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

RESPONSES OF THE UNITED STATES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

August 9, 2013

TABLE OF REPORTS

Short Form	Full Citation
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Large Civil Aircraft (2nd complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Softwood Lumber IV (Panel)	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Steel Plate	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002

US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1

1. PRIMA FACIE CASE

a. Question to the United States

81. We refer to para. 13 of the United States' second written submission. Please explain the argument that "Exhibits CHI-121 through 125 do not shed light on the facts at issue for each determination". We also refer to China's response to Panel question No. 4, para. 19. How does the United States respond to China's argument that "[t]he inconsistency of the challenged measures with the relevant provisions of the SCM Agreement, properly interpreted, is apparent on the face of the excerpts from the USDOC's own determinations referenced in China's first written submission"?

1. The excerpts of Commerce's initiation checklists and preliminary and final determinations that China provided at Exhibits CHI-121 through CHI-125 contain only selected excerpted statements without any discussion or explanation of the underlying facts of the investigation itself. China advances almost 100 individual claims and has failed to walk through the facts related to each of those claims to demonstrate that Commerce acted inconsistently with the relevant provisions of the SCM Agreement.

2. China's response to Panel Question 4 exemplifies China's flawed approach to its claims in this dispute. China has advanced its claims in this dispute on the allegation that Commerce's determinations are "based on the application of legal standards that are inconsistent with the SCM Agreement."[1] However, the logic of China's argument falls apart in several respects. First, China has failed to demonstrate the existence of a "legal standard" applied in a consistent manner across Commerce's determinations. Second, because China has not advanced "as such" claims, but rather a large number of "as applied" claims, the relevant question for the Panel is *not* whether any alleged "legal standard" is or is not consistent with the SCM Agreement, but rather whether the *individual determinations* are or are not consistent with the SCM Agreement.

3. In order for China to meet its initial burden of presenting a *prima facie* case for each of its claims, China would have had to demonstrate how each challenged determination was inconsistent with the relevant provision of the SCM Agreement. At a minimum, China would have needed, for each determination at issue, to have identified the facts on the record that were relevant to the issue, to have discussed the analysis used by Commerce with respect to those facts,[2] and ultimately to have demonstrated that each individual determination at issue was inconsistent with the relevant obligations under the SCM Agreement. China has failed to do so.

4. China's attempt to recast this dispute as one concerning a small number of "legal standards" fails to remedy the deficiency of Exhibits CHI-121 through 125 in establishing its *prima facie* case. For example, CHI-122 contains excerpts from the applications and initiation checklists related to specificity, but contains no mention of the evidence submitted by applicants in support of those applications. Without such information, CHI-122 is of little use for the Panel

[1] China Responses to the Panel's First Set of Written Questions ("China Responses to First Panel Questions"), para. 18.

[2] Furthermore, to the extent that China's argument is based on a theory that the analysis used in making a specific determination is the same as the analysis used in some allegedly WTO-inconsistent "legal standard," China would have the burden of establishing this fact for each challenged determination.

to determine whether there was sufficient evidence in the application to justify initiation under Article 11.3. With respect to the ultimate specificity determinations, CHI-122 also contains insufficient information for the Panel to evaluate China's claims. For the specificity determinations involving a resort to "facts available", for the reasons the United States has previously discussed with respect to CHI-125, the selected excerpts are taken out of context of Commerce's full discussion of its determination and the facts of the investigations.[3] For the specificity determinations not involving a resort to "facts available", China has declined to discuss the actual facts of each investigation. For example, in the *Kitchen Shelving* excerpt at page 2 of CHI-122, Commerce discusses an exhibit provided by China in the underlying investigation. Commerce states that its specificity finding is "[b]ased on our review of the data," but China has not presented that data to the Panel in this dispute. As a result, it is impossible to determine "on the face of the excerpts"[4] whether Commerce's determinations are consistent with the SCM Agreement.

5. With respect to Exhibit CHI-124, as the United States clearly delineates in its second written submission,[5] China's pasting of block quotes from the determinations falls short of providing the Panel with the information it requested and needs in order to make a finding for China. Regarding Exhibit CHI-125, as we have previously noted and demonstrated through Exhibit US-94, China's selected excerpts are insufficient to support China's claim and establish the facts and circumstances of each use of facts available.

6. Exhibits CHI-121 and 123 similarly only contain selected excerpts, which provide insufficient information regarding the facts and circumstances at issue in the investigations to establish the elements of China's claims and demonstrate that Commerce acted inconsistently with the provisions of the SCM Agreement.

3. PUBLIC BODY

b. Questions to the United States

87. Please explain whether and how the USDOC has applied and/or should apply the concept of "meaningful control", as defined in para. 10 of the United States' Opening Statement.

7. As we have explained, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body repeatedly referred to the government's "meaningful control" over an entity when it applied the legal standard it had set forth for determining whether an entity is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement.[6] Whether the links between the government and an entity are sufficient to constitute "meaningful control" requires an examination of the relationship between the government and the entity.[7] A proper application

[3] *See* U.S. Second Written Submission, paras. 145-46; U.S. Opening Statement at Second Panel Meeting ("U.S. Second Opening Statement"), paras. 64-65.
[4] China Responses to First Panel Questions, para. 19.
[5] *See* U.S. Second Written Submission, paras. 65-71.
[6] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 318, 346, and 355.
[7] We note that the relationship between a producer and exporter/importer that is sufficient to deem those entities "related" for purposes of the domestic industry provision is also viewed through a notion of "control," when the

of the customary rules of interpretation leads to the conclusion that, for purposes of the assessment whether an entity's transfer of economic resources is a "financial contribution" attributable to the government, there will be sufficient links to establish that an entity is a "public body" within the meaning of Article 1.1(a)(1) when a government controls the entity such that it can use the entity's resources as its own. Accordingly, an investigating authority should seek information to determine whether the government controls an entity such that it can use the entity's resources as its own. The nature and amount of evidence that might demonstrate whether or not there is such control necessarily will vary from case to case.[8]

8. That being said, the United States acknowledges that, in the investigations China challenges in this dispute, Commerce did not apply the interpretation of the term "public body" for which the United States now advocates.

88. Please comment on China's statement in para. 10 of China's Oral Statement that the Kitchen Shelving "policy" is the only ratio decidendi for subsequent "public body" findings.

9. China's opening statement mischaracterizes both the Kitchen Shelving discussion and the analysis in subsequent public body findings. First, in typical fashion, China fails to identify a single "subsequent case" that solely used the Kitchen Shelving memorandum as the reasoning for relevant public body findings. It is an unsupported assertion, and for this reason alone, China's statement deserves no further scrutiny.

10. In addition, even a cursory review of public body findings reveals in subsequent proceedings that they are findings based upon the facts and circumstances of each investigation, and not solely reliant on the reasoning discussed in Kitchen Shelving. For example, in the Drill Pipe Issues and Decisions memorandum, Commerce determined that an input producer was a public body based upon evidence submitted by the Government of China.[9] The Kitchen Shelving discussion was not mentioned in this decision. Instead, it was an independent decision made by Commerce based on the facts on the record and those discovered during the course of the investigation. However, China conveniently overlooks this.

11. China continues to present insufficient factual support and legal analysis when attempting to unify the separate conclusions in Commerce's separate investigations (that specific entities were controlled by the government such that they were public bodies) with a single decision in a single investigation. In doing so, China fails to delve into the facts of each investigation and fails to conduct an analysis of those facts against the relevant legal provisions. China's approach seeks to avoid the facts that the investigations were complicated, with each decision based upon the specific facts presented in that investigation and a case-by-case analysis. Moreover, China has failed to show that the discussion found in Kitchen Shelving is the legal reasoning on which all public body findings are based, because the explanation found in Kitchen Shelving does not control the findings Commerce makes in subsequent determinations. That there are similar

---

former is "legally or operationally in a position to exercise restraint or direction" over the latter. SCM Agreement, Article 16.1 & n. 48.

[8] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

[9] Drill Pipe Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation at 22 (January 3, 2011) (CHI-80).

conclusions based on similar fact patterns across investigations does not create the basis for an "as such" finding. As the panel in *US—Steel Plate* rightly stated, "That 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. …Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its past practice.[10] China's analysis lacks any basis, and China has failed to show that the U.S. measures at issue are inconsistent, as such, with Article 1.1 of the SCM Agreement.

89. Please comment on China's argument in para. 18 of China's Oral Statement that, under the United States' interpretation, the same entity could be simultaneously "private" under Art. 1.1(a)(1) and a "government supplier" under Art. 14(d) of the SCM Agreement.

12. China's argument that "under the U.S. interpretation, the same entity could simultaneously be deemed a 'private' supplier of goods under Article 1.1(a)(1), and a 'government' supplier of goods for purposes of the distortion analysis under Article 14(d)"[11] presents a false dichotomy that does not exist in the text of the SCM Agreement. As demonstrated in *US – Anti-Dumping and Countervailing Duties (China)*, and for reasons discussed in prior U.S. submissions[12] and below, if a majority-government-owned producer of a particular input is not considered a public body under Article 1.1(a)(1) for financial contribution purposes, that entity can still be a factor in market distortion analysis under Article 14(d) of the SCM Agreement.

13. China admits that its entire argument with regard to benchmarks "is premised on its view that the same legal standard for determining whether an entity is a 'government' supplier for purposes of the financial contribution inquiry Article 1.1(a)(1) of the SCM Agreement must also apply when determining whether an entity is a 'government' supplier for purposes of the distortion inquiry under Article 14(d)."[13] However, China appears to be reading into the text of Article 14(d) words that are not there. The words "government supplier" appear nowhere in Article 14(d). Accordingly, China is setting up a false test – since the term "government supplier" does not appear in Article 14(d), there can be no requirement that the interpretation of "public body" must somehow conform to the meaning of a non-existent term. Such an analysis would be contrary to customary rules of interpretation, which "neither requires nor condone[s] the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[14]

14. Furthermore, the Appellate Body has made it clear that its findings in *US – Anti-Dumping and Countervailing Duties (China)* were not made on that same premise. In fact, the Appellate Body's examination of the use of out-of-country benchmarks is clear that state-owned enterprises (SOEs) factor into a distortion analysis, regardless of their status as a public body under Article 1.1(a)(1). In *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body found that a 96.1 percent SOE market share "makes it *likely* that the government as the predominant

[10] *US – Steel Plate*, para. 7.22.
[11] China Second Opening Statement, para. 18.
[12] *See e.g.*, U.S. Second Written Submission, paras. 57-59, U.S. Second Opening Statement, paras. 31-37.
[13] China Second Written Submission, para. 72.
[14] *India – Patents(US)*, para. 45.

supplier has the market power to affect through its own pricing strategy the pricing by private providers of the same goods . . . ."[15] Importantly, the Appellate Body found that the government had such market power without finding it necessary to conduct an analysis of whether the SOEs were public bodies. This finding makes it clear that an analysis of whether domestic prices in the relevant input market are distorted is not limited to the circumstance where the government – in the sense defined by the Appellate Body for purposes of a public body analysis – is the predominant supplier of a given input.

15. China misinterprets Article 1.1(a)(1) and Article 14(d) to create a false dichotomy in the challenged determinations that all entities not found to be public bodies under Article 1.1(a)(1) should have no bearing on the analysis of whether prices are a reliable benchmark in a given market. China provides no meaningful support from the text of the SCM Agreement for requiring that China's interpretation (or, for that matter, the Appellate Body's interpretation) of public body for Article 1.1(a)(1) purposes must extend to the Article 14(d) context. China's reliance on the word "government" in Article 14(d) is misplaced, as it only appears in relation to the financial contribution analysis.

16. China makes the same mistake when it discusses the term "private body" in Article 1.1(a)(1)(iv). Whether or not an entity is considered a private body under Article 1.1 is not instructive as to how the entity should be considered in the Article 14(d) analysis. China's argument improperly assumes that if there is not a finding that an entity is the government or a public body, then the entity necessarily has no bearing on the reliability of prices for benchmark purposes. This has no basis in the text.

17. In addition, China's interpretation would lead to a rigid rule that could potentially lead to absurd results. For example, a 100% government-owned SOE with a large market share could be considered irrelevant to the analysis of the reliability of prices in a given input market for the purposes of establishing benchmarks if, for some reason, it is not considered a public body under Article 1.1(a)(1). The panel should avoid this legal fiction, and instead allow investigating authorities the ability to make factual inquiries into when certain markets are distorted as a result of the predominant role of the government in those markets. The United States has explained that SOE presence in a given input market is indicative of government involvement in that market for purposes of evaluating the reliability of prices in that market for benchmark purposes under Article 14(d), regardless of whether the SOEs in question constituted a public body under Article 1.1(a).[16]

18. The United States has demonstrated precisely why a government can be involved in an input market in ways other than as a provider of a financial contribution that distort the market. The government of China through a predominant role in the relevant input market—whether that be through provision of a financial contribution of the relevant input, through its ownership of SOE producers in that market, or through some other and/or additional forms of involvement or intervention in that market—can affect prices in that input market and, thereby, the reliability of prices in that market for selecting a benchmark to measure the adequacy of remuneration. Accordingly, it was fully consistent with Article 14(d) of the SCM Agreement for the United

[15] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 455.
[16] *See* U.S. First Written Submission, paras. 162-167; U.S. Second Written Submission, paras. 57-59.

States to use out-of-country benchmarks where, as was the case in the investigations at issue, the facts on the record of each challenged determination demonstrated that through SOE ownership and other factors the government played a predominant role in the relevant input market at issue such that prices in these input markets were distorted.

4. SPECIFICITY UNDER ARTICLE 2.1 OF THE SCM AGREEMENT

a. Questions to both parties

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

19. The words "reasons to believe that the subsidy may in fact be specific" in the introductory sentence of Article 2.1(c) explain when an investigating authority may consider the factors laid out in that subparagraph. The Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* described the purpose of this phrase as follows:

> The analysis under Article 2.1(c) proceeds where there are "reasons to believe that the subsidy may in fact be specific". While a conclusion that there is "an appearance of non-specificity" under Article 2.1(a)-(b) does not provide a panel license to refrain from examining claims under Article 2.1(c), a panel must consider whether, in the light of the arguments made by the parties, there are "reasons" for it to believe that an assessment under Article 2.1(c) is warranted. These "reasons" would have to relate to the factors mentioned in subparagraph (c).[17]

20. Although it is not at issue in this dispute, the United States observes that this precondition to the *de* facto specificity analysis is not a high threshold. It only requires that there be "reasons to believe" that a subsidy may be specific to certain enterprises, and does not limit the basis for those "reasons".

21. The use of the term "in fact" defines the inquiry under subparagraph (c) as a factual one; that is, it makes clear that Article 2.1(c) is concerned with how the subsidy operates in fact (apart from how a subsidy is administered on the face of any implementing legislation, regulation or government decree, or whether there is any such formalized instrument). Notably, this precondition to Article 2.1(c) is not dependent on whether a subsidy has been analyzed under Articles 2.1(a) and (b). Subparagraph (c) addresses a separate question from subparagraphs (a) and (b) – how the subsidy *operates in fact*, irrespective of the means by which it is implemented.

22. This precondition is clearly satisfied in the countervailing duty investigations at issue in this dispute. The allegations and supporting information in the applications more than adequately indicated "reasons to believe that the subsidy may in fact be specific," because the

[17] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 797.

inputs provided for less than adequate remuneration could only be used by certain industries in China.[18]

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

23. Evidence of a "subsidy program" will depend on the facts of each investigation and the type and application of the alleged subsidy. The ordinary meaning of "program" includes a "plan or outline of (esp. intended) activities" or "planned series of activities or events."[19] This ordinary meaning must be understood within the context of Article 2 and the scope of subsidies subject to the SCM Agreement, discussed further *infra*, in response to Panel Question 95. Due to the scope of subsidies covered by the SCM Agreement, there are many means by which a subsidy program could be evidenced. One form a subsidy program may take is that of a subsidy implemented through relevant legislation, regulation, or government decree.[20] However, as the United States has observed, [21] a subsidy program need not be evidenced by some sort of formal government decree. Indeed, Article 2.1(c) contains no requirement for an investigating authority to identify such a formally implemented subsidy program.

24. Where there is no identified implementing legislation, regulation or government decree, as in the subsidies at issue in this dispute, the "subsidy program" might instead be evidenced by the operation of the subsidy itself and its recipients. For example, an investigating authority might determine that a government or public body has provided: 1) a one-time grant or equity-infusion to a single entity; 2) multiple subsidy payments to a single recipient; or 3) a single separate subsidy payment made to each of multiple recipients. Under any of these scenarios, the existence of a "subsidy program" would be made evident by the facts surrounding the distribution of the subsidy at issue. China argues that further evidence of a "plan" would be necessary under such scenarios, but there is nothing in the text of Article 2.1(c) to mandate such a requirement.

25. In the investigations at issue, the applicants alleged that a certain input was being provided for less than adequate remuneration by public bodies to users of the input in China. For example, in *Aluminum Extrusions*, the application alleged (and contained sufficient evidence for purposes of initiation) that primary aluminum was being provided by public bodies to primary aluminum consumers in China.[22] Accordingly, the subsidy with respect to the products under investigation was the provision of primary aluminum to aluminum extrusions producers, and the subsidy program considered by Commerce for the purpose of its specificity analysis was the provision of primary aluminum to *all primary aluminum consuming industries* in China. This

[18] *See US – Softwood Lumber IV (Panel)*, para. 7.116 ("In the case of a *good* that is provided by the government – and not just money, which is fungible – and that has utility only for certain enterprises (because of its inherent characteristics), it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only.") (emphasis in the original).
[19] The New Shorter Oxford English Dictionary at 2371 (1993) (CHI-117).
[20] U.S. First Written Submission, para. 178; China First Written Submission, para. 101.
[21] U.S. First Written Submission, paras. 176-184.
[22] U.S. Second Written Submission, para. 79.

subsidy is limited in scope to a certain segment of the economy, because only certain enterprises can make use of the product, and was thus specific under the SCM Agreement.[23]

26. China argues that Commerce should have relied on China's unsupported statements in the investigations that there was no "subsidy program."[24] China had no basis for that argument during the investigations, and has no basis for it now. China has offered no explanation of how the alleged subsidies may be distributed or administered if not pursuant to a "program", nor has China presented any facts related to the distribution of the subsidies in a manner other than pursuant to a program. Following China's logic, it is unclear how an investigating authority could ever countervail against a subsidy unless there are written instruments (or express pronouncements) evidencing the "program". Under China's interpretation of Article 2.1(c), otherwise countervailable subsidies could never be found specific under Articles 2.1(a) or 2.1(c), absent the existence of such written instruments or express pronouncements.

27. The result of China's proposed interpretation of Article 2.1 would be that if a Member is nontransparent in the operation of its subsidy program, avoiding for example the publication of guidance regarding the administration of a program, it would be able to avoid the disciplines of the SCM Agreement altogether. To illustrate, under China's reading of Article 2.1(c), if a government provided certain natural resources, either directly or through public bodies, *for free* to a limited number of enterprises within its territory, then unless a written instrument existed evidencing a natural resource program, the subsidy could not be found specific and the subsidy could not be countervailed.

28. China also presents an argument – inconsistent with its position addressed above – that there may be some larger "subsidy program" which Commerce should have investigated (even though it paradoxically argues that there is no such program).[25] However, China never provided evidence or arguments on this point in any of the challenged investigations and has not in this dispute pointed to any information or reason to believe that such a larger program existed on the records of any of those proceedings.[26]

c. Question to the United States

95. Does the United States consider it necessary, under Article 2.1(c) of the SCM Agreement, for an investigating authority to identify a planned series of subsidies?

29. No, it is not necessary for an investigating authority to always identify a "planned series of subsidies" when conducting a specificity analysis under Article 2.1(c). Indeed, Article 2.1(c) does not require that there be a "subsidy program" at all in order for a particular subsidy to be

[23] *See US – Softwood Lumber IV (Panel)*, para. 7.116.
[24] China Second Written Submission, note 141.
[25] *See* China First Written Submission, paras. 110-12.
[26] China appears to argue that Commerce's findings of subsidy programs with respect to a handful of different inputs evidences the existence of a larger subsidy program. *See* China First Written Submission, paras. 110-12. However, this line of reasoning is highly speculative and not grounded in the facts of the investigations. China has not offered any arguments or facts related to the connection between these subsidy programs that would support a finding of a larger subsidy program. Further, it is not clear that this reasoning would apply to all the investigations, as the number of prior findings of inputs being provided for less than adequate remuneration was even lower in the earlier investigations.

"specific."[27] Where a "subsidy program" is involved, then as explained *supra* in response to Panel Question 91, the relevant evidence for a specificity determination and identification of the "subsidy program" will vary depending on the facts at issue in the investigation.

30. The meaning of the term "subsidy program" is informed by both the ordinary meaning of "program", as well as the context provided by Article 2 and the SCM Agreement as a whole. The ordinary meaning and context confirm that where one or more public bodies provides an input for less than adequate remuneration to one or more recipients, that activity constitutes a "subsidy program." The ordinary meaning of "program" is "[a] plan or outline of (esp. intended) activities. . . . a planned series of activities or events."[28] The context provided by the SCM Agreement indicates that this ordinary meaning should be interpreted in a manner that encompasses "programs" of "subsidies". In particular, a subsidy is a financial contribution of a government or any public body as described in Article 1.1(a) that has a result described in 1.1(b).

31. So long as the subsidy, as defined in Article 1, is specific to certain enterprises it is subject to the disciplines in the SCM Agreement. As the Appellate Body explained in *US – Large Civil Aircraft (2nd Complaint)*:

> [T]he chapeau of Article 2.1 makes it clear that the assessment of specificity is framed by the particular subsidy found to exist under Article 1.1. This means that the assessment of specificity under Article 2.1 should not examine subsidies that are different from those challenged by the complaining Member. A subsidy, access to which is limited to "certain enterprises," does not become non-specific merely because there are other subsidies that are provided to other enterprises pursuant to the same legislation.[29]

Specificity may be evidenced by an explicit limitation on access to a subsidy under Article 2.1(a), or by the facts of how a subsidy is used, distributed or granted under Article 2.1(c).

32. China has argued that just because subsidies are administered or distributed in a series of events or activities, this does not mean they are "planned" and therefore constitute a "program."[30] As noted above, Article 2.1(c) does not require that a subsidy be part of a "program" in order to be "specific." But even aside from this fact, China's overly-restrictive understanding of the word "plan" and interpretation of the term "program" is illogical and contrary to the context provided by the SCM Agreement. In each of the challenged investigations, a public body systematically sold an input to users of that input within China. Furthermore, in each instance, the public body had to decide to make each sale at a specific price. And, as established by the records in the investigations, the sales were made at

---

[27] The United States observes that Article 2.1(c) relates to whether a *subsidy* may in fact be specific, not a subsidy program. Further, certain of the factors in Article 2.1(c) do not include the term "subsidy program" at all. The third factor of Article 2.1(c) describes the provision of a disproportionately large amount of a subsidy to certain enterprises and makes no reference to a "subsidy program," and the fourth factor is concerned with the manner in which discretion has been exercised in the granting of the subsidy, also without reference to a "subsidy program".
[28] The New Shorter Oxford English Dictionary at 2371 (1993) (CHI-117).
[29] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 751.
[30] China Second Opening Statement, para. 25.

prices below appropriate benchmarks. This type of systematic activity is captured by the term "subsidy program," as understood in the context of Article 2.1(c) and the SCM Agreement as a whole.

5. REGIONAL SPECIFICITY UNDER ARTICLE 2.2 OF THE SCM AGREEMENT

a. Question to both parties

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

33. The panel in *US – Anti-Dumping and Countervailing Duties (China)* concluded that the term "certain enterprises" in Article 2.2 of the SCM Agreement "refers to those enterprises located within, as opposed to outside, the designated geographical region in question, with no further limitation within the region being required."[31] The panel based its conclusion on an analysis that considered, *inter alia*, the text of Article 2.2, the role of Article 2.2 within Article 2, and context provided by other provisions of the SCM Agreement.[32] This finding, which China did not appeal, was adopted by the Dispute Settlement Body.[33]

34. The panel's finding on this matter is well founded in the text and relevant context of the SCM Agreement. Accordingly, the United States agrees with the panel's finding that a subsidy may be found to be specific within the meaning of Article 2.2 of the SCM on the basis of the recipient's geographical location and that further limitation to a subset of enterprises within the region is not necessary for specificity to exist.

c. Questions to the United States

98. Does the United States consider that China's argument referred to in the previous question accurately frames the relevant issue before the Panel?

35. The United States respectfully disagrees that Question 97 accurately frames the relevant issue before the Panel. The issue before the Panel is whether China has met its burden of asserting and proving its claim that in "each investigation" Commerce's determination of specificity with respect to land-use rights is inconsistent with Article 2.2 of the SCM Agreement.

36. China has failed to put forth an adequate legal agreement and adequate evidence for each alleged breach of Article 2.2, and thus has failed to make a *prima facie* case. Instead, China's submissions and argumentation have focused on the facts in *Laminated Woven Sacks* which was the investigation at issue in *US – Anti-Dumping and Countervailing Duties (China)*. The *Laminated Woven Sacks* investigation, however, is not at issue in this dispute. China ignores that the panel's conclusion in *US – Anti-Dumping and Countervailing Duties (China)* was "driven by

[31] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.135.
[32] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 9.124-34.
[33] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 406.

the facts that were on the record of that investigation,"[34] and China fails to address the facts of the seven investigations at issue in this dispute or to apply the provisions of Article 2 to those facts.

37. China could have attempted to meet its burden to make a *prima facie* case by demonstrating how each challenged determination was inconsistent with the provisions of Article 2.2, but failed to do so. In other words, China could have, for each investigation at issue, identified the facts relevant to regional specificity, discussed the analysis used by Commerce with respect to those facts, and ultimately tried to demonstrate that the individual determinations at issue in *this dispute*, are inconsistent with the obligations in Article 2.2.

38. However, instead of addressing the facts and circumstances of each investigation at issue, China simply asserts that each of the investigations is the same as *Laminated Woven Sacks.* The record does not support China's broad assertion. As the United States explained in its second written submission,[35] the facts and regional specificity analysis in *Laminated Woven Sacks* was not the same as the facts and regional specificity analysis in all the challenged investigations. For example, in *Laminated Woven Sacks*, the responding parties cooperated with Commerce's investigation and provided the requested information regarding the provision of land use rights.[36] In at least one of the investigations China challenges in this dispute, however, the parties refused to provide Commerce with any information regarding the provision of land use rights.[37] This is a substantial difference in the relevant facts regarding Commerce's investigation of regional specficity. Indeed, the panel in *US – Anti-Dumping and Countervailing Duties (China)* never described what kind of analysis would be appropriate when a party refuses to provide an investigating authority with any information.

39. In summary, China is incorrect in arguing that the facts and analysis used in *Laminated Woven Sacks* was the same as that which was used in all the challenged investigations. China's reliance on the findings of the panel in *US – Anti-Dumping and Countervailing Duties (China)* is misplaced, and it has failed to demonstrate that all the regional specificity determinations in the challenged investigations were WTO-inconsistent.

99. What type of specific information does the USDOC seek from interested parties when assessing regional specificity under Article 2.2 of the SCM Agreement?

40. Article 2.2 provides that "[a] subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific." Consistent with Article 2.2, Commerce makes its regional specificity determinations on a case-by-case basis. Because the facts vary greatly from investigation to investigation, Commerce must consider the nature of the alleged subsidy, as well as the facts and context of a particular investigation, including the extent to which parties have provided Commerce with

[34] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.162.
[35] U.S. Second Written Submission, paras. 104-07.
[36] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.154.
[37] *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China at 24-25 (Sept. 20, 2010) (CHI-73).

information, in determining what information to examine in determining whether regional specificity exists.

41. The United States notes that a determination of what information to seek is complicated by the fact that a wide variety of information could be evidence relevant to an investigating authority's regional specificity analysis. Indeed, in *US – Anti-Dumping and Countervailing Duties (China)*, the panel indicated that an investigating authority should evaluate facts such as special rules, distinctive pricing, or other elements distinguishing the provision of land in the industrial park from the provision of land outside the park to determine whether the provision of land-use rights within the industrial park constituted a distinct regime that was clearly distinguishable from the provision of land-use rights outside the industrial park.[38] For its part, the Appellate Body noted that a limitation on access to a subsidy "may be established *in many different ways*," although the limitation must be substantiated on the basis of positive evidence.[39]

42. Because an investigating authority may rely on any number of indicators as a basis for finding regional specificity, the investigating authority must consider the extent that evidence of such indicators is relevant in each specific case and determine what information is necessary in light of the context of the investigation.

6. EXPORT RESTRAINTS

b. Questions to the United States

101. In para. 50 of its Oral Statement, China states that the "contextual evidence" referred to by the United States consists of ""evidence" to the effect that the "export restraints" were part of a broader governmental policy" to promote the export of higher value goods through increasing the domestic supply of the inputs involved". Does this accurately describe the United States' position on "contextual evidence"?

43. China's characterization does not cover the full range of contextual, or circumstantial, evidence contained in the applications that supports Commerce's initiation of investigations into China's export restraint schemes on coke in *Seamless Pipe* and magnesia in *Magnesia Carbon Bricks*. And China's assertion in para. 51 of its opening statement that the "only 'evidence' the United States cites," referring to USA-73 and USA-93, is incorrect.[40]

44. The Seamless Pipe application contained evidence that the export restraints on coke were part of a broader government policy of promoting the manufacture and export of higher-value goods through increasing the domestic supply of coke.[41] Similarly, the Magnesia Carbon Bricks application and supplement thereto contained evidence that China's export restraint schemes on raw materials had the purpose of encouraging exports of downstream finished refractory products.[42]

---

[38] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.162.
[39] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413.
[40] China Second Opening Statement, para. 51.
[41] U.S. Second Written Submission, para. 127; U.S. First Written Submission, para. 289 & note 352.
[42] U.S. Second Written Submission, para. 127; U.S. First Written Submission, para. 290 & note 358.

45. Beyond this information, there was evidence in the applications of significant price differentials between the price of coke domestically in China and in the United States,[43] as well as between the price of Chinese-origin magnesium raw materials in China and abroad.[44] As the United States explained, this evidence can reasonably be interpreted as tending to prove or indicating the existence of entrustment or direction to suppliers in China to sell domestically to the downstream industry because, normally, a firm would prefer to sell at the high price.[45] Thus, evidence of these price differentials supports the initiation of investigations into China's export restraint schemes.

46. Additionally, such evidence is precisely the kind of evidence that the Appellate Body and prior panels have found to be relevant in considering whether certain activity constitutes a financial contribution through entrustment or direction. The Appellate Body has recognized that circumstantial evidence can play an important role in an analysis of entrustment or direction.[46] Recognizing that "entrustment or direction of a private body will rarely be formal, or explicit," one panel has stated, "allegations of government entrustment or direction are likely to be based on pieces of circumstantial evidence."[47] Another panel stated, "[t]here is no reason why a case of government entrustment or direction should not be premised on circumstantial evidence . . . ."[48]

47. When the undisputed evidence of China's export restraint schemes are considered in conjunction with the contextual, or circumstantial, evidence in the applications, the totality of the evidence tends to prove or indicates the existence of a financial contribution through entrustment or direction. At the very least, the evidence in the applications, taken in its totality, was more than sufficient to support Commerce's determination to initiate investigations into these particular export restraint schemes.

102. In para. 52 of its Oral Statement, China notes that the "United States never explains how this alleged "contextual evidence" affects the analysis of whether the export restraints at issue here entrust or direct private parties to provide goods". Please respond.

48. China's statement is incorrect; it ignores the clear explanations in the U.S. submissions. In its second written submission, the United States explained how evidence of the price difference between coke in China and in the United States, and the price differential between magnesite in China and abroad, is relevant to an analysis of entrustment or direction.[49] The United States explained that such evidence reasonably can be interpreted as tending to prove or indicating the existence of entrustment or direction to suppliers in China to sell domestically to the downstream industry, because normally a firm would prefer to sell at the higher price.[50]

---

[43] U.S. First Written Submission, para. 288.
[44] U.S. First Written Submission, para. 290.
[45] U.S. Second Written Submission, para. 129.
[46] *US – Countervailing Duty Investigation on DRAMS (AB)*, note 277 ("We agree…that this approach is particularly relevant in cases of entrustment or direction under Article 1.1(a)(1)(iv), where much of the evidence that is publicly available, and therefore readily accessible to interested parties and the investigating authority, will likely be of a circumstantial nature.").
[47] *Japan – DRAMs (Korea)*, para. 7.73.
[48] *Korea – Commercial Vessels*, para. 7.373.
[49] U.S. Second Written Submission, para. 129.
[50] U.S. Second Written Submission, para. 129

Other contextual evidence in the *Seamless Pipe* application addresses this same point by saying, "the by far largest part of the Chinese coke production is sold domestically irrespective of higher prices that could be realized on the international markets."[51]

49. In paragraph 127 of its Second Written Submission, the United States also discussed additional contextual evidence from the applications. In that paragraph, the United States first took note that the European Union had suggested that "evidence of the government's intention to support the downstream industry. . . may be relevant to determine the existence of a 'financial contribution' under Article 1.1(a)(1)(iv) of the SCM Agreement . . . ."[52] The United States continued to explain that the applications in the investigations at issue and supplements thereto did in fact include evidence of the context in which these export restraint schemes were being imposed. In particular, the evidence showed that China's export restraint schemes on coke and magnesia were part of a broader government policy of promoting the manufacture and export of downstream goods.[53]

50. In sum, contrary to China's assertion, the United States has fully explained the relevance of the cited contextual information, and has shown that this evidence supports Commerce's determination to initiate investigations into China's export restraint schemes on coke and magnesia.

[51] U.S. Second Written Submission, para. 127, quoting from Exhibit III-54 of *Seamless Pipe Petition* (USA-93).
[52] U.S. Second Written Submission, para. 127; European Union Third Party Submission, para. 77.
[53] U.S. Second Written Submission, para. 127.