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

EXECUTIVE SUMMARY OF OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

August 1, 2013

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 <u>not</u> 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.