liable under the SCM Agreement. As argued before, the link of "control" between the government and public body has different parameters in that respect.

III. USE OF OUT-OF-COUNTRY BENCHMARKS

10. In terms of legal discussion on the use of "*out-of-country benchmarks*" in subsidy calculations pursuant to Article 14 of the SCM Agreement, where the investigating authority establishes that prices are distorted because of the predominant role of the government (government might be a supplier of the investigated product, or the suppliers of the investigated product might be owned and controlled by the government) or interference of government-entities or public bodies to the domestic market price of the investigated product, the investigating authority has a discretion to disregard the domestic market prices. Turkey believes that, when the investigating authority comes to the conclusion that the price of the investigated product in the domestic market is distorted and unreliable, it can resort to out-of-country benchmarks in order to determine whether government has provided goods for less than adequate remuneration and make correct subsidy amount determination.

11. In line with the ruling of the Appellate Body in *US – Softwood Lumber IV*[2], the calculation of the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale.

12. Turkey expresses that the overwhelming role of the state in the domestic market is a strong proxy that domestic prices fail to reflect the levels that are normally observed in market conditions free from government intervention.

IV. INITIATION STANDARDS

13. As regard to the standards to be applied for the initiation of countervailing duty investigations Turkey considers that the context of the word "sufficient", as used in Article 11. 2 of the SCM Agreement, sets the legal margin of the initiation standards.

14. Article 11.2 sets out the evidentiary standards for the application to initiate a countervailing investigation and Article 11.3 obliges the investigating authority to review the sufficiency of the evidence as a condition to initiate an investigation.

15. Turkey underlines that the "*sufficiency*" of information used in the application is a case-based issue which must pass the minimum threshold identified in the second sentence of Article 11.2 of the SCM Agreement. In this respect, under no circumstances shall the information depend on simple assertions that are unsubstantiated by relevant evidence.

16. The last sentence of Article 11.2, on the other hand, introduces the concept of "*reasonable availability*" of the information. The reasonable availability of the information depends widely on, *inter alia*, general record keeping and publication requirements for a government, access information on company recording and publication requirements access information on laws and regulations. It should be also noted that notification requirements under Article 25 of the SCM Agreement is another important source of information about subsidy schemes of members. However, non-fulfilment of Article 25 notification requirement of certain members adversely affects rest of the membership to be informed about subsidy schemes of those members.

[2] *US – Softwood Lumber IV*, para. 102.

17. Thus, under the conditions changing case by case and country to country, it may not be reasonably possible to gather the information required in the following paragraphs of Article 11.2 then it will be embarked upon the investigating authority to decide whether the application meets requirements.

18. Considering the contextual interpretation of Article 11.2 of the SCM Agreement the investigating authority has the discretion to decide whether the application meets the minimum requirements of sufficiency and whether the absence of information is an outcome of reasonable unavailability of the said information. Turkey reiterates that this is a case and fact based determination.

19. Mr. Chairman, distinguished Members of the Panel, with these comments, Turkey expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its view on this relevant debate, regarding the interpretation of the SCM Agreement. We thank you for your kind attention and remain at your disposal for any question you may have.

ANNEX F

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX F-1

EXECUTIVE SUMMARY OF
THE SECOND WRITTEN SUBMISSION OF CHINA

I. Introduction

1. This submission presents China's rebuttal to the arguments advanced by the United States in its first written submission and at the first substantive meeting of the Panel, as well as China's comments on the United States' responses to the questions posed by the Panel following the first substantive meeting.

II. The United States Has Failed to Rebut China's Showing that the Preliminary Determinations in *Wind Towers* and *Steel Sinks* Are Within the Panel's Terms of Reference

2. The Appellate Body has said that as long as the complaining Member "does not expand the scope of the dispute" or change the "essence of the challenged measures", a panel's terms of reference can include measures that were not included in the consultations request. The inclusion of the preliminary determinations in *Wind Towers* and *Steel Sinks* in China's panel request neither "expands the scope of the dispute" nor "changes the essence of the challenged measures", because the initiations of these two countervailing duty investigations were identified in China's request for consultations and were subject to consultations between China and the United States. The initiation and preliminary determinations represent a "continuum of events" in the United States' investigation concerning the existence, degree, and effects of alleged subsidization on imports of *Wind Towers* and *Steel Sinks* from China. Therefore, there is a "sufficient degree of identity between the measures that were the subject of consultations and the specific measures identified in the request for establishment of the panel to warrant a conclusion that the challenged measures were subject to consultations as required by Article 4 of the DSU."

3. China's challenge of the preliminary determinations in *Wind Towers* and *Steel Sinks* represents nothing more than additional instances of the same claims that China has already raised in respect of other measures at issue in this dispute, and that were the subject of consultations. For these reasons, the United States has failed to demonstrate that China's challenges of the preliminary determinations in *Wind Towers* and *Steel Sinks* are not within the Panel's terms of reference.

III. China Has Established a *Prima Facie* Case with Respect to All of Its Claims

4. The Appellate Body observed in *US – Gambling* that "the evidence and arguments underlying a *prima facie* case ... must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision". The Appellate Body has applied this standard to evaluate the sufficiency of claims relating to trade remedy determinations. Accordingly, this is the standard against which the United States' assertions that China has failed to make out a *prima facie* case must be evaluated.

5. China has met each of the elements that the Appellate Body has deemed necessary to establish a *prima facie* case with respect to all of its claims. China has: (1) identified the challenged measure at issue and precisely those portions of the measure pertinent to the particular claim; (2) identified the relevant provisions of the SCM Agreement with which it alleges the particular aspects of each challenged measure are inconsistent, and presented China's understanding of the legal obligation each such provision imposes; and (3) explained the basis for its claim that the particular aspects of each of the challenged measures at issue are inconsistent with the relevant provisions of the SCM Agreement, properly interpreted.

6. Contrary to the United States' unfounded assertions, China is not "attempt[ing] to avoid a factual examination of its claims", nor does "it expect the Panel to do China's work for it". Rather, China has limited its factual presentation to the specific aspects of the USDOC determinations cited

in CHI-1 and CHI-2, and excerpted in CHI-121 – CHI-125, because these are the only facts that China needs to adduce to establish that the USDOC has applied an incorrect legal standard in each determination under challenge with respect to financial contribution, benefit, specificity, initiation, and the use of facts available.

7. The United States' repeated insinuation that the underlying "facts" of particular investigations are somehow relevant to China's claims presupposes that its interpretation of the relevant provision of the SCM Agreement is correct. But this begs the very interpretative questions that China's claims in this case raise. If the U.S. interpretations of the SCM Agreement are incorrect, as China alleges is the case with respect to each set of claims it presents, then the only "fact" that matters is that the USDOC applied those incorrect legal interpretations in the investigations at issue – a fact that China has amply demonstrated by reference to the USDOC's own determinations.

IV. The United States Has Failed to Rebut China's Showing that the USDOC's Public Body Determinations in the 14 Investigations Under Challenge Are Inconsistent with Article 1.1(a)(1) of the SCM Agreement

8. As China has demonstrated, the USDOC's public body determinations in the 14 investigations under challenge were, in each instance, expressly based upon the USDOC's view that any entity controlled by the Government of China is a public body, with majority government ownership in itself being sufficient to satisfy the USDOC's control-based test. This is evident on the face of the pages of the USDOC Issues and Decision Memoranda and preliminary determinations that China identified in CHI-1 and whose excerpts are collected in CHI-123. The control-based legal standard that the USDOC applied in the 14 investigations under challenge is the same legal standard that the Appellate Body addressed in the four investigations at issue in DS379, and found to be inconsistent with Article 1.1(a)(1).

9. The United States does not take issue with any of these propositions. It follows that the only question that the Panel needs to address in order to decide China's "as applied" public body claims is whether to apply the interpretation of the term "public body" that the Appellate Body established in DS379. If the Panel agrees with China that the Appellate Body's legal interpretation must be applied here, then all of the USDOC's public body findings referenced in CHI-1 and CHI-123 must be found inconsistent with Article 1.1(a)(1).

10. Here again, the United States does not disagree. Its only defence of the USDOC's public body determinations is its assertion that the control-based standard the USDOC applies is the "correct" standard, and that China "erroneously interprets the phrase 'public body' in Article 1.1(a)(1)" when it relies upon the interpretation established by the Appellate Body in DS379. The United States asks the Panel to disregard the Appellate Body's legal interpretation and instead embrace as the "proper" interpretation of the term "public body" the same USDOC control-based test that the Appellate Body expressly rejected. Because the United States categorically rejects the jurisprudence on the proper role of prior Appellate Body legal interpretations, it sees no reason to present "cogent reasons" in support of this extraordinary request, and therefore offers none.

11. Indeed, the United States' discussion of the Appellate Body's decision in *Canada – Dairy* in its first written submission and in response to Panel question 24 unwittingly demonstrates that the legal interpretations the Appellate Body adopted in DS379 were the only ones possible in light of well-established principles of treaty interpretation.

12. In its first written submission, the United States sought to find support for its position that the ordinary meaning of the term "public body" did not convey the meaning of "vested with or exercising governmental authority" by noting that "there were a number of other terms that were available to the drafters [of the SCM Agreement] had they wished to convey that meaning". These terms included "governmental body", "public agency", "governmental agency", and "governmental authority", all of which, in the United States' view, "would have, through their ordinary meaning, more clearly conveyed the sense of exercising governmental authority".

13. The problem for the United States is that one of the terms whose ordinary meaning it concedes would have "more clearly conveyed the sense of exercising governmental authority" in fact *was used* in Article 1.1(a)(1) of the SCM Agreement. The identical term for "public body" in

the Spanish text of Article 1.1 of the SCM Agreement – "organismo público" – is used in the plural form in the Spanish text of Article 9.1 of the Agreement on Agriculture to mean "agencies" of a "government".

14. To give effect to the integrated nature of the different agreements under the WTO Agreement, identical terms in the different agreements ordinarily must be given the same meaning. It follows that a treaty interpreter faced with the task of interpreting the term "organismo público" in Article 1.1(a)(1) of the SCM Agreement would naturally look to the meaning previously given to that identical term in *Canada – Dairy*. Indeed, to comply with the obligation to interpret Article 1.1 of the SCM Agreement "harmoniously" with Article 9.1 of the Agreement on Agriculture, as interpreted by the Appellate Body in *Canada – Dairy*, and in a way that "gives effect, simultaneously" to the terms in each provision in each authentic language, the English terms "public body" and "government agency" must be treated as functional equivalents, since that is how the Spanish texts of the SCM Agreement and Agreement on Agriculture treat the corresponding Spanish terms. In other words, a "public body" – like a "government agency", like an "organismo público" – must be "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.''

V. The United States Has Failed to Rebut China's Showing that the Policy Articulated by the USDOC in *Kitchen Shelving* Is "As Such" Inconsistent with Article 1.1(a)(1) of the SCM Agreement

15. China has demonstrated that the policy articulated by the USDOC in *Kitchen Shelving* establishes a rule or norm pursuant to which the USDOC conclusively determines that all entities controlled by the government are "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement, with majority government ownership presumptively establishing such control. By its express terms, the policy announced in *Kitchen Shelving* was *not* meant to apply only in the particular context of that investigation, but rather, was intended to have general and prospective application, a fact confirmed by its systematic application by the USDOC in all subsequent countervailing duty investigations. China also has demonstrated that the *Kitchen Shelving* policy leads the United States to act inconsistently with Article 1.1(a)(1) of the SCM Agreement, because it reflects the same control-based standard that the Appellate Body rejected in DS379.

16. The United States' argument that the *Kitchen Shelving* policy is not a "measure" subject to WTO dispute settlement is directly contradicted by established jurisprudence to the effect that any act or omission attributable to a WTO Member, including "practice", may be challenged before WTO panels. The United States argues that the *Kitchen Shelving* policy does not have "general and prospective application" because it merely describes the USDOC's "past practice" with respect to the "public body" analysis, but this argument is directly contradicted by the text of the measure itself. The express terms of *Kitchen Shelving* establish a rule or norm that is intended to apply to all subsequent countervailing duty investigations in which the question of whether state-owned enterprises are "public bodies" arises. The policy sets forth an irrebuttable presumption that a government's control over an entity makes it a "public body" in all cases.

17. The U.S. argument that the *Kitchen Shelving* policy does not "necessarily" result in a breach of Article 1.1(a)(1) of the SCM Agreement because the USDOC has the discretion to abandon this policy in the future is equally unpersuasive. As China noted in its oral statement, the Appellate Body's finding that non-mandatory measures may be challenged "as such" *per force* means that, on the merits, measures of this type may be found, and indeed have been found, to be "as such" inconsistent with the relevant provisions of the covered agreements. Even assuming that the mandatory/discretionary distinction were relevant to the Panel's assessment of China's "as such" claim on the merits, the relevant question is not whether the USDOC retains the theoretical discretion to abandon the *Kitchen Shelving* policy in the future. Rather, it is whether the *Kitchen Shelving* policy itself provides the USDOC with discretion to act consistently with Article 1.1(a)(1) of the SCM Agreement. It does not, because it results in the USDOC applying the same control-based standard that is insufficient, as a matter of law, to establish a "public body" within the meaning of Article 1.1(a)(1).

18. The *Kitchen Shelving* policy establishes an irrebuttable presumption that all government-controlled entities are "public bodies" under Article 1.1(a)(1). If the Panel were to follow the Appellate Body's interpretation of Article 1.1(a)(1) in DS379, it follows that the *Kitchen Shelving*

policy necessarily results in the United States acting inconsistently with Article 1.1(a)(1) of the SCM Agreement in each instance in which it is applied.

VI. The United States Has Failed to Rebut China's Showing that All of the USDOC's Adequate Remuneration Determinations in the Investigations Under Challenge Are Inconsistent with Articles 14(d) and 1.1(b) of the SCM Agreement Because They Were Predicated on Unlawful "Distortion" Findings

19. In each of the 14 input subsidy investigations under challenge, the USDOC's "distortion" finding was predicated on its conclusion that the "government" played a "predominant role" in the market because SOEs provide at least a "substantial portion" of the market for the input. The USDOC's "government predominance" findings were thus based exclusively, or primarily on treating SOEs as "government suppliers", solely on the grounds that SOEs are owned and/or controlled by the Government of China. These facts are evident on the face of the pages of the USDOC Issues and Decision Memoranda and preliminary determinations that China identified in CHI-1 and whose excerpts are collected in CHI-124.

20. China's claims under Articles 14(d) and 1.1(b) are premised on its view that the same legal standard for determining whether an entity is a "government" supplier for purposes of the financial contribution inquiry under Article 1.1(a)(1) must also apply when determining whether an entity is a "government" supplier for purposes of the distortion inquiry under Article 14(d). China has offered the Panel compelling reasons why this must be the case.

21. First, Article 1.1(a)(1) of the SCM Agreement sets forth a single definition of the term "government" that by its express terms applies throughout the SCM Agreement, including with respect to the interpretation and application of Article 14(d). Second, the *only* circumstance in which the Appellate Body has interpreted Article 14(d) as authorizing the rejection of private in-country prices is where "the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular". The Appellate Body identified the potential cause of "distortion" as the government's role in providing "the financial contribution". In this way, the Appellate Body affirmed that the same juxtaposition between governmental and private actors set forth in Article 1.1 applies in the distortion inquiry under Article 14(d) as well.

22. The United States asks the Panel to accept its position that "government ownership and control – in and of itself – is an appropriate test for determining whether SOE presence in a given market indicates government involvement in that market", on nothing more than its *opinion* that it would make sense to have such a rule. Putting aside that a Member's opinions should not guide the Panel's interpretative exercise, the United States' position makes no sense at all. To the contrary, it would produce the nonsensical result that in the same investigation, an entity properly found to be a "private body" under Article 1.1(a)(1) when providing goods nonetheless could be deemed a "government" supplier when engaged in the same conduct for purposes of the distortion analysis under Article 14(d).

23. China wishes to close this discussion with a brief rebuttal of the United States' assertion that "Commerce relies on other facts" beyond SOE presence in a market to support its distortion findings. This argument fails for three independent reasons. First, in the seven investigations where the USDOC cited "other facts" in support of its distortion findings, those facts did not provide an independent basis for the USDOC's findings. Second, the most common factor the USDOC cites in support of its findings of "government predominance" in a market is the "low level of imports" or "insignificant" share of imports as a share of domestic consumption. In the USDOC's view, imports are a proxy for private sales, which is correct as far as it goes. *By itself*, however, a low level of imports says nothing about the extent or nature of the government's role as a supplier in the market. Third, the only other factor the USDOC occasionally cites in support of its distortion findings is the existence of export restraints with respect to certain inputs. Here again, the existence of export restraints cannot, whether alone or in tandem with a "low levels of imports", support a finding that the government is a predominant supplier in the market.

24. It is undisputed that the USDOC's distortion findings served as the sole basis for its rejection of Chinese prices and resort to out-of-country prices as a benchmark in each of the 14 investigations under challenge. Because those distortion findings lack a proper legal basis, it

follows that all of the USDOC's benefit determinations in those cases must be found inconsistent with Articles 14(d) and 1.1(b) of the SCM Agreement.

VII. The United States Has Failed to Rebut China's Showing that the USDOC's Input Specificity Determinations Are Inconsistent with a Proper Interpretation and Application of Article 2.1(c) of the SCM Agreement

25. China has identified four specific respects in which the USDOC's findings of specificity in the determinations at issue were inconsistent with a proper interpretation and application of the first factor under Article 2.1(c). In particular, China has shown that the USDOC: (1) failed to identify the relevant "granting authority" (or "authorities") responsible for the provision of the alleged input subsidies; (2) failed to apply the first factor under Article 2.1(c) in light of a prior "appearance of non-specificity", as required by the first sentence of Article 2.1(c); (3) failed to identify and substantiate the relevant "subsidy programme" under the first factor; and (4) failed to take into account the two mandatory considerations set forth in the last sentence of Article 2.1(c).

26. To the extent that the United States has engaged with China's arguments at all, the United States has not genuinely disputed the fact that the USDOC failed to undertake the four elements of the specificity analysis that are the basis of China's claim under Article 2.1(c). Instead, the United States has advanced legal interpretations that are contrary to the interpretative principles of the Vienna Convention, contrary to the manner in which prior panels and the Appellate Body have interpreted and applied these provisions, and contrary to interpretations of the same provisions that the United States has advanced in other disputes.

27. The first sentence of Article 2.1(c) expressly conditions any evaluation of the "other factors" under Article 2.1(c) on a prior "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b). Question 43 from the Panel asked the United States to respond to China's description of the conditional nature of Article 2.1(c). The United States responded by trying to interpret the clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" as having no practical significance whatsoever. According to the United States, the purpose of this clause is merely to indicate that "a finding of non-specificity under (a) or (b) … does not *prevent* consideration of [the] additional factors" under Article 2.1(c).

28. This explanation makes no sense on its face, as the first sentence of Article 2.1(c) would not have "prevented" anything even in the absence of the "notwithstanding" clause. Moreover, this conclusion does not follow at all from the ordinary meaning of the term "notwithstanding" that the United States has provided. As the United States itself observed in *EC – Aircraft*, "[s]ubparagraph (c) of Article 2.1 presumes that a specificity analysis *already has occurred* under subparagraphs (a) and (b)." This conclusion follows directly from the ordinary meaning of the term "notwithstanding", as the U.S. definition plainly demonstrates.

29. The fact that Article 2.1(c) "applies only when there is an 'appearance' of non-specificity" is also supported by the context of Article 2.1 as a whole. The Appellate Body has observed that "a granting authority will normally administer subsidies pursuant to legislation". Thus, it makes sense that a panel or investigating authority would ordinarily begin its evaluation of specificity by examining the legislation (or other written instrument), if any, pursuant to which the granting authority conferred the subsidy at issue. However, Articles 2.1(a) and 2.1(b) are not limited to an evaluation of written instruments. Both subparagraphs also refer to the granting authority itself, i.e. to any "express acts" or "pronouncements" of the granting authority that may shed light on whether the granting authority has imposed a limitation of access to the subsidy. The Appellate Body has stressed that any assessment of specificity under Article 2.1 "should normally look at both" of these factors, i.e. the legislation pursuant to which the granting authority operates, as well as the acts or pronouncements of the granting authority itself.

30. In most cases, the application of subparagraphs (a) and (b) to the instruments and/or conduct of the granting authority will resolve the issue of specificity one way or the other. Article 2.1(c) is in the nature of an exception that panels and investigating authorities may take into account when the prior application of subparagraphs (a) and (b) has resulted in an "appearance of non-specificity". It is undisputed that the USDOC did not identify an "appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)".

31. Nor, as is evident from the United States' response to Panel question 34, did the USDOC identify a relevant "subsidy programme" in the 14 determinations at issue. The United States cannot point to a single passage in any of the USDOC's Issues and Decision Memoranda or preliminary determinations in which the USDOC substantiated the existence of an actual "subsidy programme" by reference to record evidence. In the absence of an identifiable "subsidy programme", the USDOC had no basis to determine whether the users of that programme constituted no more than "a limited number of certain enterprises". This should be the end of the line for the "subsidy programme" issue.

32. In relation to China's claim that the USDOC failed to identify the relevant "granting authority" (or "authorities") that were responsible for providing the alleged input subsidies, the United States asserts that there is no need to "conduct a separate analysis and [identify] the granting authority" for purposes of Article 2 "if the granting authority has already been identified through the analysis of the financial contribution at issue under Article 1.1." As China has explained, the U.S. response appears to treat each SOE provider of inputs as a distinct "public body" and therefore, under the U.S. rationale, a distinct "granting authority" for the purposes of the specificity analysis under Article 2. This is an *ex post* rationale that does not appear anywhere on the face of the USDOC's determinations. Furthermore, the proposition that each SOE is a "granting authority" appears to contradict the USDOC's position that SOEs are "public bodies" merely by virtue of being "controlled" by the government (a position which implies that some entity other than the SOE is the relevant "granting authority"), and it appears to contradict the USDOC's assertion that the alleged subsidies were provided pursuant to input-specific "subsidy programmes" (which implies a degree of coordination among SOEs that the USDOC has never been able to substantiate).

33. Finally, the last sentence of Article 2.1(c) states that, with respect to any application of that subparagraph, "account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation." Contrary to the U.S. assertion, an investigating authority's obligation to take these considerations into account is not dependent upon whether an interested party "raised the relevance of the two factors" or whether there were "facts before an investigating authority that would indicate [whether] either factor may be relevant". As China further explained in response to question 36, the failure of the USDOC to take these two factors into account is inextricably bound up with its failure to apply other aspects of Article 2.1. Once the investigating authority no longer feels constrained by the actual text and requirements of Article 2.1, the analytical framework that Article 2.1 imposes begins to fall apart.

VIII. The United States Has Failed to Rebut China's Showing that the USDOC's Regional Specificity Determinations in the Seven Investigations Under Challenge Are Inconsistent with Article 2.2 of the SCM Agreement

34. China has identified for the Panel and the United States the seven regional specificity determinations that it is challenging in this dispute by identifying the pages in the USDOC's Issues and Decision Memoranda and preliminary determinations where the USDOC provides its regional specificity analysis, and by providing relevant excerpts from those pages at the first substantive meeting of the parties. China has explained that the text of Article 2.2 of the SCM Agreement requires the investigating authority to identify "[a] subsidy which is *limited to* certain enterprises located within a designated geographical region within the jurisdiction of the granting authority". China has explained that the USDOC acted inconsistently with this provision in the seven determinations at issue by finding the provision of land use rights to be regionally specific without identifying the requisite limitation on access.

35. Given that the United States has failed to contest China's characterizations of the USDOC's findings or China's understanding of the requirements of Article 2.2, all that remains for the Panel to decide is whether it, like the panel in DS379, believes that a proper finding of regional specificity under Article 2.2 requires the investigating authority to identify a limitation on access to the financial contribution or the benefit. If the Panel agrees with China that such a limitation is required, then the USDOC's determinations in the seven determinations under challenge are inconsistent with Article 2.2 of the SCM Agreement.

IX. The United States Has Failed to Rebut China's Showing that the USDOC's Initiation Decisions Under Challenge Are Inconsistent with Article 11.3 Because They Were Based on the Application of Incorrect Legal Standards

36. In response to question 54 from the Panel, the United States definitively states that it does not agree with China's claim that when an investigating authority initiates a subsidy investigation on the basis of an incorrect legal standard, it necessarily acts inconsistently with Article 11.3 of the SCM Agreement. The United States argues that "China reads into Article 11.3 words that are not there – China reads into Article 11.3 a requirement that the investigating authorities, in conducting the review called for under Article 11.3, articulate and be bound by some 'legal standard'." China's argument does nothing of the sort. To the contrary, China's argument gives meaning and effect to all of the relevant provisions of Article 11, which together make clear that an investigating authority cannot possibly judge the sufficiency of the evidence within the meaning of Article 11.3 other than in relation to "some 'legal standard'".

37. The United States explained in its first written submission that the term "sufficient" is defined as "[a]dequate to satisfy an argument, situation, etc., satisfactory." As is evident from the U.S. definition, the term "sufficient" is a relative term. With respect to Article 11 of the SCM Agreement, whether evidence "is sufficient to justify the initiation of an investigation" under Article 11.3 only has meaning in relation to Article 11.2, which requires "sufficient evidence of the *existence* of a subsidy".

38. In considering what would constitute "sufficient evidence of the *existence* of a subsidy", the panel in *China – GOES* explained that "[a]lthough definitive proof of the existence and nature of a subsidy, injury and a causal link is not necessary for the purposes of Article 11.3, adequate evidence, tending to prove or indicating the existence of these elements, is required." This means that there must be "adequate evidence tending to prove or indicating the existence of" a financial contribution, of a benefit, and of specificity.

39. China cannot conceive of how an investigating authority would determine whether there is "adequate evidence tending to prove or indicating the existence of" a financial contribution, of a benefit, or of specificity without a precise understanding of what these subsidy elements require. Moreover, the United States has recognized as much. In its first written submission, the United States explained that *under the U.S. control-based legal standard* "Article 11 requires adequate evidence that tends to prove or indicating that the entity is controlled by the government", but that under *China's interpretation of the term "public body"*, Article 11 requires "adequate evidence tending to prove or indicating that an entity possesses, exercises, or is vested with governmental authority …". The United States understood, at least prior to its responses to Panel questions, that it is the legal standard that determines what would constitute "adequate evidence" under Article 11.

40. If the legal standard determines what would constitute "adequate" and "sufficient" evidence under Article 11 – and it does – it necessarily follows that when the investigating authority applies the *wrong* legal standard, the legitimacy of the investigating authority's conclusion that there was "adequate" and "sufficient" evidence to justify initiation is irreparably undermined.

X. The United States Has Failed to Rebut China's Showing that the USDOC's Initiation Decisions in *Magnesia Bricks* and *Seamless Pipe* Are Inconsistent with Article 11.3 Because They Were Predicated on the Incorrect Legal Standard that Export Restraints May Constitute a Financial Contribution Within the Meaning of Article 1.1(a)(1)(iv) of the SCM Agreement

41. In China's view, the facts are undisputed regarding the circumstances that led the UDSOC to initiate investigations in *Magnesia Bricks* and *Seamless Pipe* into the petitioners' allegations that certain export restraints constitute a countervailable subsidy.

42. First, the measures that the petitioners cited in support of their export restraint allegations in *Magnesia Bricks* and *Seamless Pipes* fall squarely within the broad definition of an "export restraint" set forth in *US – Export Restraints*. Second, the sole basis for petitioners' claims that the export restraints constituted a financial contribution was their assertion that through the imposition of the export restraints, China was entrusting or directing domestic suppliers of the inputs (magnesia and coke) to provide such inputs to domestic consumers. Third, the USDOC's

justification for initiating investigations with respect to export restraints can be found in the initiation checklists for the *Magnesia Bricks* and *Seamless Pipe* investigations. Finally, in each case, the USDOC initiated the investigations based on its legal interpretation that export restraints may constitute a financial contribution in the form of government-entrusted or -directed provision of goods.

43. The only potential source of disagreement between the parties is reflected in the United States' response to Panel question 71, where the United States said that "the applications in *Seamless Pipe* and *Magnesia Bricks* contained contextual evidence relating to the particular export restraints at issue over and above the existence of the export restraints themselves". The United States did not bother telling the Panel what this purported "contextual evidence" was, or where it might be found in the record. More importantly, the United States was careful *not* to assert that the petitions in the two cases cited "*measures*" other than the export restraints themselves as being relevant to their financial contribution allegations – the subject of China's assertion in paragraph 84 of its oral statement. Nor did the United States assert that the USDOC actually took any other "*measures*" or even some unidentified "contextual" evidence into account when deciding to initiate the investigations in each case. The United States did not make these assertions presumably because it knows that the petitions and the USDOC initiation checklists would establish that they are untrue.

44. If, consistent with the reasoning of the panel report in *US – Export Restraints*, the Panel agrees with China that the export restraints alleged in *Magnesia Bricks* and *Seamless Pipes* cannot, as a matter of law, constitute a financial contribution within the meaning of Article 1.1(a)(1)(iv), then in China's view it necessarily follows that the USDOC's initiations were inconsistent with Article 11.3 for all of the reasons set forth in Section 0 above.

XI. The United States Has Failed to Rebut China's Showing that the USDOC's "Adverse Facts Available" Determinations Under Challenge Are Inconsistent with Article 12.7 of the SCM Agreement Because They Were Not Based on "Facts" That Were "Available"

45. China and the United States agree that any determination under Article 12.7 of the SCM Agreement must be based on "facts" that are "available" on the record of the investigation, but disagree as to how an investigating authority must comply with this requirement. Based on its response to Panel question 78, the United States apparently considers that a "facts available" determination is consistent with Article 12.7 so long as the investigating authority once referred to a fact that might conceivably have provided support for the investigating authority's *later* determination to resort to "facts available". The United States believes this to be true even though the investigating authority's stated rationale for using "facts available" nowhere refers to this fact, or indeed to any facts at all. Moreover, by accusing China of "fail[ing] to demonstrate that any of the 48 challenged determinations are *not* supported by the record evidence in each investigation", the United States appears to take the position that it is somehow *China's* obligation to search for "facts" that the USDOC *might* have relied upon to support its "facts available" determination, had it bothered to do so, and to rule out the possibility that any such undisclosed "facts" actually existed.

46. This attempt by the United States to evade the *prima facie* case that China has established is wholly unfounded. It was the USDOC's obligation as the investigating authority to provide a reasoned and adequate explanation of how the evidence on the record supported its application of "facts available" under Article 12.7. It is preposterous to suggest that it is now China's obligation, or the obligation of this Panel, to determine in hindsight if the USDOC might have been able to provide a reasoned and adequate explanation of how its determination was consistent with Article 12.7, if it had actually sought to do so.

47. The absurdity and impracticality of the position that the United States has taken is precisely why *investigating authorities* – not panels or complaining Members – are required to provide a "reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination". This reasoned and adequate explanation "should be discernible from the published determination itself". In the case of a determination based on "facts available" under Article 12.7 of the SCM Agreement, a "reasoned and adequate explanation" would require, at a minimum, some explanation of how the investigating authority's determination was based on "facts" that were

"available". This explanation would have to be apparent from the investigating authority's published determination – not from conjecture or *post hoc* rationalizations supplied by the responding Member.

48. The U.S. position – that any fact referred to anywhere on the record can later be invoked to support a "facts available" determination – plainly does not comport with these requirements. The mere existence of a particular fact on the record of an investigation does not constitute a "reasoned and adequate explanation" as to why the investigating authority considered this fact to be relevant to the gap that it needed to fill. It provides no indication whatsoever that the investigating authority engaged in "an evaluative, comparative assessment" of all the available evidence, "tak[ing] into account all the substantiated facts provided by an interested party", to conclude that this particular fact represented the "best information available". The Panel's assessment of China's claims must be based on the rationales set forth in the USDOC's published determinations, and those rationales are plainly inconsistent with Article 12.7.

ANNEX F-2

EXECUTIVE SUMMARY OF THE
SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. This dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements and requires an objective assessment of the specific facts in the dispute. Yet, in China's first written submission and its responses to questions from the Panel, China has cut corners in its legal analysis, failed to analyze the specific facts of each investigation, and failed to make a *prima facie* case with respect to most of its claims. The Panel should not accept China's invitations to take short cuts, and the Panel cannot make China's case for it. China's arguments simply do not provide a basis on which the Panel could sustain China's allegations that the United States has acted inconsistently with its WTO obligations.

II. TERMS OF REFERENCE

2. China argues that adding the preliminary determinations in *Wind Towers* and *Steel Sinks* together with new legal claims in its panel request does not "expand the scope of the dispute" because it made similar claims with respect to different investigations in its consultations request. However, China's arguments are not consistent with the plain language of Articles 4 and 6.2 of the DSU. To the contrary, the fact that China considers the initiation of an investigation to be subject to different obligations from preliminary determinations only highlights that they are distinct.

3. The fact that China brought claims against multiple measures does not relieve China of its obligations under Article 6.2 of the DSU to identify "the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Instead, the fact that China is challenging multiple measures only increases the need for clarity of its claims. China's arguments do not address the threshold fact that these preliminary determinations did not exist at the time China requested consultations, and so they could not have been the subject of consultations. Where the responding Member engages in consultations, the complaining Member may request the establishment of a panel on the disputed matter only "[i]f the consultations fail to settle the dispute." This request for panel establishment under Article 7.1 of the DSU, in turn, establishes the terms of reference for the panel proceeding. The process helps resolve disputes earlier in the context of consultations, and thereby potentially reduces the number of panel proceedings.

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

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

5. China does not discuss or cite to the facts of the investigations at all, much less demonstrate that those facts are all "similar." As a result, China has failed to demonstrate that Commerce "adopted an 'assembly line' approach," or any other approach, to its subsidy determinations. Further, China cannot avoid its burden to present a *prima facie* case for *each* of its numerous claims by simply asserting that "the central issues in this dispute are issues of legal interpretation" and that its claims concern the "applications of legal standards." It is impossible to know whether any particular "legal standard" (as proposed by China) was applied in a given determination and

whether a particular *application* of any such legal standard was inconsistent with the SCM Agreement, because China has not discussed the facts of the investigations.

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

6. The U.S. first written submission explains in detail the reasons why the Panel should conclude that the term "public body" in Article 1.1(a)(1) of the SCM Agreement means an entity controlled by the government such that the government can use that entity's resources as its own. Rather than seriously engage with the interpretation of "public body" proposed by the United States, China simply insists repeatedly that the interpretative question has been "definitive[ly]" settled as a result of the DSB adoption of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. China is incorrect.

7. The Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation of public international law. The DSU not only empowers the Panel to take on that task, it charges the Panel with that responsibility through DSU Articles 11 and 3.2. It does not limit the Panel to simply "apply[ing] the legal standard" adopted by the Appellate Body, as China urges. China's proposed analytical approach – a simple binary choice between two competing interpretations – is impermissible under the DSU. The DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." The Panel should address the arguments that the Parties have put before it here and should come to its own conclusions about the proper interpretation of the term "public body" using customary rules of interpretation, pursuant to the DSU.

8. The Panel should take into account all prior panel and Appellate Body reports that have addressed the meaning of the term "public body," and which are relevant to the Panel's own consideration of the proper interpretation of that term. The DSU, consistent with the practice of GATT and WTO panels and the Appellate Body, gives the Panel broad authority to draw upon the reasoning of prior dispute settlement reports, both adopted and unadopted, as the Panel works to resolve the legal questions that have been presented to it. The "hierarchical structure contemplated in the DSU" exists only in relation to a particular dispute. Outside the context of a dispute in which there has been an appeal, Appellate Body reports do not have an elevated status above adopted or even unadopted panel reports. The Appellate Body is not infallible, and its legal interpretations are not binding outside the context of a particular dispute. Accordingly, the Panel should take into account all panel and Appellate Body reports that discuss the same issue and that the Panel considers could assist the development of its own reasoning.

9. China draws the Panel's attention to the panel report in *Canada – Renewable Energy*. The United States agrees that the Panel should take that panel report into account, but we submit that the panel's application of the public body standard there is much closer to the U.S. proposed interpretation than it is to China's. That panel focused on the government's "meaningful control" and did not find that Hydro One "itself possess[ed] the authority to 'regulate, control, supervise or restrain' the conduct of others." We consider "meaningful control" to mean control over the entity such that the government can use the entity's resources as its own.

10. The Appellate Body applied the same public body standard in *US – Anti-Dumping and Countervailing Duties (China)* when it upheld Commerce's determinations that state-owned commercial banks (SOCBs) in China were public bodies. The Appellate Body repeatedly referred to the government's "meaningful control" over an entity. There was no evidence that the banks could or did regulate, control, supervise, or restrain the conduct of others. The implication is that the SOCBs would fail to meet the new test China has proposed in this dispute. China's approach is, in reality, a deviation from the standard articulated in *US – Anti-Dumping and Countervailing Duties (China)*, as applied by the Appellate Body.

11. Finally, we share Canada's concern about the potential for circumvention of the SCM Agreement if the term "public body" were interpreted too narrowly. China's proposed interpretation would permit a government to provide the same financial contribution with the same economic effects and escape the SCM Agreement definition of a "financial contribution" merely by changing the legal form of the grantor. This could have wide-ranging effects in the international

marketplace if Members began engaging in subsidizing activity that, under China's proposed interpretation, would technically be outside the scope of the SCM Agreement. Such an outcome would be a major step backwards from the subsidies disciplines that were a key accomplishment of the Uruguay Round, but would not result from a proper interpretation of the term "public body." We believe that our proposed interpretation of the term "public body" is consistent with and supports the object and purpose of the SCM Agreement, and it is the interpretation that results from the proper application of the customary rules of interpretation of public international law.

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

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

13. As demonstrated in the U.S. first written submission and U.S. responses to the Panel's questions, Commerce's discussion of the public body issue in the *Kitchen Shelving* final determination is not a "measure" that can be challenged "as such." In *Kitchen Shelving*, Commerce described its past determinations regarding the public body issue. As explained in the U.S. first written submission, the discussion in *Kitchen Shelving* does not bind Commerce to any particular analysis of whether an entity is a public body. At most, it explains Commerce's past actions. However, an explanation is not a "measure," and even a practice or policy is not necessarily a "measure."

14. China argues that "any act or omission attributable to a WTO Member" can be a measure. However, even with this problematic and broad definition of a measure, the explanation in *Kitchen Shelving* that China challenges is not an "act or omission." The explanation, on its own, does not do or accomplish anything. It has no "independent operational status such that it could independently give rise to a WTO violation." It is descriptive, rather than proscriptive.

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

VI. OUT-OF-COUNTRY BENCHMARKS

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

17. Where the government maintains a controlling ownership interest in SOEs, it, like any owner of a company, has the ability to influence that entity's prices. Therefore, to the extent SOEs, which have shared ownership by the Government of China, are producers in the relevant market in China, this presence is evidence of the government's ability to influence prices in that market. It is neither necessary nor logical as a policy matter or as a matter of interpretation of the SCM Agreement for the Panel to find that the only way for a government to exert market power or influence prices in a particular market is through entities engaging in governmental functions—i.e., the public body analysis from *US – Anti-Dumping and Countervailing Duties (China)*. And it would be inappropriate to limit the benefit analysis in this way. Where prior Appellate Body findings permit the use of out-of-country benchmarks because of the government's ability to affect prices,

and SOE presence in a market is evidence of a government's ability to affect prices in that market, Commerce's benefit analysis is consistent with prior Appellate Body findings.

18. China is also incorrect when it states that "USDOC's equation of SOEs with the government is explicitly or implicitly based on its belief that entities majority-owned and controlled by the government are '*public bodies*'." The government's ownership and control of SOEs is relevant for Commerce's assessment of government presence in a given input market. In turn, such SOE presence is an indicator of government presence in that market for purposes of evaluating the government's ability to influence prices in the relevant input market.

19. The *US – Anti-Dumping and Countervailing Duties (China)* report demonstrates that the Appellate Body did not perceive altering the public bodies standard in Article 1.1(a) of the SCM Agreement as an impediment to upholding Commerce's reliance on out-of-country benchmarks in the investigations challenged in *US – Anti-Dumping and Countervailing Duties (China)*.

20. While a public body analysis is relevant, it is not – as demonstrated by the findings in *US – Anti-Dumping and Countervailing Duties (China)* an "essential factual predicate" for the market distortion analysis under Article 14(d). The findings of *US – Anti-Dumping and Countervailing Duties (China)* show that the examination of public bodies and market distortion remain two distinct analyses such that even if the Panel were to find Commerce's public body determinations in this dispute to be WTO inconsistent, it still could find Commerce's benchmark determinations not to be WTO inconsistent. Whether or not China made the same argument before the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that it makes before this Panel, the Appellate Body was fully aware in *US – Anti-Dumping and Countervailing Duties (China)* that (1) Commerce applied an ownership or control standard in its analysis that certain SOEs constituted public bodies; and (2) Commerce had treated SOE presence in the market as indicative of government presence in the market.

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

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

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

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

24. China has not disputed the fact that the record of each investigation supported a finding that the number of users of each of the inputs in question was limited. Rather, China appears to argue that Commerce should have considered these subsidies in light of an overarching formally implemented subsidy program, even though it points to no facts or arguments on the record that would have supported the existence of such a program. Further, China has not provided support

for the argument that Commerce should have disregarded evidence relating to the existence of the subsidy programs it found to exist in each challenged investigation. Accordingly, China has failed to make a *prima facie* challenge to Commerce's specificity determinations.

25. In each specificity determination, Commerce properly determined, based on the records of the investigations, that only a limited number of enterprises used the input being provided for less than adequate remuneration, which was the subsidy program being evaluated under Article 2.1(c).

26. There is nothing in the ordinary meaning of the word "program" that requires that a program be written or "expressly pronounced" as China contends. China's position also does not comport with the context of the term in Article 2.1(c). In particular, Article 2.1(c) is concerned with whether a subsidy is *in fact* specific not whether it is "explicitly" specific, which is the subject of an Article 2.1(a) inquiry. A requirement that all subsidies be implemented through formal means would frustrate the operation of the SCM Agreement and enable Members to avoid its application by providing the subsidy to recipients without formal implementation.

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

28. China's characterizations of Commerce's determinations are divorced from the facts of the investigations. Commerce did not "merely assert" or "makeup" the existence of the "subsidy programs" for purposes of its Article 2.1(c) analysis. Far from being "made up," Commerce's determinations that a limited number of recipients used the subsidy programs at issue are grounded in the facts of each record. In each investigation, the subsidy programs were first identified in the applications, which contained evidence. Then, Commerce investigated the programs, by 1) asking questions relating to those programs of China and other interested parties; 2) identifying the specific programs in each preliminary determination; 3) providing parties the opportunity to comment on the preliminary determinations with respect to those programs; and 4) ultimately issuing a final determination on those programs. The *Aluminum Extrusions* example demonstrates that Commerce did not "merely assert" the existence of a subsidy program in each of the challenged investigations. Instead, Commerce investigated the alleged programs and reviewed the administrative record as a whole, determining in the final determination that a subsidy program was used by a limited number of certain enterprises, and was therefore *de facto* specific.

29. China's argument that Commerce was required to analyze subparagraphs (a) and (b) of Article 2.1 before turning to (c) is contradicted by the text and context of that provision in the SCM Agreement. Further, the Appellate Body's consideration of Article 2.1(c) confirms that there is no mandatory order of analysis. For these reasons, there is no merit to China's claim that the SCM Agreement requires investigating authorities to always conduct a *de jure* specificity analysis before conducting a *de facto* analysis, even where there is no basis for a *de jure* finding.

30. China's order of analysis argument rests primarily on the subordinate clause in the first sentence of Article 2.1(c). China's proposed interpretation, however, is not supported by the ordinary meaning of the text, nor the structure of the sentence. The purpose of the "notwithstanding" clause is to convey that a finding of non-specificity under (a) or (b) does not *prevent* further consideration of a subsidy from under (c), not that such a finding is a mandatory. Further, China's interpretation is in conflict with the context of subparagraph (c) provided by the chapeau of Article 2.1. The Appellate Body has repeatedly discussed the structure of Article 2.1 and concluded that Article 2.1 does not mandate that investigating authorities address each subparagraph of Article 2.1. The Appellate Body's statements regarding the "concurrent application" of the "principles" of Article 2.1 correctly anticipate that on a case-by-case basis, an investigating authority must consider the facts on the record and determine if those facts warrant a *de jure* analysis pursuant to Article 2.1(a), or if, as was the case in the challenged investigations, it is appropriate to proceed directly to a *de facto* specificity analysis under Article 2.1(c).

31. In addition, contrary to China's novel interpretation of Article 2.1, Commerce was not required to identify a "granting authority" as part of its specificity analysis. China's assertion, in its

responses to questions from the Panel, that it is "impossible" to conduct an analysis of specificity under Article 2.1 and that identification of a granting authority is "require[d]" directly contradicts the numerous specificity analyses undertaken by the panels and Appellate Body in *US – Large Civil Aircraft (2nd complaint)*, *EC and certain member States – Large Civil Aircraft*, and *US – Anti-Dumping and Countervailing Duties (China)*, none of which involved the identification of a "granting authority." China's interpretation is far removed from the text of Article 2.1, as well as the context provided by the rest of the SCM Agreement.

32. The focus of a *de facto* analysis under the first factor of Article 2.1(c) is on the universe of *users* of the subsidy, not on the "granting authority" – and the relevant jurisdiction of the granting authority for purposes of the specificity analysis is the jurisdiction where those users are located. For each specificity determination at issue, Commerce determined that the input was provided for less than adequate remuneration to a limited number of users *within China*. China's arguments seem designed to preclude investigating authorities from examining subsidies of the type maintained by China, despite the fact that such subsidies are specifically covered by the SCM Agreement. For these reasons, this Panel should reject China's argument.

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

34. The language in the last sentence of the principles set out in Article 2.1(c) requires only that an investigating authority "take into account" the two factors. "Account shall be taken" does not mean that an investigating authority must explicitly analyze the two factors in each and every investigation. With respect to the determinations at issue, Commerce had no reason to believe that the two factors would be relevant, and China has not pointed to any reason either before Commerce during the investigations or before this Panel in this dispute. China is incorrect to argue that Article 2 of the SCM Agreement required Commerce in the challenged investigations to analyze economic diversity or the length a time a subsidy program has been in operation.

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

35. At this late stage in the dispute, China has only just clarified that its Article 2.2 claim is limited solely to the seven specific regional specificity determinations in CHI-121. However, China still fails to make a *prima facie* case with respect to any of the alleged breaches. China continues to rely on the legal reasoning and factual findings in *US – Anti-Dumping and Countervailing Duties (China)* even though that panel's conclusion was made on an "as applied" basis and was "driven by the specific facts that were on the record of that investigation." China must demonstrate, on an as applied basis, that each challenged determinations was inconsistent with WTO obligations.

36. China's blanket assertion that the provision of land-use rights within an industrial park or economic development zone is "immaterial" to a determination that the provision of land use rights is regionally specific is in error. Such a finding is material to the analysis of whether the land at issue constitutes a "geographical region," and the weight of such a finding depends on the case-specific facts that are available on the record. China's assertions in its response to questions from the Panel regarding Commerce's regional specificity finding in *Coated Paper* (referred to by China as *Print Graphics*) have no merit. Commerce's analysis in *Coated Paper* differed from that applied in *Laminated Woven Sacks*, as well as the other determinations at issue in this investigation. In *Coated Paper*, due to noncooperation by responding parties, Commerce had insufficient facts regarding the provision of land use rights to conduct such an analysis. China's contention that the use of facts available in *Coated Paper* is inconsistent with Article 12.7 is also in error.

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

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

38. China's arguments with respect to these initiation claims must fail for several reasons. First, China does not dispute that certain of the applications contain substantial evidence relating to the use of the inputs provided for less than adequate remuneration. The relevant question under the first factor of Article 2.1(c) is whether there are a limited number of *users* of the subsidy program, and so the question of which enterprises "use" the input is relevant to the inquiry. An examination of the provision of a good by the government will necessarily involve the question of whether only a limited number of enterprises are capable of using the good. Second, China argues that an application must identify, and contain evidence of a "facially non-specific subsidy program," the "granting authority" and the two factors set out in the last sentence of Article 2.1(c). Not only is China incorrect in asserting these elements are required for an Article 2.1(c) finding, but also there is no basis to conclude that these elements would be necessary to meet the Article 11 standard.

39. Finally, China cites no evidence supporting the general assertion that none of Commerce's final determinations cited in applications were properly determined (including those outside the scope of this dispute), nor does it place the cited final determinations on the record, or discuss why applications citing to those determinations fail to meet the Article 11 standard.

40. As for the "Public Bodies" claims, there was sufficient evidence, within the meaning of Article 11.3 of the SCM Agreement, to initiate investigations into whether "public bodies" provided goods for less than adequate remuneration. Article 11 does not require that applicants allege, or that investigating authorities recite, a particular legal standard prior to initiation. There is a distinction between a finding that an entity is a public body for purposes of a preliminary or final determination, and a finding that there is sufficient evidence within the meaning of Article 11 of the SCM Agreement to support initiation of an investigation into whether entities are public bodies.

41. Indeed, the SCM Agreement indicates that interested parties present "arguments" to the investigating authority (Article 12.2) and that the authority's determinations shall set out "findings and conclusions reached on all issues of fact and law considered material by the investigating authority" (Article 22.3). Those issues of law may involve the legal standards to be applied, and arguments related to those issues may be considered during the investigation itself.

42. China's argument is particularly misplaced, given that evidence of government ownership or control is relevant to a public body analysis, even under the legal standard it advances. That is, evidence of government ownership or control can tend to prove or indicate that an entity is a public body under (1) a standard that an entity is a public body if it is simply controlled by the government, (2) a standard that an entity is a public body if it is controlled by the government such that the government can use the entity's resources as its own, or (3) a standard that an entity is a public body if it possesses, exercises, or is vested with governmental authority.

43. Further, contrary to China's argument, the United States is not advancing an *ex post* rationalization to support Commerce's initiations. In the Appellate Body's view, a Member is "precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority's determination." The rule does not make sense in the context of an initiation, considering that Article 22.2 of the SCM Agreement (in contrast to Article 22.3 for determinations) does not require any public explanation of reasons which have led to the initiation of the investigation.

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

44. China argues "an export restraint cannot, as a matter of law, constitute government entrusted or directed provision of goods." China does not argue, in the alternative, that the evidence in the applications was insufficient for initiation purposes should the Panel find that an export restraint scheme could constitute a financial contribution determination in some situations.

45. At the same time China, in its responses to the Panel's questions, criticizes the factual basis for the initiation of the investigations at issue with regard to export restraints. China has no legitimate basis for this criticism, and has ignored important and relevant evidence on the record in the investigations, as the applications for *Seamless Pipe* and *Magnesia Carbon Bricks* contained sufficient evidence of the existence of the export restraint schemes themselves, and sufficient

evidence that through these policies the government was entrusting or directing private entities to provide the covered goods to downstream producers in China.

46. Article 1.1(a)(1)(i)-(iv) of the SCM Agreement describes various forms of government conduct that may be considered a financial contribution. The list is not exhaustive; instead it includes "general terms with illustrative examples that provide an indication of the common features that characterize the conduct referred to more generally." Rather than preventing any particular *action* from possibly being a financial contribution, an investigating authority must seek to determine whether such government *behavior* is a financial contribution under Article 1.1(a)(1)(i)-(iv). Particularly with respect to entrustment or direction under (iv), this analysis will necessarily "hinge on the particular facts of the case." Certainly, there is no basis in the text of the SCM Agreement for declaring all measures defined loosely as export restraints to be exempt from coverage under the SCM Agreement.

47. Even the report in *US – Export Restraints*, upon which China so heavily relies, recognized that "an export restraint could result in a private body or bodies 'provid[ing] goods'." It follows that when it is alleged that a government is providing a financial contribution through a private body, an authority may investigate whether a "private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii)." In this instance, that type of function is the provision of goods. It is up to the investigating authority to "identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the SCM Agreement." Commerce's investigation into China's export restraint schemes was consistent with these principles.

48. The *US – Export Restraints* panel recognized that it was possible for a private entity to provide a good as a result of an export restraint scheme, this Panel's analysis of the relevance of the *US – Export Restraints* panel findings to this dispute should focus, in part, on the *US – Export Restraints* panel's interpretation of entrustment or direction. In this regard, the United States agrees with China that the Appellate Body has found the *US – Export Restraints* panel's interpretation of entrustment or direction is too narrow. And it is that very interpretation of entrustment or direction that led the panel to conclude that "an export restraint in the sense that the term is used in this dispute cannot satisfy the 'entrusts or directs' standard of subparagraph (iv)." This Panel's analysis should also consider and decide whether there are differences between the evidence in *US – Export Restraints* and this dispute such that the findings of the *US – Export Restraints* are not persuasive for purposes of this dispute. The United States considers that the *US – Export Restraints* findings are not persuasive for purposes of this dispute in light of the difference between the evidence and legal posture presented to this Panel and the hypotheticals before the panel in *US – Export Restraints*.

49. It is quite possible that if the *US – Export Restraints* panel had the Appellate Body's broader interpretation in mind, the panel would have concluded that the hypothetical it was examining could satisfy the entrusts or directs standard. In any event, given that the findings in *US – Export Restraints* were based on an overly narrow interpretation of entrustment or direction, the findings of the panel are not persuasive for purposes of determining whether the export restraints in this dispute satisfy the entrustment or direction standard in Article 1.1(a)(1)(iv). Instead, the Panel should base its analysis on the broader interpretation of entrustment or direction recognized by the Appellate Body.

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

50. China's only facts available argument – that Commerce's facts available determinations were allegedly not based on facts – necessarily involves an analysis of the facts and circumstances of each determination. The only way for China to establish a *prima facie* case would be to demonstrate that Commerce acted inconsistently with the SCM Agreement in each of the 48 separate uses of facts available it has challenged. China has failed to do so, and so has failed to meet its burden. China bases its 48 facts available claims on sweeping and inaccurate generalizations. Exhibit, CHI-125, fails to advance China's arguments. The exhibit consists of excerpted text, taken out of context, and does not explain how or why China views the excerpts of text as support for the proposition that Commerce did not base its determinations on available facts on the record in the investigations.

51. Due to the lack of cooperation by responding parties, there was often very little factual information on the record, other than that in the application, for Commerce to make a determination. Commerce used this limited factual basis to, consistent with Article 12.7, make inferences to reach its determination. Because necessary information was unavailable, an "inference" was needed to connect the fact relied upon to the conclusion in the determination. China agrees that "the use of 'facts available' by an investigating authority could be 'adverse' to the interests of the non-cooperating party." In light of China's (or another interested party's) non-cooperation, Commerce looked to what information was available on the record to make its determination. China tries to refocus the issue now by alleging that Commerce failed to provide a "reasoned and adequate explanation" of its facts available determinations. However, whether Commerce has provided sufficient reasons is a question under Article 22 of the SCM Agreement, not Article 12.7.

XII. CONCLUSION

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

ANNEX G

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING

ANNEX G-1

EXECUTIVE SUMMARY OF THE OPENING STATEMENT
OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

Mr. Chairperson, members of the Panel:

1. China has cut corners in its legal analysis, failed to analyze the specific facts of each investigation, and failed to make a *prima facie* case with respect to its almost 100 individual claims. The Panel should not accept China's invitation to take short cuts and the Panel cannot make China's case for it. China has also failed to provide a proper interpretive analysis of the relevant provisions of the SCM Agreement. China departs from the accepted rules of treaty interpretation, and in its effort to find any support for its views, attempts to rely on the facts at issue in prior disputes and answers advanced by the United States with respect to other issues in other disputes. China invents obligations found nowhere in the text of the covered agreement with the aim of protecting its subsidies from any analysis under the SCM Agreement, as well as to prevent application of any resulting remedies. China's arguments simply do not provide a basis on which the Panel could sustain China's allegations that the United States has acted inconsistently with its WTO obligations.

I. THE TERM "PUBLIC BODY" SHOULD BE UNDERSTOOD TO MEAN AN ENTITY CONTROLLED BY THE GOVERNMENT SUCH THAT THE GOVERNMENT CAN USE THE ENTITY'S RESOURCES AS ITS OWN

2. In its second written submission, China asserts that "the only question that the Panel needs to address in order to decide China's 'as applied' public body claims is whether to apply the interpretation of the term 'public body' that the Appellate Body established" in *US – Anti-Dumping and Countervailing Duties (China)* ("DS379"). China offers the Panel a false choice and an analytical approach that simply has no basis in the DSU or in the customary rules of interpretation of public international law. China would reduce the role of the Panel to a mere rubber stamp.

3. We disagree with that approach and believe that the role of the Panel under the DSU is much more important. As we have explained, consistent with Articles 11 and 3.2 of the DSU, the Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation, because the DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". The Panel should address the arguments that the parties have put before it here, taking into account all relevant panel and Appellate Body reports that have addressed the meaning of the term "public body," and should come to its own conclusions about the proper interpretation of that term.

4. China argues that the United States has not provided the Panel any "cogent reasons ... for departing from the Appellate Body's interpretation of the term 'public body' in DS379". Again, this is a false choice. The Panel is not limited to choosing between applying and not applying the Appellate Body's interpretation. The Panel has the option – indeed, under the DSU, it has the obligation – to make and apply its own interpretation. Aside from the text of the DSU, one "cogent reason" for doing so is that the Appellate Body's interpretation of the term "public body" is incorrect. Another reason is the significant disagreement between the parties as to how exactly the Appellate Body applied that interpretation in DS379. China proposes an interpretation that would be inconsistent with the Appellate Body's application of its interpretation in that dispute when it reviewed Commerce's "public body" determinations with respect to state-owned commercial banks in China. The United States suggests a correct interpretation of the term "public body," and one that would not be inconsistent with the Appellate Body's findings in DS379.

5. In our view, a proper application of the customary rules of interpretation leads to the conclusion that there will be sufficient links to establish that an entity is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement when a government controls the entity such that it can use the entity's resources as its own.

6. China raises one additional – though hardly new – argument in its second written submission. China argues that the Appellate Body's interpretation of the term "governments or their agencies" in Article 9.1 of the Agreement on Agriculture should govern the Panel's interpretation of the term "a government or any public body within the territory of a Member" in Article 1.1(a)(1) of the SCM Agreement because the same term, "organismo público," is used in the Spanish versions of Article 9.1 of the Agreement on Agriculture, Article 1.1(a)(1) of the SCM Agreement, and the Appellate Body report in *Canada – Dairy*. China urges that the term "organismo público" must be interpreted "harmoniously", which is to say that the Panel must apply the interpretation adopted by the Appellate Body in *Canada – Dairy*.

7. This is not a new argument. China raised it before both the panel and the Appellate Body in DS379. However, neither the Panel nor the Appellate Body relied on Article 9.1 of the Agreement on Agriculture as context for the interpretation of Article 1.1(a)(1) of the SCM Agreement. While China insisted there, as it does here, that the covered agreements must be interpreted "harmoniously," the Appellate Body explained that "specific terms may not have identical meanings in every covered agreement". That is the correct result here.

8. The terms of Article 9.1 of the Agreement on Agriculture, in any language, are different from the terms of Article 1.1(a)(1) of the SCM Agreement. Furthermore, in *Canada – Dairy*, the Appellate Body was interpreting the specific term "their agencies" or "leurs organismes" or "organismos públicos" in the context of Article 9.1 and in light of the object and purpose of the Agreement on Agriculture. There is no reason that the Appellate Body's interpretation in *Canada – Dairy* should dictate the outcome of the interpretation of a different phrase, situated in a different context, in a different Agreement that has its own object and purpose.

9. While the United States agrees that the *ordinary meaning* of the term "government" is the same when it is used in Article 9.1 of the Agreement on Agriculture and Article 1.1(a)(1) of the SCM Agreement – indeed, we would agree that the *ordinary meanings* of the words "organismo" and "público" are the same – that does not answer the interpretative question. The terms must be interpreted in their context and in light of the object and purpose of the agreement in which they appear. China appears to confuse the *ordinary meaning* of a term with its *interpretation* according to the customary rules of interpretation. China also ignores the concern we raised later in our response to the same question from the Panel that the Appellate Body's interpretation of the term "government" in *Canada – Dairy* appears incomplete or too narrow, because the Appellate Body neglected numerous types of government functions beyond the regulation, control, supervision or restraint of individuals.

II. THE DISCUSSION IN KITCHEN SHELVING IS NOT A MEASURE AND CHINA'S "AS SUCH" CHALLENGE FAILS

10. China's efforts to cast the descriptive sections of the Kitchen Shelving final determination as a measure that breaches WTO obligations "as such" have fallen short of the requirements in the DSU and findings articulated in past WTO reports. China argues that a measure, minimally, may be an "act or omission" and that various types of government action can be considered a measure. However, China conveniently ignores that these types of action still must have "independent operational status in the sense of doing something or requiring some particular action". The Kitchen Shelving discussion does not do something or require some particular action. Instead, it is an explanation of Commerce's historic approach and current actions.

11. China has not connected the explanatory language in the Kitchen Shelving memorandum with any action by the United States. Instead, it has found a general description of Commerce's consideration of an issue or policy, and then found other citations to that description that are similar – but not the causation between the Kitchen Shelving memorandum and any other action by the United States that would indicate that it is an "act" or "doing something". Therefore, China has failed to show that the discussion is, in fact, a measure, in the sense of a legally relevant act or omission by a Member.

12. Even more starkly, China's efforts to turn the language of the discussion into a rule of general and prospective application to support its "as such" challenge fail upon a cursory examination of the text of the document. China claims that the Kitchen Shelving memorandum creates an "irrebuttable presumption" that "all government-controlled entities are public bodies". This characterization flatly ignores the context and the plain language of the document. Whether

or not "all" government-controlled entities are public bodies under the SCM Agreement simply is outside the purview of the brief explanation. Commerce made no such statement in Kitchen Shelving.

13. The Kitchen Shelving discussion is simply Commerce's explanation of how it approached a public body analysis in response to interested party arguments during the Kitchen Shelving investigation. In other words, it is Commerce's satisfaction of its obligation under Article 22.5 of the SCM Agreement. The fact that Commerce may have repeated the approach in Kitchen Shelving in subsequent determinations does not transform the approach into a measure. As the panel stated in *US – Steel Plate*, "[t]hat 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".

14. As the United States has noted previously, in fact, in the Kitchen Shelving discussion Commerce stated that it would examine evidence and arguments that "majority ownership does not result in control of the firm" and would consider "all relevant information". Thus, even aside from the fact that the discussion is not a measure (an act or omission with independent operational status), the discussion does not require Commerce to do anything or not to consider any necessary information. The discussion does not therefore necessarily result in any outcome on the issue of "public body", and for that reason cannot breach any WTO obligation "as such".

III. THE PRELIMINARY DETERMINATIONS IN WIND TOWERS AND STEEL SINKS ARE OUTSIDE THE PANEL'S TERMS OF REFERENCE

15. In its second written submission, China does nothing to further its argument that adding the preliminary determinations in *Wind Towers* and *Steel Sinks* together with new legal claims in its panel request does not "expand the scope of the dispute" because it made similar claims with respect to <u>different</u> investigations in its consultations request. China's arguments were and are not consistent with the plain language of Articles 4 and 6.2 of the DSU. To the contrary, China's responses only highlight the fact that the legal claims are not a natural evolution from the claims associated with the measures consulted upon – the initiation of the investigations – but are distinct, and it is only due to the fact that China challenged separate, different measures using the same claims that there is any alleged similarity in the scope of the dispute.

16. The fact that China brought claims against multiple measures does not relieve China of its obligations under Article 6.2 of the DSU to identify "the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in its panel request. Instead, the fact that China is challenging multiple measures only increases the need for clarity of its claims. China's arguments do not address the threshold fact that these preliminary determinations did not exist at the time China requested consultations, and so that they could not have been the subject of consultations. There are important reasons for why measures should be the subject of consultations. Where the responding Member engages in consultations, the complaining Member may request the establishment of a panel on the disputed matter only "[i]f the consultations fail to settle the dispute". This request for panel establishment, in turn, establishes the terms of reference under Article 7.1 of the DSU for the panel proceeding. The process helps resolve disputes earlier in the context of consultations, and thereby potentially reduces the number of panel proceedings.

17. In sum, China has failed to cure the initial procedural failings contained in the consultations and panel requests regarding these preliminary determinations.

IV. 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

18. China continues to argue that the same legal standard for determining whether an entity is a public body for purposes of the financial contribution analysis under Article 1.1(a)(1) must also apply when determining whether an entity is reflective of government involvement in a particular input market for purposes of the distortion analysis under Article 14(d). Further, China continues to argue that the interpretation of public body set out in the Appellate Body report in DS379 applies in both analyses.

19. The parties agree that, in order for China to succeed in its argument, the Panel must (1) adopt China's interpretation of public body, and (2) find that it necessarily extends to the benefit analysis. The United States has addressed the errors in China's approach to the first element in Section I of this statement. Here, we focus on the second element.

20. As the United States previously explained, China's argument conflates two separate analyses: a financial contribution analysis under Article 1.1(a)(1) on the one hand, and a benefit analysis under Article 14(d) on the other hand. China focuses on the use of the term "government" in Article 1.1(a)(1), but the use of this term in Article 14(d) expressly refers to the financial contribution analysis. Instead, the question before the Panel is whether it is inconsistent with Articles 14(d) and 1.1(b) of the SCM Agreement for Commerce to focus on the Government of China's ownership and control of producers in the relevant input market to examine whether inputs were provided for adequate remuneration.

21. China errs in arguing that the interpretation of "public body" under Article 1 necessarily applies to the analysis of benefit under Article 14(d). In fact, the Appellate Body's report in DS379 demonstrates that the Appellate Body did not make the extension for which China advocates. Instead, the Appellate Body report reflects that the examination of public bodies and market distortion are two distinct analyses. China's arguments are neither rooted in the Appellate Body's findings in that case, or the text of the SCM Agreement. So, to be clear, China is asking the Panel to make a new pronouncement on the use of out-of-country benchmarks.

22. It is important to recall the Appellate Body's finding in *US — Softwood Lumber IV* rejecting a challenge to the use out-of-country benchmarks under Article 14(d) of the SCM Agreement. In making this finding, the Appellate Body was focused on the ability of the government to influence prices in the marketplace, not any other function of governmental authority at issue in this dispute, such as the power to "regulate, control, supervise or restrain" the conduct of others. The Appellate Body's analysis in DS379 also did not focus on other governmental factors.

23. The United States has demonstrated that Commerce applied an appropriate test for examining market distortion in the benefit context. While China erroneously contends that the United States' position "makes no sense," the United States has demonstrated that when focusing on the adequacy of remuneration to determine the benefit conferred by the provision of a good, it is logical that Commerce would consider the ability of the government to influence prices for that good in the market through its ownership or control of other entities, among other ways.

24. A simple example illustrates why China's reasoning fails. Let us assume (1) that the "governmental authority test" articulated in DS379 for public bodies is controlling, and (2) that for a given product in a Member, five wholly government-owned entities produce input goods, one with a market share of two per cent, and the four others hold the remaining market share of 98%. Further, assume that Commerce determined that the entity with two per cent of the market was a public body under China's test, but the others, while wholly-government owned, did not meet the "governmental authority test". The potential for government to influence prices in this market is evident. However, under China's argument, under this scenario, in spite of the government's 100 per cent ownership or control of production in the relevant input market, it would not be possible for Commerce to use an out-of-country benchmark.

25. With respect to the China's argument that Commerce relied exclusively on SOE market share in each of the challenged investigations to determine distortion, we have demonstrated that this is not correct. Commerce used a variety of other factors to consider whether the relevant markets could be distorted.

V. COMMERCE'S SPECIFICITY DETERMINATIONS ARE CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

26. China's claims with respect to specificity are based on obligations that are nowhere to be found in the text of Article 2 of the SCM Agreement. China argues that Commerce must identify a "facially non-specific subsidy program", that Article 2.1 contains a mandatory "order of analysis", and that an investigating authority must explicitly identify a "granting authority", even though the text of the SCM Agreement contains no such requirements and prior panels and the Appellate Body have found no such obligations in their numerous considerations of Article 2.1.

27. China appears to advance an alternative argument in its second written submission – that Commerce failed to provide a "reasoned and adequate explanation" of its specificity analysis. To the extent that China is alleging that Commerce has insufficiently explained the basis for its specificity determinations, such a claim is dealt with under the procedural obligations under Article 22 which was not addressed in China's Panel Request, and is not before the Panel. However, Commerce's explanations of its specificity determinations were more than sufficient.

A. The First Sentence of Article 2.1(c) Does Not Prescribe an Order of Analysis

28. As the United States has previously explained, the clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" does not *require* a determination under subparagraphs (a) and (b) of non-specificity. Rather, it explains that such an appearance does not prevent the application of subparagraph (c), and a resulting finding of *de facto* specificity. China argues that this understanding of the clause renders it inutile. However, that is not the case. The clause serves to explain that a subsidy that appears to be non-specific as a result of an examination of relevant legislation may nevertheless be specific in application, and an investigating authority should examine the factors under Article 2.1(c) as appropriate, that is, where there are reasons to believe that the subsidy may in fact be specific. This is an important concept that would be lost if the clause were excluded. For that reason, the clause is utile – it does not need to impose a prerequisite to an Article 2.1(c) analysis in order to have meaning.

29. Despite China's repeated attempts to transform this explanatory clause into a mandatory precondition, it is clear from the French and Spanish texts that it is not. Although China is generally correct regarding the translation of the terms in the French and Spanish versions, it misconstrues their meaning. The use of "*aun cuando*", which may be translated to "even when" and "*nonobstant*", which may be translated to "notwithstanding", confirms that an appearance of non-specificity resulting from the application of subparagraphs (a) and (b) does not prevent the application of subparagraph (c).

30. These terms serve the same purpose as in the English. They clarify that Article 2.1(c) provides an alternative means of determining specificity *even when* there is an appearance of non-specificity. China's interpretation would require them to be exclusive – China would attribute the meaning of "only when" to "notwithstanding" or "even when". Further, the use of the word "any" to modify "appearance" supports the conclusion that an "appearance of non-specificity" is not a mandatory prerequisite, and may or may not be identified prior to undertaking an analysis under subparagraph (c). If an appearance of non-specificity were identified in each instance, the article "the" would be used instead.

31. As the United States has explained, multiple statements by the Appellate Body regarding the application of the principles laid out in Article 2.1 support a finding that there is no mandatory order of analysis to Article 2.1. In particular, the Appellate Body stated in paragraph 371 of *US – Anti-Dumping and Countervailing Duties (China)* 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". 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*". These statements show that these subparagraphs are not necessarily to be applied sequentially and to every specificity determination.

32. China mistakenly relies on a statement the Appellate Body makes in the same paragraph which merely illustrates the point that it is not necessary to analyze each subparagraph of Article 2.1 as part of a specificity analysis. China's argument cannot be reconciled with the Appellate Body's analysis that where the evidence unequivocally indicates specificity in fact, then there is no need to look at subparagraphs (a) and (b).

33. China argues that an Article 2.1(a) analysis can be undertaken even where there are no known written instruments regarding the administration of the subsidy, because Article 2.1(a) addresses "express acts" or "pronouncements" of the granting authority. However, it is not clear in what circumstances a granting authority would "explicitly limit[] access to a subsidy", through for

example, acts, without a written record of the limitation. Further, a pronouncement may only be examined by an investigating authority to the extent that there is some record of it. In any event, China has not alleged that any such unrecorded, explicit limitation existed in the investigations, or pointed to a source of such limitation Commerce should have analyzed. Where there is no evidence of an explicit limitation on access to a subsidy, there is no basis for analyzing the subsidy under subparagraphs (a) and (b). The implications of China's argument is that, if a Member is able to avoid "explicit" limitations on access to a subsidy, an investigating authority is unable to examine the specificity of the subsidy under either subparagraph (a) or (c).

34. Even if China were correct that an investigating authority must identify an "appearance of non-specificity" prior to undertaking an analysis under Article 2.1(c), Commerce would have satisfied that condition in the investigations at issue. In the 14 investigations, there was no legislation or any other source of an "explicit" limit to access to the subsidy. The Appellate Body has explained that an explicit limitation under Article 2.1(a) "is express, unambiguous, or clear from the content of the relevant instruments, and not merely 'implied' or 'suggested'." There were no known relevant instruments (such as legislation, regulations, guidance, etc.), or pronouncements that would provide such express or unambiguous limitations. For that reason, the evidence before DOC unequivocally indicated that the subsidies were not *de jure* specific under subparagraph (a), and any consideration under that subparagraph was unnecessary.

35. Accordingly, under the first sentence of Article 2.1(c), the lack of any legislation or other source of an explicit limitation on the subsidy amounts to an "appearance of non-specificity".

B. Commerce Identified the Relevant "Subsidy Program" in Each Investigation

36. With respect to Commerce's identification of the relevant "subsidy program" in the investigations at issue, the United States has explained in detail with respect to one example, the *Aluminum Extrusions* investigation, that Commerce clearly identified the subsidy program at issue in each case, a determination that was supported by facts on the record. China has not disputed the fact that, in each investigation, the applications contained information tending to show that a certain good was provided for less than adequate remuneration. On that basis, Commerce initiated the investigations and analyzed the programs at issue – the provision of each good for less than adequate remuneration in China. Not only were the programs at issue identified in the applications and questions to each interested party, but they were also identified in the preliminary and final determinations. As a result, China's assertion that Commerce did not identify the relevant subsidy programs is contradicted by the findings on each record.

C. Commerce Was Not Required to Identify the "Granting Authority" or Explicitly Analyze the Two Factors in the Last Sentence of Article 2.1(c)

37. With respect to China's arguments concerning the "granting authority," for the reasons stated in our prior submissions, Commerce was not required to identify a "granting authority". China's speculation as to what is and is not the "granting authority" reveals that this inquiry is tangential to the question that Article 2.1 is concerned with – whether the subsidy at issue is specific to certain enterprises. For the reasons the United States has explained, the identification of the granting authority is not required in a specificity analysis, and in the investigations at issue, the relevant jurisdiction was identified as all of China. As the relevant jurisdiction was not limited to some part of the Member, any *de facto* analysis would not be influenced by geographic limitations. Finally, for the reasons already explained by the United States, Commerce was not required to explicitly analyze the two factors in the last sentence of Article 2.1(c).

VI. THE "LEGAL STANDARD" EMPLOYED BY COMMERCE IS NOT DETERMINATIVE OF WHETHER INITIATION DECISIONS WITH RESPECT TO SPECIFICTY AND PUBLIC BODY WERE CONSISTENT WITH ARTICLE 11.3 OF THE SCM AGREEMENT

38. China has failed to demonstrate that Commerce's initiation decisions with respect to specificity and public body are inconsistent with Article 11.3 of the SCM Agreement. China attempts to recast the inquiry in Article 11 from the question of the sufficiency of evidence to a question of the "legal standard" employed. China's arguments have no basis in the text of Article 11.3 or the facts of the investigations at issue. A determination to initiate a countervailing duty investigation is fundamentally an evaluation of the sufficiency of the evidence in an application and supporting documents.

39. China argues that an investigating authority is required to judge the sufficiency of evidence in relation to a correct "legal standard", and that because Commerce employed an incorrect "legal standard", according to China, its initiation determinations are "necessarily" inconsistent with Article 11.3. The logic of China's argument is flawed for several reasons.

40. First, as a threshold matter, Commerce's ultimate determinations with respect to public body and specificity were consistent with Articles 1.1(a)(1) and 2, respectively, for the reasons the United States has explained extensively in its submissions. Second, China's use of the term "legal standard" is emblematic of its attempt to transform this dispute from one concerning a large number of "as applied" claims to one concerning a few "as such" claims. China has not demonstrated the existence of any "legal standards" applied across investigations. In any event, the question for the Panel remains whether the individual determinations made by Commerce were consistent with the relevant provisions of the SCM Agreement.

41. Third, even if the Panel were to conclude that Commerce's final determinations are inconsistent with the SCM Agreement, that conclusion would not be determinative of the initiation decisions, made at the very outset of the requested investigation. The relevant question at the initiation stage is not whether the information in each application fully satisfies the requirements in the relevant substantive provisions of the SCM Agreement, but rather whether it is "sufficient to justify the initiation of an investigation". By asserting that an investigating authority must apply a particular legal standard, China appears to seek to convert the initiation decision into another preliminary determination – in other words, to require a determination whether the petitioner has supplied sufficient evidence that, if unrebutted, would suffice to reach an affirmative determination in relation to the legal issue in question. But that is not the question to be answered. The investigating authority is seeking to ascertain if there is sufficient evidence of subsidization and injury to undertake the investigation. The evaluation of an alleged subsidy may evolve during an investigation and will depend upon the nature of the subsidy.

42. Fourth, the evidence in the applications was sufficient to justify initiation even if the Panel adopts the interpretations of Articles 1.1(a)1 and 2 by China.

43. With respect to public body regardless of the final standard of evidence necessary to prove that a certain entity is a public body, evidence of government ownership or control is relevant and sufficient evidence to initiate an investigation into whether an entity is a public body. This is true even under China's proposed interpretation of the term "public body" as an entity vested with or exercising governmental authority. Further, it is frequently the only evidence reasonably available to an applicant and an investigating authority. To require more evidence than is reasonably available would be contrary to the plain language of the text.

44. Further, with respect to public body, we note that China has not shown, or even attempted to show, that the evidence in the four cases challenged was insufficient to justify initiations of investigations into whether there were public bodies. We detailed at length in our first written submission the evidence that tended to prove, or indicated, either that (1) entities were controlled by the government such that the government could use their resources as its own; or (2) entities possessed, exercised or were vested with governmental authority. China's only argument is its untenable position that Commerce's initiations "necessarily" breached the SCM Agreement.

45. With respect to specificity, China argues that the applications failed to present evidence of any "subsidy programme, much less evidence of a facially non-specific subsidy programme that, in practice was used by a limited number of certain enterprises". However, the United States has explained, and China does not refute, that each application did contain evidence regarding a program – the provision of a certain input for less than adequate remuneration, and that only a limited number of certain enterprises used those inputs. That information is sufficient for purposes of initiation. Even if China were correct that a subsidy under the first factor of Article 2.1(c) must be administered pursuant to a "facially neutral subsidy program", it has not explained why such a program is necessary to meet the standard under Article 11.3, particularly where no written law or other instrument describing such a program is available to the applicants.

46. Finally, China's reliance on the panel's reasoning in *Argentina – Poultry Anti-Dumping Duties* is misplaced. In that dispute, Argentina's investigating authority based its initiation determination under Article 5.3 of the AD Agreement upon a weighted average export price that "was not based on the totality of appropriate export transactions" and "totally exclude[d]" certain export prices".

The panel determined that it was inappropriate for Argentina's investigating authority to disregard certain transactions when determining whether to initiate. Argentina was found to have unjustifiably *ignored* information on the record. That is not the case here; Commerce did not employ a methodology that disregarded relevant information. The information in the applications at issue was relevant to and indicated that the entities at issue were public bodies, and that the subsidies were specific.

VII. COMMERCE'S INITIATION OF INVESTIGATIONS OF CERTAIN EXPORT RESTRAINT POLICIES BY CHINA ARE NOT INCONSISTENT WITH THE SCM AGREEMENT

47. In its second written submission, China inaccurately frames the question before the Panel as whether an export restraint can constitute government entrusted or directed provision of goods. The real question before the Panel is whether it was permissible for Commerce to initiate investigations examining whether China's export restraint schemes constitute a countervailable subsidy under the SCM Agreement. China failed to provide any evidence or argumentation to prove that such an initiation was improper, but instead asks the Panel to rely wholly on the analysis in *US – Export Restraints* to conclude that any investigation under any circumstance would be impermissible. For the reasons the United States presented in its submissions and at the first panel meeting, China's argument must be rejected.

48. The United States has demonstrated that its initiations of investigations regarding China's export restraint schemes were supported by sufficient evidence of the existence of a subsidy. Also, the United States has shown that the structure and language of Article 1.1(a)(1)(i)-(iv), as supported by the more expansive view reports have taken with regards to the terms entrustment and direction since *US – Export Restraints*, demonstrates that it is permissible for an investigating authority to consider whether export restraints can constitute a countervailable subsidy. It is unnecessary to spend more of the Panel's time repeating our arguments, though we welcome further discussion during this meeting.

49. China presents the puzzling argument that "the United States did not bother telling the Panel what this purported 'contextual evidence' was, or where it might be found in the record". This is incorrect. The U.S. first written submission presented the evidence supporting the petitions in *Seamless Pipe* and *Magnesia Carbon Bricks*. The U.S. second written submission also lays out evidence that the applications in *Seamless Pipe* and *Magnesia Carbon Bricks* contained sufficient evidence to sustain an investigation into whether the Chinese government was entrusting or directing private entities to provide goods to downstream producers in China.

50. However, this argument was and remains irrelevant, since China does not argue in the alternative that, as an evidentiary matter, the evidence in the applications was insufficient for initiation purposes.

VIII. COMMERCE'S USES OF FACTS AVAILABLE ARE CONSISTENT WITH ARTICLE 12.7 OF THE SCM AGREEMENT

51. China's "facts available" claim is based on mischaracterizations of Commerce's determinations and contradicts the records of the investigations. In particular, China has selectively excerpted text from the relevant issues and decision memoranda and ignored the complete facts on the record that support Commerce's facts available determinations in the challenged investigations.

52. China's Exhibit CHI-125, the only place in China's submissions where it presents the facts of the investigations at issue, consists only of selected excerpts of the facts available discussion, taken out of context, from the issues and decision memoranda or *Federal Register* notices. In Exhibit USA-94, the United States has provided the full discussion of the "facts available" determinations, as well as corresponding information relied upon as "facts available".

53. In its second written submission, China argues that the examples the United States has discussed in prior submissions from *Magnesia Carbon Bricks*, *OCTG*, *Line Pipe*, and *Coated Paper* are not based on "facts available" because Commerce did not refer to "facts available". The full passages of the facts available discussions at Exhibit USA-94 contradict this assertion:

- At page 43 of Exhibit USA-94 the *Magnesia Carbon Bricks* issues and decision memorandum explains that "[i]n [Commerce's] initiation analysis for the export restraints at issue, the Department found that the Petitioner had properly alleged the three elements necessary for the imposition of CVD duties ... and that these elements were supported by information reasonably available to the Petitioner with regard to export restraints at issue ...". On this basis, Commerce asked questions of China and, in the face of noncooperation, Commerce "drew an adverse inference when choosing among the incomplete information on the record" consisting, as explained by Commerce, of information from the application, "and determined that the export restraints are specific and provide a financial contribution".

- At pages 32-33 of Exhibit USA-94, the *OCTG* issues and decision memorandum explains that China failed to provide requested information and then discussed Commerce's practice of "selecting information" and its reliance on "secondary information", defined as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review ...". These statements, in the context of the investigation, make clear that the information relied upon was from the application.

- At pages 6-11 of Exhibit USA-94, the passages from the *Line Pipe* issues and decision memorandum explains the facts available determination with respect to input specificity. In particular, at pages 7-8, Commerce explains that China failed to provide necessary information and that Commerce uses "as adverse facts available (AFA) information derived from the petition, the final determination, a previous administrative review, or other information placed on the record". These statements, made in the context of the investigation, make clear that the only relevant information on the record was information available in the application.

- At pages 54-57 of Exhibit USA-94, the passages from the *Print Graphics* issues and decision memorandum explain the facts available determination with respect to input specificity. Again, Commerce explains that China had not cooperated in the investigation by failing to provide necessary information. As a result, Commerce resorted to facts available and concluded that "record information supplied by Petitioners, supported their allegations with respect to the specificity of papermaking chemicals by citing various webpages. Regarding caustic soda, Petitioners' information shows that its main uses are for pulp and paper, alumina, soap and detergents, petroleum products and chemical production. The information goes on to say that one of the largest consumers of caustic soda is the pulp and paper industry where it is used in pulping and bleaching processes". Inexplicably, China continues to cite, at paragraph 190 of its second written submission, and previously in its first oral statement, language from *Print Graphics* related to a facts available determination which is not at issue in this dispute.

54. It is clear from these examples that, in most of the instances at issue in this dispute, the information relied on for the facts available determination may be found in the application. The information in the application is the basis for the initiation of the investigation and the questions asked by Commerce of interested parties regarding the investigated subsidies. The noncooperation of the parties means that information in the application was often the only information available to Commerce. As a result, in the context of an investigation where parties are refusing to cooperate, the parties are able to understand from the memoranda and preliminary determinations the content of "the factual basis that led to the imposition of the final measures" even if the specific facts were not recited in Commerce's determinations. It is disingenuous for China to argue otherwise and accuse the United States of employing an *ex post* rationalization.

55. In a handful of instances, the source of facts available was something other than the application, but Commerce's issues and decision memoranda, as well as the context of the facts available determinations, make clear what the source of the facts available was in those instances. In these types of instances as well, Commerce's determinations were sufficient for interested parties, and the Panel, to understand how and why Commerce made its facts available determinations.

56. As these examples illustrate, Exhibit USA-94 demonstrates that Commerce's facts available determinations were based on "facts" and provides references to those facts, which are available

as additional exhibits. Commerce's use of an "adverse" inference in selecting from among the facts otherwise available is, by its terms based on facts available applied in a manner consistent with Article 12.7 of the SCM Agreement, as understood in the context provided by Annex II of the AD Agreement. The "adverse" inference applied by Commerce merely enables Commerce to make determinations based only on the limited facts that are available in the face of noncooperation, which may lead to a result that is less favorable to the non-cooperating party.

57. While an Article 22 claim is not within the terms of reference of the Panel, Exhibit USA-94 demonstrates that Commerce's explanations are more than sufficient to meet the procedural obligations under Article 22. Commerce's determinations indicate how and why Commerce made its facts available determinations. An investigating authority is not required "to cite or discuss *every* piece of supporting record evidence for each fact in the final determination". Indeed, the Appellate Body has found that it is inappropriate for a panel to disregard information on the record of the investigation, but not cited in a final determination. To the extent that China alleges that Commerce has insufficiently explained the basis for its uses of facts available, and even though Commerce's explanation was more than sufficient, the sufficiency of such explanations are dealt with under Article 22 of the SCM Agreement, not Article12.7.

58. China has failed to demonstrate that any instances of resort to facts available by Commerce were not based on facts, much less that there is a "pattern" of applications of facts available deficient of factual foundation. China's refusal to point to any verifiable record evidence which *should have been relied on* is telling because there was no information on the record *except* information that tends to show the existence of some aspect of a subsidy.

59. For these reasons, China's claim with respect to facts available must fail.

IX. CONCLUSION

60. As we have demonstrated in our previous submissions and statements, and again this morning, China has failed to make its case in this dispute, both as a matter of evidence and as a matter of law. Accordingly, the United States respectfully requests the Panel to reject China's claims.

ANNEX G-2

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF CHINA AT THE SECOND MEETING OF THE PANEL

Introduction

1. The principal issues in this dispute involve questions regarding the proper legal interpretation of several of the most fundamental provisions of the SCM Agreement. Through their submissions to date, the parties have provided the Panel with their respective – and sharply divergent – views on the proper understanding of those provisions. The resolution of China's claims will require the Panel to choose between these competing interpretations.

2. China has demonstrated that the interpretations it has advanced are fully consistent with well-established principles of treaty interpretation and the legal interpretations established in prior adopted panel and Appellate Body reports. It has also demonstrated that the interpretations the United States has presented to the Panel cannot be reconciled with either the plain language of the relevant SCM Agreement provisions at issue, or the legal interpretations regarding those provisions embodied in prior adopted panel and Appellate Body reports.

Public Body – As Applied Claims

3. Through the excerpts from Commerce's Issues and Decision Memoranda identified in CHI-1 and CHI-123, China has demonstrated that in each investigation at issue, Commerce applied the same majority ownership, control-based standard for determining whether an entity is a public body that the Appellate Body rejected in DS379. The United States does not dispute this. Nor does the United States dispute that the purportedly "more refined interpretation" of the term public body that it has invented for this proceeding *was not* applied by Commerce in any of the 14 investigations at issue.

4. Accordingly, the only question that the Panel needs to address in order to decide China's "as applied" public body claims is whether to apply the interpretation of the term "public body" that the Appellate Body established in DS379. Contrary to the U.S. argument in its second submission, China is not asking the Panel to modify or deviate from the legal standard established by the Appellate Body. China is asking the Panel to apply that standard precisely as it was articulated by the Appellate Body in DS379, pursuant to which a "public body" is an entity that is "vested with, and exercising, authority to perform governmental functions". If the Panel agrees with China that the Appellate Body's interpretation in DS379 must be applied here, and that the United States has not presented any legitimate justification for departing from that interpretation, then all of Commerce's public body findings referenced in CHI-1 and CHI-123 must be found inconsistent with Article 1.1(a)(1).

Public Body – "As Such" Claim

5. With respect to China's "as such" public body challenge, the central issue in dispute remains largely unchanged from the last time the parties were before the Panel, namely, whether the policy articulated in *Kitchen Shelving* reflects a measure of general and prospective application that is the proper subject of an "as such" challenge. In its second submission, the United States argues that it does not because *Kitchen Shelving* is "descriptive rather than proscriptive" and constitutes mere "explanation of [Commerce's] reasoning in the context of a trade remedy investigation".

6. China notes that the United States' position – that *Kitchen Shelving* merely reflects Commerce's reasoning in the context of that investigation – is directly contradicted by the text of the measure itself. Having outlined its "policy" of "normally" treating majority government-owned entities as "public bodies", Commerce articulates the following reasoning to conclude that the producers of wire rod in *Kitchen Shelving* were "public bodies": "In this investigation, the GOC holds a majority ownership position in certain of the wire rod producers that supply [the

respondent]. Consistent with the policy explained above, we are treating these producers as 'authorities'".

7. This is the entire "explanation of the reasoning" articulated by Commerce in the context of the facts in *Kitchen Shelving*. All of the discussion that precedes it has no relationship to the particular facts in that investigation. It simply is not credible to suggest that Commerce was doing anything other than applying the rule or norm of general application that it had just articulated as the "policy" to address the "recurring issue" of how to analyse whether particular entities were public bodies. True to form, subsequent cases contain similarly curt reasoning, and refer back to the policy articulated in *Kitchen Shelving* as the only *ratio decidendi* for the relevant "public body" findings.

8. The United States fares no better in suggesting that some legal significance should flow from the fact that the policy in *Kitchen Shelving* was articulated in the body of a final determination, rather than in a stand-alone document like Commerce's "Sunset Policy Bulletin". The Appellate Body has made clear that the determination of whether a measure may be challenged "as such" must be based on the "content and substance of the alleged measure, and not merely on its form". Following this line of reasoning, the Appellate Body has found measures expressed in a variety of forms, including unwritten measures and *administrative methods as reflected in Commerce's final determinations* to be "as such" inconsistent with the relevant provisions of the covered agreements. The United States' overly formalistic approach in this dispute has no merit.

9. If the Panel agrees with China that the policy articulated in *Kitchen Shelving* is susceptible to an "as such" challenge, it remains unrebutted that this policy necessarily leads Commerce to act inconsistently with Article 1.1(a)(1) in each instance.

Benefit

10. China's benefit related claims are premised upon the simple proposition that the legal standard for defining the "government" that provides "the financial contribution" under Article 1.1(a)(1) of the SCM Agreement and the "government" whose predominant role as a supplier in the market may be found to distort private prices under Article 14(d) must be the same.

11. The United States has been unable to provide any coherent explanation as to how its contrary position can be reconciled with the language of Articles 1.1(a)(1) and 14(d) of the SCM Agreement and the Appellate Body's interpretation of those provisions. All the United States can offer in its second submission is that "prior Appellate Body findings permit the use of out-of-country benchmarks because of the government's ability to affect prices", and "SOE presence in a market is evidence of a government's ability to affect prices in that market". The first of these statements is a gross mischaracterization of the Appellate Body's "distortion" jurisprudence, and the second is a conclusory assertion that begs the very question at issue.

12. Contrary to the United States' assertion, it is not some generic governmental "ability to affect prices" that may justify a distortion finding, but the very specific instance where the "government is the predominant provider of certain goods" and it "has been established" by the investigating authority that "the government's role *in providing the financial contribution* is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods".

13. Under Article 1.1(a)(1), the "government" providing the financial contribution is "a government" or "any public body". An entity that is neither a government nor any public body is, by definition, a "private body", whose provision of goods is presumptively deemed non-governmental. Since it is undisputed that SOEs are not part of the government in the narrow sense, it necessarily follows that "SOE presence in the market" could support a distortion finding only if the SOEs at issue were properly found to be public bodies within the meaning of Article 1.1(a)(1). In the absence of such a finding, they cannot be deemed to be "government providers" or "government suppliers", nor can the prices at which they sell those goods be deemed "government" prices capable of causing "distortion" for purposes of Article 14(d).

14. Aside from lacking any interpretative basis and flying in the face of the very Appellate Body jurisprudence on which it purports to rely, the U.S. interpretation produces absurd results. As

China has shown, under the U.S. interpretation, the same entity could simultaneously be deemed a "private" supplier of goods under Article 1.1(a)(1), and a "government" supplier of goods for purposes of the distortion analysis under Article 14(d). While the United States asserts (without any elaboration) that this counterintuitive result "make[s] sense as a policy matter", China is confident that the Panel will conclude that it does nothing of the sort.

Specificity

15. China has demonstrated that Commerce's specificity determinations in respect of the alleged input subsidies are inconsistent with Article 2.1(c) of the SCM Agreement in multiple respects. The United States' second submission confirms that it has no credible response to China's arguments.

16. China has shown that the specificity determinations at issue were inconsistent with Article 2.1(c) because Commerce did not examine the first of the "other factors" under this subparagraph in light of a prior appearance of non-specificity. In its second submission, China demonstrated that the U.S. response to this claim is based on an interpretation of Article 2.1(c) that is contradicted by the ordinary meaning of its terms, finds no support in its context, and is contrary to the manner in which the Appellate Body has interpreted this provision.

17. The only remaining issue in dispute with regard to the identification of the relevant "subsidy programme" under the first factor of Article 2.1(c) is whether Commerce did, in fact, identify the relevant "subsidy programme" in each of the input specificity determinations at issue.

18. In its second submission, the United States continues to assert, as it did in its answers to Panel questions, that Commerce's identification of the relevant "subsidy programme" was "grounded in the facts on the record". The United States now provides an "example" from the *Aluminum Extrusions* investigation which purports to substantiate this assertion. In addition to its entirely *ex post* nature, the problem with this example is that it does not prove the assertion for which the United States offers it.

19. The "facts" identified by the United States reveal only that Commerce grouped a series of alleged subsidies together and called them a "program". There is absolutely nothing in these facts to show that this was a *planned* series of subsidies, which, as the definition of the term makes clear, and as the United States has agreed, is the *sine qua non* of a "subsidy programme".

20. The supposed "facts" of the *Aluminum Extrusions* investigation demonstrate that the United States is trying to back away from the agreed understanding of the term "subsidy programme", without openly acknowledging its retreat. The United States now tries to frame the issue as whether Commerce was required to identify the existence of what it calls a "formal" subsidy programme, or whether it was sufficient for Commerce to "informally establish[]" the existence of a subsidy programme by reference to a "series of activities or events". But whether a subsidy programme is "formal" or "informal", what makes it a "programme" is that it is a *planned* series of subsidies. A "series of activities or events" is not a "programme" – a fact that the United States conveniently overlooks by omitting the word "planned" from the definition of the term "programme" on which both parties rely.

21. At bottom, the United States is trying to read the term "programme" out of the first factor of Article 2.1(c). If an investigating authority can call any series of alleged subsidies a "subsidy programme", without the slightest evidence that it was a planned series of subsidies, then the term "subsidy programme" would no longer have any meaning. The United States seems to recognize that the principle of *effet utile* requires it to give meaning to this term, but then it interprets and applies this term as if it had no meaning at all and were synonymous with the term "subsidy".

22. The United States is forced to engage in these contortions because it is obvious that Commerce failed to substantiate the existence of input-specific "subsidy programmes" based on positive evidence in the record. The existence of these "subsidy programmes" was, as China has shown, based on nothing more than Commerce's assertions.

23. On the issue of whether Commerce was required to identify the relevant "granting authority" in respect of the alleged input subsidies, China confesses that it can no longer keep track of the U.S. position. The United States seems to acknowledge that the identification of the granting

authority is a prerequisite to evaluating whether a particular subsidy is specific to certain enterprises "within the jurisdiction of the granting authority". This is, after all, the entire point of the specificity inquiry under Article 2, and it is hard to see how the relevant jurisdiction can be identified without knowing who the granting authority is. At the same time, the United States continues to insist that Commerce "was not required to identify a 'granting authority' as part of its specificity analysis." China cannot reconcile these two positions.

24. China is equally confused by the positions that the United States has taken, at least implicitly, on who the relevant granting authority was in the case of the alleged input subsidies. At first, it seemed that the United States was taking the position that each SOE acted as its own "granting authority" in respect of the input subsidies that it allegedly provided to downstream producers. In its second submission, however, the United States appears to be taking the position that the *Government of China* was the "granting authority" in respect of all alleged input subsidies.

25. So was each SOE a "granting authority", or was the Government of China the granting authority? Since the United States appears to have settled on the latter position, at least for the moment, it is worth examining the implications of this latest position. In the 14 input specificity determinations at issue in this dispute, Commerce found 11 different types of inputs to be specific countervailable subsidies under the first factor of Article 2.1(c). Logically, Commerce must consider that the Government of China maintains 11 distinct, input-specific "subsidy programmes" with respect to the subsidized provision of these inputs. Each one of these nationwide, input-specific "programmes" must coordinate the subsidy granting activities of the tens, hundreds, and maybe even thousands of SOEs in China that manufacture and sell each type of input. But where is the evidence that these "programmes" exist? On what factual basis does Commerce infer that these are distinct subsidy programmes, as opposed to a single subsidy programme concerning the provision of all types of inputs?

26. As China has sought to demonstrate throughout this dispute, Commerce's failure to identify the relevant granting authority, in addition to being inconsistent with Article 2 by its own terms, speaks to the basic incoherence of the entire "input subsidy" fiction that it has created. In the vast majority of cases, the identification of the relevant granting authority is obvious and scarcely warrants comment. In the determinations at issue here, by contrast, neither Commerce nor the United States could clearly identify the relevant granting authority, even on an *ex post* basis, for the simple reason that these subsidies do not actually exist.

27. For these reasons, and for the other reasons that China has set forth in its submissions, the Panel should find that Commerce's specificity determinations in respect of the alleged input subsidies were inconsistent with Article 2.1(c) of the SCM Agreement.

Initiation

28. China's initiation related claims are predicated on what it considers must be an axiomatic proposition of law: namely, that if an investigating authority initiates a subsidy investigation on the basis of an incorrect legal standard, it necessarily acts inconsistently with Article 11.3 of the SCM Agreement. For its part, the United States asserts that "there is no basis for this argument", but the reasons it provides are not persuasive. In the United States' view, "Article 11 speaks to providing and evaluating evidence" and "does not require that … investigating authorities recite, a particular legal standard prior to initiation".

29. China agrees that Article 11 speaks to "evaluating evidence", but contrary to the suggestion of the United States, the evaluation of that evidence does not occur in a vacuum. Rather, it must be conducted within the legal framework that Article 11 sets forth, which makes clear that for there to be "sufficient evidence" to justify initiation under Article 11.3, there must be "adequate evidence, tending to prove or indicating the existence of" a subsidy as set forth in Article 11.2. This means that there must be "adequate evidence tending to prove or indicating the existence of" a financial contribution, of a benefit, and of specificity.

30. Each of these three elements of a subsidy has an established legal meaning under the SCM Agreement. It necessarily follows that the adequacy and sufficiency of the evidence tending to prove their existence must be evaluated against that established meaning. An investigating authority cannot possibly evaluate whether there is "adequate" or "sufficient" evidence of a

financial contribution, of a benefit and of specificity without applying its understanding of the proper legal standard for each of these terms.

31. At the outset of this case, the United States had no difficulty endorsing this basic understanding of the proper operation of Article 11. In its first submission, the United States explained that *under the U.S. control-based legal standard* for public body, "Article 11 requires adequate evidence that tends to prove or indicating that the entity is controlled by the government" , but that *under China's interpretation of the term "public body"*, Article 11 requires "adequate evidence tending to prove or indicating that an entity possesses, exercises, or is vested with governmental authority …". By expressly linking the sufficiency determination to the particular legal standard applied, the United States clearly understood that it is, in fact, the legal standard that determines what constitutes "adequate" and "sufficient" evidence" under Article 11.

32. The United States has now abandoned that understanding. It has done so because it belatedly came to realize that if the legal standard determines what constitutes "adequate" and "sufficient" evidence under Article 11, then it must follow that if an investigating authority applies the *wrong* legal standard, the legitimacy of its conclusion that the evidence was sufficient to justify initiation is irreparably tainted.

33. This is precisely what the panel in *Argentina – Poultry* concluded. In that case, the panel found that by using an unlawful zeroing methodology, Argentina had violated Article 5.3 of the Antidumping Agreement "by initiating its investigation without a proper basis to conclude that there was sufficient evidence of dumping to justify initiation".

34. Applying this same reasoning here, if the Panel agrees with China that the legal standards Commerce applied at initiation with respect to financial contribution and specificity are inconsistent with Article 1.1(a)(1) and Article 2 of the SCM Agreement, then Commerce was "without a proper basis to conclude that there was sufficient evidence" of these elements of a subsidy to justify initiation in the investigations under challenge.

35. The United States' has no credible response to China's interpretative analysis or to the reasoning of the panel in *Argentina – Poultry*. This has led the United States to tie itself into knots trying to explain why China's initiation claims nonetheless must fail. Most notable in this regard is the U.S. assertion that Commerce "did not adopt any particular interpretation of the term 'public body' in initiating the investigations at issue".

36. This is a remarkable assertion for the United States to be making, not only because it is implausible on its face and contradicted by the record, but because it suggests that investigating authorities are free to make initiation decisions untethered from any legal standards whatsoever. In the world the United States envisions, investigating authorities apparently may evaluate the adequacy and sufficiency of the evidence regarding the existence of the elements of a subsidy using any baseline they choose, regardless of whether it has a proper basis in the SCM Agreement or even any basis at all. If the United States' interpretation of Article 11 were correct, it effectively would make initiation decisions unreviewable.

37. This cannot be, and of course, is not the law, as the panel reports in *Argentina – Poultry* and *China – GOES* among other cases make clear. Just as importantly, the record establishes that Commerce does not, in fact, inhabit the imaginary world the United States has concocted for this proceeding where investigating authorities evaluate the sufficiency of the evidence for initiation in a legal vacuum. Commerce's initiation checklists, along with the evidence and arguments from the petitions that they cite, demonstrate that Commerce does have established views on the legal standards necessary to establish the existence of a subsidy, and that it applied those legal standards in the investigations at issue with respect to financial contribution and specificity.

38. The problem for the United States is that the legal standards that Commerce applied are inconsistent with Article 1.1(a)(1) and Article 2 of the SCM Agreement as those provisions have been interpreted by the Appellate Body. For this reason, Commerce's initiation determinations in the investigations at issue are necessarily inconsistent with Article 11.3 of the SCM Agreement.

Export Restraints

39. China's export restraints claim raises two separate questions of legal interpretation. The first is whether the export restraints alleged in *Magnesia Bricks* and *Seamless Pipe* cannot, as a matter of law, constitute a financial contribution within the meaning of Article 1.1(a)(1). The second question is the one I just addressed, namely, whether an investigating authority acts inconsistently with Article 11.3 when it initiates a countervailing duty investigation on the basis of an incorrect legal standard.

40. On the first of these interpretative questions, the United States' second submission covers no new ground. Accordingly, China will not repeat this morning all of the reasons why it believes this Panel should resolve the first question in the same manner as the panel in *US – Export Restraints*. And, for all of the reasons I just explained, China believes an affirmative answer to the second question is required as well, particularly in light of the panel's decision in *China – GOES*, which is directly on point.

41. The only issue China intends to address this morning is the United States' futile attempt in its second submission to distinguish factually the situation Commerce confronted in the two cases at issue here and the situation the panel addressed in *US – Export Restraints*. At the outset, China notes that the United States does not dispute that the export restraint *measures* at issue in both *Magnesia Bricks* and *Seamless Pipe* – export quotas, export taxes, and export licensing requirements – fall squarely within the definition of export restraints considered in *US – Export Restraints*. It is also beyond dispute that no measures other than the export restraints themselves were alleged to constitute a financial contribution in either investigation.

42. The United States nonetheless argues that in contrast to the situation in *US – Export Restraints*, here "there was evidence before Commerce relating to the context in which the export restraint schemes were imposed as well as other direct and circumstantial evidence to inform the analysis of the export restraint schemes". This "context", according to the United States, consisted of "evidence" to the effect that the "export restraints were part of a broader governmental policy" to promote the export of higher value goods through increasing the domestic supply of the inputs involved. In fact, the only "evidence" the United States cites in support of this characterization, which can be found at USA-73 and USA-93, amounts to nothing more than conclusory assertions unsupported by any documentary evidence whatsoever.

43. More importantly, the United States never explains how this alleged "contextual evidence" affects the analysis of whether the export restraints at issue here entrust or direct private parties to provide goods. In fact, even if such evidence existed, it would not alter the nature of the relevant government action involved. Whether the objective of an export restraint is to conserve exhaustible natural resources, reduce air pollution, promote downstream industries, or some combination thereof, in no case does the export restraint "give responsibility" to a private body, "give authoritative instructions" to a private body, or "order" a private body to "carry out" the provision of goods to domestic consumers. Instead, an export constraint imposes specific limitations or conditions on the export of particular goods, nothing more and nothing less.

44. In sum, the United States' attempt to distinguish the case before the Panel from the one addressed in *US – Export Restraints* is wholly unpersuasive. For the reasons that China has already explained, the panel's reasoning in that case was persuasive when adopted, and remains so in light of subsequent panel and Appellate Body jurisprudence.

"Adverse Facts Available"

45. I will now turn to China's claims under Article 12.7 of the SCM Agreement, in relation to Commerce's use of so-called "adverse facts available". As a result of the parties' responses to Panel questions and written submissions, the points of disagreement between the parties in respect of China's claims under Article 12.7 are now sharply defined. The United States agrees with China that when making a determination on the basis of "facts available" under Article 12.7, an investigating authority "must apply facts that are 'available'". Where the parties disagree is what this means in practice.

46. The U.S. theory, as explained in its second submission, is that the Panel should conclude that Commerce properly applied facts available under Article 12.7 in the 48 instances under

challenge because the United States has *now*, for purposes of this dispute, "provide[d] examples of the record evidence supporting the determinations" at issue. Notably, the United States *does not* assert that Commerce actually relied on the information it provides in USA-94 when making its "adverse facts available" determinations. In fact, the United States maintains that "Commerce was not required to explicitly cite such information in its determinations".

47. In contrast to the U.S. view, China believes that for an investigating authority properly to apply facts available, Article 12.7 requires it to "explicitly cite" and discuss the facts that provide the basis for its legal conclusions. It is undisputed that there is no reference to or discussion of the facts that the United States cites in USA-94 in any of Commerce's actual determinations. There is, accordingly, no evidence in those determinations that Commerce's "adverse facts available" findings were based on anything other than groundless assumptions. The U.S. attempt to provide an *ex post* factual basis for Commerce's determinations, by providing "examples of the record evidence supporting the determinations", does nothing but make clear that Commerce failed to provide the necessary "reasoned and adequate" explanation for its conclusions in the 48 instances under challenge.

48. The United States suggests that the "sufficiency of an investigating authority's explanations" is a procedural obligation, not relevant to whether an investigating authority has complied with the substantive requirements in Article 12.7 of the SCM Agreement. While China understands why the United States would want to draw this distinction, it is not persuasive.

49. The Appellate Body explained in *US – Softwood Lumber VI* that in reviewing the sufficiency of an investigating authority's determinations, and specifically in reviewing "the *factual components* of the findings made by investigating authorities", a Panel should examine whether an investigating authority's conclusions are "reasoned and adequate". Whether the investigating authority's conclusions are "reasoned and adequate" is informed, in part, by "whether the explanations given disclose how the investigating authority treated the facts and evidence in the record". The Appellate Body cautioned that a panel must not be "passive by 'simply accept[ing] the conclusions of the competent authorities'".

50. The "reasoned and adequate" explanation provided by the investigating authority is what allows a panel to assess the validity of the investigating authority's conclusions under the substantive provisions of the covered agreements, including Article 12.7 of the SCM Agreement. In the absence of such a "reasoned and adequate explanation", a panel has no basis to evaluate "how the investigating authority treated the facts and evidence in the record" and is put in a position of having to "simply accept" the investigating authority's conclusions.

51. The United States believes that it can retroactively cure Commerce's failure to provide the necessary explanation for its findings by providing the Panel with facts from the record that arguably might have supported Commerce's findings had it actually relied on them at the time. But there is a reason that the Appellate Body has said that an investigating authority's "reasoned and adequate" explanation "should be discernible from the published determination itself". Exhibit USA-94 tells us nothing about how *Commerce* treated the facts and evidence cited therein when making its determinations. The only evidence of how Commerce treated the facts and evidence in the record in the 48 instances under challenge is Commerce's own analysis in its preliminary determinations and Issues and Decision Memoranda. By reference to Commerce's actual determinations, China has demonstrated that these determinations were based on "assumptions" and "adverse inferences" that had no documented basis in the record evidence.

52. The United States argues in its second submission that an investigating authority is only required to discuss "those facts that allow an understanding of the factual basis that led to the imposition of the final measures". China has thoroughly reviewed USA-94, which purports to provide "the complete discussion from the relevant issues and decision memorandum or preliminary determination for each determination [at issue]", and China still has not found an analysis by Commerce that allows for "an understanding of the factual basis that led to the imposition of the final measures".

ANNEX G-3

CLOSING STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

Mr. Chairperson, members of the Panel:

1. You have heard extensive arguments from both sides in our written submissions and oral presentations. At this point, the disagreements of the parties have been clearly established. Perhaps, then, we might acknowledge here a point on which the parties agree. As China said in the second paragraph of its opening statement at this meeting, "[t]he principal issues in this dispute involve questions regarding the proper legal interpretation of several of the most fundamental provisions of the SCM Agreement". That is correct.

2. However, China goes on to note the "sharply divergent" views of the parties on the proper understanding of those provisions, and suggests that "[t]he resolution of China's claims will require the Panel to choose between these competing interpretations". On that, we cannot agree. China proposes an analytical approach that is simply without support in the DSU. Rather than choosing between the interpretations proposed by the parties, or choosing whether or not to apply an interpretation elaborated by the Appellate Body, the Panel's role, and the way the Panel will help the parties resolve this dispute, is by undertaking its own interpretative analysis of the terms of the SCM Agreement in accordance with the customary rules of interpretation of public international law.

3. We are confident that when the Panel interprets the terms of the SCM Agreement in good faith in accordance with the ordinary meaning to be given to the terms of the Agreement in their context and in the light of its object and purpose, the Panel will agree with the proposed interpretations that the United States has advanced, and will find that China's proposed interpretations are divorced from the text of the SCM Agreement and entirely inconsistent with the interpretative analysis required by the customary rules of interpretation.

4. In short, as we have demonstrated, for all of its nearly 100 individual claims, China simply has failed to make its case, on the law and on the facts. Accordingly, we respectfully request that the Panel reject China's claims.

5. In closing, the United States once again would like to thank the Panel members, as well as the Secretariat staff, for your time and the careful attention you are giving to this matter.

ANNEX H

WORKING PROCEDURES OF THE PANEL

ANNEX H-1

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

WORKING PROCEDURES FOR THE PANEL

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.[1] Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

[1] The United States submitted its request for preliminary rulings on 14 December 2012, prior to its first written submission. Accordingly, the date determined by the Panel for China to submit its response to this request has been indicated in the Timetable adopted by the Panel in these proceedings.

8. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN-1, CHN-2, etc. If the last exhibit in connection with the first submission was numbered CHN-5, the first exhibit of the next submission thus would be numbered CHN-6. The United States' exhibits could be numbered USA-1, USA-2, etc.

Questions

9. The Panel may at any time pose questions to the parties and third parties, orally in the course of a meeting or in writing.

Substantive meetings

10. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.30 p.m. the previous working day.

11. The first substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. on the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

12. The second substantive meeting of the Panel with the parties shall be conducted as follows:

(a) The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by China. If the respondent chooses not to avail itself of that right, the Panel shall invite China to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.30 p.m. of the first working day following the meeting.

(b) After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to

respond in writing to the other party's questions within a deadline to be determined by the Panel.

(c) The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

(d) Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

13. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

14. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.30 p.m. the previous working day.

15. The third-party session shall be conducted as follows:

(a) All third parties may be present during the entirety of this session.

(b) The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.30 p.m. of the first working day following the session.

(c) After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

(d) The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

16. The parties and third parties shall provide the Panel with executive summaries of the facts and arguments as presented to the Panel in each of their written submissions, other than answers to written questions, and in their oral presentations, within one week following the delivery to the Panel of the written version of the submission or oral statement concerned. Each executive summary of the parties shall be limited to no more than ten (10) pages. The executive summaries shall not serve in any way as a substitute for the submissions of the parties in the Panel's examination of the case. Third parties are requested to provide the Panel with executive summaries of their written submissions and oral statements of no more than five (5) pages each, within one week following the delivery to the Panel of the written version of the relevant submission. Paragraph 21 shall apply to the service of executive summaries.

17. The descriptive part of the Panel's report will include the procedural and factual background to the present dispute. Description of the main arguments of the parties and third parties will

consist of the executive summaries referred to in paragraph 16, and these will be annexed as addenda to the report.

Interim review

18. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

19. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

20. The interim report shall be kept strictly confidential and shall not be disclosed.

Service of documents

21. The following procedures regarding service of documents shall apply:

(a) Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

(b) Each party and third party shall file 8 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs, 5 CD-ROMS/DVDs and 5 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

(c) Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to XXXXXX and XXXXXX. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

(d) Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Service may take place in electronic format (CD-ROM, DVD, or e-mail attachment), if the party receiving service consents to such format. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

(e) Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.30 p.m. (Geneva time) on the due dates established by the Panel.

(f) The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.