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

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

June 7, 2013

I. INTRODUCTION

1. This dispute, like all WTO disputes, presents questions about the interpretation of the covered agreements and requires an objective assessment of the specific facts in the dispute. Yet, in China's first written submission and its responses to questions from the Panel, China has cut corners in its legal analysis, failed to analyze the specific facts of each investigation, and failed to make a *prima facie* case with respect to most of its claims. The Panel should not accept China's invitations to take short cuts, and the Panel cannot make China's case for it. China's arguments simply do not provide a basis on which the Panel could sustain China's allegations that the United States has acted inconsistently with its WTO obligations.

II. TERMS OF REFERENCE

2. China argues that adding the preliminary determinations in *Wind Towers* and *Steel Sinks* together with new legal claims in its panel request does not "expand the scope of the dispute" because it made similar claims with respect to different investigations in its consultations request. However, China's arguments are not consistent with the plain language of Articles 4 and 6.2 of the DSU. To the contrary, the fact that China considers the initiation of an investigation to be subject to different obligations from preliminary determinations only highlights that they are distinct.

3. The fact that China brought claims against multiple measures does not relieve China of its obligations under Article 6.2 of the DSU to identify "the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Instead, the fact that China is challenging multiple measures only increases the need for clarity of its claims. China's arguments do not address the threshold fact that these preliminary determinations did not exist at the time China requested consultations, and so they could not have been the subject of consultations. Where the responding Member engages in consultations, the complaining Member may request the establishment of a panel on the disputed matter only "[i]f the consultations fail to settle the dispute." This request for panel establishment under Article 7.1 of the DSU, in turn, establishes the terms of reference for the panel proceeding. The process helps resolve disputes earlier in the context of consultations, and thereby potentially reduces the number of panel proceedings.

III. CHINA HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE WITH RESPECT TO ALLEGED VIOLATIONS OF THE SCM AGREEMENT

4. China's first submission relied on broad and inaccurate generalizations regarding the facts of Commerce's preliminary and final determinations. Because China did not discuss how the provisions of the SCM Agreement apply to any of the determinations made by Commerce, it failed to make a *prima facie* case. China belatedly submitted exhibits CHI-121 through CHI-125, which provide excerpts from various documents. However, these exhibits fail to cure the deficiencies in China's submissions. In particular, the "cut and paste" excerpts in CHI-121 through CHI-125 fail to "explain the basis for the claimed inconsistency of the measure with" the provision at issue, which China acknowledges is a necessary component of a *prima facie* case.

5. China does not discuss or cite to the facts of the investigations at all, much less demonstrate that those facts are all "similar." As a result, China has failed to demonstrate that Commerce "adopted an 'assembly line' approach," or any other approach, to its subsidy determinations. Further, China cannot avoid its burden to present a *prima facie* case for *each* of its numerous claims by simply asserting that "the central issues in this dispute are issues of legal interpretation" and that its claims concern the "applications of legal standards." It is impossible to know whether any particular "legal standard" (as proposed by China) was applied in a given determination and whether a particular

application of any such legal standard was inconsistent with the SCM Agreement, because China has not discussed the facts of the investigations.

IV. THE PANEL SHOULD FIND THAT A "PUBLIC BODY" IS AN ENTITY CONTROLLED BY THE GOVERNMENT SUCH THAT THE GOVERNMENT CAN USE THAT ENTITY'S RESOURCES AS ITS OWN

6. The U.S. first written submission explains in detail the reasons why the Panel should conclude that the term "public body" in Article 1.1(a)(1) of the SCM Agreement means an entity controlled by the government such that the government can use that entity's resources as its own. Rather than seriously engage with the interpretation of "public body" proposed by the United States, China simply insists repeatedly that the interpretative question has been "definitive[ly]" settled as a result of the DSB adoption of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. China is incorrect.

7. The Panel should undertake its own interpretative analysis in accordance with the customary rules of interpretation of public international law. The DSU not only empowers the Panel to take on that task, it charges the Panel with that responsibility through DSU Articles 11 and 3.2. It does not limit the Panel to simply "apply[ing] the legal standard" adopted by the Appellate Body, as China urges. China's proposed analytical approach – a simple binary choice between two competing interpretations – is impermissible under the DSU. The DSU tasks each panel with making its own "objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." The Panel should address the arguments that the Parties have put before it here and should come to its own conclusions about the proper interpretation of the term "public body" using customary rules of interpretation, pursuant to the DSU.

8. The Panel should take into account all prior panel and Appellate Body reports that have addressed the meaning of the term "public body," and which are relevant to the Panel's own consideration of the proper interpretation of that term. The DSU, consistent with the practice of GATT and WTO panels and the Appellate Body, gives the Panel broad authority to draw upon the reasoning of prior dispute settlement reports, both adopted and unadopted, as the Panel works to resolve the legal questions that have been presented to it. The "hierarchical structure contemplated in the DSU" exists only in relation to a particular dispute. Outside the context of a dispute in which there has been an appeal, Appellate Body reports do not have an elevated status above adopted or even unadopted panel reports. The Appellate Body is not infallible, and its legal interpretations are not binding outside the context of a particular dispute. Accordingly, the Panel should take into account all panel and Appellate Body reports that discuss the same issue and that the Panel considers could assist the development of its own reasoning.

9. China draws the Panel's attention to the panel report in *Canada – Renewable Energy*. The United States agrees that the Panel should take that panel report into account, but we submit that the panel's application of the public body standard there is much closer to the U.S. proposed interpretation than it is to China's. That panel focused on the government's "meaningful control" and did not find that Hydro One "itself possess[ed] the authority to 'regulate, control, supervise or restrain' the conduct of others." We consider "meaningful control" to mean control over the entity such that the government can use the entity's resources as its own.

10. The Appellate Body applied the same public body standard in *US – Anti-Dumping and Countervailing Duties (China)* when it upheld Commerce's determinations that state-owned

commercial banks (SOCBs) in China were public bodies. The Appellate Body repeatedly referred to the government's "meaningful control" over an entity. There was no evidence that the banks could or did regulate, control, supervise, or restrain the conduct of others. The implication is that the SOCBs would fail to meet the new test China has proposed in this dispute. China's approach is, in reality, a deviation from the standard articulated in *US – Anti-Dumping and Countervailing Duties (China)*, as applied by the Appellate Body.

11. Finally, we share Canada's concern about the potential for circumvention of the SCM Agreement if the term "public body" were interpreted too narrowly. China's proposed interpretation would permit a government to provide the same financial contribution with the same economic effects and escape the SCM Agreement definition of a "financial contribution" merely by changing the legal form of the grantor. This could have wide-ranging effects in the international marketplace if Members began engaging in subsidizing activity that, under China's proposed interpretation, would technically be outside the scope of the SCM Agreement. Such an outcome would be a major step backwards from the subsidies disciplines that were a key accomplishment of the Uruguay Round, but would not result from a proper interpretation of the term "public body." We believe that our proposed interpretation of the term "public body" is consistent with and supports the object and purpose of the SCM Agreement, and it is the interpretation that results from the proper application of the customary rules of interpretation of public international law.

12. The United States continues to urge the Panel to engage in a fulsome interpretative analysis in accordance with the customary rules of interpretation of public international law. We remain confident that doing so will lead the Panel to conclude that a "public body" is an entity controlled by the government such that the government can use that entity's resources as its own.

V. THE DISCUSSION IN *KITCHEN SHELVING* IS NOT A MEASURE THAT CAN BE CHALLENGED "AS SUCH"

13. As demonstrated in the U.S. first written submission and U.S. responses to the Panel's questions, Commerce's discussion of the public body issue in the *Kitchen Shelving* final determination is not a "measure" that can be challenged "as such." In *Kitchen Shelving*, Commerce described its past determinations regarding the public body issue. As explained in the U.S. first written submission, the discussion in *Kitchen Shelving* does not bind Commerce to any particular analysis of whether an entity is a public body. At most, it explains Commerce's past actions. However, an explanation is not a "measure," and even a practice or policy is not necessarily a "measure."

14. China argues that "any act or omission attributable to a WTO Member" can be a measure. However, even with this problematic and broad definition of a measure, the explanation in *Kitchen Shelving* that China challenges is not an "act or omission." The explanation, on its own, does not do or accomplish anything. It has no "independent operational status such that it could independently give rise to a WTO violation." It is descriptive, rather than proscriptive.

15. Indeed, the fact that the discussion in *Kitchen Shelving* does not have "general and prospective application" is fatal to China's claim. There is no indication in that discussion that Commerce intended the *Kitchen Shelving* reasoning to apply to all cases, regardless of the unique facts and record in each case. There is no indication that Commerce intended "to conclusively treat all entities controlled by the Government of China as 'public bodies' in *all* cases…." The language used in *Kitchen Shelving* indicates that rather than opining on the conclusive status of all entities controlled by the government in all cases and for all time, Commerce would in the future examine evidence and

arguments that "majority ownership does not result in control of the firm" and would consider "all relevant information."

VI. OUT-OF-COUNTRY BENCHMARKS

16. As the United States demonstrated previously, China's argument conflates two distinct analyses: a financial contribution analysis under Article 1.1(a)(1) on the one hand, and a benefit analysis under Article 14(d) on the other hand. Article 14(d) is solely focused on the adequacy of the remuneration. Instead, the question before the Panel is whether it is inconsistent with the text of the SCM Agreement for Commerce to focus on those aspects of the Government of China's ownership and control that are necessary to affect the adequacy of the remuneration – i.e., the prices. As the United States has explained, Commerce asked the appropriate questions, and reached the correct conclusions, regarding the adequacy of remuneration.

17. Where the government maintains a controlling ownership interest in SOEs, it, like any owner of a company, has the ability to influence that entity's prices. Therefore, to the extent SOEs, which have shared ownership by the Government of China, are producers in the relevant market in China, this presence is evidence of the government's ability to influence prices in that market. It is neither necessary nor logical as a policy matter or as a matter of interpretation of the SCM Agreement for the Panel to find that the only way for a government to exert market power or influence prices in a particular market is through entities engaging in governmental functions—i.e., the public body analysis from *US – Anti-Dumping and Countervailing Duties (China)*. And it would be inappropriate to limit the benefit analysis in this way. Where prior Appellate Body findings permit the use of out-of-country benchmarks because of the government's ability to affect prices, and SOE presence in a market is evidence of a government's ability to affect prices in that market, Commerce's benefit analysis is consistent with prior Appellate Body findings.

18. China is also incorrect when it states that "USDOC's equation of SOEs with the government is explicitly or implicitly based on its belief that entities majority-owned and controlled by the government are '*public bodies*'." The government's ownership and control of SOEs is relevant for Commerce's assessment of government presence in a given input market. In turn, such SOE presence is an indicator of government presence in that market for purposes of evaluating the government's ability to influence prices in the relevant input market.

19. The *US – Anti-Dumping and Countervailing Duties (China)* report demonstrates that the Appellate Body did not perceive altering the public bodies standard in Article 1.1(a) of the SCM Agreement as an impediment to upholding Commerce's reliance on out-of-country benchmarks in the investigations challenged in *US – Anti-Dumping and Countervailing Duties (China)*.

20. While a public body analysis is relevant, it is not – as demonstrated by the findings in *US – Anti-Dumping and Countervailing Duties (China)* an "essential factual predicate" for the market distortion analysis under Article 14(d). The findings of *US – Anti-Dumping and Countervailing Duties (China)* show that the examination of public bodies and market distortion remain two distinct analyses such that even if the Panel were to find Commerce's public body determinations in this dispute to be WTO inconsistent, it still could find Commerce's benchmark determinations not to be WTO inconsistent. Whether or not China made the same argument before the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that it makes before this Panel, the Appellate Body was fully aware in *US – Anti-Dumping and Countervailing Duties (China)* that (1) Commerce applied an ownership or control standard in its analysis that certain SOEs constituted public bodies; and (2)

Commerce had treated SOE presence in the market as indicative of government presence in the market.

21. The United States recalls that the Panel went out of its way to give China a second opportunity to present a *prima facie* case; requesting that "China present the facts on the record for each investigation challenged in relation to the use of out-of-country benchmarks" and "detail how the USDOC treated such facts for its benefit analysis." But China failed to use that opportunity to support its claims. Instead China responds to the first aspect of the Panel's request by providing a table, CHI-124. China then asserts that "it is evident on the face of the cited pages that the USDOC's justification for its recourse to an out-of-country benchmark is its conclusion that SOEs provide at least a 'substantial portion' of the market for the input, which renders the market distorted due to the 'government's' predominant role as a supplier in the market."

22. Additionally, in an apparent concession that China's claims in its first written submission were incorrect, China has since modified its argument. Whereas in its first written submission, China argued that Commerce found government predominance in a given market based "*exclusively*" on its equation of SOEs with government suppliers, China now argues that Commerce based such findings "exclusively *or primarily*" on its equation of SOEs with the government. This new argument demonstrates that there is no generally applicable measure by which Commerce finds distortion in a particular market, as indicated by China's highly generalized legal theory arguments.

VII. COMMERCE'S DETERMINATIONS THAT THE PROVISION OF CERTAIN INPUTS FOR LESS THAN ADEQUATE REMUNERATION WERE SPECIFIC WERE CONSISTENT WITH ARTICLE 2 OF THE SCM AGREEMENT

23. Each of Commerce's determinations that the provision of an input for less than adequate remuneration was specific is fully consistent with Article 2 of the SCM Agreement. After identifying a subsidy in accordance with Article 1.1(a)(1)(iii), Commerce determined, based on evidence on the record, that a "limited number of certain enterprises" used the subsidy.

24. China has not disputed the fact that the record of each investigation supported a finding that the number of users of each of the inputs in question was limited. Rather, China appears to argue that Commerce should have considered these subsidies in light of an overarching formally implemented subsidy program, even though it points to no facts or arguments on the record that would have supported the existence of such a program. Further, China has not provided support for the argument that Commerce should have disregarded evidence relating to the existence of the subsidy programs it found to exist in each challenged investigation. Accordingly, China has failed to make a *prima facie* challenge to Commerce's specificity determinations.

25. In each specificity determination, Commerce properly determined, based on the records of the investigations, that only a limited number of enterprises used the input being provided for less than adequate remuneration, which was the subsidy program being evaluated under Article 2.1(c).

26. There is nothing in the ordinary meaning of the word "program" that requires that a program be written or "expressly pronounced" as China contends. China's position also does not comport with the context of the term in Article 2.1(c). In particular, Article 2.1(c) is concerned with whether a subsidy is *in fact* specific not whether it is "explicitly" specific, which is the subject of an Article 2.1(a) inquiry. A requirement that all subsidies be implemented through formal means would frustrate the operation of the SCM Agreement and enable Members to avoid its application by providing the subsidy to recipients without formal implementation.

27. Based on its incorrect interpretation of Article 2.1(c), China argues that information related to the "end use" of a particular input cannot be a basis for determining that the number of "users" is limited. China appears to argue that where a good is provided for less than adequate remuneration, an investigating authority is barred from examining which enterprises "use" the subsidy, that is, which enterprises are being provided the good in the first place. China's interpretation is illogical and finds no support in the text of the SCM Agreement.

28. China's characterizations of Commerce's determinations are divorced from the facts of the investigations. Commerce did not "merely assert" or "makeup" the existence of the "subsidy programs" for purposes of its Article 2.1(c) analysis. Far from being "made up," Commerce's determinations that a limited number of recipients used the subsidy programs at issue are grounded in the facts of each record. In each investigation, the subsidy programs were first identified in the applications, which contained evidence. Then, Commerce investigated the programs, by 1) asking questions relating to those programs of China and other interested parties; 2) identifying the specific programs in each preliminary determination; 3) providing parties the opportunity to comment on the preliminary determinations with respect to those programs; and 4) ultimately issuing a final determination on those programs. The *Aluminum Extrusions* example demonstrates that Commerce did not "merely assert" the existence of a subsidy program in each of the challenged investigations. Instead, Commerce investigated the alleged programs and reviewed the administrative record as a whole, determining in the final determination that a subsidy program was used by a limited number of certain enterprises, and was therefore *de facto* specific.

29. China's argument that Commerce was required to analyze subparagraphs (a) and (b) of Article 2.1 before turning to (c) is contradicted by the text and context of that provision in the SCM Agreement. Further, the Appellate Body's consideration of Article 2.1(c) confirms that there is no mandatory order of analysis. For these reasons, there is no merit to China's claim that the SCM Agreement requires investigating authorities to always conduct a *de jure* specificity analysis before conducting a *de facto* analysis, even where there is no basis for a *de jure* finding.

30. China's order of analysis argument rests primarily on the subordinate clause in the first sentence of Article 2.1(c). China's proposed interpretation, however, is not supported by the ordinary meaning of the text, nor the structure of the sentence. The purpose of the "notwithstanding" clause is to convey that a finding of non-specificity under (a) or (b) does not *prevent* further consideration of a subsidy from under (c), not that such a finding is a mandatory. Further, China's interpretation is in conflict with the context of subparagraph (c) provided by the chapeau of Article 2.1. The Appellate Body has repeatedly discussed the structure of Article 2.1 and concluded that Article 2.1 does not mandate that investigating authorities address each subparagraph of Article 2.1. The Appellate Body's statements regarding the "concurrent application" of the "principles" of Article 2.1 correctly anticipate that on a case-by-case basis, an investigating authority must consider the facts on the record and determine if those facts warrant a *de jure* analysis pursuant to Article 2.1(a), or if, as was the case in the challenged investigations, it is appropriate to proceed directly to a *de facto* specificity analysis under Article 2.1(c).

31. In addition, contrary to China's novel interpretation of Article 2.1, Commerce was not required to identify a "granting authority" as part of its specificity analysis. China's assertion, in its responses to questions from the Panel, that it is "impossible" to conduct an analysis of specificity under Article 2.1 and that identification of a granting authority is "require[d]" directly contradicts the numerous specificity analyses undertaken by the panels and Appellate Body in *US – Large Civil*

Aircraft (2nd complaint), EC and certain member States – Large Civil Aircraft, and *US – Anti-Dumping and Countervailing Duties (China)*, none of which involved the identification of a "granting authority." China's interpretation is far removed from the text of Article 2.1, as well as the context provided by the rest of the SCM Agreement.

32. The focus of a *de facto* analysis under the first factor of Article 2.1(c) is on the universe of *users* of the subsidy, not on the "granting authority" – and the relevant jurisdiction of the granting authority for purposes of the specificity analysis is the jurisdiction where those users are located. For each specificity determination at issue, Commerce determined that the input was provided for less than adequate remuneration to a limited number of users *within China*. China's arguments seem designed to preclude investigating authorities from examining subsidies of the type maintained by China, despite the fact that such subsidies are specifically covered by the SCM Agreement. For these reasons, this Panel should reject China's argument.

33. Contrary to China's assertions that it reiterates in its response to questions from the Panel, an investigating authority is not required to analyze economic diversity or the length of time a subsidy program has been in operation where – as was true with respect to the determinations at issue – there is no reason to believe either of these factors would alter the specificity analysis.

34. The language in the last sentence of the principles set out in Article 2.1(c) requires only that an investigating authority "take into account" the two factors. "Account shall be taken" does not mean that an investigating authority must explicitly analyze the two factors in each and every investigation. With respect to the determinations at issue, Commerce had no reason to believe that the two factors would be relevant, and China has not pointed to any reason either before Commerce during the investigations or before this Panel in this dispute. China is incorrect to argue that Article 2 of the SCM Agreement required Commerce in the challenged investigations to analyze economic diversity or the length a time a subsidy program has been in operation.

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

35. At this late stage in the dispute, China has only just clarified that its Article 2.2 claim is limited solely to the seven specific regional specificity determinations in CHI-121. However, China still fails to make a *prima facie* case with respect to any of the alleged breaches. China continues to rely on the legal reasoning and factual findings in *US – Anti-Dumping and Countervailing Duties (China)* even though that panel's conclusion was made on an "as applied" basis and was "driven by the specific facts that were on the record of that investigation." China must demonstrate, on an as applied basis, that each challenged determinations was inconsistent with WTO obligations.

36. China's blanket assertion that the provision of land-use rights within an industrial park or economic development zone is "immaterial" to a determination that the provision of land use rights is regionally specific is in error. Such a finding is material to the analysis of whether the land at issue constitutes a "geographical region," and the weight of such a finding depends on the case-specific facts that are available on the record. China's assertions in its response to questions from the Panel regarding Commerce's regional specificity finding in *Coated Paper* (referred to by China as *Print Graphics*) have no merit. Commerce's analysis in *Coated Paper* differed from that applied in *Laminated Woven Sacks*, as well as the other determinations at issue in this investigation. In *Coated Paper*, due to noncooperation by responding parties, Commerce had insufficient facts regarding the provision of land use rights to conduct such an analysis. China's contention that the use of facts available in *Coated Paper* is inconsistent with Article 12.7 is also in error.

IX. COMMERCE'S INITIATIONS WERE CONSISTENT WITH ARTICLE 11 OF THE SCM AGREEMENT

37. Commerce's initiation determinations with respect to the specificity of the provision of goods for less than adequate remuneration were consistent with the standard set out in Articles 11.2 and 11.3 of the SCM Agreement because the applications at issue contained "sufficient" evidence to justify initiation, in light of the information reasonably available to the applicant.

38. China's arguments with respect to these initiation claims must fail for several reasons. First, China does not dispute that certain of the applications contain substantial evidence relating to the use of the inputs provided for less than adequate remuneration. The relevant question under the first factor of Article 2.1(c) is whether there are a limited number of *users* of the subsidy program, and so the question of which enterprises "use" the input is relevant to the inquiry. An examination of the provision of a good by the government will necessarily involve the question of whether only a limited number of enterprises are capable of using the good. Second, China argues that an application must identify, and contain evidence of a "facially non-specific subsidy program," the "granting authority" and the two factors set out in the last sentence of Article 2.1(c). Not only is China incorrect in asserting these elements are required for an Article 2.1(c) finding, but also there is no basis to conclude that these elements would be necessary to meet the Article 11 standard.

39. Finally, China cites no evidence supporting the general assertion that none of Commerce's final determinations cited in applications were properly determined (including those outside the scope of this dispute), nor does it place the cited final determinations on the record, or discuss why applications citing to those determinations fail to meet the Article 11 standard.

40. As for the "Public Bodies" claims, there was sufficient evidence, within the meaning of Article 11.3 of the SCM Agreement, to initiate investigations into whether "public bodies" provided goods for less than adequate remuneration. Article 11 does not require that applicants allege, or that investigating authorities recite, a particular legal standard prior to initiation. There is a distinction between a finding that an entity is a public body for purposes of a preliminary or final determination, and a finding that there is sufficient evidence within the meaning of Article 11 of the SCM Agreement to support initiation of an investigation into whether entities are public bodies.

41. Indeed, the SCM Agreement indicates that interested parties present "arguments" to the investigating authority (Article 12.2) and that the authority's determinations shall set out "findings and conclusions reached on all issues of fact and law considered material by the investigating authority" (Article 22.2). Those issues of law may involve the legal standards to be applied, and arguments related to those issues may be considered during the investigation itself.

42. China's argument is particularly misplaced, given that evidence of government ownership or control is relevant to a public body analysis, even under the legal standard it advances. That is, evidence of government ownership or control can tend to prove or indicate that an entity is a public body under (1) a standard that an entity is a public body if it is simply controlled by the government, (2) a standard that an entity is a public body if it is controlled by the government such that the government can use the entity's resources as its own, or (3) a standard that an entity is a public body if it possesses, exercises, or is vested with governmental authority.

43. Further, contrary to China's argument, the United States is not advancing an *ex post* rationalization to support Commerce's initiations. In the Appellate Body's view, a Member is "precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify

the investigating authority's determination." The rule does not make sense in the context of an initiation, considering that Article 22.2 of the SCM Agreement (in contrast to Article 22.3 for determinations) does not require any public explanation of reasons which have led to the initiation of the investigation.

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

44. China argues "an export restraint cannot, as a matter of law, constitute government entrusted or directed provision of goods." China does not argue, in the alternative, that the evidence in the applications was insufficient for initiation purposes should the Panel find that an export restraint scheme could constitute a financial contribution determination in some situations.

45. At the same time China, in its responses to the Panel's questions, criticizes the factual basis for the initiation of the investigations at issue with regard to export restraints. China has no legitimate basis for this criticism, and has ignored important and relevant evidence on the record in the investigations, as the applications for *Seamless Pipe* and *Magnesia Carbon Bricks* contained sufficient evidence of the existence of the export restraint schemes themselves, and sufficient evidence that through these policies the government was entrusting or directing private entities to provide the covered goods to downstream producers in China.

46. Article 1.1(a)(1)(i)-(iv) of the SCM Agreement describes various forms of government conduct that may be considered a financial contribution. The list is not exhaustive; instead it includes "general terms with illustrative examples that provide an indication of the common features that characterize the conduct referred to more generally." Rather than preventing any particular *action* from possibly being a financial contribution, an investigating authority must seek to determine whether such government *behavior* is a financial contribution under Article 1.1(a)(1)(i)-(iv). Particularly with respect to entrustment or direction under (iv), this analysis will necessarily "hinge on the particular facts of the case." Certainly, there is no basis in the text of the SCM Agreement for declaring all measures defined loosely as export restraints to be exempt from coverage under the SCM Agreement.

47. Even the report in *US – Export Restraints*, upon which China so heavily relies, recognized that "an export restraint could result in a private body or bodies 'provid[ing] goods'." It follows that when it is alleged that a government is providing a financial contribution through a private body, an authority may investigate whether a "private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii)." In this instance, that type of function is the provision of goods. It is up to the investigating authority to "identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the SCM Agreement." Commerce's investigation into China's export restraint schemes was consistent with these principles.

48. The *US – Export Restraints* panel recognized that it was possible for a private entity to provide a good as a result of an export restraint scheme, this Panel's analysis of the relevance of the *US – Export Restraints* panel findings to this dispute should focus, in part, on the *US – Export Restraints* panel's interpretation of entrustment or direction. In this regard, the United States agrees with China that the Appellate Body has found the *US – Export Restraints* panel's interpretation of entrustment or direction is too narrow. And it is that very interpretation of entrustment or direction

that led the panel to conclude that "an export restraint in the sense that the term is used in this dispute cannot satisfy the 'entrusts or directs' standard of subparagraph (iv)." This Panel's analysis should also consider and decide whether there are differences between the evidence in *US – Export Restraints* and this dispute such that the findings of the *US – Export Restraints* are not persuasive for purposes of this dispute. The United States considers that the *US – Export Restraints* findings are not persuasive for purposes of this dispute in light of the difference between the evidence and legal posture presented to this Panel and the hypotheticals before the panel in *US – Export Restraints*.

49. It is quite possible that if the *US – Export Restraints* panel had the Appellate Body's broader interpretation in mind, the panel would have concluded that the hypothetical it was examining could satisfy the entrusts or directs standard. In any event, given that the findings in *US – Export Restraints* were based on an overly narrow interpretation of entrustment or direction, the findings of the panel are not persuasive for purposes of determining whether the export restraints in this dispute satisfy the entrustment or direction standard in Article 1.1(a)(1)(iv). Instead, the Panel should base its analysis on the broader interpretation of entrustment or direction recognized by the Appellate Body.

XI. COMMERCE'S "FACTS AVAILABLE" DETERMINATIONS ARE BASED ON A FACTUAL FOUNDATION

50. China's only facts available argument – that Commerce's facts available determinations were allegedly not based on facts – necessarily involves an analysis of the facts and circumstances of each determination. The only way for China to establish a *prima facie* case would be to demonstrate that Commerce acted inconsistently with the SCM Agreement in each of the 48 separate uses of facts available it has challenged. China has failed to do so, and so has failed to meet its burden. China bases its 48 facts available claims on sweeping and inaccurate generalizations. Exhibit, CHI-125, fails to advance China's arguments. The exhibit consists of excerpted text, taken out of context, and does not explain how or why China views the excerpts of text as support for the proposition that Commerce did not base its determinations on available facts on the record in the investigations.

51. Due to the lack of cooperation by responding parties, there was often very little factual information on the record, other than that in the application, for Commerce to make a determination. Commerce used this limited factual basis to, consistent with Article 12.7, make inferences to reach its determination. Because necessary information was unavailable, an "inference" was needed to connect the fact relied upon to the conclusion in the determination. China agrees that "the use of 'facts available' by an investigating authority could be 'adverse' to the interests of the non-cooperating party." In light of China's (or another interested party's) noncooperation, Commerce looked to what information was available on the record to make its determination. China tries to refocus the issue now by alleging that Commerce failed to provide a "reasoned and adequate explanation" of its facts available determinations. However, whether Commerce has provided sufficient reasons is a question under Article 22 of the SCM Agreement, not Article 12.7.

XII. CONCLUSION

52. For the reasons set forth above, along with those set forth in the U.S. written filings and oral statements, the United States requests that the Panel reject all of China's claims.