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

EXECUTIVE SUMMARY OF FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

March 22, 2013

I. INTRODUCTION

1. In this dispute, which is one of the largest in the history of the WTO, China advances claims with respect to 97 individual alleged breaches of the SCM Agreement concerning 17 different CVD investigations, and involving 31 initiations of investigations or preliminary or final determinations. Despite the enormous scope of this case, in its first written submission, China follows a pattern – established in its consultations and panel requests – of taking shortcuts. In particular, China makes sweeping factual generalizations regarding the various investigations and fails to adequately link its broad legal arguments with the specific facts of the determinations. China asserts that its claims "largely entail the application of the findings in DS379, as well as other well-settled jurisprudence." In fact, this dispute involves several novel interpretations of the SCM Agreement that were not addressed in DS379, or any other dispute. Additionally, China inappropriately relies on the findings of other panels relating to the facts of *other disputes*. China declines to include in its submission virtually any discussion of the facts at issue in the determinations it challenges. Accordingly, China's claims have no merit, as it (1) has failed to establish its *prima facie* case with respect to its claims and (2) China's legal arguments lack support in the text of the SCM Agreement.

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

2. China's panel request lists the preliminary determinations in *Wind Towers* and *Steel Sinks* as measures at issue. These measures, however, are not listed in China's request for consultations. As such, these measures were never subject to consultations, and thus, as a matter of law, these measures are not within the terms of reference of this proceeding. The inclusion of claims related to these determinations would inarguably expand the scope of this dispute as compared to the matter described in the request for the consultations. Under the DSU and Appellate Body findings, the terms of reference of this proceeding cannot extend to these two determinations.

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

3. China's submission lacks legal arguments and evidence sufficient to establish China's *prima facie* case. Throughout its first written submission, China follows a pattern established in its panel request of taking numerous shortcuts in the presentation of its case. China, as the complaining party in this dispute, must make a *prima facie* case for each of the 97 alleged breaches of the relevant provisions of the WTO agreements. It has failed to do so.

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

instant dispute. This line of reasoning is inadequate. China must apply the relevant provisions of the SCM Agreement to the facts in *this dispute*, but it has failed to do so. Both the legal arguments and evidence must be present for a panel to address a claim, because "when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU."

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

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

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

7. The context of the term "public body" reveals that it is indeed government ownership or control that is central to a proper interpretation, for these elements mean that the government can use the entity's resources as its own. In Article 1.1(a)(1), "public body" is part of the disjunctive phrase "by a government or any public body within the territory of a Member. . . ." The SCM Agreement thus uses two different terms – "a government" and "any public body" – to identify the two types of entities that can directly provide a financial contribution. The use of the distinct terms "a government" and "any public body" together this way suggests that the terms have distinct and different meanings. Treaty interpretation should give meaning and effect to all terms of a treaty, and "public body" cannot be interpreted in a manner that would render it redundant.

8. The use of "a," "any," and "or" in Article 1.1(a)(1) suggests that there might be different *types* of public bodies. Some entities might be more akin to government agencies, while others might be corporations engaging in business activities. The unifying characteristic of all public bodies is that they are controlled by the government, such that the government can use their resources in the same manner as its own.

9. The use of the term "government" as a shorthand reference does not require a narrow interpretation of "public body." While the terms "government" and "public body" are related, the question is: what is the nature of their relationship? Understanding the relationship as one of control of a "public body" by "a government" (on behalf of the community it represents) gives meaning to both terms and avoids reducing the term "public body" to redundancy. It is also consistent with the dictionary definitions relevant to the term "public body."

10. The context provided by the term "private body" in Article 1.1(a)(1)(iv) supports an understanding of the term "public body" as an entity controlled by the government such that the

government can use the entity's resources as its own. Logically, since the ordinary meaning of the term "public" is the opposite of "private," the term "public" means "*provided or owned by the State or a public body rather than an individual*."

11. The context provided by "financial contribution" in Article 1.1(a)(1) supports an understanding of "public body" as an entity controlled by the government such that the government can use the entity's resources as its own. Financial contributions are one part of a definition of "subsidy," and those subsidies are granted or maintained by Members. A Member can make the financial contribution underlying the subsidy directly through its "government" or also through entities that it controls.

12. Further context in Article 1.1(a)(1), such as "payments to a funding mechanism," supports this understanding of the scope of transactions that are "financial contributions." When a financial contribution flows to a recipient through the economic activity of an entity controlled by the government, value is conveyed from a Member to that recipient in the same way as if the government had provided the financial contribution directly. Article 1.1(a)(1) is designed to capture such flows within its definition of "financial contribution."

13. The context provided by the "entrusts or directs" language in Article 1.1(a)(1)(iv) does not weigh against an understanding of "public body" as an entity controlled by the government such that the government can use the entity's resources as its own. The fact that an entity has the "authority" or "responsibility" to do a task, such as selling steel or chemicals, which can be entrusted to another entity if the first entity so chooses, does not mean that the entity has "authority" or "responsibility" to perform governmental functions. Further, even assuming *arguendo* that the authority or responsibility to entrust or direct is the same as the authority or responsibility to perform governmental functions, it does not follow that all public bodies must have this authority. In other words, it does not follow that all public bodies must be homogeneous in their possession of authority to entrust or direct private bodies.

14. Additionally, the suggestion that the reference to government functions in Article 1.1(a)(1)(iv) relates to the "authority to 'regulate, control, supervise or restrain' the conduct of others" is unsupported by the text. The language in subparagraph (iv) of Article 1.1(a)(1) simply refers back to the functions described in subparagraphs (i) through (iii). It is circular to read Article 1.1(a)(1)(iv) as requiring that the term "public body" be interpreted as meaning an entity vested with or exercising authority to perform governmental functions.

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

16. The object and purpose of the SCM Agreement support an interpretation of "public body" as meaning an entity controlled by the government such that the government can use the entity's resources as its own, without the additional requirement that the entity must be vested with authority from the government to perform governmental functions. Interpreting "public body" in this way preserves the strength and effectiveness of the subsidy disciplines and inhibits circumvention. Such an interpretation ensures that governments cannot escape those disciplines

by using entities under their control to accomplish tasks that would potentially be subject to those disciplines were the governments themselves to undertake them. In any event, such an interpretation is consistent with the broad range of meanings suggested by the ordinary meaning of "public" and "body," and reading "public body" in context supports that interpretation.

17. When interpreting Article 1.1(a)(1), it is not necessary to take into account the ILC Articles, because they are not relevant rules of international law applicable in the relations between the parties. Even assuming *arguendo* that the ILC Articles can be considered "applicable," they are not helpful in determining *whether* the United States breached its obligations. They would only be helpful in determining whether the United States was responsible for any alleged breach, for example, if there was some question about whether the action of Commerce is attributable to the United States.

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

19. While the parties are in agreement that the findings of the Appellate Body on "public body" are important and need to be taken into account in this dispute, China does not and cannot assert that the Panel may merely rely on or apply those findings. The Panel should consider the interpretation of "public body" by applying the customary rules of interpretation of public international law, taking due account of previous interpretations of that term.

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

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

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

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

23. China argues that *Kitchen Shelving* established a "policy" or "practice" of a rebuttable presumption that majority government-owned entities are public bodies, which Commerce then followed in subsequent determinations. However, even labeling the *Kitchen Shelving* discussion as a "policy" or "practice" by Commerce, would not necessarily result in a breach of the SCM Agreement. Because a particular policy or practice under U.S. law can and frequently does change, it does not itself direct Commerce to take any future action, and therefore it cannot necessarily result in a WTO breach. China's allegations of repetition do not transform the discussion in *Kitchen Shelving* into a measure that can be challenged. Not having established that the *Kitchen Shelving* discussion is a measure, China has also failed to show that that discussion can result in an "as such" breach of the SCM Agreement.

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

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

25. There can be no question that an investigating authority may rely on out-of-country benchmarks in certain circumstances. Additionally, it should come as no surprise to China that an investigating authority might rely on out-of-country benchmarks as the reliability of Chinese in-country prices was of sufficient concern to Members that China's Accession Protocol recognizes that such prices within China might not always be appropriate benchmarks.

26. China conflates what are, necessarily, two separate analyses: (1) a financial contribution analysis under Article 1.1 of the SCM Agreement; and (2) a benefit analysis under Article 14(d). As evidenced by *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body did not perceive Commerce's treatment of SOEs as public bodies as an impediment to upholding Commerce's reliance on out-of-country benchmarks in those investigations.

27. Commerce's public body determinations in the investigations challenged here were not WTO-inconsistent. In any event, the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* demonstrates that a WTO-inconsistent public body determination does not mean that a determination that government involvement in an input market distorts prices in that market, such that the use of out-of-country prices as a benchmark is appropriate, is also WTO-inconsistent.

28. Notwithstanding its claims before this Panel, China itself considered production by majority government-owned firms to be of key relevance in Commerce's examination of China's presence in the market. As such, China essentially challenges Commerce's reliance on China's

own reporting. China would have the Panel overturn Commerce's determinations to use out-of-country benchmarks where Commerce relied on China's own reporting.

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

30. China also mischaracterizes Commerce's methodology by stating that Commerce applies a *per se* test that relies exclusively on government market-share rather than the case-by-case analysis that it actually performs. China's generalization that Commerce relies exclusively on government-market share in each case to determine that distortion exists is incorrect, as Commerce relies on other facts as well. So even if, *arguendo*, Commerce could not rely on the share of government-produced good in the market alone to find distortion in the in-country market, China's arguments fail.

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

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

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

33. China's interpretation must be understood within the context of Article 2 and the SCM Agreement. China's interpretation would negate the distinction between Article 2.1(c), relating to subsidies that are *de facto* specific, and Article 2.1(a), relating to subsidies that are *de jure* specific. China's interpretation of Article 2.1(c) would incorrectly focus a *de facto* specificity inquiry on the existence of a formal plan or outline, and not on whether or not there are a limited number of users, the inquiry which is the subject of Article 2.1(c). This interpretation is not only

unsupported by the text of the Agreement, but would also allow Members to circumvent the disciplines of the Agreement by avoiding the creation of an identifiable plan or outline, thereby frustrating the ability of investigating authorities to countervail otherwise actionable subsidies.

34. Second, China's assertion that an investigating authority must examine a subsidy under Articles 2.1(a) and 2.1(b) before examining Article 2.1(c) in every case has no basis in the text of the SCM Agreement. The ordinary meaning of Article 2.1 makes clear that the paragraphs in Article 2.1 should be applied "concurrent[ly] and that, although Article 2.1 "suggests" that the specificity analysis will "ordinarily" proceed sequentially, this is not a mandatory prescription. Because China's arguments are inconsistent with the ordinary meaning and context of the provisions of the SCM Agreement, the Panel must find there is no order of analysis requirement in Article 2.1.

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

36. Fourth, China argues that Commerce was required to address expressly the diversification of China's economy and the length of time inputs had been provided for less than adequate remuneration in each challenged determination. A specificity determination involves a fact-based analysis, made on a case-by-case basis. Thus, the relevance of either (1) the length of time a subsidy has been in place or (2) the economic diversification in the Member country would also be determined on a case-by-case basis. In particular, those factors would be relevant only if the period of time examined could directly impact the specificity determination, or if the subject economy lacks diversification. The factors were not relevant to the investigations at issue, and China's submission does not allege that the factors would have impacted the analysis in the investigations at issue. Thus, China's argument is without merit, and Commerce's determinations that the provision of inputs was specific in the challenged investigations were fully consistent with U.S. obligations under Article 2.1.

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

37. China appears to challenge determinations made by Commerce in seven CVD investigations that the provision of land-use rights in China was specific within the meaning of Article 2 of the SCM Agreement. Although China claims that in "each investigation" Commerce's determination of specificity with respect to land-use rights is inconsistent with Article 2.2 of the Agreement, China has failed to make a *prima facie* case of any of these alleged breaches. For that reason, the Panel must reject China's claims with respect to regional specificity.

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

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

39. Article 11 of the SCM Agreement requires only that there be "sufficient evidence" of the existence of a subsidy in an application to justify initiation of an investigation. As the panel stated in *China – GOES*, all that is required is "adequate evidence, tending to prove or indicating the existence of" a subsidy, not "definitive proof" of the subsidy's existence and nature. Further, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant. As the panel in *China – GOES* stated: "[i]n the Panel's view, the fact that an applicant must provide such information as is 'reasonably available' to it confirms that the quantity and quality of the evidence required at the stage of initiating an investigation is not of the same standard as that required for a preliminary or final determination." China has failed to demonstrate that Commerce's determinations were inconsistent with this standard.

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

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

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

43. If evidence of government ownership or control is relevant to the question of whether an entity is a public body in a final determination, such evidence can be adequate to "tend to prove

or indicate" or "support a statement or belief" that an entity is a public body at the initiation stage, as required by Article 11 of the SCM Agreement.

44. Further, when assessing the sufficiency of evidence, an investigating authority must be cognizant of what is, and what is not, reasonably available to an applicant. If the precise identities of the entities that may be public bodies are not reasonably available, then their characteristics and features also are not reasonably available to an applicant. This means that certain evidence relevant to the question of whether an entity "possesses, exercises or is vested with governmental authority" generally may not reasonably be available to an applicant, and instead, this evidence must be gathered by the investigating authority through the investigatory process. Even if the identities of some of the entities that may be public bodies are available, much of the evidence regarding the nature of those entities is not in the public realm and thus not available to an applicant. At the same time, an investigation cannot be initiated on the basis of no evidence, or on the basis of simple assertion, unsubstantiated by relevant evidence. The question for the investigating authority is therefore: what evidence is reasonably available to an applicant, and does it tend to indicate that the government or public bodies are providing financial contributions? In general, evidence of government ownership or control is in certain circumstances the only evidence that is reasonably available. In fact, the issue of public bodies is an example of why the SCM Agreement includes the term "reasonably available."

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

45. China challenges Commerce's decision in *Seamless Pipe* and *Magnesia Carbon Bricks* to initiate investigations into export restraints imposed by China, in addition to Commerce's determination to countervail those export restraints after China refused to provide information necessary to the analysis. China's objections to these initiation decisions – objections which are crucial to China's case given that it failed to cooperate once the investigations were underway – are unfounded because they rely on China's flawed belief that investigating authorities are prohibited from examining China's various export restraint schemes based on one WTO panel report.

46. China failed to make a *prima facie* case. Additionally, Commerce's initiation of investigations into export restraints in the challenged investigations was not inconsistent with Articles 11.2 and 11.3 of the SCM Agreement, in spite of the *US – Export Restraints* panel's erroneous *obiter dicta* analysis of whether hypothetical export restraints could constitute a financial contribution.

47. Notwithstanding the erroneous panel report, examining whether an export restraint constitutes a financial contribution through entrustment or direction is fully consistent with Article 1.1(a)(1). Additionally, the United States decisions to countervail China's export restraints on coke and magnesia are not WTO-inconsistent where they were based upon the use of facts available pursuant to Article 12.7 of the SCM Agreement. The use of facts available was required after China declined to provide necessary information based on its erroneous position

that, as a legal matter, an export restraint cannot constitute a financial contribution encompassed by Article 1.1(a) of the SCM Agreement.

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

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

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

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

XII. CONCLUSION

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