UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

(AB-2014-8 / DS437)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF REPORTS iii

I. INTRODUCTION AND EXECUTIVE SUMMARY 1

II. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 14(D) OF THE SCM AGREEMENT 6

- A. Introduction 6
- B. China's Appeal Is Premised on an Incorrect Understanding of Article 14(d) that Is Contrary to the Appellate Body's Interpretation of that Article in *US – Softwood Lumber IV* 8
- C. China Has Failed to Demonstrate Why the Appellate Body's Findings and Analysis in *US – Anti-Dumping and Countervailing Duties (China)* Are Not Persuasive 11
  - 1. The Panel's Understanding of the Appellate Body's Findings in US – *Anti-Dumping and Countervailing Duties (China)* Is Correct 11
  - 2. The Appellate Body Could Have Made the Finding on Benchmarks in *US – Anti-Dumping and Countervailing Duties (China).* 13
  - 3. The Standard Articulated by the Appellate Body in *US – Softwood Lumber IV* Is the Proper Test for Benefit Inquiries 13
- D. The Panel Did Not Act Inconsistently with Article 11 of the DSU in Evaluating China's Claims under Article 14(d) of the SCM Agreement 14
  - 1. China's Article 11 Claim Is Subsidiary to its Substantive Argument 15
  - 2. China Is Recasting Its Arguments Before the Panel Under the Guise of an Article 11 Claim, Which Is "Unacceptable" 15
  - 3. The Panel's Finding Was Not Contradicted by the Panel's Own Intermediate Factual Findings Relating to *OCTG* and *Solar Panels* 16
  - 4. The Panel Did Not Fail to Evaluate China's "As Applied" Claims Separately and on their Own Merits 19
- E. The Appellate Body Should Not Complete the Analysis with Respect to the *OCTG*, *Solar Panels*, *Line Pipe*, and *Pressure Pipe* Investigations 20

III. THE PANEL DID NOT ERR IN ITS INTERPRETATION OF ARTICLE 2.1 OF THE SCM AGREEMENT 23

- A. Introduction 23
- B. The Panel Correctly Interpreted Article 2.1 To Allow Investigating Authorities To Examine Specificity Exclusively Under Article 2.1(c) 25
  - 1. The Panel's Interpretation Is Consistent with the Ordinary Meaning of the First Sentence of Article 2.1(c) 25

2. The Panel's Interpretation of the First Sentence of Subparagraph (c) Is Consistent with the Context Provided by Article 2.1 28

C. The Panel Correctly Determined That a Subsidy Program Under Article 2.1(c) May Be Evidenced by a Systemic Activity or Series of Activities 34

1. The Panel's Interpretation of "Subsidy Programme" Is Consistent with the Ordinary Meaning and Context of the Term.. 34

2. The Panel Correctly Applied the Term "Subsidy Programme" to Commerce's Investigations.. 36

D. The Panel Correctly Determined That Commerce Was Not Required To Explicitly Identify the "Granting Authority" Under Article 2.1.. 39

E. The Appellate Body Should Not Complete the Analysis with Respect to China's Claim Under Article 2.1 That Commerce Did Not Properly Identify the Subsidy Programs 42

IV. THE PANEL MADE AN OBJECTIVE ASSESSMENT OF CHINA'S CLAIMS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT, WHICH WAS CONSISTENT WITH THE PANEL'S OBLIGATION UNDER ARTICLE 11 OF THE DSU............... 43

A. China Misunderstands the "Standard of Review" under Article 11 of the DSU that Is To Be Applied to the Panel's Evaluation of China's Claims under Article 12.7 of the SCM Agreement 44

1. China Misunderstands and Therefore Misapplies Previous Appellate Body Reports Articulating the "Standard of Review" under Article 11 of the DSU.. 44

2. China's Reliance on a Panel Report's Finding on China's Breach of Article 12.7 of the SCM Agreement in Another Dispute Confirms China's Misunderstanding of the "Standard of Review" Applicable to China's Claims under Article 12.7 48

B. The Panel's Evaluation of China's Claims under Article 12.7 of the SCM Agreement Meets the Requirements of Article 11 of the DSU 49

1. Contrary to China's Arguments, the Panel Undertook an In-Depth Examination of Commerce's Determinations and All the Evidence from Commerce's Administrative Record that the Parties Presented to the Panel 50

2. The Panel Did Not Err in Examining Evidence that Was on Commerce's Administrative Record 53

3. China, in Effect, Faults the Panel for Not Making China's Case for It, Which the Panel Was Not Permitted To Do 55

C. China Has Simply Recast its Arguments before the Panel as an Article 11 Claim on Appeal, which the Appellate Body Has Explained Is "Unacceptable" 56

D. The Appellate Body Should Not Complete the Analysis 57

V. CONCLUSION.. 61

TABLE OF REPORTS

Short Form	**Full Citation**
Panel Report	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R, circulated 14 July 2014
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
Canada – Periodicals (AB)	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
China – Broiler Products	Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
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EC – Hormones (AB)	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC and certain member States – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011

Short Form	**Full Citation**
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Korea – Alcoholic Beverages (AB)	Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999
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Short Form	**Full Citation**
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US – Carbon Steel (India) (Panel)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India,* WT/DS436/R and Add.1, circulated 14 July 2014
US – Continued Zeroing (AB)	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009
US – COOL (AB)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
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 – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996
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 – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Section 211 Appropriations Act (AB)	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002

Short Form	**Full Citation**
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
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 – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In this appeal, China pursues the same goal as it did before the Panel with many of the same arguments that the Panel correctly rejected. China asked the Panel, and now requests that the Appellate Body, to adopt novel interpretations of core subsidy disciplines contained in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that would undermine the ability of Members and the WTO to identify government subsidies and discipline their injurious use. In addition, China raises claims under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), making baseless attacks on the Panel's objectivity. In making such challenges, however, China fundamentally misunderstands the Article 11 legal standard, failing to heed admonitions not to use this claim as a mere device to re-litigate all matters before the Appellate Body.

2. The measures challenged by China include 14 preliminary and final countervailing duty determinations made by the U.S. Department of Commerce ("Commerce") with respect to Chinese imports.[1] In its determinations, Commerce found that certain Chinese state-owned enterprises ("SOEs") provided goods for less than adequate remuneration to producers of the investigated products. China's appeal of the Panel's legal interpretations are aimed at preventing investigating authorities from analyzing and countervailing such subsidies.

3. China advances formalist interpretations that lack grounding in the text of the SCM Agreement and create unnecessary hurdles to the investigating authority's task. The Appellate Body will not find the requirements that China describes on the face of the SCM Agreement. Rather, it is only through legal and linguistic gymnastics that elevate formality over substance and context that China reaches its interpretive conclusions.

4. China's conclusions, though, are contrary to both the text of the SCM Agreement and a sound understanding of how that Agreement operates. For example, under China's interpretations, an investigating authority cannot calculate benefit based on a market price undistorted by a government's own intervention and cannot find that a subsidy is specific absent evidence of formal implementation or promulgation of a "program." These interpretations would allow China, and any other Member, to manipulate and evade the application of the SCM Agreement to its subsidies. As such, it is China's interpretations, not those of the Panel that, if adopted, would "gravely undermine the effectiveness of the disciplines that the SCM Agreement imposes on the use of subsidies and countervailing measures."[2]

5. China also claims that the Panel failed to meet the requirements of Article 11 of the DSU. However, China has not met the high standard for demonstrating that the Panel failed to make an objective assessment of the matter before it. In effect, China asks for another bite at the apple, by recasting some arguments it made before the Panel, advancing other arguments that it did not even pursue before the Panel, and asking the Appellate Body to re-examine factual and legal findings in the panel report with which China disagrees. China presents no

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[1] China Appellant Submission, note 2. China's appeal concerns four investigations with respect to its claims under Article 14(d) of the SCM Agreement, 12 investigations with respect to its claims under Article 2.1 of the SCM Agreement, and 13 investigations with respect to its claims under Article 12.7 of the SCM Agreement. China Appellant Submission, para. 444.

[2] China Appellant Submission, para. 3.

valid basis for the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU.

6. In this appellee submission, the United States will address each of China's claims on appeal, as follows. Section II addresses China's two arguments regarding the use of out-of-country benchmarks. First, the United States responds to China's continued advocacy that the same test the Appellate Body established for the "financial contribution" analysis in Article 1.1(a) of the SCM Agreement should now be applied to the separate "benefit" analysis in Articles 1.1(b) and Article 14(d). The United States demonstrates that this approach would contravene the approach to the market distortion analysis that the Appellate Body used in *US – Softwood Lumber IV* as it would have the potential to prevent authorities from determining when the government price itself serves as the benchmark. Moreover, China's claim would require the Appellate Body to determine either (i) the Appellate Body previously failed to understand the consequences of its own analysis of Article 1.1(a)(1) and Article 14(d) in *US – Anti-Dumping and Countervailing Duties (China)*, or (ii) it was not within the Appellate Body's authority to make such a finding. Neither of these premises is correct.

7. Section II will also address China's arguments that the Panel acted inconsistently with its role under DSU Article 11 when making its findings on benchmarks. The United States will explain how (i) these arguments are subsidiary to China's substantive argument that the "government authority" test should be applied to the benchmark analysis and (ii) China is recasting the argument before the Panel under the guise of an Article 11 claim. As a result, China's challenge is inappropriate under Article 11 and it is not a good use of dispute settlement resources.

8. In addition, China's claims under Article 11 of the DSU are not factually accurate, and are premised on a mischaracterization of the Panel's analysis. The panel report was not "contradictory", as China alleges. In fact, the excerpts China cites instead support the Panel's finding that China failed to prove its claim's factual premise. The Panel also did not fail to evaluate China's "as applied" claims separately and on their own merits. The Panel reviewed each investigation and the record as presented and found, correctly, that most of them did not even refer to SOEs as public bodies in the context of the benchmark analysis. For the few that did, the Panel objectively assessed the evidence on the record and found that China still failed to establish the factual premise of its claim.

9. The Appellate Body should also decline to complete the analysis for the four challenged investigations because there are insufficient undisputed facts on the record for the Appellate Body to do so. Not only is China incorrect when it says that the Panel found that China failed to make a *prima facie* case, China is also incorrect when it asserts that it will be "simple" for the Appellate Body to complete the analysis. If the Appellate Body were to reverse the Panel's findings, a thorough examination of not only Commerce's determinations, but also of the evidence on Commerce's administrative record that underlies those investigations, would still be necessary. Such an inquiry would be inappropriate for the Appellate Body to conduct in light of the nature of the Appellate Body's limited review, and because the full contents of the administrative record were not before the Panel, nor are they now in front of the Appellate Body.

10. Section III addresses China's novel and flawed interpretations of Article 2.1 of the SCM Agreement. China appeals three aspects of the Panel's findings with respect to Commerce's specificity determinations, basing its arguments on erroneous interpretations of the SCM Agreement rejected by the Panel. China's interpretations would create artificial and unnecessary hurdles to an investigating authority's inquiry into whether a subsidy "is specific to an enterprise or industry or group of enterprises or industries" as provided in Article 2.1 of the SCM Agreement.[3]

11. In each of the challenged investigations, Commerce determined that the inputs provided for less than adequate remuneration by public bodies were, as a matter of fact, only used by a discrete segment of China's economy comprising a limited number of certain enterprises, consistent with Article 2.1(c) of the SCM Agreement. Each determination was based on facts on the record and was consistent with an accurate interpretation of Article 2.1. China does not argue that the subsidies at issue were broadly available, but rather argues that Commerce's determinations failed to comply with a formalistic checklist created by China through creative interpretation lacking foundation in the text of SCM Agreement. In Section III, the United States explains why China's interpretations are inconsistent with an accurate interpretation of the SCM Agreement. In particular, the ordinary meaning of Article 2.1, together with its context with the Agreement as a whole, does not support China's arguments.

12. First, there is no merit to China's argument that an investigating authority must always examine a subsidy under paragraphs (a) and (b) of Article 2.1, before turning to paragraph (c), even when the record contains no evidence indicating that paragraphs (a) or (b) are relevant. China bases its theory on an incorrect interpretation of the text of the first sentence of Article 2.1(c) and on mischaracterizations of Appellate Body applications of this provision. However, China's theory contradicts the ordinary meaning of Article 2.1(c), which provides that the factors set out in that provision may be applied "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" *not* "only if" there is such an appearance of non-specificity. The Panel's rejection of China's interpretation is supported by the context of Article 2.1 and the SCM Agreement as a whole, which contains no indication that a subsidy must be evaluated under Article 2.1(a) or (b) prior to consideration under Article 2.1(c). Prior considerations by the Appellate Body of the structure and operation of Article 2.1 confirm that the Panel's interpretation is accurate.

13. Second, China's narrow interpretation that an investigating authority must identify a formal "subsidy programme" pursuant to which the government or a public body provides inputs for less than adequate remuneration should be rejected because it is inconsistent with the ordinary meaning and context of the term in Article 2.1(c) of the SCM Agreement. China advances a rigid interpretation of the term "program" whereby an investigating authority must identify a formal "plan or outline" pursuant to which a subsidy is provided. This theory converts the *de facto* inquiry under subparagraph (c) into a *de jure* inquiry regarding whether the subsidy has been enshrined in an identified "plan or outline." The Panel correctly rejected this interpretation, finding that a "subsidy programme" can be established by the operation of the subsidy itself, without regard to the existence of a "plan or outline."

[3] SCM Agreement, Article 2.1.

14. Finally, the Appellate Body should reject China's argument that an investigating authority is required to expressly identify the "granting authority" as part of the specificity analysis. The focus of the specificity analysis under Article 2.1 is on the universe of *users* of the subsidy, not on the "granting authority." Commerce explained that the relevant jurisdiction, *i.e.*, where the users are located, was all of China. China does not dispute this finding, but rather inserts a non-existent requirement that would not change or advance an investigating authority's analysis under Article 2.1 of the SCM Agreement. Because China's argument asserting that an investigating authority must always identify the granting authority lacks any basis in the text of the agreement, the Panel was correct in rejecting this interpretation.

15. The requirements created by China's legal theories are nowhere to be found on the face of the text in Article 2.1 of SCM Agreement, and they have little relationship to the question in front of Commerce, *i.e.*, whether the subsidies at issue were, in fact, used by a limited number of certain enterprises. Rather, these interpretations are more closely related to China's goal of exempting its subsidy programs from the disciplines of the SCM Agreement through a lack of transparency and formal implementation. For these reasons, the Panel's interpretations of Article 2.1 of the SCM Agreement were correct, and China's appeal of these aspects of the Panel's findings on specificity should be rejected. Furthermore, because Commerce's complete administrative record was not placed before the Panel and is not now on the record before the Appellate Body, there is insufficient factual evidence for the Appellate Body to evaluate whether Commerce's identifications of the "subsidy programmes" were appropriate, as China asks the Appellate Body to do.

16. Section IV responds to China's claim on appeal that the Panel acted inconsistently with Article 11 of the DSU in finding that Commerce did not act inconsistently with Article 12.7 of the SCM Agreement in applying "facts available" in 42 separate instances in certain of the underlying investigations at issue in this dispute. China does not appeal the substance of the Panel's interpretation of Article 12.7. Rather, China claims on appeal that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. However, China fails to meet the high standard for establishing that the Panel acted inconsistently with Article 11.

17. China misunderstands the standard of review under Article 11 of the DSU that is to be applied to the Panel's evaluation of China's claims under Article 12.7 of the SCM Agreement. Eschewing virtually all of the elaboration of Article 11 contained in prior Appellate Body reports, China focuses almost exclusively on just two Appellate Body reports: *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigations on DRAMS*. However, those Appellate Body reports do not support China's argument that the Panel failed to apply the correct standard of review. Because China asked the Panel to address only a relatively simple question – the question of whether Commerce relied on any facts at all in making its "facts available" determinations – it was not necessary for the Panel to assess whether Commerce's "conclusions" were "reasoned and adequate" in the manner that the Appellate Body described in those two disputes. China did not, in the context of its Article 12.7 claims, challenge Commerce's "conclusions." Accordingly, even if the Panel did not apply the standard of review that China advocates, that would not mean that the Panel acted inconsistently with Article 11 of the DSU.

18. China also fails to identify specific errors regarding the objectivity of the Panel's assessment, and fails to explain why the alleged errors meet the standard of review under Article 11 of the DSU. Contrary to China's arguments, the Panel undertook an in-depth examination of Commerce's determinations and all the evidence from Commerce's administrative record put before the Panel. The Panel did not err in examining evidence that was on Commerce's administrative record but which was not cited in Commerce's determinations. As the Appellate Body found in *US – Countervailing Duty Investigation on DRAMS*, the SCM Agreement "does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination," and a Member is not precluded from relying on evidence that, although contained in the record of the investigating authority, is not explicitly referred to in its decision.[4] The Panel also did not err by not individually examining each of the instances of Commerce's use of "facts available." China did not present arguments and evidence on a case-by-case basis, and it would have been error for the Panel to do so, as that would have involved the Panel making China's case for it.

19. Finally, China's claim under Article 11 of the DSU fails because China has simply recast its arguments before the Panel as an Article 11 claim on appeal, and the Appellate Body has admonished that doing so is "unacceptable."[5] The Panel reviewed and correctly rejected the same arguments China presents on appeal. While China disagrees with the Panel's findings, China has failed to identify specific errors regarding the objectivity of the Panel's assessment. Accordingly, the Appellate Body should reject China's claim that the Panel acted inconsistently with Article 11 by failing to make an objective assessment of China's claims under Article 12.7 of the SCM Agreement.

20. The Appellate Body should also reject China's request that it complete the legal analysis of China's claims under Article 12.7 of the SCM Agreement, for a number of reasons. First, China is asking the Appellate Body to undertake a case-by-case evaluation of Commerce's applications of "facts available," but China did not ask the Panel to undertake such an analysis – and China itself did not undertake such an analysis in presenting its arguments to the Panel. China cannot now ask the Appellate Body to act as the trier of facts in a manner different from how it asked the Panel to perform that task. To do so is at odds with "the distinction between the respective roles of the Appellate Body and panels."[6]

21. Second, China's claim that Commerce's "facts available" determinations were not sufficiently or adequately explained would more appropriately have been advanced under Article 22 of the SCM Agreement. The Panel recognized this and concluded that such a claim was outside the Panel's terms of reference. Consequently, the Panel did not address China's legal arguments or factual assertions that Commerce failed to provide sufficient detail regarding the facts underlying the challenged "facts available" determinations.

22. Third, were the Appellate Body to agree to China's request to look individually at each instance in which Commerce applied "facts available," it would be necessary for the Appellate Body to review more than simply the excerpts China quotes in its appellant submission. The

[4] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 159, 164.
[5] *EC – Fasteners (China) (AB)*, para. 442.
[6] *E.g.*, *EC – Fasteners (China) (AB)*, para. 441.

Appellate Body would need to review the evidence on Commerce's administrative record, including, in particular, the evidence cited and reproduced in Exhibits USA-94 and USA-95 through USA-133. In order to do so, the Appellate Body would need to undertake its own thorough examination of the evidence. Such a thorough examination would doubtless require the Appellate Body to examine a host of issues related to, *inter alia*, the probative value of certain pieces of evidence, the relevance of particular facts, and inferences that may reasonably be drawn from an analysis of the evidence in its totality. However, as was the case in *US – Countervailing Duty Investigation on DRAMS*, the participants have not addressed sufficiently, in their submissions, the issues that the Appellate Body might need to examine if it were to complete the analysis in this dispute.[7]

23. Finally, we note that the entire body of Commerce's administrative record was not placed before the Panel and is not now on the record before the Appellate Body. In the absence of a more complete record of the proceedings before Commerce, there simply is insufficient factual evidence for the Appellate Body to evaluate whether Commerce's "facts available" determinations are "reasoned and adequate," as China asks the Appellate Body to do.

24. For these reasons, the Appellate Body should not complete the legal analysis and should not find that Commerce's "facts available" determinations are inconsistent with Article 12.7 of the SCM Agreement.

II. THE PANEL DID NOT ERR IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 14(D) OF THE SCM AGREEMENT

A. Introduction

25. China challenges the Panel's finding that China did not demonstrate that Commerce's approach to, and findings of, out-of-country benchmarks were inconsistent with Article 14(d) of the SCM Agreement. China originally challenged Commerce's approach and findings on two bases, both of which are flawed and must be rejected. First, China argues that the role of SOEs in finding that an out-of-country benchmark is appropriate to analyze "benefit" can only be made following a "public body" finding, as in the context of "financial contribution." However, China's argument has no basis in the text of Articles 1.1(b) or 14(d) and is contradicted by the approach of the Appellate Body in examining "benefit" in previous reports.[8]

26. Second, China challenges the Panel's findings that China did not meet the factual premise of its claim under the guise of a challenge under Article 11 of the DSU. However, this claim must fail as well. China misunderstands the elements necessary for an Article 11 claim, misinterprets the Panel's finding, and, in any event, the record provides sufficient evidence to demonstrate the Panel objectively assessed the facts of the four challenged investigations.

27. In interpreting Article 14(d), China argued to the Panel that Commerce's determinations concerning the benefit conferred when a SOE provided inputs for less than adequate

[7] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 197.
[8] *See US – Softwood Lumber IV (AB)*, paras. 91-92; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras 456-457.

remuneration were WTO-inconsistent if, in the same investigation, Commerce did not *also* determine that the particular SOE constituted a "public body" under the approach articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. The Panel found that there was nothing in the text of Article 14(d) or in prior WTO reports to require the same analyses in these distinct aspects of a countervailing duty determination. In particular, the Panel found merit in the idea that a government can distort prices in a market through other ways than its role as a provider of a financial contribution.[9] China appeals that finding, repeating its argument that the analysis of the role of SOEs in the context of "financial contribution" must apply to all possible roles of the government in determining the "benefit" as well.

28. However, as the United States has argued, and the Appellate Body found in *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*, the "financial contribution" and "benefit" elements of a subsidy are, by their terms, different and play different roles. Each element requires a distinct inquiry into the nature of the governmental intervention in a marketplace. As demonstrated below, the Panel's interpretation of Article 14(d) is consistent with the object and purpose of the SCM Agreement, as it allows for the fact-based analysis necessary to determine whether the use of an out-of-country benchmark is appropriate. In addition, the Panel's findings are consistent with the Appellate Body's previous interpretations of Article 14(d) as elaborated in *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*. Moreover, the interpretation of Articles 1.1(b) and 14(d) for which China advocates contradicts prior Appellate Body reports and would result in benefit calculations that are artificially low or even zero.

29. As for China's DSU Article 11 challenge, it is important to recall that China originally challenged 15 investigations[10] in which Commerce had found that the market was distorted for certain inputs such that the prices within China for these inputs were not based on market principles. Therefore, these prices could not be used as benchmarks to determine the adequacy of remuneration (*i.e.*, for the purpose of calculating a "benefit").

30. China's factual premise before the Panel, at least initially, was that Commerce "applied the same framework [*i.e.*, solely used evidence of ownership to show government predominance in a given marketplace] for evaluating whether market prices for a particular input in China are distorted."[11] Then, when the United States pointed out the flaws in this premise,[12] China changed its argument, stating instead that Commerce's findings were "based exclusively, or primarily[,] on treating SOEs as 'government suppliers'."[13]

31. The panel report analyzed China's revised argument that Commerce's findings were based exclusively or primarily on treating SOEs as government suppliers (what the Panel

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[9] Panel Report, para. 7.193.
[10] Request for Establishment of a Panel by China, W/DS437/2, circulated August 21, 2012 ("Panel Request"), fn. 7. China dropped its claim as to *Galvanized Steel Wire* and the Panel found *Wind Towers* and *Steel Sinks* outside the terms of reference. *See* Panel Report, para. 7.29.
[11] China First Written Submission to the Panel, para. 69.
[12] *See* U.S. First Written Submission to the Panel, paras. 164-167.
[13] China Second Written Submission to the Panel, para. 70.

characterized as the one "relevant"[14] fact), and found that the evidence did not support China's assertion.[15] China, in its appellant submission, apparently agrees with the Panel's assessment of the facts and has abandoned its claims except with respect to four of the investigations: *OCTG, Solar Cells, Line Pipe*, and *Pressure Pipe*.[16] For these investigations, China has embarked on a strained DSU Article 11 claim to convince the Appellate Body that it had met the original factual premise of its own case. China's Article 11 claim relies on a mistaken approach to Article 11 claim and misunderstands both the Panel's finding as well as the evidence on the record.

32. Accordingly, both China's interpretation of Article 14(d) and the challenge under DSU Article 11 are erroneous and must be rejected.

B. China's Appeal Is Premised on an Incorrect Understanding of Article 14(d) that Is Contrary to the Appellate Body's Interpretation of that Article in *US – Softwood Lumber IV*

33. The Panel correctly interpreted Article 14(d) based on the text of the SCM Agreement, read in its context, and consistently with previous Appellate Body reports.

34. Before turning to those sources, the United States notes that, in general, the purpose of the benefit calculation is to determine whether the recipient is "better off than it would otherwise have been absent a contribution."[17] While in-country, private market benchmarks are the starting point in determining whether the financial contribution made the recipient better off, the parties agree that in certain circumstances, such as when the government is predominant in the marketplace, authorities may use out-of-country benchmarks to determine whether a benefit has been conferred.[18] The use of an in-country benchmark under such circumstances would result in a circular analysis of the adequacy of remuneration analysis. That is, the analysis would be simply comparing the government price to itself. "The resulting comparison of prices carried out…would indicate a benefit that is artificially low, or even zero, such that the extent of the subsidy would not be captured…."[19] China argues for an approach in this dispute that would do just that; it would prevent authorities from properly analyzing the ways that the government can interfere in a given marketplace and distort prices. Ultimately, China's approach would result in a benefit calculation that would not capture how much better off the recipient is made through a contribution.

35. The chapeau of Article 14 and subpart (d) of the SCM Agreement states:

> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent

[14] Panel Report, para. 7.177.
[15] Panel Report, para. 7.178.
[16] China Appellant Submission, para. 61.
[17] *See Canada – Aircraft (AB)*, para. 157.
[18] *See* China Appellant Submission, para. 21.
[19] *US – Softwood Lumber IV (AB)*, para. 95.

and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

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> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. *The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)*. (emphasis added).

36. The Appellate Body has noted that the chapeau to Article 14 and subpart (d) envision that different approaches and methods may be used by the authorities to determine whether a benefit has been conferred on a recipient. The chapeau of Article 14 refers to "any method" used by an investigating authority and describes the subparagraphs of Article 14 as "guidelines." The Appellate Body has explained that "[t]he reference to 'any' method in the chapeau clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient".[20] Moreover, the Appellate Body has emphasized that the provisions in the subparagraphs of Article 14, including Article 14(d), are "guidelines" and has stated that "the use of the term 'guidelines' in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'."[21]

37. Importantly, the Appellate Body has stated that the determination of "whether private prices are distorted because of the government's predominant role. . . *must* be made *on a case-by-case basis*, and according to the particular facts underlying each countervailing duty investigation".[22] The Appellate Body found that there is "little difference" between situations where the government is the predominant provider of certain goods or the sole provider as it "is likely that it can affect through its own pricing strategy the prices to the point where there may be little difference, if any, between the government price and the private prices. The resulting comparison of prices carried out … would indicate a benefit that is artificially low, or even zero, such that the extent of the subsidy would not be captured…."[23] Thus, the inquiry should not be focused simply on the form of the government involvement, whether it is a government entity regulating a particular market, a sole provider of the good, a "competitor" that provides goods at less than adequate remuneration, or otherwise; rather the inquiry must be flexible to take

[20] *US – Softwood Lumber IV (AB)*, para. 91.
[21] *US – Softwood Lumber IV (AB)*, para. 92.
[22] *US – Softwood Lumber IV (AB)*, para. 102 (emphasis added).
[23] *US – Softwood Lumber IV (AB)*, para. 100.

adequate account of the particular facts revealing whether the government is predominant in a given marketplace. The Panel concurred with this approach.

38. The position for which China advocates on appeal conflicts with the findings of the Appellate Body in *US – Softwood Lumber IV*. Under the test that China proposes, there is a potential for the government to own and control every entity in a given marketplace and yet for an authority to be unable to determine that the recipient received a benefit. It is important to recall that in reality China's distinction is not between a government actor and a "private body," as China argues,[24] but between a government or "public body" under the approach of *US – Anti-Dumping and Countervailing Duties (China)*, and other government-owned entities that, for whatever reason, do not have adequate indicia under that approach.[25]

39. A simple example illustrates why China's reasoning would lead to results that conflicts with the aim of Article 14(d) and with the Appellate Body's previous reasoning. Assume that, for a given product in a marketplace, five wholly government-owned entities produce input goods, one with a market share of two percent, and the four others hold the remaining market share of 98 percent.

40. Further, assume that the investigating authority determined that the entity with two percent of the market was a "public body" for purposes of the financial contribution analysis, but the others, while wholly-government owned, were not considered public bodies for financial contribution purposes (perhaps because of inadequate indicia of "governmental authority"). The potential for government presence to distort prices in this market is evident. The government wholly-owns all input providers in that market. However, under China's argument, under this scenario, in spite of the government's 100 percent ownership of production in the relevant input market, an authority could not find that the government was predominant in the marketplace and therefore use an out-of-country benchmark to determine whether a benefit is being conferred on a recipient.

41. Government ownership of SOEs changes the incentive for price competition between such entities, and where SOEs are predominant in a market, the same situation analyzed by the Appellate Body in *US – Softwood Lumber IV* arises: "Whenever the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices."[26] Under China's approach, however, it is not the market that serves as the benchmark for a benefit calculation but rather the government price that serves as the benchmark. This is exactly the result that *US – Softwood Lumber IV* sought to avoid. As the Appellate Body explained: "[t]he use of an in-country benchmark under such circumstance would result in a circular adequacy of remuneration analysis."[27] As such, China's

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[24] China Appellant Submission, para. 36.

[25] Either the entity would fail to be a public body, and thus no financial contribution would be conferred and thus no benefit analysis would be undertaken, or it would already have met the "government authority" test, and any distinction between the Article 1.1(a)(1) analysis and the Article 14(d) analysis would be irrelevant.

[26] *US – Softwood Lumber IV* (AB), para. 100.

[27] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444 & note 410 (citing *US – Softwood Lumber IV (AB)*, para. 93).

overly restrictive understanding of Article 14(d) contradicts the Appellate Body's understanding of market distortion articulated in *US – Softwood Lumber IV*.

C. China Has Failed to Demonstrate Why the Appellate Body's Findings and Analysis in *US – Anti-Dumping and Countervailing Duties (China)* Are Not Persuasive

1. The Panel's Understanding of the Appellate Body's Findings in US – *Anti-Dumping and Countervailing Duties (China)* Is Correct

42. The Panel correctly relied on the fact that the Appellate Body's benchmark findings in *US – Anti-Dumping and Countervailing Duties (China)* "did not concern whether or not SOEs are public bodies (and thus government) but rather whether the extent of SOE involvement in a marketplace supports a determination with article 14(d) that prices in that market were distorted and thus the use of out-of-country benchmarks was appropriate."[28]

43. For China to prevail on its appeal concerning benefit calculations, it asks the Appellate Body to upend its own findings in *US – Anti-Dumping and Countervailing Duties (China)* and substantially change its findings in *US – Softwood Lumber IV*. China's appeal requires the Appellate Body to determine either (i) the Appellate Body previously failed to understand the consequences of its own analysis of Article 1.1(a)(1) and Article 14(d), or (ii) it was not within the Appellate Body's authority to make a finding on out-of-country benchmarks. Neither of these premises is accurate.

44. China seems to argue that the Appellate Body did not understand its actions in *US – Anti-Dumping and Countervailing Duties (China)*. In making its textual argument, China points to *US – Anti-Dumping and Countervailing Duties (China)* and argues that the interpretation of the word "government" must be "consistent with the meaning attributed to the term 'public body' in *US – Anti-Dumping and Countervailing Duties (China)*."[29] China insists that "as a matter of law", "government ownership and control alone are an insufficient basis on which to conclude that the provision of goods by a state-owned entity is the conduct of a 'government' supplier for purposes of a distortion inquiry."[30] On the contrary, the Appellate Body was fully aware in that dispute that (1) Commerce applied an ownership 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.[31]

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[28] Panel Report, para. 7.194.
[29] China Appellant Submission, para. 24.
[30] China Appellant Submission, para. 23.
[31] In the investigations at issue in *US – Anti-Dumping and Countervailing Duties (China)*, "the USDOC found, relying at least to some extent on facts available, that SOEs produced 96.1 per cent of all [hot-rolled steel] produced in China and that all the SOE suppliers are majority owned by the government." *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 451. Additionally, "the USDOC concluded . . . that, 'because of the government's overwhelming involvement in [China's] [hot-rolled steel] market, the use of private producer prices in China would be akin to comparing the benchmark to itself' and that, therefore, private prices in China could not be used to determine the adequacy of remuneration." *Id.* para. 452.

45. Nor was this finding in *US – Anti-Dumping and Countervailing Duties (China)* "*sub silentio*."[32] The Appellate Body conducted a full analysis and, notwithstanding its finding of WTO-inconsistency with respect to Commerce's public body analysis, still found that China had not demonstrated that Commerce's benchmark determinations were WTO-inconsistent. With respect to Commerce's public body analyses the Appellate Body stated: "[W]e recall the Panel's findings that in all of the investigations at issue, the USDOC determined that the relevant SOEs were public bodies based on the fact that the Government of China held the majority ownership of the shares in the respective companies." [33] With respect to Commerce's market distortion analysis the Appellate Body stated: "[T]he USDOC found, relying at least to some extent on facts available, that SOEs produced 96.1 per cent of all [hot-rolled steel] produced in China and that all the SOE suppliers are majority owned by the government . . . . the USDOC concluded . . . that, 'because of the government's overwhelming involvement in [China's] [hot-rolled steel] market, the use of private producer prices in China would be akin to comparing the benchmark to itself' and that, therefore, private prices in China could not be used to determine the adequacy of remuneration."[34]

46. Thus, there can be no question that the Appellate Body recognized that predominant government market share could be sufficient evidence of a market distorted by the government notwithstanding its determination that public body analyses based solely on government ownership were WTO-inconsistent.[35] Indeed, the Appellate Body stated: "China asserts that the USDOC disregarded evidence submitted by the respondents regarding *factors other than government market share*."[36] However, the Appellate Body upheld the Panel's finding that Commerce "considered and rejected as unpersuasive arguments regarding factors other than market share."[37] This also means that the Appellate Body recognized that, in the investigations that it found government ownership insufficient for financial contribution purposes, it was sufficient for determining when the government had a predominant role in the market for purposes of evaluating benefit.

47. The Panel in the instant case evaluated the factual and legal situation in *US – Anti-Dumping and Countervailing Duties (China)* and found "that the Appellate Body was faced with a very similar situation."[38] The Panel noted that the Appellate Body, "after having found that the USDOC's finding on 'financial contribution' were inconsistent with Article 1.1(a)(1)" still "upheld Commerce's use of out-of-country benchmarks in the same determinations."[39] Further, the Appellate Body's findings "did not concern whether or not SOEs are public bodies (and thus government) but rather whether the extent of SOE involvement in a marketplace supports a determination consistent with article 14(d) that prices in that market were distorted and thus the use of out-of-country benchmarks was appropriate."[40]

[32] China Appellant Submission, para. 47.
[33] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 343.
[34] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 451-452.
[35] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 456.
[36] *US – Anti-Dumping and Countervailing Duties (China) (AB),* para. 457 (emphasis added).
[37] *US – Anti-Dumping and Countervailing Duties (China) (AB),* para. 457.
[38] Panel Report, para. 7.194.
[39] Panel Report, para. 7.194.
[40] *US – Anti-Dumping and Countervailing Duties (China) (AB),* para. 457.

48. In light of the findings in *US – Anti-Dumping and Countervailing Duties (China)* – the reasoning of which was sound and remains applicable here – the Appellate Body should find that the United States did not act inconsistently with Article 14(d) of the SCM Agreement.

2. The Appellate Body Could Have Made the Finding on Benchmarks in *US – Anti-Dumping and Countervailing Duties (China).*

49. China also argues that the issue was not properly before the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, and so if the Appellate Body had decided this issue it would have raised "significant systemic concerns". The Appellate Body would have exceeded its mandate under Article 17.6 of the DSU by "implicitly resolved a legal question that was not before either panel or the Appellate Body".[41]

50. In fact, by raising Article 17.6 of the DSU, China undermines its own point. While Article 17.6 states that an appeal "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel", it is well established that it is within the rights of the Appellate Body to make additional legal findings when "the reversal of a panel's finding on a legal issue may require [it] to make a finding on a legal issue which was not addressed by the panel."[42] As China indeed challenged the panel's findings of benefit under Article 1.1(b), the Appellate Body could have relied on its approach to Article 1.1(a)(1) in reaching its conclusion under 1.1(b), but declined to do so.

3. The Standard Articulated by the Appellate Body in *US – Softwood Lumber IV* Is the Proper Test for Benefit Inquiries

51. China further decries that without the "government authority" test of Article 1.1(a)(1), an investigating authority would be able to use "even the most extreme definition of what constitutes a 'government' provider."[43] China states that this "untenable outcome" can only be avoided by reversing the Panel's finding and the Appellate Body's previous guidance on this issue and accepting China's view of the SCM Agreement.[44]

52. However, China need not be so concerned. The guidance provided by *US – Softwood Lumber IV* requires that "[t]he determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, *must* be made on a case-by-case basis, according to the facts underlying each countervailing duty investigation"[45] (emphasis added). The Commerce Department follows this guidance, delving into a fact-specific inquiry into whether a government has distorted the market such that an out-of-country benchmark is needed. Commerce does so by analyzing concrete facts such as the government's ability to affect prices in the market. This analysis takes into account a myriad of factors, including, *inter alia*, government ownership, management interest, or other indicators of control of SOEs, the total volume and value of domestic production and the total volume and

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[41] China Appellant Submission, para. 48.
[42] *EC – Poultry (AB). See also US – Gasoline (AB); Canada – Periodicals (AB).*
[43] China Appellant Submission, para. 56.
[44] China Appellant Submission, para. 56.
[45] *See US – Softwood Lumber IV (AB)*, para. 102.

value of domestic consumption, imports, export tariffs and licensing and otherwise reviews the "totality of the evidence."

53. The *US – Softwood Lumber IV* analysis for the government's role in a particular marketplace permits an investigating authority to determine, based on the record, whether or not the government has the ability to influence the pricing strategy of a particular entity – or the prices overall in a given marketplace. The Appellate Body should decline to change its previous interpretation of the benefit analysis and deny China's appeal.

D. The Panel Did Not Act Inconsistently with Article 11 of the DSU in Evaluating China's Claims under Article 14(d) of the SCM Agreement

54. China claims that the Panel acted inconsistently with Article 11 of the DSU in its evaluation of China's claims under Article 14(d) of the SCM Agreement. China's claim is without merit.

55. We recall that the Appellate Body has explained that "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation," one that "goes to the very core of the integrity of the WTO dispute settlement process itself."[46] For China's Article 11 claim to succeed, China must demonstrate that the Panel committed "an egregious error that calls into question the [Panel's] good faith."[47] The Appellate Body has also emphasized that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreements."[48] In addition, the Appellate Body has stated unequivocally that it is "unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim."[49] The Appellate Body has further explained that the weighing of evidence is within the discretion of the panel,[50] and that it is not an error under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."[51]

56. As explained below, China has failed to meet the high standard for establishing that the Panel acted inconsistently with Article 11 of the DSU. First, China's arguments in support of its Article 11 claim simply are subsidiary to its claim that the Panel failed to apply Article 14(d) of the SCM Agreement correctly, as evidenced by China's repeated invocation of the phrase "under the correct interpretation" or "under the proper interpretation" of Article 14(d), by which China means its own preferred interpretation, which the Panel rejected. Second, China attempts to recast its substantive argument under the guise of an Article 11 claim. Third, China's contention that the Panel failed to comply with its obligations under Article 11 in four of the challenged investigations is unsupported. China argues that the Panel's finding that China failed to establish the factual premises for its claims with respect to the *OCTG* and *Solar Panels*

[46] *EC – Poultry (AB)*, para. 133.
[47] *EC – Hormones (AB)*, para. 133.
[48] *EC – Fasteners (China) (AB)*, para. 442.
[49] *EC – Fasteners (China) (AB)*, para. 442.
[50] *Korea – Dairy (AB)*, para. 137.
[51] *Korea – Alcoholic Beverages (AB)*, para. 164.

determinations is contradicted by its own intermediate factual findings (it is not), and that the Panel failed to evaluate China's "as applied" claims separately and on their own merits (it did not). Accordingly, there is no basis to find that the Panel acted inconsistently with Article 11 of the DSU.

1. China's Article 11 Claim Is Subsidiary to its Substantive Argument

57. Throughout its discussion of its Article 11 claim, China repeats the phrase "under the correct interpretation" or "under the proper interpretation" of Article 14(d) at least ten times.[52] The premise of China's Article 11 claim is that, had the Panel applied this correct or proper interpretation, *i.e.*, the interpretation China prefers and for which China continues to argue on appeal, then the Panel would have come to what China's considers is the correct conclusion.

58. By framing its Article 11 claim this way, however, it is clear that China is doing nothing more than presenting an Article 11 claim that is subsidiary to its substantive argument that the Panel incorrectly applied Article 14(d) of the SCM Agreement. As noted above, the Appellate Body has explained that "a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument or claim in support of a claim that the panel failed to apply correctly a provision of the covered agreement."[53] For this reason, China's Article 11 claim is improperly made and should be rejected.

2. China Is Recasting Its Arguments Before the Panel Under the Guise of an Article 11 Claim, Which Is "Unacceptable"

59. China presents to the Appellate Body, as a claim under Article 11 of the DSU, the same arguments that it presented to the Panel. Before the Panel, China argued that "the interpretation of the term 'public body' established in *US – Anti-Dumping and Countervailing Duties (China)* should be applied for determining whether an entity is a government supplier for purposes of the distortion inquiry under Article 14(d)."[54] China also argued that, as a factual matter, Commerce equated SOEs with the government, and that this was "explicitly or implicitly based on its interpretation that entities majority-owned by the government are public bodies."[55] The Panel considered and rejected China's arguments. On appeal, China asks the Appellate Body to find that, in doing so, the Panel acted inconsistently with Article 11 of the DSU. China's request should be denied.

60. As noted above, the Appellate Body has admonished that it is "unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim."[56] That is all that China is doing here. China disagrees with the Panel's legal interpretation and the Panel's weighing of the evidence, so it has presented to the Appellate Body the very same arguments that it presented to the Panel. However, the Appellate Body has

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[52] *See, e.g.*, China Appellant Submission, paras. 66, 69, 70, 76, 79, 85, 88, 92, 95, 100.
[53] *EC – Fasteners (China) (AB)*, para. 442.
[54] Panel Report, para. 7.161.
[55] Panel Report, para. 7.179.
[56] *EC – Fasteners (China) (AB)*, para. 442.

explained that it will not "interfere lightly" with a panel's fact-finding authority, and, therefore, for a party to prevail on an Article 11 claim, the Appellate Body "must be satisfied that the panel has exceed its authority as the trier of facts" and "cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached."[57] For that reason, "it is insufficient for an appellant to simply disagree with a statement or to assert that it is not supported by the evidence."[58]

61. The Panel reviewed the evidence presented to it, including systematically reviewing the Issues and Decision Memoranda from each investigation,[59] and found that the evidence does not support China's assertion "in each challenged determination."[60] The Panel specifically found that "some determinations are based on the market share of government-owned/controlled firms in domestic production alone" (citing *Pressure Pipe* and *Solar Panels*); "others on adverse facts available" (citing *Line Pipe, Lawn Groomers, OCTG, Seamless Pipe*, and *Drill Pipe*); "others on market share of the government plus the existence of low level of imports" (citing *Print Graphics* and *Steel Cylinders*); and others on market share of the government and export restraints (citing *Kitchen Shelving, Aluminum Extrusions*, and *Wire Strand*).[61] The Panel clearly laid out its factual findings as to each of China's claims and ultimately found that China's argument "is not accurate."[62]

62. The Panel's explanation of its reasoning demonstrates that it carefully reviewed the evidence presented, meeting the standards of Article 11 of the DSU. As the Appellate Body explained in *US – Softwood Lumber VI (Article 21.5 – Canada)*, "a panel's examination of [an investigating authority's] conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report."[63] While China may disagree with the Panel's conclusion, it is "unacceptable" for China to "recast the issue under the guise of an Article 11 claim" in front of the Appellate Body.[64] Accordingly, China's Article 11 claim must fail.

3. The Panel's Finding Was Not Contradicted by the Panel's Own Intermediate Factual Findings Relating to *OCTG* and *Solar Panels*

63. China asserts that "[t]he Panel's conclusion that China failed to establish the factual premise for each of its 'as applied' claims is directly contradicted by the Panel's own factual findings in respect of the OCTG and Solar Panels determinations."[65] China's assertion is baseless, and premised on mischaracterizing what the Panel actually said.

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[57] *US – Wheat Gluten (AB)*, para. 151.
[58] *EC – Seal Products (AB)*, para. 5.150.
[59] Panel Report, para. 7.180.
[60] Panel Report, para. 7.188.
[61] Panel Report, para. 7.186.
[62] Panel Report, para. 7.186.
[63] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.
[64] *EC – Fasteners (China) (AB),* para. 442.
[65] China Appellant Submission, para. 65.

64. China notes that the Panel found that "[o]ur review of the relevant Issues and Decision Memoranda reveals that it is only in a few cases that the USDOC's findings of a predominant role of the government in the relevant market, because of the market share of SOEs, refer to the SOEs as public bodies."[66] China then asserts that the Panel expressly recognized that, in these "few cases," "it is explicit that the government's predominant role is based on the market share of SOEs on the basis that they are 'authorities' (public bodies)."[67] According to China, these statements from the panel report demonstrate that the Panel actually found that the evidence did support China's assertion that Commerce based its market distortion analysis on a finding that SOEs are public bodies based on the approach to Article 1.1(a)(1) of the SCM Agreement that the Appellate Body rejected in *US –Anti-Dumping and Countervailing Duties (China)*. China misreads the panel report and has taken the Panel's statements out of context.

65. In fact, the Panel explained that it is only in a few cases that Commerce's findings refer to SOEs as public bodies at all, and then, only in reference to Commerce's separate findings that the particular SOEs referenced are themselves public bodies. Commerce did not say in its market distortion analysis, and the Panel did not find that Commerce said, that all SOEs are public bodies based on the approach to Article 1.1(a)(1) of the SCM Agreement that the Appellate Body rejected in *US –Anti-Dumping and Countervailing Duties (China)*.

66. With respect to the *OCTG* investigation, the Panel noted that Commerce "relied on Adverse Facts Available to determine that certain public bodies were taken into account in assessing the government's role in the market."[68] The Panel quoted from the final Issues and Decision Memoranda in *OCTG*:

> "*GOC authorities*" play a significant/predominant role (respectively) in the PRC market for steel rounds and billets and the prices actually paid in the PRC for this input during the POI are not an appropriate tier one benchmark under section 351.511(a)(2)(i) of our regulations.[69]

67. Nothing in the above passage suggests, as China argues, that Commerce's market distortion finding in *OCTG* was predicated exclusively on equating GOC owned or controlled firms with the government on the basis that they are authorities, *i.e.*, public bodies, based on the approach to Article 1.1(a)(1) of the SCM Agreement that the Appellate Body rejected in *US – Anti-Dumping and Countervailing Duties (China)*.[70] Further evidence of what Commerce actually said about SOEs in connection with its market distortion analysis can be found in a subsection of the *OCTG* determination entitled "Extent of State Ownership in the PRC Steel Rounds Industry." There, Commerce explains that it considered whether "*GOC owned or controlled firms* dominate the steel rounds market in the PRC and that this results in a significant distortion of the prices there, with the result that use of an external benchmark is

[66] China Appellant Submission, para. 65 (*quoting* Panel Report, para. 7.180).
[67] China Appellant Submission, para. 65 (*quoting* Panel Report, para. 7.183).
[68] Panel Report, para. 7.182.
[69] Panel Report, para. 7.182.
[70] China Appellant Submission, para. 75.

warranted."[71] This demonstrates that Commerce's market distortion analysis was not predicated exclusively on equating SOEs and public bodies. Accordingly, the Panel's discussion of *OCTG* provides no evidence of a contradiction in the Panel's findings.

68. The Panel's discussion of Commerce's *Solar Panels* investigation similarly does not provide any evidence of a contradiction in the Panel's findings. The Panel noted that, in the *Solar Panels* investigation, "it is explicit that the government's predominant role is based on the market share of SOEs on the basis that they are authorities (public bodies)."[72] As noted above, China seizes on this statement and mischaracterizes its implications. However, the Panel's statement, and the block quote that the Panel includes in the panel report, do not support China's assertion that, with respect to the *Solar Panels* investigation, the Panel agreed with China that Commerce's market distortion analysis equated SOEs and public bodies based on the approach to Article 1.1(a)(1) of the SCM Agreement that the Appellate Body rejected in *US – Anti-Dumping and Countervailing Duties (China)*.

69. Indeed, the passage the Panel quotes makes clear that the opposite is true. The block quote the Panel includes in paragraph 7.183 of its report includes the statement by Commerce that "[i]n addition to the 30 producers determined to be 'authorities', the GOC reports it maintains an ownership or management interest in another seven, bringing to 37 the number of producers *through which the GOC influences and distorts the domestic market for polysilicon*, out of a universe of 47 producers in the PRC."[73] As this statement shows, Commerce considered that some SOEs were public bodies (as it had previously found in a separate analysis of financial contribution), while other SOEs were not necessarily public bodies (Commerce had not examined them in the context of its financial contribution analysis). However, Commerce considered that all of the 37 SOEs taken together were the means "through which the GOC influences and distorts the domestic market." The Panel signaled its recognition of the distinction Commerce made by quoting this passage and emphasizing that Commerce considered that all 37 SOEs (both SOEs found to be public bodies and those that had not been found to be SOEs) contributed to market distortion. Again, there is no contradiction in the Panel's findings, and no indication that the Panel ever agreed with China's factual argument.

70. Contrary to China's arguments on appeal, the Panel found unambiguously that "[t]he evidence before us does not support China's assertion."[74] China is simply wrong to suggest that there exists a contradiction between that finding and any other factual finding by the Panel. Accordingly, China's argument lends no support to its claim that the Panel acted inconsistently with Article 11 of the DSU.

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[71] *OCTG Final IDM*, p. 4 (emphasis added) (CHI-45). *See also id*. pp. 80-81.
[72] Panel Report, para. 7.183.
[73] Panel Report, para. 7.183 (*quoting* Solar Panels, Preliminary Affirmative Countervailing Duty Determination, Fed. Reg. Vol. 77, No. 58 (Mar 26 2012, pp. 17448-17449) (emphasis added by the Panel).
[74] Panel Report, para. 7.180.

4. The Panel Did Not Fail to Evaluate China's "As Applied" Claims Separately and on their Own Merits

71. For the *Pressure Pipe* and *Line Pipe* investigations, China argues that the Panel acted inconsistently with Article 11 of the DSU because it "did not individually address whether China had established the factual premises of its claims in respect of the Pressure Pipe and Line Pipe investigations."[75] China is once again simply incorrect.

72. The Panel examined Commerce's determination in the *Pressure Pipe* investigation and found that Commerce based its determination in *Pressure Pipe* on "the market share of government-owned/controlled firms in domestic production alone,"[76] but the Panel did not find that this demonstrated that Commerce "has actually treated SOEs as public bodies and thus part of the government in the collective sense."[77]

73. With respect to *Line Pipe*, the Panel examined Commerce's determination and found that it was based on "adverse facts available,"[78] but, again, the Panel did not agree with China's contention that Commerce "treated SOEs as public bodies and thus part of the government in the collective sense."[79]

74. While the Panel's discussion of the *Pressure Pipe* and *Line Pipe* investigations is succinct, it is also sufficient. In evaluating the Panel's analysis, it is important to recall what China had argued – that Commerce's market distortion analyses in all the challenged investigations were improper because Commerce premised its determinations on a finding that "that entities majority owned or controlled by the Government of China [*i.e.*, SOEs] constitute public bodies."[80] The Panel explained that it reviewed the Issues and Decision Memoranda for all of the investigations at issue and found that most of them did not even refer to SOEs as public bodies in the context of the benchmark analysis.[81] Accordingly, it was unnecessary for the Panel to extensively address each investigation individually in the panel report to respond to China's argument. As the Appellate Body has explained previously, a panel "is not required to discuss, in its report, each and every piece of evidence"[82] nor is it the case that a panel must explicitly refer to that evidence in its reasoning.[83]

75. China suggests that "the Panel seems to have treated China's 12 separate 'as applied' claims as a single overarching claim, with 12 identical factual predicates, the failure of any one or more of which necessarily defeated the entire claim."[84] China posits that "[t]his is the only explanation for the Panel's finding that China had not established the factual premise of its

[75] China Appellate Submission, para. 80.
[76] Panel Report, para. 7.186.
[77] Panel Report, para. 7.188.
[78] Panel Report, para. 7.186.
[79] Panel Report, para. 7.188.
[80] China First Written Submission to the Panel, para. 71.
[81] Panel Report, para. 7.180.
[82] *EC – Fasteners (China) (AB)*, para. 441 (quoting *Brazil – Retreaded Tyres (AB)*, para. 202).
[83] *EC – Fasteners (China) (AB)*, para. 441.
[84] China Appellant Submission, para. 67.

claim 'in each challenged determination'."[85] However, a more plausible explanation, in light of the Panel's statement that it undertook a "review of the relevant Issues and Decision Memoranda,"[86] is that the Panel examined each investigation individually and found that, with respect to each and every investigation, China failed to establish the factual premise of its claim. The Panel's discussion in its report of only the "few cases" where there was any indication at all that Commerce referred to certain SOEs as public bodies, and its decision not to discuss other cases where there was no indication whatsoever that Commerce did so, does not support China's contention that the Panel took an "all or nothing" approach inconsistent with "the Panel's obligation to consider each of China's 12 as applied claims separately and on their own merit."[87]

76. China's argument is without any foundation, and cannot support a finding that the Panel acted inconsistently with Article 11 of the DSU.

E. The Appellate Body Should Not Complete the Analysis with Respect to the *OCTG*, *Solar Panels*, *Line Pipe*, and *Pressure Pipe* Investigations

77. For the reasons given above, the Appellate Body should reject China's substantive appeal of the Panel's interpretation and application of Article 14(d) of the SCM Agreement, and should also reject China's claim that the Panel acted inconsistently with Article 11 of the DSU. Accordingly, it would not be necessary for the Appellate Body to complete the legal analysis of China's claims.

78. However, were the Appellate Body to reverse the Panel's finding that Commerce's determinations in the *OCTG*, *Solar Panels*, *Line Pipe*, and *Pressure Pipe* investigations are not inconsistent with Article 14(d) of the SCM Agreement, the Appellate Body should decline China's request to complete the legal analysis, because there are insufficient undisputed facts on the record to permit the Appellate Body to do so.

79. Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." This precludes any fact finding by the Appellate Body. Accordingly, "[i]n previous disputes, the Appellate Body has emphasized that it can complete the analysis 'only if the factual findings of the panel, or the undisputed facts in the panel record' provide a sufficient basis for the Appellate Body to do so."[88] The Appellate Body has further explained that it will "complete the analysis" only in cases where the panel has addressed a claim and made a legal interpretation, finding, or conclusion,[89] where there are "sufficient factual findings,"[90] or where there are "sufficient

[85] China Appellant Submission, para. 68.
[86] Panel Report, para. 7.180.
[87] China Appellant Submission, para. 68.
[88] *See, e.g., US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 1250 (citing numerous Appellate Body reports in prior disputes).
[89] *EC – Poultry (AB)*, para. 107; *EC – Asbestos (AB)*, paras. 79, 82.
[90] *US – Section 211 Appropriations Act (AB)*, para. 343; *EC and certain member States – Large Civil Aircraft (AB)* paras. 735, 1101, 1417; *Australia – Salmon (AB)*, para. 118.

uncontested facts on the record."[91] The Appellate Body has recognized that its ability to complete the analysis is subject to "important limitation" and has adopted a "cautious approach" in the past.[92] In this dispute, contrary to China's assertion, it would not be possible for the Appellate Body to complete the legal analysis.

80. As an initial matter, we note that, in support of its request for the Appellate Body to complete the legal analysis, China erroneously contends that the Panel erred by finding that China failed to make a *prima facie* case.[93] That simply is not what the Panel found. Rather, the Panel found that China's proposed interpretation of Article 14(d) of the SCM Agreement is incorrect,[94] and further found that China's factual argument that Commerce, in each of its determinations, equated SOEs with public bodies, was not supported by the evidence on the record, namely Commerce's determinations themselves.[95] So, China's suggestion that all the Appellate Body need do is determine whether the United States introduced evidence and argument sufficient to rebut China's *prima facie* case with respect to the *OCTG*, *Solar Panels*, *Line Pipe*, and *Pressure Pipe* investigations simply is not correct.[96]

81. China is also incorrect when it asserts that it is "a simple matter for the Appellate Body to complete the analysis having resort to the relevant determinations at issue," which, China asserts, "conclusively establish that the USDOC's distortion findings in those cases were predicated exclusively on the USDOC's conclusion that the 'government' played a predominant role in the market as a supplier of the goods in question."[97] On the contrary, establishing whether Commerce's determinations are inconsistent with Article 14(d) of the SCM Agreement, as Article 14(d) is interpreted by China, would require a thorough examination not only of Commerce's determinations, but of the evidence on Commerce's administrative record that underlies Commerce's determinations. The United States notes that while much of the evidence and underlying memoranda from the challenged investigations was submitted to the Panel, the entirety of Commerce's administrative records is not on the record of this dispute. Thus, all the evidence and underlying memoranda that support Commerce's analyses are not before the Appellate Body in this dispute.

82. Assuming *arguendo* that the Appellate Body has accepted China's proposed interpretation, in order to test Commerce's determinations, it would be necessary to ascertain whether evidence on Commerce's administrative records supports the conclusion that that the SOEs identified by Commerce meet the standard to be deemed public bodies, as the Appellate Body has interpreted that term. If they do, then by China's own reckoning, Commerce's determinations should be upheld. While the fact that Commerce did not itself undertake such an

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[91] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 157 ("Canada, as the complaining party, must persuade us that there are sufficient uncontested facts on the record to enable us to complete the analysis by stepping into the shoes of the Panel.").
[92] *US – Continued Zeroing (AB)*, para. 195 ("We recognise the important limitation on our ability to complete the analysis.").
[93] *See* China Appellant Submission, para. 108.
[94] *See* Panel Report, para. 7.195.
[95] *See* Panel Report, para. 7.188.
[96] *See* China Appellant Submission, para. 108.
[97] China Appellant Submission, para. 109.

evaluation is not an explicit bar to examining whether record evidence nevertheless would support Commerce's conclusion under China's proposed interpretation,[98] the Appellate Body should not do so here, for the reasons given herein.

83. In this regard, the fact that Commerce may not have cited to particular evidence in its determinations is not the end of the matter. As the Appellate Body has explained, the SCM Agreement "does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination,"[99] and a Member is not precluded from pointing to evidence not cited by the agency that supports the agency's determination.[100] A holistic evaluation of the evidence on Commerce's administrative record would be required.

84. However, because the Panel did not accept China's proposed legal interpretation, the Panel did not evaluate Commerce's determinations on the basis of such an interpretation, and did not make the factual findings, including assessing and weighing evidence on Commerce's administrative record, that would have been associated with such an evaluation. The Appellate Body has been hesitant to complete the analysis when factual findings by the Panel are absent. In *US – Continued Zeroing*, the Appellate Body declined to complete the analysis when there was "insufficient factual findings to indicate that zeroing has been repeatedly applied."[101] Instead, the Appellate Body said that, "[i]n such circumstances, an examination of the facts, as well as a determination as to what conclusions may be drawn from the remaining evidence in the record, would be more appropriately conducted by a panel, with the assistance of the parties."[102]

85. In order to complete the legal analysis and determine whether Commerce's decisions to resort to out-of-country benchmarks are inconsistent with Article 14(d) of the SCM Agreement, the Appellate Body would need to undertake its own thorough examination of the evidence. Such a thorough examination would doubtless require the Appellate Body to examine a host of issues related to, *inter alia*, the probative value of certain pieces of evidence, the relevance of particular facts, and inferences that may reasonably be drawn from an analysis of the evidence in its totality.

86. When faced with a similar situation in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body declined to complete the analysis, because the participants there had not addressed such issues sufficiently.[103] China, of course, in its appellant submission, makes no attempt whatsoever to grapple with the facts on Commerce's administrative record, arguing that Commerce's determinations alone are sufficient evidence in support of its claims. The United States, for its part, will not in this appellee submission speculate and respond to arguments that China does not make. It would be impractical for the participants to address

[98] *US – Anti-Dumping and Countervailing Duties (China) (AB),* para. 355 (wherein the Appellate Body analyzed, under a standard that neither Commerce nor the panel applied, whether state-owned commercial banks were public bodies).
[99] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 164 (italics in original).
[100] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165.
[101] *US – Continued Zeroing (AB)*, para. 195.
[102] *US – Continued Zeroing (AB)*, para. 195.
[103] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 194-197.

such issues later in this proceeding, in light of the limited nature of – and the compressed time for – the Appellate Body's review, as provided in the DSU.[104] So, similar to *US – Countervailing Duty Investigation on DRAMS*, the participants have not addressed sufficiently, in their submissions, the issues that the Appellate Body might need to examine if it were to complete the analysis in this case.[105]

87. For these reasons, the Appellate Body should decline China's request to complete the analysis, and should not find that Commerce's benchmark determinations in the *OCTG*, *Solar Panels*, *Line Pipe*, and *Pressure Pipe* investigations are inconsistent with Article 14(d) or Article 1.1(b) of the SCM Agreement.

III. THE PANEL DID NOT ERR IN ITS INTERPRETATION OF ARTICLE 2.1 OF THE SCM AGREEMENT

A. Introduction

88. Before the Panel, China challenged Commerce's specificity determinations in 12 countervailing duty investigations[106] under Article 2.1 of the SCM Agreement. In those investigations, Commerce determined that public bodies had provided certain inputs for less than adequate remuneration to a limited number of certain enterprises. China now appeals three aspects of the Panel's findings with respect to those specificity determinations, basing its arguments on the same erroneous interpretations of the SCM Agreement that it pursued before the Panel.

89. China's arguments are based on erroneous interpretations of the SCM Agreement that would create artificial and unnecessary hurdles to an investigating authority's determination of whether a subsidy "is specific to an enterprise or industry or group of enterprises or industries."[107] First, China argues that an investigating authority must always examine a subsidy under paragraphs (a) and (b) of Article 2.1, before turning to paragraph (c), even when the record contains no evidence indicating that paragraphs (a) or (b) are relevant.[108] Second, China argues an investigating authority must identify a formal subsidy "program" pursuant to which the government or a public body provides inputs for less than adequate remuneration.[109] Finally, China argues that an investigating authority is required to expressly identify the "granting authority" as part of the specificity analysis.[110] With each of these erroneous interpretations of Article 2.1, China would simply elevate form over substance, opening an avenue for a Member to provide subsidies but evade subsidy findings by not identifying a

[104] *See* DSU Article 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.") and Article 17.5 ("As a general rule, [appellate] proceedings shall not exceed 60 days . . . . In no case shall the proceeding exceed 90 days.").
[105] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 197.
[106] China originally challenged specificity determinations in 14 investigations, but the Panel found that the preliminary determinations in two of those investigations were outside its terms of reference. *See* Panel Report, para. 7.2, 7.29 & note. 256.
[107] SCM Agreement, Article 2.1.
[108] China Appellant Submission, paras. 120-156.
[109] China Appellant Submission, paras. 157-171.
[110] China Appellant Submission, paras. 172-178.

"program" in relevant instruments, and precluding an investigating authority from making a finding of *de facto* specificity even where the facts reveal the subsidy is specific. As the Panel concluded, however, a correct interpretation of Article 2.1 does not lead to these outcomes, which would undermine the subsidy disciplines agreed by Members.

90. In each of the challenged investigations, Commerce determined that the inputs provided for less than adequate remuneration by public bodies were, as a matter of fact, only used by a discrete segment of China's economy comprising a limited number of certain enterprises consistent with Article 2.1(c). Each determination was based on facts on the record and was consistent with an accurate interpretation of Article 2.1.

91. For example, in the *Aluminum Extrusions* investigation, the U.S. domestic industry filed an application alleging that primary aluminum was being provided for less than adequate remuneration and that the provision of this input was specific to a limited number of users.[111] The record shows that only a limited number of enterprises or industries in China actually use primary aluminum, the input at issue in that case, and China has never challenged this particular fact.[112] China refers to Commerce's consideration of this evidence as an "end-use" approach, and alleges that it is facially inconsistent with Article 2.1(c).[113] This is despite the fact that China appears to agree that this "approach" involves a finding that the users of a particular input that was provided for less than adequate remuneration, *i.e.*, the users of the subsidy program, were limited in number.[114] In other words, China does not dispute that the evidence demonstrated that the subsidies were in fact specific to certain enterprises.[115] Rather, China argues that Commerce failed to clear the artificial hurdles that China's interpretations would place before an investigating authority. China's approach, then, would prevent the application of countervailing duties to the type of subsidy at issue which is enjoyed by a limited number of users, contrary to the terms of Article 2.1.

92. Specifically under China's arguments, even if, as a matter of fact, a subsidy is "specific to an enterprise or industry or group of enterprises or industries" within an identified jurisdiction, an investigating authority may not countervail that subsidy under Article 2.1 unless it first: (1) follows a particular order of analysis in every case, no matter the factual circumstances; (2) identifies a formally implemented "subsidy programme;" and (3) explicitly identifies a granting authority. Each of China's arguments would convert the specificity inquiry into a formalistic checklist, with items that could be evaded by a subsidizing Member, and could preclude investigating authorities from examining subsidies of the type maintained by China – the provision of inputs for less than adequate remuneration – despite the fact that they are expressly covered by the SCM Agreement.[116] As explained in detail below, the Panel

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[111] *See* Petition for the Imposition of Antidumping and Countervailing Duties Against Aluminum Extrusions from the People's Republic of China Petition, Volume III, p. 76 (Oct. 19, 2009) (USA-08).
[112] *See* U.S. Second Written Submission to the Panel, para. 79 & accompanying footnotes.
[113] China Appellant Submission, para. 117.
[114] China Appellant Submission, para. 117.
[115] *See* China Response to Panel Question No. 56, para. 145.
[116] *See* SCM Agreement, Articles 1.1(a) (iii) & 14(d). The Panel recognized that the interpretation advocated by China would permit Members to circumvent the disciplines of the SCM Agreement, and expressly identified this as a factor it considered as part of its analysis. Panel Report, para. 7.240 (concluding that a "narrow interpretation of 'subsidy program' could enable the circumvention of the disciplines of the SCM Agreement").

correctly rejected China's incorrect interpretations of Article 2.1 and concluded that this provision does not require investigating authorities to undertake analysis or make findings that are unnecessary for the final determination of specificity. Accordingly, the Panel correctly interpreted Article 2.1 and its conclusions should not be reversed.

B. The Panel Correctly Interpreted Article 2.1 To Allow Investigating Authorities To Examine Specificity Exclusively Under Article 2.1(c)

93. China argues that, in every specificity analysis under Article 2.1 of the SCM Agreement, an investigating authority must examine a subsidy under Articles 2.1(a) and 2.1(b) before examining it under Article 2.1(c). There is no merit to China's argument. China bases this argument on an incorrect interpretation of the text of the first sentence of Article 2.1(c) and on mischaracterizations of Appellate Body applications of this provision, and claims that because Commerce did not conduct such an analysis in any of the challenged investigations with respect to the provision of inputs for less than adequate remuneration, all of Commerce's challenged specificity determinations were inconsistent with Article 2.1.[117] Contrary to China's arguments, the Panel's finding that paragraph (c) does not impose a mandatory order of analysis is consistent with the ordinary meaning of the first sentence of Article 2.1(c) and with the context of that provision within Article 2.1 and the SCM Agreement, as elaborated by the Appellate Body in its prior considerations of this provision. For these reasons, China errs in arguing that the SCM Agreement requires investigating authorities to always conduct a *de jure* specificity analysis under Articles 2.1(a) and (b) before conducting a *de facto* specificity analysis under Article 2.1(c), even when there are no facts relevant for a *de jure* specificity finding, or assertions that such a finding should be made.

1. The Panel's Interpretation Is Consistent with the Ordinary Meaning of the First Sentence of Article 2.1(c)

94. China's order of analysis arguments rests primarily on its erroneous interpretation of the first sentence of Article 2.1(c), and in particular the "notwithstanding" clause:

> If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered.[118]

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[117] China Appellant Submission, para 121.
[118] The complete text of Article 2.1 states:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

95. Article 2.1(c) then goes on to describe the “other factors” that may be considered, including the factor used in the specificity determinations at issue in this dispute: the “use of a subsidy programme by a limited number of certain enterprises.” On appeal, China repeats its arguments rejected by the Panel that the “notwithstanding” clause contains a necessary precondition for an investigating authority to examine the “other factors” described in Article 2.1(c). The ordinary meaning of this phrase demonstrates that China’s interpretation is incorrect.

96. China ignores the structure of the first sentence of Article 2.1(c) when it argues that the word “if” introduces *two* necessary preconditions for an examination under Article 2.1(c): (1) that there must be an “appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)”; and (2) that there must be “reasons to believe that the subsidy may in fact be specific.”[119] China’s interpretation fails to take into account the fact that the two phrases are treated differently within the structure of the sentence. China’s interpretation would only apply to the sentence if it were rearranged to state:

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

97. But, as the Panel found, this is not what the sentence states; the differing treatment of the two clauses conveys different meanings.

98. The Panel disagreed with China’s interpretation, finding that an examination of Article 2.1(c) is conditioned only on whether there are “reasons to believe” that the subsidy is in fact specific, and not on an appearance of non-specificity as a result of the application of

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> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
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> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulations, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme has been in operation.

[119] China Appellant Submission, para. 123.

subparagraphs (a) and (b).[120] The Panel observed that, just because the "notwithstanding" clause follows the word "if", does not mean that "if" applies to that clause.[121] The clause is set off with commas and introduced by the word "notwithstanding." The ordinary meaning of the term "notwithstanding" is "[i]n spite of, without regard to or prevention by."[122] As a result, consistent with this definition and the sentence structure, the ordinary meaning is that the "other factors may be considered" if "there are reasons to believe that the subsidy may in fact be specific," and such a consideration may be undertaken "in spite of, without regard to or prevention by" any findings made under the subparagraphs (a) or (b), not "only if" such findings are made.

99. In confirming the ordinary meaning of the provision, the Panel looked to the Spanish and French versions of the sentence and noted that the Spanish version places the "notwithstanding" clause after the clause "[i]f there are reasons to believe that the subsidy may in fact be consistent."[123] The Panel explained that this sentence structure supports the interpretation that the "notwithstanding" clause "signifies that the principles embodied in subparagraph (c) can be applied *even if* the application of the principles in subparagraphs (a) and (b) indicates an appearance of non-specificity, provided there are 'reasons to believe that the subsidy may in fact be specific.'"[124] In other words, subparagraph (c) is not applied *only if* an analysis under subparagraphs (a) and (b) indicates an appearance of non-specificity; it is also applied under other circumstances, for example if no such analysis is conducted at all.

100. In contrast, China's treatment of the Spanish text again distorts its meaning.[125] As China notes, the Spanish text can be translated as follows: If there are reasons to believe that the subsidy may in reality be specific even when the application of the principles enumerated in paragraphs (a) and (b) result in an appearance of non-specificity, other factors may be considered.[126] China argues that the absence of commas setting of the "even when" (*aun cuando*) clause clarifies that the conditional "if" applies to both clauses.[127] However, China's interpretation reads the words "even when" completely out of the sentence in the Spanish text. The implication of the fact that an investigating authority may consider the other factors in paragraph (c) *even when* there is an appearance of non-specificity under subparagraphs (a) and (b) is that the investigating authority may consider such factors *also when* other conditions prevail, *i.e.*, when there is no such appearance of non-specificity.

[120] Panel Report, para. 7.226.
[121] Panel Report, para. 7.227.
[122] *EC – Tariff Preferences (AB)*, para. 90 (citing *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002)).
[123] Panel Report, para. 7.227 & note 200.
[124] Panel Report, para. 7.227.
[125] China Appellant Submission, para. 141.
[126] The Spanish text of the sentence states: *Si hay razones para creer que la subvención puede en realidad ser específica aun cuando de la aplicación de los principios enunciados en los apartados a) y b) resulte una apariencia de no especificidad, podrán considerarse otros factores.*
[127] China Appellant Submission, para. 141.

101. China claims that an interpretation according to the ordinary meaning as applied by the Panel would render the "notwithstanding" clause "*inutile*,"[128] "unnecessary and superfluous."[129] To the contrary, the purpose of the clause is to convey that a finding of non-specificity under (a) or (b) does not *prevent* consideration of additional factors, not that such an analysis is mandatory. Logically, once an investigating authority has completed a *de jure* analysis and found no specificity on the basis of any relevant laws or regulations, it might conclude there is no further need to conduct a subsequent *de facto* specificity analysis. The clause clarifies that *even if* an investigating authority has examined the legislation and any objective criteria governing the provision of a subsidy under subparagraphs (a) and (b), and found an appearance of non-specificity on that basis, the examination of specificity may not be complete if there are reasons to believe the subsidy is in fact specific.[130] The phrase also helps to clarify that the subject of subparagraph (c) is something different from subparagraphs (a) and (b), *i.e., how* the subsidy is in fact distributed. These points would be lost if the "notwithstanding" clause were removed from the text;[131] its inclusion serves an important purpose in explaining the relationship between the investigation authority's analysis in the three subparagraphs.

102. Despite China's repeated attempts to transform the explanatory "notwithstanding" clause into a mandatory precondition, such an interpretation is inconsistent with the ordinary meaning of the first sentence of Article 2.1(c). Further, as described below, China's interpretation is inconsistent with the context provided by Article 2.1, as is made clear by multiple applications of that provision by the Appellate Body.

2. The Panel's Interpretation of the First Sentence of Subparagraph (c) Is Consistent with the Context Provided by Article 2.1

103. The Panel's interpretation of the first sentence of subparagraph (c) is supported not only by the ordinary meaning of that sentence, but also by the context provided by Article 2.1 and the SCM Agreement as a whole. In contrast, China's interpretation would create a new requirement that all subsidies be distributed pursuant to "legislation" or another source of an "explicit[] limit[ation]"[132] on the subsidy which can be evaluated under subparagraph (a). Such

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[128] China Appellant Submission, para. 152 (emphasis in the original).
[129] China Appellant Submission, para. 145.
[130] This interpretation is consistent with the analysis of the Appellate Body in *US – Large Civil Aircraft (2nd Complaint)* in which the Appellate Body explained that "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)." *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 797.
[131] *See* China's Appellant Submission, paras. 146-148.
[132] The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* considered what qualified as an explicit limitation, and observed: "The word 'explicitly' qualifies the phrase 'limits access to a subsidy to certain enterprises'. In its adverbial form, the term 'explicitly' signifies '[d]istinctly expressing all that is meant; leaving nothing merely implied or suggested; unambiguous; clear'. Moreover, 'express' is a synonym for 'explicit'. We therefore consider that a subsidy is specific under Article 2.1(a) if the limitation on access to the subsidy to certain enterprises is express, unambiguous, or clear from the content of the relevant instrument, and not merely 'implied' or 'suggested.'" *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 372.

a result is not supported by the text of Article 2.1, guiding the evaluation whether a subsidy is specific. As a result, consistent with prior Appellate Body considerations of the operation of Article 2.1(c), the Panel correctly considered this context of the first sentence of Article 2.1(c) and concluded there is no order of analysis requirement whereby an investigating authority must evaluate Article 2.1(a) and (b) in every specificity analysis.

104. The chapeau to Article 2.1 provides a framework for subparagraphs (a) through (c) and states that the "principles" set out in those subparagraphs "apply"; it in no way indicates that each specificity analysis proceeds on the basis of an examination of all three subparagraphs. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body stressed that the use of the term "principles," in the chapeau of Article 2 "instead of, for instance, 'rules' – suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle."[133]

105. Further, Article 2.1, as well as the SCM Agreement as a whole, applies to subsidies whether or not they have the features described in subparagraphs (a) and (b). In other words, there is no requirement in the SCM Agreement that countervailable subsidies be distributed pursuant to "legislation" or another source of an "explicit[] limit[ation]" on the subsidy, or that there be a source of "objective criteria or conditions" governing the provision of the subsidy. In fact, according to the terms of Article 2.1, subsidies may be found to be provided on either a *de jure* (according to legislation or other source of an explicit limitation as set out in subparagraph (a)) or *de facto* (whereby the examination is how the subsidy is provided "in fact" under subparagraph (c)) basis. If the SCM Agreement included a requirement that a specificity analysis can only proceed if a subsidy was implemented through legislation or other formal means, such a requirement would enable governments to circumvent the disciplines of the SCM Agreement by merely avoiding such formal implementation of the subsidy. A government could distribute a financial contribution that provides a benefit to a limited number of recipients, which is, in fact, specific, but avoid scrutiny under the SCM Agreement because the subsidy was not implemented under the specific means and form argued by China.

106. In its appellant submission, China's ignores the chapeau and the context provided by the SCM Agreement and argues that investigating authorities must *always* examine each paragraph.[134] This interpretation is more akin to a "rule," rather than an application of "principles" and is therefore in conflict with the text of the chapeau of Article 2.1. Furthermore, it is inconsistent with the logical relationship between the subparagraphs, in light of the chapeau, as explained by the Appellate Body over the course of several disputes.

107. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* explained that a "proper understanding of specificity under Article 2.1 must allow for the concurrent application of these principles to the various legal and factual aspects of a subsidy in any given case."[135] The Appellate Body's use of the term "concurrent application" is

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[133] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366 (also concluding that the "chapeau of Article 2.1 offers interpretive guidance with regard to the scope and meaning of the subparagraphs that follow").
[134] *See* China Appellant Submission, paras. 131-136.
[135] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371.

significant. The term "concurrent" is defined as "occurring or operating simultaneously or side by side."[136] Accordingly, in using that term, the Appellate Body recognized that on a case-by-case basis, it is appropriate for an investigating authority to consider each of the principles "concurrently" and decide which principle or principles apply:

> Yet, we recognize that there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary. For instance, Article 2.1(c) applies only when there is an 'appearance' of non-specificity. Likewise, a granting authority or authorizing legislation may explicitly limit access to a subsidy to certain enterprises within the meaning of Article 2.1(a), but not provide objective criteria or conditions that could be scrutinized under Article 2.1(b). We do, however, caution against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case.[137]

108. As the Appellate Body explained in this passage, scrutiny under one or another of the subparagraphs may not be warranted in every circumstance. For example, there is no need for an investigating authority to resort to Article 2.1(c) when there is no "appearance of non-specificity" (*i.e., when there is*, to the contrary, *an appearance* of specificity), [138] and there is no basis for an examination under Article 2.1(b) when there are no applicable "objective criteria or conditions." Similarly, in the absence of legislation or any "explicit[] limit[ation]" on access to a subsidy, there is nothing for an investigating authority to examine under Article 2.1(a). The Appellate Body's "caution against examining specificity" under only one subparagraph of Article 2.1 "*when* the potential for application of other subparagraphs is warranted" confirms the Appellate Body's conclusion that there are circumstances where the application of other subparagraphs *is not* warranted.[139]

109. Consistent with its reasoning in *US – Anti-Dumping and Countervailing Duties (China)*, in *US – Large Civil Aircraft (2nd complaint)*, the Appellate Body observed that an analysis of subparagraph (c) would only "normally"[140] or "ordinarily"[141] follow after an analysis of the

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[136] *The New Shorter Oxford English Dictionary* at 470 (1993) (USA-90).
[137] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371.
[138] In its Appellant Submission, China takes this sentence out of context when it implies that the Appellate Body unequivocally stated that "Article 2.1(c) applies only when there is an 'appearance of non-specificity.'" China's Appellant Submission, para. 125. In context, the Appellate Body's example indicates that in circumstances where an investigating authority finds, as a result of an examination under subparagraphs (a) or (b), that the subsidy is *de jure* specific (and that there is no "appearance of non-specificity"), there is no need to conduct a further examination under subparagraph (c).
[139] *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 945; *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 754.
[140] *US – Large Civil Aircraft (2nd complaint) (AB),* para. 796.
[141] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 873.

other two subparagraphs, but need not always. In *EC and certain member states – Large Civil Aircraft*, the Appellate Body reiterated the observation that there may be cases where the evidence "unequivocally indicates specificity or non-specificity under one of the subparagraphs of Article 2.1." [142] In both disputes, the Appellate Body, again, explained that because each subparagraph represents a principle, instead of a rule, "a proper understanding of specificity under Article 2.1 must allow for the concurrent application of the principles set out" in that provision.[143]

110. China mischaracterizes the Appellate Body's discussions of Article 2.1 in *US – Large Civil Aircraft (2nd Complaint)* as supporting its restrictive interpretation of the first sentence of Article 2.1. In that dispute, the Appellate Body prefaced its discussion of the Industrial Revenue Bonds ("IRBs") with the following observation of the "overall framework" of Article 2.1:

> [S]ubparagraphs (a) through (c) of Article 2.1 are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle, and which allows for their concurrent application. We have also noted that the structure of Article 2.1 suggests that the specificity analysis will ordinarily proceed in a sequential order by which subparagraph (c) is examined following an assessment under subparagraphs (a) and (b).[144]

111. The Appellate Body then discussed whether it was *appropriate*, as a threshold matter, for the panel to have examined whether the alleged subsidy was specific under subparagraph (a) even though the European Union only brought a claim under subparagraph (c).[145] In so doing, it described the process "ordinarily" followed whereby subparagraph (c) is examined after subparagraphs (a) and (b). This is because, ordinarily, a subsidy program is implemented according to legislation or other source of an "express[] limit[ation]" on the subsidy, as was the case with the IRBs. In such circumstances "the application of Article 2.1(c) proceeds on the basis of the conclusions reached as a result of the application of the preceding subparagraphs of Article 2.1(c)."[146] Because there was legislation at issue with respect to the IRBs, it was appropriate for the Panel to examine such legislation under Article 2.1(a), and to proceed with its Article 2.1(c) analysis on the basis of findings made under subparagraphs (a) and (b). However, as the Appellate Body stated, as a general matter, the structure of Article 2.1 only "suggests" that the analysis will "ordinarily" proceed in sequential order. The Appellate Body did not address the situation at issue before it now, where there *is no such legislation* or other

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[142] *EC and certain member States – Large Civil Aircraft (AB)*, para. 945. The Appellate Body also repeated the caution "against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, *when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular cas*e." *Id.* (emphasis added).

[143] *US – Large Civil Aircraft (2nd complaint) (AB),* para. 796. *See also EC and certain member States – Large Civil Aircraft (AB)*, para. 945.

[144] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 873.

[145] *US – Large Civil Aircraft (2nd complaint) (AB)*, paras. 874-876.

[146] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 876.

potential source of an express limitation in the investigations at issue and so no basis for such an examination that would "ordinarily" be undertaken by an investigating authority.

112. China's extrapolation that the Appellate Body's specificity analysis with respect to the IRBs applies to the specificity analysis of *all subsidies*[147] is contradicted not only by the Appellate Body's discussion of the framework of Article 2.1, but also the Appellate Body's conclusions with respect to the IRBs. China ignores the fact, for example, that the Appellate Body observed that "analysis by the Panel under Article 2.1(b) was not necessary"[148] with respect to the IRBs when China argues that the Appellate Body's discussion requires that *all* specificity determinations must be assessed under Article 2.1(a) *and (b)*.[149]

113. The Appellate Body's discussion of the framework of Article 2.1 and its application of that provision to the IRBs are consistent with the fact that the SCM Agreement applies to a wide variety of subsidies that must be considered on a case-by-case basis. Although many subsidies are implemented pursuant to legislation, regulations, guidance or other sources which may contain an explicit limitation on access to a subsidy, others are not. The specificity inquiry will vary depending on the facts of the investigation, because as the Appellate Body has explained, "Article 2.1 makes it clear that the assessment of specificity is framed by the particular subsidy found to exist under Article 1.1."[150] Thus, as the Appellate Body's statements explain, the analysis under Article 2.1 will depend on the facts presented.

114. In its appellant submission, China further mischaracterizes the Appellate Body's statement that the application of Article 2.1(c) would "normally follow the other two subparagraphs" of Article 2.1.[151] China argues, without support, that the statement merely referred to the *sequence* of consideration of the subparagraphs of Article 2.1. China does not explain, under its interpretation, when it would be more logical to consider the *de facto* application of a subsidy program *before* considering any available legislation, if such legislation exists.

115. The more straightforward understanding is that, in the context of the chapeau of Article 2.1 which describes the subparagraphs as setting out "principles", along with the absence of any requirement in the SCM Agreement that a subsidy be enacted according to legislation or any other source of an "explicit[] limit[ation]", although a specificity analysis may "normally" proceed through each subparagraph, there may be circumstances where one or the other is inapplicable to the analysis. There is therefore no merit to China's argument that the Appellate Body's analysis in *US – Large Civil Aircraft (2nd complaint)* supports its interpretation of the order of analysis in Article 2.1.

116. Consistent with the ordinary meaning and context of the first sentence of Article 2.1(c), as well as the explanations of the operation of Article 2.1 of the Appellate Body, the Panel

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[147] China Appellant Submission, paras. 126-129.
[148] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 876.
[149] China Appellant Submission, paras. 127-130.
[150] *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 841.
[151] China Appellant Submission, paras. 151-152 (citing *US – Large Civil Aircraft (2nd complaint) (AB)*, para.796).

observed that the "subparagraphs of Article 2.1 follow a certain logical structure," but that this structure does not "translate into procedural rules that investigating authorities must follow in each specificity analysis under that provision."[152] The Panel found that the circumstances of the investigations at issue, which were "not based on an explicit limitation of access by the granting authority or the legislation pursuant to which the granting authority operates; nor are they based on criteria or conditions that were spelled out in law, regulation, or other official documentation" are "circumstances" where "further consideration under the other subparagraphs of Article 2.1 may be unnecessary."[153] The Panel thus concluded that because of the "unwritten nature of the subsidies that the USDOC found to exist that led it to consider 'other factors' under subparagraph (c)," Commerce "did not act inconsistently with Article 2.1 by analyzing specificity exclusively under Article 2.1(c)."[154]

117. In the challenged investigations, there was no basis for examination of the subsidy programs under subparagraphs (a) and (b). For this reason, the Panel's interpretation of Article 2.1(c), and application of that provision to the facts before it, is supported by the ordinary meaning and context of the first sentence of that provision. China's interpretation of Article 2.1, on the other hand, relies upon a faulty understanding of the provision and mischaracterizations of the Appellate Body's analysis of Article 2.1 in multiple disputes. Furthermore, as noted above, China's interpretation of the text of Article 2.1 would mandate unnecessary hurdles to an investigating authority's inquiry into whether a subsidy that is, in fact, specific for purposes of the SCM Agreement.

118. China has not argued that any party in the investigations alleged issues under paragraphs (a) and (b) or presented any evidence that could be evaluated under those provisions. Due to the unwritten and informal nature of the subsidy program, the facts before the Panel embodied "circumstances" where "further consideration under the other subparagraphs may be unnecessary."[155] Despite the undisputed fact that there are no sources to be consulted for an analysis under Article 2.1(a) and (b), China would have the investigating authority nevertheless conduct an empty analysis to satisfy a purely formalistic requirement. This interpretation is not supported by the text of Article 2.1 or the context of the SCM Agreement as a whole, which contains no requirement that subsidies be implemented pursuant to legislation or other explicit means. Accordingly, China's appeal in this regard should be rejected.

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[152] Panel Report, para. 7.229 (citing *US – Large Civil Aircraft (2nd complaint) (AB)*, para. 796 and *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 366, 371).
[153] Panel Report, paras. 7.229-7.230 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371).
[154] Panel Report, paras. 7.230-7.231. Significantly, another WTO panel recently agreed with the Panel's analysis of Article 2.1 of the SCM Agreement. In *US – Carbon Steel (India) (Panel)*, citing the Appellate Body's analysis in *US - Anti-Dumping and Countervailing Duties (China)*, the panel concluded that Commerce "was entitled to proceed directly to consider, in the context of Article 2.1(c), whether the provision" of "iron ore was restricted in fact." *US – Carbon Steel (India) (Panel)*, para. 7.120. The panel in *US – Carbon Steel (India) (Panel)* found it significant that there was "no suggestion" in Commerce's determinations that the "provision of iron ore" was "restricted by law," and therefore an analysis under Article 2.1(a) would have been unnecessary. *Id.*
[155] China Appellant Submission, paras. 7.229 (citing *US - Anti-Dumping and Countervailing Duties (China) (AB)*, para. 371).

C. The Panel Correctly Determined That a Subsidy Program Under Article 2.1(c) May Be Evidenced by a Systemic Activity or Series of Activities

119. Article 2.1(c) provides that one of the "factors" that "may be considered" as part of a *de facto* specificity analysis is "use of a subsidy programme by a limited number of certain enterprises." China argues that a "subsidy programme" must be interpreted to require the identification of a formally implemented "plan or outline."[156] Under this interpretation, a finding of specificity could only be made when a subsidy is implemented according to legislation or other written instrument laying out such a "plan or outline." The Panel correctly rejected this interpretation, finding that such a narrow interpretation is not supported by the text of Article 2.1, or the context of the SCM Agreement on the whole, and that a "subsidy programme" encompasses a "systematic activity or series of activities" such as the provision of an input for less than adequate remuneration. The Panel correctly concluded that the subsidy programs identified by Commerce in the subject investigations comported with this definition.

1. The Panel's Interpretation of "Subsidy Programme" Is Consistent with the Ordinary Meaning and Context of the Term

120. The ordinary meaning of "program" is "[a] plan or outline of (esp. intended) activities . . . a planned series of activities or events."[157] Using a rigid application of this definition, China argues that Article 2.1(c) requires more than evidence of the systematic provision of a subsidy or subsidies – China argues that further evidence of a "plan" is necessary to comply with the requirements of the SCM Agreement.[158] However, China's interpretation completely disregards the context of the term within Article 2.1 and the SCM Agreement as a whole and injects a new requirement whereby subsidies are only countervailable if distributed according to a formal plan or outline, with the effect that one-off decisions to provide subsidies, no matter their size, or subsidies provided pursuant to unpublished policies would be immune from a finding of *de facto* specificity.

121. As the Panel pointed out, Article 2.1(c) is concerned with the operation of a subsidy, and whether it is *in fact* limited (as opposed to being limited through operation of law, or another "explicit[] limit[ation]" as set out in subparagraph (a)).[159] Further, the Panel considered that Article 2.1(c) "reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analyzing subsidies covered by the SCM Agreement."[160] The Panel concluded that this context, together with the fact that the term "programme" is used only with respect to *de facto* specificity determinations (where the subsidy may be less formally enshrined), and the absence of a definition in the SCM Agreement, supports an interpretation of the term that is not artificially constrained.[161] This interpretation considers that the term "subsidy programme" must take into account the variety of facts that may confront an

[156] China Appellant Submission, paras. 159, 169.
[157] The New Shorter Oxford English Dictionary at 2371 (1993) (CHI-117).
[158] China Appellant Submission, para. 169.
[159] Panel Report, para. 7.239.
[160] Panel Report, para. 7.240.
[161] Panel Report, para. 7.240.

investigating authority, including the degree to which the subsidy program is or is not formally enshrined.[162] The Panel also observed that a more narrow interpretation of the term "could enable the circumvention of the disciplines of the SCM Agreement and even discourage the transparent management of subsidies."[163] Therefore, the Panel concluded that in interpreting the term "subsidy programme," it was necessary to not only examine any potential sources of a "plan," but also the operations of the subsidy itself, such as how the subsidy is, in fact, distributed.

122. The Panel's interpretation of the term "subsidy progamme" accords with the text of Article 2.1(c), and the context of the SCM Agreement as a whole. A specificity determination under Article 2.1(a) requires a finding of an explicit limitation on access to a subsidy which would be made through legislation, a written document, including a "plan or outline," or other "explicit" means. Indeed, the term "*de jure*" implies that a *de jure* analysis would often focus on legal instruments. In contrast, Article 2.1(c) has no such focus on an explicit limitation either through a legal instrument or other means, including a formal plan or outline; by its very nature, a *de facto* analysis is based on the *facts*, irrespective of the existence of any formal "plan or outline" which would rather be the focus of a *de jure* analysis. China's proposed interpretation of "subsidy programme" would require formal implementation of the subsidy under both Articles 2.1(a) and 2.1(c). Such a result is inconsistent with the distinction between the analysis under the two provisions.

123. In addition, as discussed in Section III.B above, within the context of the SCM Agreement as a whole, a variety of subsidies are subject to the provisions of the SCM Agreement without limitation with respect to whether or how they are formalized.[164] Neither the text of Article 2, nor any provision of the SCM Agreement, requires a subsidy or "subsidy programme" to be implemented pursuant to a formally instituted "plan or outline." Because China's interpretation fails to take into account how the "subsidy programme" fits into the specificity analysis under Article 2.1 it should be rejected.

124. Rather than rely on the context of the term "subsidy programme," China's arguments largely rely on U.S. statements in another dispute concerning a different specificity program and different legal issues[165] to argue that "there was no dispute" in the "proceedings before the

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[162] Panel Report, para. 7.240 (citing *US – Softwood Lumber IV (Panel)*, para. 7.116 ("[S]ubsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit.").

[163] Panel Report, para. 7.240.

[164] In particular, a "financial contribution" may be made in the form of grants, loans, equity infusions, or loan guarantees; fiscal incentives such as tax credits; provision of goods or services, or the purchase of goods; payment to a funding mechanism; or income or price support, but there is no requirement with respect to how these contributions may be evidenced. *See* SCM Agreement, Article 1.1(a).

[165] *See* China Appellant Submission, paras. 161, 167, 169 & notes 115, 116, 122, 123 (relying on U.S. answers to panel questions in *EC and certain member States – Large Civil Aircraft*). China's reliance on U.S. answers to a panel question in *EC and certain member States – Large Civil Aircraft* is misplaced. The panel in *EC and certain member States – Large Civil Aircraft* was considering whether, as part of its analysis into whether certain loans provided to Airbus were "disproportionately large," and if Airbus was the "predominant user," the panel should consider a "subsidy program" and if so, what constituted the "subsidy program." *EC and certain member States – Large Civil Aircraft (Panel)*, paras. 7.961-7.977. As a result, the facts and legal issues before that panel differed significantly from the issues in this case, which relate to an entirely different type of subsidy, and the U.S.

Panel" between the United States and China that "a series of subsidies, by itself" cannot constitute a "subsidy programme."[166] That is not the case. As the United States explained before the Panel, under a proper interpretation of the term "subsidy programme," consistent with the context provided by the SCM Agreement, there is no requirement in the application of the first factor of Article 2.1(c) for an investigating authority to identify a formal "plan."[167] Rather, there are various means by which a subsidy program could be implemented and thus, evidenced.[168] In particular, where there is no identified implementing legislation, regulation, government decree or other source of a government "plan," as with the input subsidies at issue in this dispute, the "subsidy programme" might instead be evidenced by a "series of activities or events" whereby the subsidy is used by a limited number of enterprises.[169]

125. China argues that the Panel's interpretation collapses the term "subsidy programme" into the term "subsidy." That is not the case; as the Panel explained, it considered that a "systematic activity or series of activities" can constitute a "subsidy programme." This is distinct from what constitutes a "subsidy" under Article 1 of the SCM Agreement.

2. The Panel Correctly Applied the Term "Subsidy Programme" to Commerce's Investigations

126. In each of the challenged investigations, the administrative record contained evidence that input producers in China sold the products at issue to a limited number of users within China for specific prices. As established by the records in the investigations, Commerce determined that those sales were made for less than adequate remuneration. The Panel concluded that the provision of those inputs for less than adequate remuneration was a systemic activity or series of activities that reflected the existence of a subsidy program under Article 2.1(c)[170] in the absence of any alleged written source for the implementation of the program.

127. China alleges that the Panel's application of the term "subsidy programme" "deprives" the term of its "ordinary meaning,"[171] but in fact the Panel's conclusions reflects the ordinary meaning of the term and the context provided by the SCM Agreement. If anything, it is China's overly restrictive interpretation of "subsidy programme" that ignores the diversity of facts and circumstances, as described above, that investigating authorities confront when analyzing the range of subsidies under Article 2.

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responses to questions in that dispute pertained specifically to the facts and legal issues relevant to that dispute. China has taken the U.S. answers out of context to allege that they support China's position in this dispute.

[166] China Appellant Submission, paras. 161-162.

[167] *See, e.g.*, U.S. First Written Submission to the Panel, paras. 177-180; U.S. Second Written Submission to the Panel, paras. 76-78.

[168] U.S. Second Written Submission to the Panel, para. 76.

[169] U.S. Second Written Submission to the Panel, para. 76. A subsidy program might involve multiple subsidy payments to a single recipient or a single subsidy payment to multiple recipients. Under either of these scenarios, the existence of a "subsidy program" would be made evident by the facts surrounding the distribution of the subsidy at issue. *See* U.S. Response to Panel Question No. 24, para. 55.

[170] Panel Report, paras. 7.242-7.243.

[171] China Appellant Submission, para. 165.

128. China argues that, in order to find a subsidy program, an investigation authority must identify evidence in the form of some official government "plan" and that, because no such plan was at issue in the investigations, it was impossible for Commerce to have found the subsidies to be specific. This argument mirrors China's arguments with respect to the order of analysis; both would require a Member to formally implement a subsidy program in order for an investigating authority to examine whether it is specific.

129. Such a restrictive application of the term is inconsistent with the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. In that dispute, the Appellate Body rejected China's attempts to insert into the specificity analysis the requirement that investigating authorities identify a limitation on the access to both financial contribution *and* benefit under Article 2.1(a).[172] The Appellate Body disagreed, stating that "the purpose of Article 2 of the *SCM Agreement* is not to identify the elements of the subsidy as set out in Article 1.1, but to establish whether the availability of the subsidy is limited *inter alia* by reason of the eligible recipients."[173] The Appellate Body explained that "a limitation . . . to a subsidy may be established in many different ways."[174]

130. Similarly, here, China attempts to re-cast the guidelines established in Article 2 to require an investigating authority to identify a formal "subsidy programme" implemented pursuant to a "plan" as part of its specificity analysis. This reading would frustrate the purpose of Article 2, which is to determine "whether the availability of the subsidy is limited" and contradicts the Appellate Body's finding that a limitation "may be established in many different ways." As a result, China's interpretation in this dispute "would frustrate the purpose of the specificity provisions, and would open considerable scope for circumvention of the SCM Agreement, based on a distinction in form but not substance" in a similar manner to the interpretation it advanced, and the Appellate Body rejected, in *US – Anti-Dumping and Countervailing Duties (China).* [175]

131. Under China's interpretation, a Member could avoid the promulgation of any "plan" outlining the provision of a subsidy, and as a result of that non-transparency, avoid the disciplines of the SCM Agreement altogether.[176] Similar to its arguments regarding the order of analysis, the result of China's interpretation of "subsidy program" would be that a subsidy specifically described in the SCM Agreement[177] and found to be, by its nature, specific by two prior panels[178] could not be countervailed against unless evidence of a formal government

[172] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 411.
[173] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413.
[174] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413.
[175] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.30 (discussing China's proposed interpretation of Article 2.1 as requiring a specificity finding as to both financial contribution and benefit).
[176] *See supra* Section III.B. 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, unless a written instrument existed evidencing a natural resource "plan", the subsidy could not be found to be specific and could not be countervailed.
[177] SCM Agreement, Article 14(d).
[178] *US – Softwood Lumber IV (Panel)*, para. 7.116 (finding that "[i]n the case of a good that is provided by the government" and "that has utility only for certain enterprises (because of its inherent characteristics), it is all the

"plan" is placed on the record. Such a result is contrary to the ordinary meaning of the provision, as well as the object and purpose of the SCM Agreement, and should be rejected. The Panel correctly rejected China's arguments and concluded that, where there is no identified implementing legislation, regulation or government decree, a subsidy program may be evidenced by the operation of the subsidy itself and use by recipients.

132. China further argues that, in the Panel's application of the term "subsidy programme," the Panel failed to recognize that Commerce "never substantiated on the basis of positive evidence on the record" the existence of subsidy programs in the challenged investigations, and that those programs were "merely asserted" by Commerce.[179] Contrary to its arguments, however, Commerce did not "merely assert" the existence of the subsidy programs for purposes of its Article 2.1(c) analysis. The record demonstrates that, for each investigation, far from being "merely asserted," the existence of the subsidy programs are grounded in the facts on the record.

133. In particular, in each challenged investigation, the subsidy programs which Commerce investigated were first identified in the application, which China does not dispute contained evidence as to the programs' existence.[180] For example, with respect to *Aluminum Extrusions*, as the United States explained before the Panel,[181] the application alleged that primary aluminum was being provided for less than adequate remuneration and contained several pieces of evidence indicating that the potential users were in fact limited to the production of the seven main aluminum fabricated products, including casts, planks, screens, extrusions, forges, powder, and die casting. The application clearly contemplated that the informal "subsidy program" was the provision of primary aluminum *to all users of the input*, although the "subsidy" which was the subject of the application was the provision of primary aluminum *to the aluminum extrusions industry*. Commerce investigated the programs, including by asking questions of China and other interested parties; identified the programs in the preliminary determinations; gave all parties the opportunity to comment on these programs; and ultimately made a final determination with respect to those programs.[182] China provided no evidence to supports its argument that the users of primary aluminum were *not* limited.[183]

134. The example of *Aluminum Extrusions* demonstrates that Commerce did not "merely assert" the existence of a subsidy program, as claimed by China, but in fact investigated the subsidy program alleged in the application and supported by evidence on the record. As part of its investigation, in each proceeding, Commerce investigated the alleged programs, including the question of specificity, and reviewed the administrative record as a whole and concluded in

more likely that a subsidy conferred via the provision of that good is specifically provided to a certain enterprise only' and the inherent characteristics of the good provided, standing timber, limit its possible use to 'certain enterprises' only"); *US – Carbon Steel (India) (Panel)*, para. 7.132 (finding "if access is limited (to a subsidy) by virtue of the fact that only certain enterprises may use the subsidized product, the subsidy is specific").

[179] China Appellant Submission, paras. 118, 170.

[180] *See* China Response to Panel Question No. 56, para. 145.

[181] U.S. Second Written Submission to the Panel, para. 79.

[182] U.S. Second Written Submission to the Panel, para. 79.

[183] U.S. Second Written Submission to the Panel, para. 79.

the final determination that a subsidy program was used by a limited number of certain enterprises and was therefore *de facto* specific under the first factor of Article 2.1(c).[184]

135. China's restrictive interpretation of "subsidy programme" is not supported by the context of the term within Article 2 and the SCM Agreement as a whole, as it would limit the subsidies that could be found to be *de facto* specific to those implemented according to a formal "plan or outline." In contrast, the Panel arrived at a correct interpretation and application of the first factor of Article 2.1(c) that is consistent both with the text and context of that provision and properly examined Commerce's determinations. In particular, in its application of "subsidy programme," the Panel correctly found that it was not necessary for an investigating authority to identify a formal government "plan or outline" as part of its analysis under the first factor of Article 2.1(c). Accordingly, China's appeal with respect to this aspect of Article 2.1(c) should be rejected.

D. The Panel Correctly Determined That Commerce Was Not Required To Explicitly Identify the "Granting Authority" Under Article 2.1

136. China's final challenge to the Panel's conclusions with respect to Commerce's specificity determinations involves the term "granting authority." The chapeau of Article 2.1 states that an investigating authority must "determine whether a subsidy . . . is specific to an enterprise or industry or group of enterprises or industries . . . within the jurisdiction of the granting authority." China asserts that "the identification of the relevant granting authority is a prerequisite to identifying the relevant jurisdiction"[185] and a necessary component of the specificity analysis under Article 2.1. The Panel correctly found that no such requirement exists and that, as Commerce's determinations indicate that the relevant jurisdiction for the specificity inquiry was China, Commerce was not required to explicitly identify the granting authority.

137. The Panel observed that "the chapeau of Article 2.1 . . . situates the assessment of a limitation of access within the jurisdiction of the granting authority"[186] as follows:

> The chapeau of Article 2.1 contains a reference to the granting authority. The ordinary meaning and context of the chapeau, as well as the negotiating history of Article 2, suggests to us that the reference "within the jurisdiction of the granting authority" firstly indicates that specificity may only exist within the territory of a Member, and secondly recognizes that, in certain countries, subsidies may be granted not only by the central authorities, but also by other subdivisions.[187]

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[184] In contrast, there was no evidence on the record of the investigations, provided by China or any other party, to support the implication of China's argument that there was a single overarching subsidy program pursuant to which all of the ten different input subsidies investigated across the investigations were provided. China Appellant Submission, para. 170 (criticizing Commerce's finding "that each of the allegedly subsidized inputs was provided pursuant to its own input-specific "subsidy programme").
[185] China Appellant Submission, para. 173.
[186] Panel Report, para. 7.247.
[187] Panel Report, para. 7.247.

138. Because the Panel concluded that Commerce's determinations and record documents indicated that the "relevant jurisdiction" was China, the Panel concluded that Commerce did not act inconsistently with Article 2.1 of the SCM Agreement merely because it did not explicitly identify the granting authority by name in each challenged investigation.[188]

139. China argues that "[h]aving failed to identify the relevant granting authority (or authorities), it followed that the USDOC's input specificity determinations could not possibly have been consistent with Article 2.1."[189] China's position, however, is not supported by the text of the chapeau of Article 2.1, nor by the context of the SCM Agreement as a whole. The question of who provides the input is dealt with under Article 1 of the SCM Agreement. The focus of the specificity analysis under Article 2.1 is on the universe of *users* of the subsidy, not on the "granting authority." As a result, the relevant jurisdiction of the granting authority for purposes of the specificity analysis is the jurisdiction where potential users are located.

140. As with its other interpretations of Article 2, China inserts a non-existent requirement into Article 2.1 when it argues that Commerce must identify a "granting authority" with respect to the provision of inputs for less than adequate remuneration. The Panel correctly found that Article 2.1 merely requires that the jurisdiction of the subsidy be identified, where relevant (*i.e.,* with respect to Members that maintain sub-central authorities), but that the identity of the granting authority is not directly relevant to the specificity analysis. In each challenged determination, as part of its analysis under Article 1, Commerce determined that input producers were public bodies controlled by varying parts of the Chinese government, and that those public bodies provided inputs for less than adequate remuneration to certain enterprises. No further analysis was required under Article 2.1.

141. China argues that the Panel "had no basis to evaluate whether the USDOC had properly situated its analysis of specificity within the jurisdiction of the granting authority" absent the identification of the granting authority.[190] To the contrary, in each specificity determination, Commerce determined based on information provided in the application or during the course of the investigation that the input was provided for less than adequate remuneration to a limited number of users *within China*. That is, in each case, Commerce considered the jurisdiction within which it was conducting its specificity analysis (*i.e.,* the jurisdiction of the granting authority) to be China,[191] and identified this jurisdiction as the scope of its analysis.[192] China and the participating investigated respondents were therefore aware in each investigation that Commerce's analysis applied to this jurisdiction. Notably, in none of the challenged investigations did China (or any other participating party) challenge Commerce's consideration of all of China as the relevant jurisdiction for purposes of a *de facto* specificity analysis. Nor has China alleged before the Panel or in its appellant submission that this jurisdiction was somehow inappropriate.

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[188] Panel Report, para. 7.248.
[189] China Appellant Submission, para. 173.
[190] China Appellant Submission, para. 175.
[191] Panel Report, para. 7.248.
[192] *See* U.S. Second Written Submission to the Panel, note 150.

142. The Appellate Body observed in *US – Large Civil Aircraft (2nd Complaint)* that the identification of the granting authority is not the purpose of Article 2.1:

> As we have explained, the analysis under Article 2.1 focuses on ascertaining whether . . . the subsidy in question is limited to a particular class of eligible *recipients*. While the scope and operation of the granting authority is relevant to the question of whether such an access limitation with respect to a particular class of recipients exists, it is important to keep in mind that it is not the purpose of a specificity analysis to determine whether the authorities involved in granting the subsidies constitute a single subsidy *grantor* or several *grantors*.[193]

143. In that dispute, the Appellate Body never resolved the question of whether there were one or several granting authorities, finding it ancillary to the question of specificity.[194] In addition, panels and the Appellate Body have undertaken numerous specificity analyses in *US – Large Civil Aircraft (2nd complaint)*, *EC and certain member States – Large Civil Aircraft*, and *US – Anti-Dumping and Countervailing Duties (China)*,[195] and in none of those reports did the panels or Appellate Body require the identification of a "granting authority" to support their conclusions.

144. In furtherance of its argument, China misconstrues the U.S. arguments before the Panel. China claims that the United States argued that "each SOE – not the Government of China – was its own 'granting authority.'"[196] However, at no point did the United States make such an argument. The United States did not state that the SOEs are the "granting authority" for purposes of Article 2.1; rather, the United States explained that it is not necessary to analyze and identify the granting authority as part of its specificity analysis: "[i]n each challenged determination, Commerce determined that input producers were public bodies controlled by varying parts of the Chinese government, and that those public bodies provided inputs for less than adequate remuneration to certain enterprises. No further analysis was required under Article 2 of the SCM Agreement."[197] The United States did not assert that it explicitly identified the granting authority as each public body in the investigations at issue.

145. For these reasons, China is incorrect in its assertion that the SCM Agreement requires investigating authorities to conduct a separate analysis and identify the granting authority as part of an evaluation of Article 2.1. There is no textual basis for China's claim, and the Panel rightfully concluded that Commerce did not act inconsistently with Article 2.1 in this regard.

146. As with its other Article 2 arguments, China advocates an overly restrictive interpretation that would create unnecessary burdens on investigating authorities. The purpose

[193] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 756. *See also id.* para. 761 ("We have explained above that, in our view, the question of whether one or more granting authorities exist is not dispositive of and does not exhaust the analysis of whether a subsidy is specific.").
[194] *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 756.
[195] *See, e.g., EC and certain member States – Large Civil Aircraft (AB)*, para. 945; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413; *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 756.
[196] China Appellant Submission, para. 177.
[197] U.S. First Written Submission to the Panel, para. 192; U.S. Second Written Submission to the Panel, para. 97.

of the inquiry under Article 2.1 is to examine specificity, not the granting authority. China's interpretations under Article 2 of the SCM Agreement would impose requirements not directly relevant to the question of whether users of the subsidy were, *in fact*, limited. As the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, noted "the purpose of Article 2 of the *SCM Agreement* is . . . to establish whether the availability of the subsidy is limited *inter alia* by reason of the eligible recipients"[198] and formalistic interpretations such as those advanced by China "would open considerable scope for circumvention of the SCM Agreement, based on a distinction in form but not substance."[199]

147. Because China's argument asserting that an investigating authority must identify the granting authority lacks any basis in the text of the Agreement, the Panel was correct in rejecting this interpretation. Accordingly, the Panel's analysis and interpretation of Article 2.1 of the SCM Agreement in this regard was proper, and China's appeal of that interpretation is without merit and should therefore also be rejected.

E. The Appellate Body Should Not Complete the Analysis with Respect to China's Claim Under Article 2.1 That Commerce Did Not Properly Identify the Subsidy Programs

148. For the reasons given above, the Appellate Body should reject China's claims that the Panel failed to interpret and apply Article 2.1 consistent with the SCM Agreement. Accordingly, it would not be necessary for the Appellate Body to complete the legal analysis of China's claims, as China requests.[200] If, however, the Appellate Body reverses the Panel's findings that Commerce acted consistently with Article 2.1 of the SCM Agreement with respect to the identification of the "subsidy programme", then the United States offers the following comments in response to China's request for the Appellate Body to complete the legal analysis.

149. China argues that there are sufficient findings of the Panel and undisputed facts on the record to permit the completion of the analysis with respect to the specificity determinations at issue.[201] China's argument rests in part on the Panel's statement that Commerce's "end-use approach" with respect to specificity "does not apply Article 2.1 of the SCM Agreement *in the manner interpreted by China* with regard to the subparagraphs of Article 2.1" and "the identification of a 'subsidy programme.'"[202] This statement reflects the Panel's understanding of how *China* would interpret and apply Article 2.1, but it does not reflect the Panel having undertaken *its own* analysis applying the provision under a correct interpretation. For that reason, even if the Appellate Body agrees with China that the Panel's interpretations should be reversed, it must inquire whether the Panel indeed applied its own analysis to the facts at issue in this dispute. It did not.

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[198] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 413.
[199] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.30 (discussing China's proposed interpretation of Article 2.1 as requiring a specificity finding as to both financial contribution and benefit).
[200] *See* China Appellant Submission, paras. 179-188.
[201] China Appellant Submission, para. 180.
[202] Panel Report, para. 7.222 (emphasis in the original).

150. In prior disputes, "the Appellate Body has emphasized that it can complete the analysis 'only if the factual findings of the panel, or the undisputed facts in the panel record' provide a sufficient basis for the Appellate Body to do so."[203] Here, Commerce's determinations and the evidence that support those determinations are all part of Commerce's administrative record and much, but not all, of that record was provided to the Panel. However, whether or not there could be sufficient facts to complete the legal analysis, the Appellate Body should decline to do so.

151. In particular, with respect to the question of whether Commerce properly identified the "subsidy programme" under Article 2.1(c), China alleges that Commerce (1) did not properly identify a "subsidy programme" in the determinations at issue and (2) failed to substantiate the existence of such a "programme" based on positive evidence on the record.[204] Contrary to China's assertion, Commerce *did* identify the subsidy programs in each investigation.[205] Further, there was evidence on the record supporting the existence of the subsidy programmes,[206] and the Panel never purported to examine whether, consistent with Article 2.4 of the SCM Agreement, the determination was based on "positive evidence." Because the Panel did not conduct its *own analysis* regarding whether Commerce's determinations were consistent with the meaning of "subsidy programmes" as interpreted by China, the Appellate Body would need to undertake this task. Such an examination would require the Appellate Body to examine each specificity determination and consider and evaluate the relevant evidence.

152. In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body prudently declined to complete the analysis under similar circumstances, because the participants had not addressed such issues sufficiently.[207] China has not addressed the facts on the administrative record sufficiently for the Appellate Body to review its claim on appeal. For these reasons, the Appellate Body should not complete the legal analysis and should not find that Commerce's identification of the "subsidy programme" is inconsistent with Article 2.1 of the SCM Agreement.

IV. THE PANEL MADE AN OBJECTIVE ASSESSMENT OF CHINA'S CLAIMS UNDER ARTICLE 12.7 OF THE SCM AGREEMENT, WHICH WAS CONSISTENT WITH THE PANEL'S OBLIGATION UNDER ARTICLE 11 OF THE DSU

153. China appeals the Panel's finding that Commerce did not act inconsistently with Article 12.7 of the SCM Agreement in applying "facts available" in 42 separate instances in certain of the underlying investigations at issue in this dispute.[208] Significantly, China does not appeal the

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[203] *See, e.g.*, *US – Large Civil Aircraft (2nd Complaint) (AB)*, para. 1250 (citing numerous Appellate Body reports in prior disputes).
[204] China Appellant Submission, para. 184.
[205] *See* U.S. Second Written Submission to the Panel, note 160; U.S. Second Opening Statement, note 40.
[206] *See, e.g.*, China Response to Panel Question No. 56, para. 145; U.S. Second Written Submission to the Panel, para. 79.
[207] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 194-197.
[208] *See* China Notice of Appeal, paras. 14-17.

substance of the Panel's interpretation of Article 12.7.[209] Rather, China claims on appeal that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU.[210]

154. As the Appellate Body has explained, "[a]n allegation that a panel has failed to conduct the 'objective assessment of the matter before it' required by Article 11 of the DSU is a very serious allegation," one that "goes to the very core of the integrity of the WTO dispute settlement process itself."[211] In order for China's Article 11 claim to succeed, China will have to demonstrate that the Panel committed "an egregious error that calls into question the [Panel's] good faith."[212] As explained below, China has failed to meet this high standard for establishing that the Panel acted inconsistently with Article 11 of the DSU.

A. China Misunderstands the "Standard of Review" under Article 11 of the DSU that Is To Be Applied to the Panel's Evaluation of China's Claims under Article 12.7 of the SCM Agreement

1. China Misunderstands and Therefore Misapplies Previous Appellate Body Reports Articulating the "Standard of Review" under Article 11 of the DSU

155. Article 11 of the DSU requires a panel to make "an objective assessment of the matter before it," including an objective assessment of the facts at issue in a dispute. The Appellate Body has previously observed that Article 11 requires a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[213] The Appellate Body has stated that it will not "interfere lightly" with a panel's fact-finding authority, and, therefore, for a party to prevail on an Article 11 claim, the Appellate Body "must be satisfied that the panel has exceed its authority as the trier of facts" and "cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached."[214] For that reason, "it is insufficient for an appellant to simply disagree with a statement or to assert that it is not supported by the evidence."[215] Rather, the appellant "bears the onus of explaining why the alleged error meets the standard of review under Article 11."[216]

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[209] *See* China Appellant Submission, para. 189.
[210] *See* China Notice of Appeal, para. 15.
[211] *EC – Poultry (AB)*, para. 133.
[212] *EC – Hormones (AB)*, para. 133.
[213] *Brazil – Retreaded Tyres (AB)*, para. 185 (citing *EC – Hormones (AB)*, paras. 132 and 133). *See also EC – Seal Products (AB)*, para. 5.150; *Australia – Salmon (AB)*, para. 266; *EC – Asbestos (AB)*, para. 161; *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 170, 177, 181; *EC – Sardines (AB),* para. 299; *EC – Tube or Pipe Fittings (AB)*, para. 125; *Japan – Apples (AB)*, para. 221; *Japan – Agricultural Products II (AB)*, paras. 141 and 142; *Korea – Alcoholic Beverages (AB)*, paras. 161 and 162; *Korea – Dairy (AB)*, para. 138; *US – Carbon Steel (AB)*, para. 142; *US – Gambling (AB)*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 313; and *EC – Selected Customs Matters (AB)*, para. 258.
[214] *US – Wheat Gluten (AB)*, para. 151.
[215] *EC – Seal Products (AB)*, para. 5.150.
[216] *EC – Seal Products (AB)*, para. 5.150 (citing *EC – Fasteners (China) (AB)*, para. 442).

156. The weighing of evidence is within the discretion of the panel,[217] and as the Appellate Body noted in *Korea – Alcoholic Beverages*, it is not an error under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it."[218] In addition, "an appellant cannot succeed in an Article 11 claim by simply 'recast[ing]' its arguments before the panel 'under the guise of an Article 11 claim' on appeal,"[219] and, as such, a request for the Appellate Body "to conduct a *de novo* assessment of the facts" does not "suffice to make out a claim that the Panel failed to comply with its duty, under Article 11 of the DSU, to conduct an objective assessment of the facts."[220] An appellant "must identify specific errors regarding the objectivity of the panel's assessment" and "explain *why* the alleged error *meets* the standard of review under that provision."[221]

157. China eschews virtually all of the elaboration of Article 11 of the DSU contained in prior Appellate Body reports and, in its appellant submission, focuses almost exclusively on just two Appellate Body reports: *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigations on DRAMS*. Based on those two reports, China argues that the Panel was required to undertake an "in-depth examination" of Commerce's determinations and decide whether the explanations contained therein are "reasoned and adequate."[222] Further, China argues that such a standard can only be met in the investigations at issue if Commerce explicitly cited the available facts to which it resorted in applying "facts available" within the meaning of Article 12.7 of the SCM Agreement.[223] China's arguments are without merit and its reliance on the Appellate Body reports in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigations on DRAMS* is misplaced.

158. As explained further below, China did not ask the Panel, in the context of its claims under Article 12.7 of the SCM Agreement, to inquire about Commerce's conclusions or determinations with respect to matters like financial contribution, benefit, and specificity.[224] Rather, the question China asked the Panel to address in the context of its Article 12.7 claims was whether Commerce *actually applied facts* in its application of "facts available."[225] As China was not challenging the substance of Commerce's conclusions and determinations under Article 12.7, but was advancing a narrower claim under that provision, the Appellate Body reports in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigations on DRAMS* are inapposite.

159. China relies on excerpted text from the Appellate Body's reasoning in *US – Softwood Lumber VI (Article 21.5 – Canada)* to support its characterization of the standard of review to be

[217] *Korea – Dairy (AB)*, para. 137.
[218] *Korea – Alcoholic Beverages (AB)*, para. 164.
[219] *US – COOL (AB)*, para. 301 (quoting *EC – Fasteners (China) (AB)*, para. 442).
[220] *US – COOL (AB)*, para. 401.
[221] *EC – Fasteners (China) (AB)*, para. 442 (emphasis in the original).
[222] China Appellant Submission, paras. 202-203. *See also id.* paras. 193, 221-222.
[223] *See, e.g.*, China Appellant Submission, paras. 224, 233.
[224] China made separate claims with respect to Commerce's findings on each of those issues under other provisions of the SCM Agreement.
[225] *See* China First Written Submission to the Panel, paras. 145, 155; *see also* China Second Written Submission to the Panel, para. 177.

applied by a panel under Article 11 of the DSU. The passage upon which China relies provides, in full:

> We begin our analysis with an examination of the requirements of Article 11 of the DSU in the context of the review by a panel of determinations made by investigating authorities. As Canada's appeal is primarily focused on the Panel's examination of how the USITC treated the evidence before it, we examine first the duties that apply to panels in their review of the *factual components* of the findings made by investigating authorities. The Appellate Body has considered these duties on several previous occasions. It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by "simply *accept[ing]* the conclusions of the competent authorities".[226]

160. As the underlined language in this passage indicates, the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* was considering a panel's obligation under Article 11 of the DSU when the panel is examining *conclusions* reached by the investigating authority. Accordingly, the Appellate Body highlighted relevant questions for a panel to consider relating to the adequacy of the investigating authority's "reasoning," the support for "inferences made and conclusions reached," as well as explanations for whether the investigating authority "took proper account of . . . complexities" or "why it rejected or discounted alternative explanations or interpretations."

161. Similarly, in *US – Countervailing Duty Investigation on DRAMS*, on which China also relies, the Appellate Body explained that a "panel reviewing an investigating authority's subsidy determination will be informed by an examination of whether the agency provided a

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[226] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93 (underlining added).

reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination."[227]

162. The Panel here, however, was not reviewing Commerce's subsidy determinations, nor was it evaluating "how evidence on the record supported [Commerce's] factual findings." Rather, in evaluating the claims that China brought under Article 12.7 of the SCM Agreement, and the arguments China made in support of its claims, the Panel was confronted with a more straight-forward question: did Commerce fail to apply facts that were actually available on the administrative record when it resorted to "facts available" within the meaning of Article 12.7?

163. To be clear, the question China put before the Panel was not whether Commerce was justified in resorting to "facts available," or whether Commerce relied on facts that were appropriate, or whether Commerce's ultimate determination of financial contribution, benefit, or specificity based on those facts was justified. Assessment of questions such as those would likely have required the Panel to examine Commerce's factual findings and reasoning in reaching a determination in the manner described by the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS*. However, the far more basic question that China put before the Panel – the question of whether Commerce relied on *any facts at all* – did not require the Panel to assess whether Commerce's "conclusions" were "reasoned and adequate" in the manner that the Appellate Body described in those two disputes.

164. China complains that "[t]he United States provide[s] no support for the proposition that a 'reasoned and adequate' explanation is required for a panel to assess whether an investigating authority has complied with other relevant provisions of the SCM Agreement, but not with Article 12.7 of the SCM Agreement."[228] However, support for this proposition can be found in the Appellate Body reports in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS*, the very reports on which China relies so heavily. As the Appellate Body explained in those disputes, "the standard of review to be applied in a given case is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute."[229] The Appellate Body further explained that "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case <u>and the particular claims made</u>."[230] Hence, in the Appellate Body's view, the standard of review to be applied by a panel varies depending on the particular provision of a covered agreement that is at issue and the particular claim being advanced by the complaining party. China simply misunderstands the standard of review that the Panel was obligated by Article 11 of the DSU to apply in its evaluation of China's Article 12.7 claims.

165. Additionally, even if it were necessary for the Panel to evaluate whether Commerce's application of "facts available" was "reasoned and adequate," that evaluation necessarily would

[227] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186.
[228] China Appellant Submission, para. 204.
[229] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 95 (citing *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 184).
[230] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93 (underlining added).

relate to the challenge advanced by China. So, to the extent that Commerce's explanations of its application of "facts available" were relevant to the Panel's evaluation of the claims China brought under Article 12.7 of the SCM Agreement – *i.e.*, that the challenged adverse facts available determinations lacked any factual foundation – it would only be for the purpose of assessing those claims. As the Panel pointed out, "for the purpose of the Panel's assessment of this claim under Article 12.7, the level of explanation required is that sufficient to assess whether the USDOC based its adverse facts available determinations on facts."[231]

166. As discussed further in the next subsection, the Panel found that there was sufficient basis in Commerce's explanations to determine that it had applied facts that were, indeed, available on the administrative record. Commerce explained in its determinations that it was relying on "facts available," including relying on an "adverse inference" in selecting from among the "facts available." There were, as the United States demonstrated with Exhibits USA-94 through USA-133, facts available on the record relevant to the determinations for which "facts available" were applied. In light of the nature of China's Article 12.7 claims, Commerce's explanations were also "reasoned and adequate" and sufficient to show that Commerce relied on facts that were actually available on the record.

2. China's Reliance on a Panel Report's Finding on China's Breach of Article 12.7 of the SCM Agreement in Another Dispute Confirms China's Misunderstanding of the "Standard of Review" Applicable to China's Claims under Article 12.7

167. China points out that, "when the panel in *China – Broiler Products* recently examined *U.S.* claims that *China's* investigating authority ("MOFCOM") had acted inconsistently with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement in its 'facts available' determinations, the Panel deemed 'sufficiency of an investigating authority's explanations' to be highly relevant to the United States' claims."[232] China fails to appreciate the differences between the claim advanced by the United States in *China – Broiler Products* and the claim advanced by China before the Panel below.

168. The question at issue in *China – Broiler Products* was whether MOFCOM's *conclusion* – an "all others" rate of 30.3 percent based on "facts available" – had a "logical relationship with the facts and [was] a result of an evaluative, comparative assessment of those facts."[233] The panel found that the "all others" rate determined by MOFCOM did "not appear to have any logical relation with the highest individual rate, which stands at 12.5%," and that, because MOFCOM did not explain in its determination the alternate methodology purportedly used in calculating the high rate, it was not possible to establish that MOFCOM acted consistently with Article 12.7 of the SCM Agreement.[234]

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[231] Panel Report, para. 7.311.
[232] China Appellant Submission, para. 205.
[233] *China – Broiler Products*, paras. 7.357-59.
[234] *China – Broiler Products*, para. 7.359. The Panel made similar findings under Article 6.8 of the Anti-Dumping Agreement. *China – Broiler Products*, paras. 7.12-13.

169. The question before the panel in *China – Broiler Products* – based on the claim that the United States brought and the arguments the United States made in support of its claim – was whether the high "all others" rate based on "facts available" was justified. As such, that is the question that the panel in that dispute evaluated.

170. In this dispute, China did not allege before the Panel that that facts that were available on the record did not support Commerce's conclusion, or that the facts – as in *China – Broiler Products* – required a different conclusion. Rather, China argued to the Panel that Commerce did not rely on *any facts at all*. Accordingly, it was not necessary for the Panel here to evaluate China's claims in the same manner that the panel in *China – Broiler Products* evaluated the U.S. claim in that dispute.

171. The Appellate Body reports in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS* and the panel report in *China – Broiler Products* illustrate that whether an investigating authority provided a "reasoned and adequate" explanation is most relevant when a panel is evaluating a complaining Member's claim concerning an investigating authority's *conclusion*. Where a panel is evaluating a claim like China's here, which turns on the question of whether or not there were any facts at all on the administrative record from which Commerce could draw to apply "facts available," it is not necessary for the Panel to determine that the investigating authority provided a "reasoned and adequate" explanation. The reports China cites simply do not support China's argument that the Panel was obligated to apply the standard of review that China contends the Panel was obligated to apply.

172. Accordingly, even if the Panel did not apply the standard of review that China advocates, that would not mean that the Panel acted inconsistently with Article 11 of the DSU. For China to succeed in its claim that the Panel breached Article 11, China "must identify specific errors regarding the objectivity of the panel's assessment" and "explain *why* the alleged error *meets* the standard of review under [Article 11]."[235] As explained in the next subsection, China has failed to do so.

B. The Panel's Evaluation of China's Claims under Article 12.7 of the SCM Agreement Meets the Requirements of Article 11 of the DSU

173. China argues that the Panel "abdicat[ed] its obligations as a reviewing panel."[236] China's argument is utterly without support. In reality, the Panel made "an objective assessment" of China's claim under Article 12.7 of the SCM Agreement, in accordance with Article 11 of the DSU. In particular, the Panel fulfilled its obligation to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[237] The Panel correctly declined to reject as *ex*

[235] *EC – Fasteners (China) (AB)*, para. 442 (emphasis in the original).
[236] China Appellant Submission, para. 218.
[237] *Brazil – Retreaded Tyres (AB)*, para. 185 (citing *EC – Hormones (AB)*, paras. 132 and 133). *See also EC – Seal Products (AB)*, para. 5.150; *Australia – Salmon (AB)*, para. 266; *EC – Asbestos (AB)*, para. 161; *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 170, 177, 181; *EC – Sardines (AB),* para. 299; *EC – Tube or Pipe Fittings (AB)*, para. 125; *Japan – Apples (AB)*, para. 221; *Japan – Agricultural Products II (AB)*, paras. 141-142; *Korea –*

post rationalization evidence from Commerce's administrative record that was identified by the United States. The Panel also appropriately refrained from making China's case for it.

174. Ultimately, China's strategy in its appeal is to recast its arguments before the panel under the "the guise of an Article 11 claim" and such a strategy "cannot succeed."[238] China's evident disagreement with the Panel's assessment of China's "facts available" claims is not a sufficient basis for a claim under Article 11 of the DSU.[239]

1. Contrary to China's Arguments, the Panel Undertook an In-Depth Examination of Commerce's Determinations and All the Evidence from Commerce's Administrative Record that the Parties Presented to the Panel

175. In evaluating China's claims, the Panel considered whether "China has established that, in the 42 challenged adverse facts available determinations, the USDOC failed to base its determinations on facts, in contravention of Article 12.7 of the SCM Agreement."[240] The Panel determined that the evidence put forth by China was insufficient to support its claim.[241] In doing so, the Panel took into account all of the evidence and arguments presented by the parties, and the Panel's evaluation met or even exceeded the requirements of Article 11 of the DSU. China's Article 11 claim fails because China criticizes the Panel for coming to a conclusion with which China disagrees but does not identify or explain any specific error in the Panel's appreciation of the facts or why that error is so material that it bears on the objectivity of the Panel's conclusion.

176. Before it turned to the facts, the Panel noted that, for the purpose of its inquiry into the claims advanced by China under Article 12.7 of the SCM Agreement, "the level of explanation required" of Commerce "is that sufficient to assess whether the USDOC based its adverse facts available determinations on facts."[242] Further, the Panel noted that, contrary to China's arguments, there was "no procedural requirement in the text of Article 12.7 in and of itself for an investigating authority to explicitly cite each fact on the basis of which it makes facts available determinations."[243] In its appellant submission, China indicates that it agrees that the Panel "properly established the necessary analytical framework" with respect to China's Article 12.7 claims.[244]

Alcoholic Beverages (AB), paras. 161- 162; *Korea – Dairy (AB)*, para. 138; *US – Carbon Steel (AB)*, para. 142; *US – Gambling (AB)*, para. 363; *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 313; and *EC – Selected Customs Matters (AB)*, para. 258.

[238] *US – COOL (AB)*, para. 301 (quoting *EC – Fasteners (China) (AB)*, para. 442).

[239] *Korea – Alcoholic Beverages (AB)*, para. 164 (explaining that it is not an error under Article 11 of the DSU for a panel "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it").

[240] Panel Report, para. 7.307. As a result of the panel's finding that two preliminary determinations by Commerce (Wind Towers and Steel Sinks) fell outside the terms of reference, the number of "instances" of facts available challenged by China was reduced to 42. *See* Panel Report, note 357.

[241] Panel Report, para. 7.314.

[242] Panel Report, para. 7.311.

[243] Panel Report, para. 7.311.

[244] China Appellant Submission, para. 221.

177. In assessing the evidence before it, the Panel found that the excerpts of Commerce's issues and decision memoranda relied upon by China were "insufficient to establish that each of the 42 challenged adverse facts available determinations lacked a factual foundation."[245] The Panel determined that, contrary to China's assertions, it was not "evident on the face of the" excerpts provided by China that the same "legal standard" was applied across the determinations.[246] In particular, the Panel found that the terminology relied upon by China was not homogeneous, and was insufficient to support the finding of a legal standard or pattern across the investigations. The Panel further found that Commerce's determinations did not all use the term "assumption" or "inference,"[247] which was the sole evidence China relied upon to establish the existence of a supposed legal standard under which Commerce's "facts available" determinations allegedly were not actually based on facts on the administrative record.

178. The Panel also found, based on a review of Exhibit USA-94 and the full issues and decision memoranda and preliminary determinations, that "USDOC's adverse facts available determinations go well beyond the conclusions cited by China in Exhibit CHI-2 and provided in Exhibit CHI-125."[248] Additionally, the Panel found that certain of the "facts available" determinations suggest the opposite of what China alleged[249] – *i.e.*, that the "facts available" determinations were based on facts – because they state, for example that Commerce "employed adverse inferences *in selecting from the facts otherwise available*."[250] Finally, the Panel found that China had failed to establish that the term "adverse inferences," as used by Commerce in its determinations, "equates to an 'assumption.'"[251]

179. The Panel concluded that, because the evidence failed to demonstrate that Commerce applied one legal standard across the 42 applications of "facts available," and because it was "not evident on the face of the evidence provided by China" that the applications of "facts available" lacked a factual foundation in any of those instances,[252] China had failed to establish that Commerce acted inconsistently with Article 12.7 of the SCM Agreement.[253]

180. China sums up its argument that the Panel acted inconsistently with Article 11 of the DSU as follows:

> The Panel's analysis of China's claims bears no relationship to the "in-depth examination" that was required in respect of each of those claims. In order to reject all 42 of China's "as applied" claims, as the Panel did in this case, the Panel would need to have concluded that the requisite factual analysis was present on the face of *all* 42 of the challenged USDOC facts available determinations. The

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[245] Panel Report, para. 7.314.
[246] Panel Report, para. 7.317.
[247] Panel Report, para. 7.318.
[248] Panel Report, para. 7.316.
[249] Panel Report, para. 7.320.
[250] Panel Report, para. 7.319 (citing Commerce's Issues and Decision Memorandum from the *Line Pipe* investigation, although with excerpts from three other investigations).
[251] Panel Report, para. 7.322.
[252] Panel Report, para. 7.323.
[253] Panel Report, para. 7.325.

> Panel did not do this. Rather than examining *each* of the 42 challenged instances of "adverse facts available" to determine whether the USDOC had disclosed how its conclusions were supported by facts on the record, the Panel made only limited references to *any* of the individual determinations subject to challenge. The Panel then selectively used the few instances in which it disagreed with China's characterization of a particular determination at issue to reject *all* of China's claims, even in those instances where it *did not* take issue with China's portrayal of those determinations.[254]

181. As an initial matter, the standard of review described by the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS*, which concerned a panel's evaluation of conclusions made by an investigating authority, is not directly applicable here. As explained, this is because China did not ask the Panel to review the appropriateness of any of Commerce's conclusions, but rather alleged that Commerce simply did not rely on any facts at all when it made its "facts available" determinations.

182. In addition, China's description of the Panel's evaluation of China's "facts available" claims more accurately describes the argumentation presented by China before the Panel, and not the Panel's assessment of the facts. Despite arguing on appeal that the Panel was required to undertake an "'in-depth examination' to determine whether the USDOC actually provided a 'reasoned and adequate' explanation"[255] of its "facts available" determinations, China argued before the Panel that the inconsistency of Commerce's determinations with Article 12.7 of the SCM Agreement was "evident on the face of *each of* the challenged determinations."[256] In the course of its evaluation, the Panel went further than China requested it to in coming to its conclusions, opting correctly to review the "full Issues and Decision Memoranda and Preliminary Determinations,"[257] as well as facts that were cited in Exhibit USA-94, rather than just the excerpts cited by China in its submissions and exhibits. The Panel considered all of China's arguments and found that the facts did not support China's characterizations of Commerce's "facts available" determinations.

183. As described above, the Panel's examination of Commerce's determinations and the evidence on Commerce's administrative record was "critical and searching" and "in-depth,"[258] far more so than China's own cursory presentation of evidence from Commerce's record. The Panel "consider[ed] all the evidence presented to it, assess[ed] its credibility, determine[d] its weight, and ensure[d] that its factual findings have a proper basis in that evidence."[259] It is

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[254] China Appellant Submission, para. 222.
[255] China Appellant Submission, para. 193. *See also id.* paras. 194, 202, 221, 222, 227, 236.
[256] China Appellant Submission, para. 209.
[257] Panel Report, para. 7.316.
[258] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.
[259] *Brazil – Retreaded Tyres (AB)*, para. 185 (citing *EC – Hormones (AB)*, paras. 132 and 133). *See also EC – Seal Products (AB)*, para. 5.150; *Australia – Salmon (AB)*, para. 266; *EC – Asbestos (AB)*, para. 161; *EC – Bed Linen (Article 21.5 – India) (AB)*, paras. 170, 177, 181; *EC – Sardines (AB),* para. 299; *EC – Tube or Pipe Fittings (AB)*, para. 125; *Japan – Apples (AB)*, para. 221; *Japan – Agricultural Products II (AB)*, paras. 141-142; *Korea – Alcoholic Beverages (AB)*, paras. 161-162; *Korea – Dairy (AB)*, para. 138; *US – Carbon Steel (AB)*, para. 142; *US*

"insufficient" for China, on appeal, "to simply disagree with a statement or to assert that it is not supported by the evidence."[260] China "bears the onus of explaining why the alleged error meets the standard of review under Article 11."[261] But China has not met its burden. China simply criticizes the Panel for coming to a conclusion with which China disagrees and for applying a standard of review that is different from one that China favors, but which the Panel was not obligated to apply. China has failed to "identify specific errors regarding the objectivity of the panel's assessment" and China has failed to "explain *why* the alleged error *meets* the standard of review under" Article 11 of the DSU.[262]

2. The Panel Did Not Err in Examining Evidence that Was on Commerce's Administrative Record

184. Another argument China offers in support of its claim that the Panel acted inconsistently with Article 11 of the DSU concerns the Panel's reliance in its evaluation of China's claims on evidence that was on Commerce's administrative record but which was not cited in Commerce's determinations.[263] China argues that "[t]o the extent that the Panel was relying on evidence offered by the United States on an entirely *ex post* basis, this was contrary to its obligation to make an objective assessment of the matter under Article 11 of the DSU."[264] China misunderstands the prohibition against *ex post* rationalization.

185. The Appellate Body report in *US – Countervailing Duty Investigation on DRAMS* includes a relevant discussion of what constitutes an *ex post facto* rationalization. In that dispute:

> In the course of making submissions before the Panel, the United States at several points attempted to rely on evidence that, although contained in the record of the CVD investigation, had not been *cited* in the USDOC's decision. The Panel refused to consider this evidence on the ground that submission of such evidence constituted "*ex post* rationalization" on the part of the United States.[265]

186. On appeal, the United States argued that "the Panel misunderstood the scope of this prohibition against '*ex post* rationalization'."[266] The United States further argued that the "prohibition limits only a Member's right to raise before a panel new *reasons* as the basis for its investigating authority's challenged decision, but not the right to rely during panel proceedings

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– Gambling (AB), para. 363; *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 313; and *EC – Selected Customs Matters (AB)*, para. 258.

[260] *EC – Seal Products (AB)*, para. 5.150.

[261] *EC – Seal Products (AB)*, para. 5.150 (citing *EC – Fasteners (China) (AB)*, para. 442).

[262] *EC – Fasteners (China) (AB)*, para. 442 (emphasis in the original).

[263] *See* China Appellant Submission, paras. 215-217, 229.

[264] China Appellant Submission, para. 229.

[265] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 159 (italics in original).

[266] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 159 (italics in original).

on *evidence* that, although contained in the record of the investigating authority, is not explicitly referred to in its decision."[267]

187. The Appellate Body agreed with the United States and found that the panel erred in declining to consider certain record evidence not cited by Commerce in its published determination.[268] The Appellate Body explained that the SCM Agreement "does not require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination."[269]

188. China's argument, by contrast, is premised on the notion that Commerce was required to explicitly cite in its determination the facts that were available on Commerce's administrative record and that formed the basis of Commerce's "facts available" determinations.[270] The Panel, however, noted that there is "no procedural requirement in the text of Article 12.7 in and of itself for an investigating authority to explicitly cite each fact on the basis of which it makes facts available determinations."[271] In examining whether "the level of explanation" in Commerce's determinations is "sufficient to assess whether the USDOC based its adverse facts available determination on facts,"[272] the Panel correctly assessed the arguments and evidence provided by both China and the United States, including by reviewing the full issues and decision memoranda, preliminary determinations, and evidence on the record supporting Commerce's determinations.

189. China contends that the Panel was precluded from considering evidence on the administrative record of the investigations because, China asserts, "[t]here is no indication that the USDOC actually relied on" the record evidence cited in Exhibit USA-94.[273] China's assertion is incorrect. There was sufficient basis for the Panel to conclude that Commerce relied on facts that were available in the investigations. Commerce explained that it was resorting to "facts available" in each instance, and the facts cited in Exhibit USA-94 and placed before the Panel in Exhibits USA-95 through USA-133 were facts that were available on the record of the

[267] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 159 (italics in original). Relatedly, we note that there is a distinction between an improper attempt by a Member to offer new reasons for an administrative determination and a legitimate effort by a Member to explain how a challenged determination is consistent with the Member's WTO obligations. As the WTO Agreement is not self-executing under the law of many Members, many Members' investigating authorities do not address WTO rules in their determinations. Indeed, China did not raise before Commerce many of the arguments it has raised in this dispute. As a result, arguments regarding the WTO-consistency of an investigating authority's determinations will likely be raised for the first time before a WTO panel, and a Member's response to such arguments does not represent an impermissible *ex post facto* rationalization.
[268] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165.
[269] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 164 (italics in original).
[270] *See, e.g.*, China Appellant Submission, paras. 224-226, 233.
[271] Panel Report, para. 7.311.
[272] Panel Report, para. 7.311.
[273] China Appellant Submission, para. 229.

investigations at issue, and they were demonstrably relevant to the determinations for which necessary information was missing due to the noncooperation of interested parties.[274]

190. In this dispute, as in *US – Countervailing Duty Investigation on DRAMS*, the "evidence [to which the United States drew the Panel's attention] was on the record of the investigation and it was not put before the Panel in support of a new reasoning or rationale."[275] The Panel's decision here not to reject the arguments of the United States as *ex post* rationalizations is in accordance with the elaboration of the prohibition on *ex post* rationalizations set forth by the Appellate Body in the *US – Countervailing Duty Investigation on DRAMS*, and is not inconsistent with Article 11 of the DSU.

3. China, in Effect, Faults the Panel for Not Making China's Case for It, Which the Panel Was Not Permitted To Do

191. China's factual arguments with respect to the 48 individual "facts available" determinations it challenged amounted to a total of *fewer than five* pages in China's first written submission,[276] accompanied by Exhibit CHI-2, which contained a list of citations to excerpts of Commerce issues and decision memoranda and preliminary determinations. China's subsequent submissions provided little, if any, additional discussion of the facts. In that first written submission, China described an alleged Commerce practice whereby "[w]hat the USDOC refers to as 'adverse facts available' is, in fact, more accurately described as the use of adverse inferences" such that "USDOC simply assumes the ultimate legal conclusion of the inquiry for which the information had been sought."[277]

192. In its first set of questions, the Panel noted China's cursory treatment of the facts with respect to all of its claims and questioned whether China had made out its *prima facie* case, stating in Panel Question 4 that: "China has only provided some references to the facts of each investigation in its Exhibit 1. If the fact patterns are similar across investigations, does China need to do more than this in order to establish a *prima facie* case?" China responded as follows:

> *China has provided only 'some references' to the facts* of each investigation because those references are *all that is necessary to establish that the USDOC applied an incorrect legal standard* with respect to its determinations relating to financial contribution, benefit, specificity *and the use of facts available*.[278]

[274] China never disputed that the facts provided in Exhibits USA-95 through USA-133 were on the record of the investigations at issue (constituting "facts available") and supported determinations made by Commerce on the basis of "facts available."
[275] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165.
[276] China First Written Submission to the Panel, paras. 143-156.
[277] China First Written Submission to the Panel, para. 145.
[278] China Response to Panel Question No. 4, para. 19 (emphasis added). *See also id.* para 20 ("[T]he specific evidence that China should present in order to establish its *prima facie* case for each claim is evidence supporting its position that the USDOC applied an incorrect legal standard when making determinations relating to . . . the use of facts available . . . ."), para. 24 ([T]he precise factual aspects of the Department of Commerce's determinations for each challenged measure that are relevant to China's claims are those portions of the USDOC's determinations in which the USDOC applies what China considers to be an incorrect legal standard.").

193. On appeal, China now argues that the Panel was obligated to *do more* than what China asked it to do at the panel stage. China makes no reference in its appellant submission to the alleged "legal standard" that China asked the Panel to find Commerce applied when it made determinations on the basis of "facts available." Instead, China argues that the Panel's analysis was inconsistent with Article 11 of the DSU because the Panel did not individually examine *each* of the instances of Commerce's use of "facts available," and because the panel report contains only "limited references" to individual investigations.

194. The Panel was not obligated to engage factual and legal arguments that China did not actually make. The burden to make a *prima facie* case was on China as the complaining party, and the Panel was not permitted to make China's case for it.[279] As the Appellate Body has explained:

> We first recall that, in WTO dispute settlement, as in most legal systems and international tribunals, the burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence.[280]

195. Recently, the Appellate Body has noted, "[w]here there is an *absence* of argumentation, however, a panel cannot intervene to raise arguments on a party's behalf and make the case for the complainant."[281]

196. The Panel evaluated the evidence and arguments advanced by China and found that they were insufficient to establish China's claims under Article 12.7 of the SCM Agreement. China's insistence that the Panel should have addressed arguments that China did not make at the Panel stage must fail as a basis for a claim under Article 11 of the DSU. On the contrary, it would have been error for the Panel to do so.

C. China Has Simply Recast its Arguments before the Panel as an Article 11 Claim on Appeal, which the Appellate Body Has Explained Is "Unacceptable"

197. Ultimately, China is simply making before the Appellate Body an argument that it attempted – belatedly – to make before the Panel. We note that China's first written submission to the Panel made no suggestion whatsoever that Commerce's "facts available" determinations are inconsistent with Article 12.7 of the SCM Agreement because they are not "reasoned and adequate."[282] China advanced arguments related to the "reasoned and adequate" standard for the first time in response to a question from the Panel following the first Panel meeting concerning whether China had failed to make a *prima facie* case.[283] At that point, China shifted

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[279] *See Japan – Agricultural Products II (AB)*, para. 129.
[280] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.
[281] *EC – Fasteners (China) (AB)*, para. 566.
[282] *See* China First Written Submission to the Panel, paras. 128-156.
[283] *See* China Response to Panel Question No. 73.

its line of argument from the claim that Commerce "acted inconsistently with Article 12.7 of the SCM Agreement by making findings based on 'facts available' that are not actually based on available facts"[284] to the contention that Commerce was obligated to provide a "reasoned and adequate explanation" of its use of facts available.[285] China articulated this argument in its second written submission.[286]

198. Though China presented the "reasoned and adequate" line of argument only late in the panel proceeding, the Panel was aware of it and responded to it in the panel report. In summarizing China's main arguments, the Panel noted that:

> China submits that the mere existence of a particular fact on the record of an investigation is insufficient to fulfil the requirements of Article 12.7. China submits that it was the USDOC's obligation as the investigating authority to provide a reasoned and adequate explanation of how the evidence on the record supported its application of facts available under Article 12.7. Referring to the Appellate Body's findings in *US – Countervailing Duty Investigation on DRAMS*, China argues that investigating authorities have to provide a reasoned and adequate explanation of (i) how the evidence on the record supported their factual findings, and (ii) how those factual findings supported the overall subsidy determination. Such an explanation should be discernible from the published determination itself.[287]

199. The Panel did not agree with China's argument. Rather, the Panel considered that its task was "to consider whether the USDOC provided sufficient explanation of the challenged adverse facts available determinations to assess whether the USDOC based these determinations *on facts*. As such, for the purposes of the Panel's assessment of this claim under Article 12.7, the level of explanation required is that sufficient to assess whether the USDOC based its adverse facts available determinations on facts."[288]

200. On appeal, China has recast the same substantive argument it made to the Panel – and that the Panel correctly rejected – as a claim under Article 11 of the DSU. As the Appellate Body has explained, it is "unacceptable for a participant effectively to recast its arguments before the panel under the guise of an Article 11 claim. Instead, a participant must identify specific errors regarding the objectivity of the panel's assessment."[289] China has not done so, and, accordingly, its claim under Article 11 of the DSU fails.

D. The Appellate Body Should Not Complete the Analysis

201. For the reasons given above, the Appellate Body should reject China's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective

[284] China Response to Panel Question No. 73, para. 181.
[285] China Response to Panel Question No. 73, paras. 182-183.
[286] *See* China Second Written Submission to the Panel, paras. 180-191.
[287] Panel Report, para. 7.296 (emphasis added).
[288] Panel Report, para. 7.311 (emphasis added).
[289] *EC – Fasteners (China) (AB)*, para. 442.

assessment of China's claims under Article 12.7 of the SCM Agreement. Accordingly, it would not be necessary for the Appellate Body to complete the legal analysis of China's claims, as China requests.[290]

202. If, however, the Appellate Body reverses the Panel's finding that Commerce did not act inconsistently with Article 12.7 of the SCM Agreement when it applied "facts available" in 42 instances, then the United States respectfully submits that, for the following reasons, it would not be appropriate for the Appellate Body to complete the legal analysis.

203. Article 17.6 of the DSU provides that "[a]n appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel." This precludes any fact finding by the Appellate Body. Accordingly, "[i]n previous disputes, the Appellate Body has emphasized that it can complete the analysis 'only if the factual findings of the panel, or the undisputed facts in the panel record' provide a sufficient basis for the Appellate Body to do so."[291] The Appellate Body has further explained that it will "complete the analysis" only in cases where the panel has addressed a claim and made a legal interpretation, finding, or conclusion,[292] where there are "sufficient factual findings,"[293] or where there are "sufficient uncontested facts on the record."[294] The Appellate Body has recognized that its ability to complete the analysis is subject to "important limitation" and has adopted a "cautious approach" in the past.[295]

204. In this dispute, there are a number of reasons for the Appellate Body to decline China's request that the Appellate Body complete the legal analysis.

205. First, China is asking the Appellate Body to undertake a case-by-case evaluation of Commerce's applications of "facts available," but China did not ask the Panel to undertake such an analysis – and China itself did not undertake such an analysis in presenting its arguments to the Panel. As the Panel pointed out, China "fail[ed] to address the specific facts of each of the challenged investigations."[296] The Panel correctly noted that China's failure was "problematic."[297] Instead of putting before the Panel arguments about each instance in which Commerce applied "facts available," China sought to establish that Commerce applied "one and the same legal standard … across the 42 challenged adverse facts available determinations," but the Panel found that China's argument was not supported "on the face of the evidence provided

[290] *See* China Notice of Appeal, para. 17; China Appellant Submission, paras. 238-443.
[291] *See, e.g.*, *US – Large Civil Aircraft (Second Complaint) (AB)*, para. 1250 (citing numerous Appellate Body reports in prior disputes).
[292] *EC – Poultry (AB)*, para. 107; *EC – Asbestos (AB)*, paras. 79, 82.
[293] *US – Section 211 Appropriations Act (AB)*, para. 343; *EC – Aircraft* (AB) paras. 735, 1101, 1417; *Australia – Salmon (AB)*, para. 118.
[294] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 157 ("Canada, as the complaining party, must persuade us that there are sufficient uncontested facts on the record to enable us to complete the analysis by stepping into the shoes of the Panel.").
[295] *US – Continued Zeroing (AB)*, para. 195 ("We recognise the important limitation on our ability to complete the analysis.").
[296] Panel Report, para. 7.323.
[297] Panel Report, para. 7.323.

by China."[298] In making its argument the way it did, China deprived the Panel of the opportunity to perform its role as "a trier of facts"[299] through the evaluation individually of each application by Commerce of "facts available." Indeed, had the Panel undertaken such an evaluation on its own initiative, it would have erred by making China's case for it.[300]

206. China cannot now ask the Appellate Body to act as the trier of facts in a manner different from how it asked the Panel to perform that task. To do so is at odds with "the distinction between the respective roles of the Appellate Body and panels."[301] As it has done before, the Appellate Body should "not 'interfere lightly' with the panel's fact-finding authority" by undertaking itself a factual evaluation that would have been far better suited to the Panel, had China presented the arguments and evidence necessary for the Panel to do so.[302]

207. Second, as noted above, China sought late in the panel proceeding to reframe its claims under Article 12.7 of the SCM Agreement – and it persists on appeal exclusively with this same line of argument – by contending that the proper application of Article 12.7 requires Commerce's determinations to provide a "reasoned and adequate explanation" of how each "facts available" determination is based on facts.[303] However, a claim that Commerce's "facts available" determinations were not sufficiently or adequately explained would more appropriately have been advanced under Article 22 of the SCM Agreement. The Panel recognized this and concluded that such a claim was outside the Panel's terms of reference.[304] The Panel explained that, "[w]hether the USDOC has disclosed in 'sufficient detail the findings and conclusion reached on all issues of fact' or 'all relevant information on matters of fact' is a separate question which concerns Article 22 of the SCM Agreement, and is not within the terms of reference of this Panel."[305] Because the Panel found that a claim under Article 22 was outside its terms of reference, the Panel did not address China's legal arguments or factual assertions that Commerce failed to provide sufficient detail regarding the facts underlying the challenged "facts available" determinations.

208. Third, were the Appellate Body to agree to China's request to look individually at each instance in which Commerce applied "facts available," we note China's argument that all that is necessary[306] – indeed, all that is permissible[307] – is for the Appellate Body to look at the excerpts China quotes in its appellant submission. However, the excerpts China quotes do not demonstrate conclusively that there were no facts at all on Commerce's administrative record, and thus do not prove China's claim[308] that Commerce failed to base its "facts available" determinations on facts. As the Appellate Body has explained, the SCM Agreement "does not

[298] Panel Report, para. 7.317.
[299] *E.g.*, *EC – Fasteners (China) (AB)*, para. 441.
[300] *EC – Fasteners (China) (AB)*, para. 566.
[301] *E.g.*, *EC – Fasteners (China) (AB)*, para. 441.
[302] *E.g.*, *EC – Fasteners (China) (AB)*, para. 441.
[303] *See* China Second Written Submission to the Panel, paras. 180-191.
[304] Panel Report, para. 7.311.
[305] Panel Report, para. 7.311.
[306] *See, e.g.*, China Appellant Submission, paras. 246, 250, 255, 259, 263, 268, 273, etc.
[307] *See, e.g.*, China Appellant Submission, paras. 252, 265, 270, 275, etc.
[308] *See* China Appellant Submission, para. 242.

require the agency to cite or discuss *every* piece of supporting record evidence for each fact in the final determination."[309] In addition, a Member is not prohibited from relying in WTO dispute settlement proceedings on evidence that, although contained in the record of the investigating authority, is not explicitly referred to in the investigating authority's decision.[310] Accordingly, it would be inappropriate for the Appellate Body to disregard, as China insists it must, evidence on Commerce's administrative record that was not cited in Commerce's discussion of its "facts available" determinations, including, in particular, the evidence cited and reproduced in Exhibits USA-94 and USA-95 through USA-133.

209. In order to complete the legal analysis and properly evaluate individually each instance in which Commerce applied "facts available," the Appellate Body would need to undertake its own thorough examination of the evidence. Such a thorough examination would doubtless require the Appellate Body to examine a host of issues related to, *inter alia*, the probative value of certain pieces of evidence, the relevance of particular facts, and inferences that may reasonably be drawn from an analysis of the evidence in its totality.

210. When faced with a similar situation in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body declined to complete the analysis, because the participants there had not addressed such issues sufficiently.[311] China, of course, in its appellant submission, makes no attempt whatsoever to grapple with the facts on Commerce's administrative record, expressly limiting its arguments to quoted excerpts from Commerce's determinations, which China first quoted in Exhibit CHI-125, and which merely provide a description of Commerce's conclusion with respect to each determination. The United States, for its part, will not in this appellee submission speculate about and respond to arguments that China once again has not made. It would be impractical for the participants to address such issues later in this proceeding, in light of the limited nature of – and the compressed time for – the Appellate Body's review, as provided in the DSU.[312] So, similar to *US – Countervailing Duty Investigation on DRAMS*, the participants have not addressed sufficiently, in their submissions, the issues that the Appellate Body might need to examine if it were to complete the analysis in this case.[313]

211. Finally, and related to the points made above, we note that the entire body of Commerce's administrative record was not placed before the Panel and is not now on the record before the Appellate Body. Rather, China and the United States placed on the Panel's record documents or portions of documents from Commerce's administrative record that each deemed most relevant to the arguments China presented. However, as we have noted, China significantly shifted the focus of its argumentation related to its claims under Article 12.7 of the SCM Agreement after the first panel meeting, with the "reasoned and adequate" line of

[309] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 164 (italics in original).
[310] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165.
[311] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 194-197.
[312] *See* DSU Article 17.6 ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.") and Article 17.5 ("As a general rule, [appellate] proceedings shall not exceed 60 days . . . . In no case shall the proceeding exceed 90 days.").
[313] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 197.

argument being elaborated fully for the first time in China's second written submission to the Panel.

212. The Panel's working procedures provided that "[e]ach party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party."[314] In its first written submission, the United States presented evidence responsive to the argument China made in its first written submission that Commerce's "facts available" determinations "have no basis in facts on the record."[315] The United States sought to disprove China's assertion by pointing to some – but not all – of the facts on Commerce's administrative record. Had the United States been called upon in the first written submission to respond to an argument by China that Commerce's "facts available" determinations were not "reasoned and adequate," the United States likely would have presented different or additional evidence from Commerce's administrative record, such as underlying memoranda, verification reports, or other particular pieces of evidence that, when viewed in their totality, would demonstrate that Commerce's "facts available" determinations were "reasoned and adequate," not simply that, contrary to China's assertions, the challenged determinations were supported by facts that were available on the record.

213. The United States did not, late in the panel proceeding, seek to supplement the Panel's evidentiary record with massive amounts of new factual evidence that would be responsive to the moving target that was China's arguments in support of its claims under Article 12.7. In the absence of a more complete record of the proceedings before Commerce, though, which the Appellate Body does not have because of how China advanced its arguments before the Panel, there simply is insufficient factual evidence for the Appellate Body to evaluate whether Commerce's "facts available" determinations are "reasoned and adequate," as China asks the Appellate Body to do.

214. For these reasons, the Appellate Body should not complete the legal analysis and should not find that Commerce's "facts available" determinations are inconsistent with Article 12.7 of the SCM Agreement.

V. CONCLUSION

215. Based on the foregoing, the United States respectfully requests the Appellate Body to reject China's claims on appeal, and uphold the Panel's findings.

[314] Panel Working Procedures, para. 7.
[315] *See* China First Written Submission to the Panel, paras. 143-156.