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

COMMENTS OF THE UNITED STATES ON CHINA'S RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

August 23, 2013

TABLE OF REPORTS

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Canada – Renewable Energy (Panel)	Panel Report, Canada – Measures Affecting the Renewable Energy Generation Sector, Canada – Measures Relating to the Feed-In Tariff Program, WT/DS412/R, WT/DS426/R, adopted 28 May 2013, as modified by Appellate Body Report, WT/DS412/AB/R, WT/DS426/AB/R
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, circulated 2 August 2013
China – Raw Materials (AB)	Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, adopted 30 January 2012
EC and certain member States – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted 25 March 2011
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Gasoline (AB)	Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, adopted 20 May 1996
US – Lamb (AB)	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001
US – Lamb (Panel)	Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, as modified by Appellate Body Report WT/DS177/AB/R, WT/DS178/AB/R

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US – Offset Act (Byrd Amendment) (AB)	Appellate Body Report, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
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
US – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1

INTRODUCTION

1. In this submission, the United States comments on China's responses to the Panel's second set of questions. To a large extent, China's responses repeat prior arguments of China that are unsupported by the text of the SCM Agreement and the record in this dispute. Rather than also repeat prior U.S. responses on these issues, the comments below contain additional points on China's arguments that we hope the Panel finds useful.

2. PRELIMINARY DETERMINATIONS

a. Question to China

82. How does China respond to the United States' argument in para. 6 of the United States' second written submission regarding the internal contradiction of China's argument that the inclusion of the preliminary determinations does not expand the scope of the dispute?

2. China's response to Question 82 only confirms that China is attempting to expand the scope of the dispute beyond the Panel's terms of reference. However, the Panel can, and should, reject this impermissible expansion. As we have explained, the preliminary determinations in *Wind Towers* and *Steel Sinks* are not within the Panel's terms of reference because China did not consult on these determinations.[1] China's response – that the initiation and preliminary determinations at issue "concern the same investigation of the same products from the same country by the same agency"[2] – is not relevant, and provides no excuse for an attempt to expand the scope of the dispute beyond that covered in the request for consultations. What is relevant is that these preliminary determinations are different measures at a different stage of the investigation and with different legal claims than the measures on which China consulted.

3. China, as the complaining party, had complete control over how it structured its claims. It has chosen to challenge certain, specific measures on an "as applied" basis. Accordingly, China was required to identify in its request for consultations and request for panel establishment each measure whose application it was challenging.[3] Indeed, with respect to other measures, China itself appears to recognize this: its request for consultations and requests for panel establishment separately cites the initiations, preliminary determinations, and final determinations.[4]

4. China's second argument is even weaker. It is not relevant that China presents other legal claims under the same provisions of the SCM Agreement for other measures. Each legal claim for each measure stands independently of each other. China challenged 29 initiations or determinations in its consultations request;[5] now China is seeking to challenge 31. This is an impermissible expansion of the Panel's terms of reference.

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[1] *See* U.S. First Written Submission paras. 12-21.
[2] China Responses to Second Panel Questions, para. 1.
[3] *See* DSU, arts. 4 and 6.
[4] *See* China Request for Consultations, p. 1; China Panel Request, p. 2.
[5] *See* U.S. First Written Submission para. 12.

3. PUBLIC BODY

a. Questions to China

83. Please respond to the United States' argument in para. 18 of the United States' Opening Statement regarding the correct interpretation of the term "organismo público".

5. In its response to Question 83 from the Panel, China asserts that a "public body" or "organismo público" or "organisme public" must be an entity "vested with, and exercising authority to perform governmental functions."[6] China asserts elsewhere in its responses to the Panel's second set of questions that "'the effective power to regulate, control or supervise individuals, or otherwise restrain their conduct through the exercise of lawful authority' are key attributes that a 'public body' must share with government in the narrow sense."[7]

6. In essence, China's position is that a "public body" is a "government agency." This argument has no merit. Under China's own constructions, a "government agency" is no different than a "government." Indeed, a government agency is part of the government. Accordingly, China's proposal – that "public body" should be interpreted to mean "government agency" – would render the term "public body" redundant or inutile. This would be contrary to the principle of effectiveness in treaty interpretation.[8]

7. In contrast, as the United States has explained, the proper interpretation must give effect to the distinct term "public body" – or "organismo público" or "organisme public" – while at the same time recognizing that this term is related to the term "government." The relevant interpretative question is: what is the nature of that relationship? This question can only be answered by considering the context in which the term is used.

8. As we have explained, Article 1.1(a)(1) of the SCM Agreement is concerned with the provision of a financial contribution, and it identifies the entities that can provide a financial contribution.[9] A financial contribution, put simply, is a conveyance of value.[10] A "government" of a Member can use its resources to convey value to a recipient, and that conveyance is a "financial contribution" if it falls within the categories of activity described in Article 1.1(a)(1)(i)-(iii). Logically, an entity controlled by the government, such that the government can use the entity's resources as its own, also can convey value from its (*i.e.*, the government's) resources to a recipient.[11] An entity so controlled may or may not be vested with or exercising governmental authority – this is beside the point. The possession of governmental authority, or the exercise of governmental authority, does not convey value. Given that Article 1.1(a)(1) of the SCM Agreement is concerned with conveying value – that is, the use or disposal of resources – reliance upon notions of governmental authority to determine which entities are "public bodies" would be misplaced. The relationship between a "government" and a "public body" is

[6] China Responses to Second Panel Questions, para. 15.
[7] China Responses to Second Panel Questions, para. 19.
[8] *See US – Offset Act (Byrd Amendment) (AB)*, para. 271; *see also US – Gasoline (AB)*, p. 23.
[9] *See, e.g.*, U.S. First Written Submission, paras. 66-74.
[10] *See* U.S. First Written Submission, paras. 67-68.
[11] *See* U.S. First Written Submission, para. 69.

one of control, such that the government can use the public body's resources as its own, not one of delegation or granting of governmental authority.

9. Throughout this dispute, China has provided no explanation of how the above interpretation could be inconsistent with the ordinary meaning of the term "public body," in its context and in light of the object and purpose of the SCM Agreement. Instead, China asks the Panel to reverse engineer the interpretation of the term "public body" by starting with the Appellate Body's earlier interpretation in *Canada – Dairy* of the term "organismo público" in the Spanish version of Article 9.1 of the Agreement on Agriculture – or "government agency" in the English version of that provision. However, nothing in the Vienna Convention supports China's proposed interpretative analysis, *i.e.*, starting with a previous interpretation of a different provision in another agreement to ascertain the proper interpretation of the provision at issue.

10. China even goes so far as to fault the United States for not analyzing the context of Article 9.1 of the Agreement on Agriculture and the object and purpose of that agreement.[12] Here again, China's approach is divorced from the interpretative analysis laid out in the Vienna Convention, which calls upon an interpreter to examine the words of the agreement under consideration, in their context, and in light of the object and purpose of the agreement. The context of Article 9.1 of the Agreement on Agriculture is not relevant to the interpretative exercise with which the DSU has tasked the Panel.

11. That being said, contrary to China's assertion, the United States has, in fact, explained how the context of Article 9.1 of the Agreement on Agriculture differs from the context of Article 1.1(a)(1) of the SCM Agreement. We have noted, in particular, that the words "their" or "leurs" in Article 9.1 are not present in Article 1.1(a)(1), and the words "or" and "any" in Article 1.1(a)(1) are not present in Article 9.1. We have explained the significance of these contextual elements previously.[13] China has offered no response to these U.S. arguments.

84. Does China consider that government functions can go beyond the regulation, control, supervision or restraint of individuals, as argued by the United States in para. 19 of its Opening Statement?

12. Question 84 goes to the heart of the interpretive assessment the Panel is called on to perform. China's response fails to address the substantive issue raised by the Panel's question. Instead, China asks the panel to blindly follow findings in other disputes.

13. In particular, China responds that the interpretation of the term "government" in the *Canada – Dairy* Appellate Body report "has now been endorsed by the Appellate Body on two separate occasions."[14] China further asserts that it is "expected" that this Panel follow the Appellate Body's findings and interpret the term "public body" in the same manner as the term "government."[15] This leads China to the remarkable conclusion that U.S. explanations

[12] China Responses to Second Panel Questions, para. 10.
[13] *See* U.S. Second Opening Statement, para. 15; *see also* U.S. First Written Submission, paras. 52-55.
[14] China Responses to Second Panel Questions, para. 19.
[15] China Responses to Second Panel Questions, para. 20.

concerning the functions of a public body contemplated in the SCM Agreement "should have no bearing" on the outcome of this dispute.[16]

14. Contrary to China's arguments, nothing in the DSU indicates that the Panel is "expected" simply to apply past Appellate Body reports without making its own critical evaluation of the text of the SCM Agreement and the arguments of the parties. Rather, the DSU provides that the Panel shall "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . . ."[17] This would include the Panel reaching its own interpretation of the term "public body," and assessing for itself whether the functions of government are limited to those identified by the Appellate Body in *Canada – Dairy*, and whether and how that should inform the interpretation of the term "public body." China's response ignores the issue raised by the Panel's question and is consistent with China's continuing effort to convince the Panel to avoid any searching or "objective assessment"[18] of the interpretive issues in this dispute.

15. As we pointed out in paragraph 55 of the U.S. responses to the Panel's first set of questions, the government functions identified by the Appellate Body in *Canada – Dairy* – that is, the regulation, control, or supervision of individuals, or other restraint of their conduct – are incomplete, especially in the context of the SCM Agreement. Article 1.1(a)(1) of the SCM Agreement sets forth several functions of a government that can constitute "financial contributions," namely, the direct transfer of funds (like a grant or loan), the foregoing of revenue, the provision of goods or services, and the purchase of goods. With the possible exception of foregoing revenue, none of these functions involves the regulation, control, supervision, or restraint of individuals. Indeed, as a matter of logic, giving something to a recipient does not involve regulating, supervising, controlling, or restraining the recipient.

16. Accordingly, the text of Article 1.1(a)(1) of the SCM Agreement itself demonstrates that governmental functions are not limited to the regulation, control, supervision, or restraint of private individuals, and that a "public body" – as that term is used in Article 1 of the SCM Agreement – need not be able to perform those functions to provide a financial contribution. Reliance upon the functions of an entity to determine whether the entity is a "public body" is unhelpful in the application of Article 1.1(a)(1), and reliance upon the government "functions" identified by the Appellate Body in *Canada – Dairy* to determine whether an entity is a "public body" would be wrong. Instead, the question of whether an entity is a "public body" is a question of the nature of the entity and its relationship to the government. If a government controls an entity such that the government can use the entity's resources as its own, then that entity is a public body. This is result that follows from a proper application of the customary rules of interpretation.

17. Additionally, the interpretation of the term "public body" discussed and explained by the United States would be consistent with the Appellate Body's application of its interpretation of "public body" in *US – Anti-Dumping and Countervailing Duties (China)*. In that dispute , despite using certain language concerning "government functions" in its discussion of the

[16] China Responses to Second Panel Questions, para. 19.
[17] DSU, art. 11.
[18] DSU, art. 11.

interpretation of the term "public body," when it applied Article 1 the Appellate Body repeatedly referred to and ultimately relied upon evidence of the government's "meaningful control" over state-owned commercial banks, not on any evidence that these banks regulated, controlled, supervised, or restrained private individuals.[19] Similarly, the panel in *Canada – Renewable Energy* emphasized the importance of the Ontario government's "meaningful control" over the entity in question there, which the panel determined to be a "public body."[20] As we have explained, this notion of "meaningful control" can be restated as government control of an entity such that the government can use the entity's resources as its own.

85. Regarding the allegation that the wording of the Kitchen Shelving I&D Memorandum sets out a rebuttable presumption, why and how does China consider that this rule on burden-of-proof can be a "measure", i.e. "act or omission with independent operational status", as defined by the United States in para. 25 of its Opening Statement?

18. In its answer, China mischaracterizes findings in other disputes with respect to when a measure is challengeable "as such." Most notably, China mistakenly relies on the Appellate Body report in *US – Oil Country Tubular Goods Sunset Reviews.* In that dispute, the Appellate Body made a narrow finding that the sunset policy bulletin was a measure, explaining that the basis for this finding was because it was "intended to have general application, as it is to apply to all the sunset reviews conducted in the United States."[21] As the United States has explained, the sunset policy bulletin at issue in *US – Oil Country Tubular Goods Sunset Reviews* is a completely different type of instrument than a memorandum of decision issued in a single countervailing duty proceeding.[22]

19. China has not rebutted the U.S. explanation of the importance of this difference. In particular, China has failed to provide meaningful evidence that the discussion in *Kitchen Shelving* is intended to have the same type of general application as the sunset policy bulletin at issue in *US – Oil Country Tubular Goods Sunset Reviews*. Generally, an issues and decisions memorandum is essentially a transparency mechanism, developed to provide responses to specific arguments or claims made by interested parties in a particular investigation, as contemplated by Article 22.5 of the SCM Agreement. The *Kitchen Shelving* memorandum is no different, stating that "[w]e have analyzed the comments submitted by the interested parties in their case and rebuttal briefs in the 'Analysis of Comments' section below, which also contains the Department's responses to the issues raised in the briefs."[23] The resulting public body discussion is part of that response and explains Commerce's understanding of "public body" in that case. China can point to no meaningful evidence that this discussion is intended to apply to all public body determinations made by Commerce in all countervailing duty proceedings.

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[19] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 318, 346, and 349-355.
[20] *Canada – Renewable Energy (Panel)*, para. 7.235; *see also id.*, para. 7.239. The panel's findings in this regard were not appealed.
[21] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 187.
[22] The United States provided a detailed response as to why the *Kitchen Shelving* discussion is different from the documents in *US – Oil Country Tubular Goods Sunset Reviews. See* U.S. Second Written Submission, para. 48.
[23] Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation ") at 1 (July 20, 2009) (CHI-38).

Rather, the record in this dispute shows that the discussion provides some clarification as to how Commerce has approached the legal and factual analysis in that particular proceeding.

20. The United States also notes that China's argument, if accepted, would have broad and harmful systemic implications. To allow for an "as such" challenge to a memorandum that is responding to the specific factual and legal questions in a particular investigation, and that does not have any identifiable legal or normative value over other investigations, would be a dramatic expansion of what constitutes a "measure" that is challengeable "as such" at the WTO. The result of such an expansion would be to discourage the very transparency encouraged by Article 22.5 of the SCM Agreement.[24]

86. Please respond to the United States' example provided in paras. 35-36 of the United States' Opening Statement regarding the relationship between the public body finding and the finding for a government's potential to influence market prices.

21. In its response to the Panel's question, China confirms that it is asking the Panel to adopt a radical view of the guidelines for calculating benefit set out in Article 14 of the SCM Agreement: namely, that even 100 per cent government ownership in a given input market would not demonstrate a predominant role so as to establish price distortion in that market – unless the government's predominant role was established in relation to its role in providing a financial contribution. As the United States explained in its responses to the Panel's questions,[25] there is no meaningful support in the SCM Agreement for China's position that a government's involvement through its total ownership of every firm in an input market would not support a determination that the government plays a predominant role in that market absent the suppliers being public bodies.

22. China also asserts in its answer to Question 86 that the United States has mischaracterized the Appellate Body's decisions concerning out-of-country benchmarks. To the contrary, the United States has accurately pointed out that the Appellate Body's finding concerning public bodies in *US – Anti-Dumping and Countervailing Duties (China)* was not determinative of its finding concerning the use of out-of-country benchmarks.[26] Similarly, the United States has cited the Appellate Body's statement that "the concept of predominance does not refer exclusively to market shares, but may also refer to market power", which the Appellate Body has equated with the ability to influence prices.[27] Nowhere does the Appellate Body limit "market power" to the government's role in providing a financial contribution, as China would have this Panel find. In sum, China would have this Panel extend the Article 1.1(a) public body analysis to a distortion analysis under Article 14(d). However, neither the text of the SCM Agreement, economic logic, nor findings in past reports support this position.[28]

[24] The United States has also provided the Panel with arguments on why such a finding would have a chilling effect on transparency and meeting Article 22.5 requirements. *See* U.S. Second Written Submission, paras. 49-50.
[25] U.S. Responses to Second Panel Questions, paras 12-18.
[26] *See, e.g.*, U.S. First Written Submission, paras. 147-149.
[27] *See, e.g.*, U.S. Second Written Submission, para. 58.
[28] U.S. Second Written Submission, para. 59.

4. SPECIFICITY UNDER ARTICLE 2.1 OF THE SCM AGREEMENT

a. Questions to Both Parties

90. What meaning do the parties attribute to the use, in Article 2.1(c) of the SCM Agreement, of the words "reasons to believe that the subsidy may in fact be specific"?

23. In its answer to Question 90, China rearranges the structure of the first sentence of Article 2.1(c) to obscure the fact that the text of the provision does not support China's order of analysis argument. China states that:

> If the "application of the principles laid down in subparagraphs (a) and (b)" results in an "appearance of non-specificity", but there are nonetheless "reasons to believe that the subsidy may in fact be specific", then the "other factors" under Article 2.1(c) "may be considered".[29]

The text in fact states:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other facts may be considered.

24. As the United States has previously explained, under a plain reading of this provision, the only mandatory prerequisite to an Article 2.1(c) analysis is that there exist "reasons to believe that the subsidy may in fact be specific."[30] The purpose of the dependent "notwithstanding" clause is to convey that a finding of non-specificity under the principles found in subparagraphs (a) and (b) does not prevent further consideration of a subsidy under Article 2.1(c). Indeed, it addresses a separate question from subparagraphs (a) and (b) – how the subsidy operates *in fact*, regardless of how it was implemented through legislation or other means.

91. What evidence do the parties consider necessary for an investigating authority to identify a subsidy programme?

25. In its response to Question 91, China observes that both parties to this dispute have cited the same definition to explain the ordinary meaning of the term "program" – and then proceeds to argue that this somehow supports China's position. It does not. To be sure, the ordinary meaning – which can be found in any dictionary – is important, but it is only the start of the analysis called for under the Vienna Convention. In particular, a treaty must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[31] The United States has explained how the context of Article 2 and the SCM Agreement as a whole informs the meaning of the term "program."[32] China,

[29] China Responses to Second Panel Questions, para. 28.
[30] *See, e.g.*, U.S. Second Opening Statement, paras. 40-42; U.S. Second Written Submission, paras. 83-85.
[31] Vienna Convention, art. 31(1).
[32] *See, e.g.*, U.S. Responses to Second Panel Questions, paras. 30-32.

however, ignores that context in an attempt to impose an unsupportable interpretation of the term "program" when used in an Article 2 specificity analysis.

26. In its response to this question, China also offers a new interpretation of "subsidy program" – namely that there "must be evidence that the subsidies at issue were 'intended' and 'planned' as a distinct 'series of subsidies'."[33] China cannot support this interpretation. First, China mistakenly relies on certain statements made by the United States in answer to panel questions in *EC and certain member States – Large Civil Aircraft*.[34] However, that dispute concerned types of subsidies and legal issues which differ greatly from those at issue here.[35] In particular, that dispute concerned subsidies that *were* provided according to a formally implemented program, and the United States only suggested that the cited factors "could" be used to determine whether subsidies of the type at issue in that dispute are implemented according to a subsidy program.[36] Other factors may be relevant in other circumstances. Therefore, China's reliance on the U.S. response in that dispute is misplaced and does not support China's interpretation of the term "program."[37]

27. Second, China's novel interpretation is not supported by the text of Article 2.1. There is no reference to the "intentions" or motivations of a government or public body in Article 2.1 in providing a subsidy to a limited number of industries or enterprises. Furthermore, the term "subsidy program" must be understood in the context of the SCM Agreement and does not require evidence of a "plan" of the type described by China. In particular, the ordinary meaning encompasses "programs" of "subsidies" as that term is defined in Article 1. Such subsidies include the provision of a good for less than adequate remuneration.[38] In evaluating whether the subsidy is specific, the emphasis of Article 2.1, as described in the chapeau and the first factor in Article 2.1(c), is on whether there is a limited number of users of a subsidy.[39] The provision of a good to users of that good in China for less than adequate remuneration is a "program" within the context of Article 2.1(c), and is specific if the number of users is limited.

28. Finally, as the United States has noted before, the result of China's interpretation of Article 2.1 would be that, if a Member elects to avoid the publication or issuance of a "plan" which shows that it "intends" to provide a subsidy to a limited number of users, and then distributes that subsidy to those limited users, no investigating authority would be able to determine the provision of that subsidy to be specific under Article 2.1. Such an interpretation of the SCM Agreement is unreasonable; if adopted it would discourage Members from administering and distributing their subsidies in a transparent manner, and would render ineffective the disciplines of the SCM Agreement.

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[33] China Responses to Second Panel Questions, para. 30.
[34] China Responses to Second Panel Questions, para. 29 (citing to U.S. Answers to Second Panel Questions, *EC and certain member States – Large Civil Aircraft*, paras. 261 and 265 (CHI-117)).
[35] The panel in that dispute was considering whether, as part of its analysis into if certain loans provided to Airbus were "disproportionately large," and if Airbus was the "predominant user," it should consider a "subsidy program" and if so, what constituted the "subsidy program." *EC and certain member States – Large Civil Aircraft (Panel)*, paras. 7.961-77.
[36] U.S. Answers to Second Panel Questions, *EC and certain member States – Large Civil Aircraft*, para. 265 (CHI-117).
[37] *See also* U.S. First Written Submission, note 220.
[38] SCM Agreement, arts. 1.1(a)(a)(iii), 14(d).
[39] *See, e.g.*, U.S. Responses to Second Panel Questions, paras. 30-32.

b. Questions to China

92. Are China's allegations of inconsistency with regard to Article 2.1 of the SCM Agreement limited to four specific aspects, namely (i) the identification of a subsidy programme, (ii) the finding of a prior appearance of non-specificity, (iii) the identification of a granting authority, and (iv) taking into account the two factors contained in the last sentence of Article 2.1(c)?

29. In response to Panel Question 92, China states that in addition to claims under Article 2.1, China is alleging in this dispute that Commerce acted inconsistently with Article 2.4 of the SCM Agreement. China, however, has presented no basis for a finding under Article 2.4.[40]

30. The United States recalls that Article 2.4 provides that specificity determinations shall be "clearly substantiated on the basis of positive evidence." China, however, has presented no arguments or analysis along these lines. China's arguments are based not on the facts of the subsidies at issue in the investigations, but rather on legal theories regarding the interpretation of Article 2. Accordingly, China has offered no argument or evidence to show that there were any evidentiary deficiencies in the specificity determinations at issue, and therefore has failed to make a *prima facie* case with respect to any claim under Article 2.4.[41]

93. Could China explain its views on the Appellate Body's statement in US – Anti-Dumping and Countervailing Duties (China) that Article 2.1 of the SCM Agreement encompasses principles, "instead of, for instance, "rules""?

31. China argues in its response to this question that the use of "principles" in the chapeau is immaterial to the understanding of the relationship between subparagraphs (a) through (c) of Article 2.1. This argument is not supported by the text of the Agreement.

32. China fails to acknowledge that the choice to use the word "principle" in the text of the SCM Agreement necessarily has implications for the application of Article 2.1. As the Appellate Body has recognized, the use of the term "principles," instead of "rules," or any other mandatory language, indicates that the subparagraphs should "be considered within an analytical framework that recognizes and accords appropriate weight to each principle."[42]

[40] However, the United States has repeatedly explained what information was relied upon in the investigations at issue. U.S. First Written Submission, para. 179; U.S. Response to First Panel Questions, paras. 90-93; U.S. Second Written Submission, para. 79.

[41] China has not disputed the fact that there are only a limited number of users of each good in China. U.S. Second Written Submission, para. 74. As the United States has previously explained, in each challenged investigation, the existence of the subsidy programs was grounded in the facts on the record. U.S. Second Written Submission, para. 79. The subsidies were first identified in the application, which contained evidence as to their existence, and then throughout each investigation Commerce collected additional information with respect to the users of the subsidies in question. In each investigation, positive evidence on the record clearly substantiated that only a limited number of industries or enterprises could, in fact, use the alleged subsidies in China. U.S. First Written Submission, para. 179.

[42] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366. *See* U.S. Second Written Submission, paras. 82-87 (discussing the term "principles" as considered by the Appellate Body).

33. China supports its argument by repeatedly[43] relying on an Appellate Body statement – that "Article 2.1(c) applies only when there is an 'appearance' of non-specificity" – that is taken out of context. That statement, when read in full, in fact illustrates that there is *no requirement* that an investigating authority analyze each subparagraph in any particular order. The full passage is:

> [W]e consider that a proper understanding of specificity under Article 2.1 must allow for the *concurrent* application of these principles to the various legal and factual aspects of a subsidy in any given case. Yet, we recognize 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. For instance, Article 2.1(c) applies only when there is an "appearance" of non-specificity. Likewise, a granting authority or authorizing legislation may explicitly limit access to a subsidy to certain enterprises within the meaning of Article 2.1(a), but not provide objective criteria or conditions that could be scrutinized under Article 2.1(b). We do, however, caution 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.[44]

34. In context, it is clear that the language relied upon by China – that "Article 2.1(c) applies only when there is an 'appearance' of non-specificity" merely makes the point that Article 2.1(c) need not be applied if specificity has *already* been found on the face of the measure. If that is the case, there is no reason to continue with an analysis of how the subsidy is in fact administered or used. Similarly, if there is no "objective criteria or conditions", an investigating authority need not examine paragraph 2.1(b), and if there is no source of an "explicit[] limit[ation]," no examination of paragraph 2.1(a) is warranted.

35. In closing, the United States would note that the Appellate Body's explanation of the distinction between "principles" and "rules," and focus on the "concurrent application" of each of the three principles, is an affirmative recognition that a determination as to which principle or principles applies is dependent on the "nature and content of measures challenged in a particular case." For this reason, China's position that the distinction is of no effect for purposes of understanding Article 2.1 is incorrect.

94. What does China consider an investigating authority should do, at a minimum, under Articles 2.1(a) and 2.1(b) of the SCM Agreement, and how should this be reflected on the record of an investigation?

36. In response to Question 94, China assumes that in *every* subsidy investigation there is a possible source of an "explicit limitation" of access to a subsidy to certain enterprises, thereby requiring in every situation an initial analysis under Article 2.1(a). China, however, presents no

[43] China First Written Submission, para. 90; China Second Written Submission, para. 113; China Responses to Second Panel Questions, para. 34.
[44] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371 (emphasis added).

basis for this assumption – either within the text of Article 2.1, or in the practical reality of subsidies administration.

37. China's arguments are incoherent on their face. China argues that even if the subsidizing Member has adopted no legislation limiting access to certain enterprises, an investigating authority must examine "express acts" or "pronouncements" of the granting authority under paragraph 2.1(a). However, China does not explain how its theory would work where there are *no such sources* of an express limitation. Likewise, China claims that under its proposed interpretation, "neither Article 2.1(a) nor Article 2.1(b) is limited to an evaluation of written instruments."[45] China, however, does not explain, and cannot explain how *unwritten* "express acts" or "pronouncements" of the granting authority would "explicitly limit" access to a subsidy.[46]

38. The United States also takes issue with China's argument that if the Panel agrees with its overall order of analysis argument, "then it is undisputed" that Commerce's "specificity determinations in the investigations at issue are inconsistent with Article 2.1."[47] This matter is not, as China contends, undisputed. China's entire order of analysis argument is premised upon the understanding that a subsidy must be issued pursuant to a specific written document or unwritten "pronouncement". In all of its submissions in this dispute, including CHI-122, China identified no documents or "pronouncements," written or otherwise, that Commerce failed to examine in the investigations at issue. Accordingly, for this reason also, China's claims with respect to the order of analysis must fail.

5. REGIONAL SPECIFICITY UNDER ARTICLE 2.2 OF THE SCM AGREEMENT

a. Question to Both Parties

96. Please comment on the finding of the panel in US – Anti-Dumping and Countervailing Duties (China) that specificity in the sense of Article 2.2 of the SCM Agreement refers to limitation of access to a subsidy on the basis of geographic location alone, and that no further limitation to a subset of the enterprises in the region in question is necessary for such specificity to exist.

39. The United States does not have a specific comment in response to China's answer to Question 96 other than to reiterate that China has failed to make a *prima facie* case with respect to its regional specificity claims.

b. Question to China

[45] China Responses to Second Panel Questions, para. 37.
[46] The panel in *EC and certain member States – Large Civil Aircraft* stated that "it follows from the ordinary meaning of the word 'explicit' that it is not any limitation on access to a subsidy to certain enterprises that will make it specific within the meaning of Article 2.1(a), but only a limitation that '{d}istinctly express{es} all that is meant; leaving nothing merely implied or suggested'; a limitation that is 'unambiguous' and 'clear.'" *EC and certain member States – Large Civil Aircraft (Panel)*, para. 7.919. China's response provides no explanation how, under its interpretation of Article 2.1(a), an "unwritten pronouncement," could "distinctly express all that is meant," be "unambiguous and clear" and leave "nothing merely implied or suggested."
[47] China Responses to Second Panel Questions, para. 39.

97. Is China's argument correctly described as follows: the USDOC failed to show that there was a limitation on access to the financial contribution or benefit because it failed to show that the land-use regime within the industrial park or economic development zone in question was distinct from that outside the park or zone?

40. In its answer to Question 97, China mischaracterizes statements by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* as supporting China's positions. In particular, China is incorrect that that the Appellate Body found that the provision of a subsidy to certain enterprises located within a designated geographical region would never be regionally specific within the meaning of Article 2.2 of the SCM Agreement "if the identical subsidy were also available to enterprises outside that designated geographical region."[48]

41. Rather, the Appellate Body was discussing China's challenges to the panel's specificity findings in *US – Anti-Dumping and Countervailing Duties (China)*. It was China itself who in that dispute characterized the panel's findings as being addressed to provision of subsidies provided inside and outside of certain regions. The Appellate Body finding relied upon by China does not go to the substance of the issue, but rather disagreed with China's characterization of the panel report. In particular, and in that context, the Appellate Body noted that it "was not at all clear" that the panel's statements "somehow imply, as China suggest[ed], that the Panel considered that the mere existence of a 'distinct' regime would enable a subsidy to be found to be specific to a designated geographical region, even if the identical subsidy were also available to enterprises outside that designated geographical region."[49] Thus, the so-called finding relied upon by China is simply a discussion of how China went about framing its issues in the appeal in *US – Anti-Dumping and Countervailing Duties (China)*, and did not go to the merits of the issue.

42. More generally, the United States would again emphasize that regional specificity determinations are fact-specific and vary greatly from investigation to investigation, and the implications of any similar, or "identical," subsidies being provided outside of a designated geographical region would need to be evaluated by an investigating authority in the context of a particular investigation to determine whether regional specificity exists within the meaning of Article 2.2.[50]

43. Finally, regardless of the discussions by the panel and the Appellate Body of this and other tangential issues in *US – Anti-Dumping and Countervailing Duties (China)*, the ultimate conclusion in that dispute has only limited relevance to this dispute. This is because the panel's conclusion was "driven by the facts that were on the record of that investigation,"[51] and China has failed to address the facts of the seven investigations at issue in this dispute, or to apply the provisions of Article 2.2 to those facts.

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[48] China Response to Second Panel Questions, para. 44.

[49] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 421. The Appellate Body also disagreed with China that the panel's qualifying statements suggested that "'the [p]anel would have found the alleged land-use rights subsidy to be regionally specific if it had been provided as part of a 'distinct regime', even if the identical subsidy was available elsewhere in Huantai County.'" *Id.*

[50] In addition, the relevance of China's hypothetical scenario to its claims in this dispute is unclear. China has not demonstrated that in each of the challenged investigations the identical land use rights subsidy was provided both inside and outside the designated geographical regions.

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

44. For these reasons, China's discussion of *US – Anti-Dumping and Countervailing Duties (China)* mischaracterizes the Appellate Body's statements in its report and is inapplicable to the issues in this dispute.

6. EXPORT RESTRAINTS

a. Question to China

110. In para. 62 of its Opening Statement, the United States notes that "China does not argue in the alternative that, as an evidentiary matter, the evidence in the applications was insufficient for initiation purposes". Please respond.

45. At the onset of this dispute, China argued that WTO jurisprudence "definitively establishes that the treatment of export restraints as a financial contribution is inconsistent with Article 1.1 of the SCM Agreement."[52] However, China has now modified its position in response to the Panel's second set of questions. Perhaps recognizing the extreme nature of its original argument, China now states that it "is *not* 'asking the Panel to rely wholly on the analysis in *US – Export Restraints* to conclude that *any* investigation [into export restraints] under *any* circumstance would be impermissible.'"[53] China's clarification is important because it demonstrates that the question before the Panel is not strictly a legal one, but a question involving an application of a legal standard to the evidence on the record in this dispute.

46. Accordingly, as China now acknowledges, the "circumstances" (which in turn are based on the record evidence) of an export restraint allegation in fact may permit investigation of whether an export restraint scheme constitutes a countervailable subsidy. Thus, the question before the Panel is whether China has shown that the "circumstances" in the *Seamless Pipe* and *Magnesia Carbon Bricks* investigations (that is, the circumstances based on the evidence contained in the record of those investigations) are such that it necessarily would be inconsistent with the obligations under the SCM Agreement for the United States to investigate whether these export restraint schemes constituted countervailable subsidies. China has made no such showing; in fact, China has not even discussed the relevant evidence contained in the applications in those two investigations. Accordingly, China's claim must fail.

47. The United States would also note that even if China had tried to address the record evidence in those two investigations, it could not have supported any claim that it was improper for the United States to initiate subsidy investigations on the export restraints at issue. In the challenged investigations, the applications contained evidence of the export restraints as well as contextual, or circumstantial, evidence the totality of which tended to prove or indicated the existence of a financial contribution through entrustment or direction.[54]

48. In sum, for the reasons set out above, China has no basis for any claim that Commerce's initiations in *Seamless Pipe* and *Magnesia Carbon Bricks* were improper under Article 11 of the SCM Agreements.

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[52] China First Written Submission, para. 185.
[53] China Responses to Second Panel Questions, para. 49 (emphasis in original).
[54] U.S. First Written Submission, paras. 299 and 290 and notes 352 and 358; U.S. Second Written Submission, para. 127; U.S. Responses to Second Panel Questions, paras. 44-47.

7. FACTS AVAILABLE

a. Questions to China

103. How does China respond to the United States' argument in paras. 65 and 66 of the United States' Opening Statement?

104. Please explain why and how China considers the Appellate Body's prior findings on "reasoned and adequate" explanations to apply specifically to Article 12.7 of the SCM Agreement.

49. The United States will comment on China's responses to Panel Questions 103 and 104 together. China's responses to these questions ignore the explanation that the United States gave in its opening statement at the second meeting of the Panel, mischaracterize the purpose of a "reasoned and adequate" explanation, and distract from the question before the Panel by raising matters that are not at issue in this dispute.

50. China states that the explanations in Commerce's issues and decision memoranda and *Federal Register* notices give "no indication" of the facts underlying its facts available determinations.[55] Exhibit USA-94,[56] as illustrated by the examples cited in paragraph 65 of the second opening statement of the United States, demonstrates that China's assertions are incorrect. In fact, it is clear from Commerce's explanations reproduced in Exhibit USA-94, together with the facts and context of the investigations, that the information relied on as "facts available" consisted in most cases of information provided in the application, often the only relevant information on the record. As Exhibit USA-94 demonstrates, Commerce's facts available determinations were fully supported by the records in the respective investigations.[57]

51. Contrary to China's assertions, Commerce was not required to provide a citation to each individual fact that underlies each facts available determination. No such obligation exists in the SCM Agreement, nor has any panel or Appellate Body report described such an obligation. Furthermore, to the extent that China were to allege that the United States somehow failed to comply with its WTO transparency obligations (a contention with which the United States would strongly disagree), that would be an issue arising under Article 22 of the SCM Agreement.

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[55] China Responses to Second Panel Questions, para. 52.

[56] Contrary to China's assumption in footnote 69 of its second response to questions from the Panel, the United States does not concede that the facts available determinations omitted from Exhibit USA-94 are inconsistent with Article 12.7. As explained in response to the Panel's second set of questions, the United States is advocating an interpretation of the term "public body" in this dispute that Commerce did not apply in the investigations that China challenges in this dispute. This contrasts with the remaining facts available determinations that China is challenging. In light of the U.S. argument regarding the interpretation of the term "public body", the Panel's review of the facts available determinations related to the public body issue is unnecessary. However, the United States maintains that China has not made its *prima facie* case with respect to those claims, as well as the rest of the uses of facts available.

[57] This contrasts with *China – Broiler Products* where the panel upheld the U.S. claim that China acted inconsistently with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement because it was "not possible to establish" based on the record of the investigation "that MOFCOM has determined the 'all others' rate consistently with the principles of Article 12.7." *China – Broiler Products*, para. 7.359. *See also id.* paras. 7.312-13 (discussing Article 6.8 of the AD Agreement).

There is no cause here, however, to explore issues involving the application of Article 22 to the facts at issue here, because China has not pursued an Article 22 claim.

52. China's answer to question 104 regarding a "reasoned and adequate" explanation confuses some very distinct concepts.[58] China argues as if a "reasoned and adequate" explanation – as discussed by the Appellate Body in *US - Softwood Lumber VI (Article 21.5 – Canada)* – is some sort of WTO obligation imposed upon Members in connection with antidumping and countervailing duty investigations. However, as even a cursory review of the report in *US - Softwood Lumber VI (Article 21.5 – Canada)* reveals, China is mistaken. What the Appellate Body was discussing in *US - Softwood Lumber VI (Article 21.5 – Canada)* was not obligations upon Members, but rather the standard of review to be applied by panels in considering the WTO-consistency of determinations made by authorities. As the Appellate Body explained:

> It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent.[59]

53. In the present dispute, China has no basis for arguing that under this standard of review (that is, somewhere between a de novo review and complete deference to the authority), the Panel should find that Commerce's facts available determinations did not meet the requirements under Article 12.7 of the SCM Agreement. To the contrary, Commerce's determinations explained why it was resorting to facts available, and the evidence in this dispute shows that the facts available chosen by Commerce were indeed on the records in the relevant investigations.[60]

54. Finally, the United States observes that, at this late stage in the proceedings, China raises issues not directly related to its legal claims, but which seem to be aimed at insinuating that Commerce's facts available determinations were somehow improper. In particular, China

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[58] *See* China Responses to Second Panel Questions, paras. 52, 56 and 58-59.

[59] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93. *See also US – Countervailing Duty Investigation on DRAMs (Korea) (AB)*, para. 180-81; *US – Lamb (Panel)*, para. 7.3.

[60] The United States would note that the explanation provided by the investigating authority must be considered *together with* the facts on the records. The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* quoted the panel report in *US – Lamb*, which stated that it would review whether "all relevant facts on the record could support the [US]DOC and [the US]ITC's determinations of subsidization and injury respectively" and would look "at the same evidentiary record as the [US]DOC and [the US]ITC." *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 180 (quoting *US – Lamb (Panel)*, para. 7.3) (alterations in the original). Thus, "a panel must limit its examination to the evidence that was before the agency during the course of the investigation, and must take into account all such evidence submitted by the parties to the dispute." *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 187.

indicates concerns with Commerce's findings of noncooperation[61] and with regard to whether "best information available" or "special circumspection" were used.[62] These determinations, however, were fully supported by the records in the investigations and consistent with WTO disciplines, and China has not shown otherwise.

55. In sum, as is explained in prior submissions of the United States, and demonstrated by Exhibit USA-94 and the exhibits referenced therein, Commerce's uses of "facts available" were based on facts, consistent with Article 12.7 of the SCM Agreement.

[61] Because China is not challenging Commerce's findings of noncooperation, the question whether interested parties cooperated is not before this Panel. *See* China First Written Submission, para. 144 ("While China considers that many of the USDOC's findings of 'non-cooperation' are unjustified, for purposes of this dispute it has decided to focus its legal challenge on the USDOC's unlawful use of 'adverse facts available'.").

[62] As the United States explained in response to the Panel's first set of questions at paragraph 139 and at the second meeting of the Panel, Annex II provides relevant context for interpreting Article 12.7 of the SCM Agreement, but it is not clear whether and how the concept of "special circumspection" applies to subsidy investigations. *See* U.S. Responses to First Panel Questions, para. 139. Further, to the extent that China implies that the "best information available" was not used by Commerce, it has pointed to no other, better information which would have been available to Commerce in making its determinations.