



WORLD TRADE  
ORGANIZATION

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**UNITED STATES – COUNTERVAILING DUTY MEASURES  
ON CERTAIN PRODUCTS FROM CHINA**

AB-2014-8

*Report of the Appellate Body*

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**ABBREVIATIONS USED IN THIS REPORT**

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GOC	Government of China
OCTG	Oil country tubular goods
Panel Report	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R, 14 July 2014
PRC	People's Republic of China
Preliminary Ruling	Preliminary Ruling by the Panel, WT/DS437/4, incorporated by reference into the Panel Report as Annex A-8, WT/DS437/R/Add.1, pp. A-34 to A-46
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SOE	State-owned enterprise
USDOC	US Department of Commerce
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

**USDOC COUNTERVAILING DUTY INVESTIGATIONS CITED IN THIS REPORT**

<b>Short Title</b>	<b>USDOC Investigation No.</b>	<b>Full Title</b>
Thermal Paper	C-570-921	Lightweight Thermal Paper From the People's Republic of China
Pressure Pipe	C-570-931	Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China
Line Pipe	C-570-936	Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China
Citric Acid	C-570-938	Citric Acid and Certain Citrate Salts From the People's Republic of China
Lawn Groomers	C-570-940	Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China
Kitchen Shelving	C-570-942	Certain Kitchen Appliance Shelving and Racks from the People's Republic of China
OCTG	C-570-944	Certain Oil Country Tubular Goods from the People's Republic of China
Wire Strand	C-570-946	Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China
Magnesia Bricks	C-570-955	Certain Magnesia Carbon Bricks From the People's Republic of China
Seamless Pipe	C-570-957	Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China
Print Graphics	C-570-959	Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China
Drill Pipe	C-570-966	Drill Pipe From the People's Republic of China
Aluminum Extrusions	C-570-968	Aluminum Extrusions From the People's Republic of China
Steel Cylinders	C-570-978	High Pressure Steel Cylinders From the People's Republic of China
Solar Panels	C-570-980	Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China
Wind Towers	C-570-982	Utility Scale Wind Towers From the People's Republic of China
Steel Sinks	C-570-984	Drawn Stainless Steel Sinks From the People's Republic of China

**PANEL EXHIBITS CITED IN THIS REPORT**

<b>Exhibit</b>	<b>Short title (if any)</b>	<b>Description</b>
CHI-1		Table of citations for China's "public body", "benefit", "input specificity", and "land specificity" claims
CHI-2		Table of citations for China's "adverse" facts available claims
CHI-12	2009 Pressure Pipe Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for Final Determination in the Countervailing Duty Investigation in Certain Welded Austenitic Stainless Pressure Pipe from the People's Republic of China (C-570-931), 21 January 2009
CHI-19	2008 Line Pipe Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Line Pipe (Line Pipe) from the People's Republic of China (C-570-936), 17 November 2008
CHI-31	2009 Lawn Groomers Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for the Final Affirmative Countervailing Duty Determination: Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China (C-570-940), 12 June 2009
CHI-45	2009 OCTG Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for Final Determination in the Countervailing Duty Investigation of Certain Oil Country Tubular Goods ("OCTG") from the People's Republic of China (C-570-944), 23 November 2009
CHI-52	2010 Wire Strand Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for Final Determination in Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China (C-570-946), 14 May 2010
CHI-80	2011 Drill Pipe Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Drill Pipe from the People's Republic of China (C-570-966), 3 January 2011
CHI-87	2011 Aluminum Extrusions Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Aluminum Extrusions from the People's Republic of China (PRC) (C-570-968), 28 March 2011
CHI-99	2012 Steel Cylinders Issues and Decision Memorandum	USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China (C-570-978), 30 April 2012
CHI-105	2012 Solar Panels Preliminary Affirmative CVD Determination	Solar Panels, Preliminary Affirmative Countervailing Duty Determination, <i>United States Federal Register</i> , Vol. 77, No. 58 (26 March 2012), pp. 17448-17449
CHI-125		Table of relevant excerpts from the USDOC's "adverse facts available" findings
USA-94		Table of "facts available" determinations made by the USDOC

## WTO CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>Canada – Continued Suspension</i>	Appellate Body Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, p. 2057
<i>Canada – Dairy (Article 21.5 – New Zealand and US)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, p. 6829
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Panel Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/R / WT/DS426/R / and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369

Short Title	Full Case Title and Citation
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>EC and certain member States – Large Civil Aircraft</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, p. 685
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5



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<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, circulated to WTO Members 8 December 2014 [adoption pending]
<i>US – Certain EC Products</i>	<i>United States – Import Measures on Certain Products from the European Communities</i> (DS165)
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Exports Restraints as Subsidies</i> , WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051

Short Title	Full Case Title and Citation
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XII, p. 4865
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Countervailing Duty Measures on Certain Products from China**

China, *Appellant/Appellee*  
United States, *Other Appellant/Appellee*

Australia, *Third Participant*  
Brazil, *Third Participant*  
Canada, *Third Participant*  
European Union, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Norway, *Third Participant*  
Russia, *Third Participant*  
Saudi Arabia, *Third Participant*  
Turkey, *Third Participant*  
Viet Nam, *Third Participant*

AB-2014-8

Appellate Body Division:

Van den Bossche, Presiding Member  
Bhatia, Member  
Chang, Member

## 1 INTRODUCTION

1.1. China and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*<sup>1</sup> (Panel Report). The Panel was established to consider a complaint by China<sup>2</sup> with respect to the imposition by the United States of countervailing duties on certain products from China.

1.2. This dispute concerns countervailing duties imposed by the United States following 17 countervailing duty investigations initiated by the US Department of Commerce (USDOC) between 2007 and 2012.<sup>3</sup> Before the Panel, China challenged several aspects of the investigations leading to the imposition of these duties, including the USDOC's application of an alleged "rebuttable presumption" to determine whether Chinese state-owned enterprises (SOEs) can be characterized as "public bodies" within the meaning of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

1.3. The 17 countervailing duty investigations at issue in this dispute concern a variety of products.<sup>4</sup> With respect to 14 of these investigations, China's claims related to the USDOC's determinations that: (i) Chinese SOEs are public bodies; (ii) the provision of certain inputs by Chinese SOEs conferred a benefit; (iii) subsidies arising from the provision of inputs for less than adequate remuneration are specific; and (iv) there was sufficient evidence with respect to the specificity of the alleged subsidies to justify the initiation of the underlying countervailing duty investigations.<sup>5</sup> With regard to seven investigations, China challenged the USDOC's determinations that subsidies in the form of the provision of land-use rights are specific. With respect to 15 of the investigations at issue, China's claims concerned the USDOC's resort to the use of "adverse" facts available. Finally, with respect to two of the investigations, China's claims related to the USDOC's

<sup>1</sup> WT/DS437/R, 14 July 2014.

<sup>2</sup> Request for the Establishment of a Panel by China, WT/DS437/2.

<sup>3</sup> In its panel request, China set forth "as applied" claims against 22 countervailing duty investigations. However, in its first written submission to the Panel, China stated that it was not pursuing its claims with respect to five of the 22 investigations listed in its panel request. (Panel Report, para. 7.1 and fn 9 thereto)

<sup>4</sup> The 17 countervailing duty investigations are listed in the table at p. 5 of this Report and concern the following products: thermal paper, pressure pipe, line pipe, citric acid, lawn groomers, kitchen shelving, oil country tubular goods (OCTG), wire strand, magnesia bricks, seamless pipe, print graphics, drill pipe, aluminum extrusions, steel cylinders, solar panels, wind towers, and steel sinks.

<sup>5</sup> With respect to four of these 14 investigations, China also challenged the USDOC's treatment of Chinese SOEs as public bodies for the purposes of the initiation of the relevant investigation.

initiation of investigations into export restraints and the determinations made by the USDOC that such export restraints are financial contributions.<sup>6</sup>

1.4. Australia, Brazil, Canada, the European Union, India, Japan, Korea, Norway, Russia, Saudi Arabia, Turkey, and Viet Nam notified their interest as third parties. On 4 December 2012, Canada requested the Panel to grant it enhanced third party rights. On 20 December 2012, the Panel rejected Canada's request, the reasons for which were provided in the Panel Report.<sup>7</sup>

1.5. On 14 December 2012, the United States submitted to the Panel a request for a preliminary ruling. The United States requested the Panel to find that China's panel request did not adequately identify the "instances" of the use of "facts available" that were being challenged and, therefore, failed to "plainly connect" the measures to the provisions at issue and "to present the problem clearly"<sup>8</sup>, as required under Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). On 8 February 2013, the Panel issued a Preliminary Ruling<sup>9</sup> to the parties, concluding that China's panel request was consistent with Article 6.2 of the DSU. The Panel's Preliminary Ruling was made "an integral part of the Panel's Final Report"<sup>10</sup>, the content of which is reproduced in Annex A-8 thereto.<sup>11</sup>

1.6. The Panel Report was circulated to Members of the World Trade Organization (WTO) on 14 July 2014.

1.7. In its Report, the Panel found that:

- a. with respect to 12 countervailing duty investigations<sup>12</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 1.1(a)(1) of the SCM Agreement when it determined that SOEs are public bodies<sup>13</sup>;
- b. the USDOC's application of a "rebuttable presumption" that a majority government-owned entity is a public body is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement<sup>14</sup>;
- c. with respect to 12 countervailing duty investigations<sup>15</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) of the SCM Agreement by failing to take into account the two factors<sup>16</sup> listed in the last sentence of Article 2.1(c) when it made "specificity" determinations<sup>17</sup>;
- d. with respect to six countervailing duty investigations<sup>18</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 2.2 of the SCM Agreement by making positive determinations of regional specificity while failing to establish that the

<sup>6</sup> China's claims and requests for findings and recommendations are set forth in greater detail in paras. 3.1 and 3.2 of the Panel Report.

<sup>7</sup> Panel Report, paras. 1.11-1.13.

<sup>8</sup> United States' preliminary ruling request, paras. 23-25.

<sup>9</sup> WT/DS437/4.

<sup>10</sup> Panel Report, para. 1.16.

<sup>11</sup> WT/DS437/R/Add.1, pp. A-34 to A-46.

<sup>12</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels. (See table of USDOC investigations at p. 5 of this Report)

<sup>13</sup> Panel Report, para. 8.1.i.

<sup>14</sup> Panel Report, para. 8.1.ii.

<sup>15</sup> *Supra*, fn 12.

<sup>16</sup> These two factors are: (i) "the extent of diversification of economic activities within the jurisdiction of the granting authority"; and (ii) "the length of time during which the subsidy programme has been in operation".

<sup>17</sup> Panel Report, para. 8.1.v.

<sup>18</sup> Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand, and Seamless Pipe. (See table of USDOC investigations at p. 5 of this Report)

alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority<sup>19</sup>; and

- e. with respect to two countervailing duty investigations<sup>20</sup>, the USDOC acted inconsistently with the obligations of the United States under Article 11.3 of the SCM Agreement by initiating investigations in respect of certain export restraints.<sup>21</sup>

1.8. The Panel further found that, as a consequence of the inconsistencies of the USDOC's actions with Articles 1, 2, and 11 of the SCM Agreement, the United States also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.<sup>22</sup>

1.9. The Panel, however, rejected several of China's claims, finding that:

- a. with respect to four countervailing duty investigations<sup>23</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 11 of the SCM Agreement by initiating the investigations without sufficient evidence of a financial contribution<sup>24</sup>;
- b. with respect to 12 countervailing duty investigations<sup>25</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China in its benefit analysis<sup>26</sup>;
- c. with respect to 12 countervailing duty investigations<sup>27</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement:
  - i. by failing to apply the first of the "other factors" under Article 2.1(c) – that is, "use of a subsidy programme by a limited number of certain enterprises" – in the light of a prior "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b);
  - ii. by failing to identify a "subsidy programme"; or
  - iii. by failing to identify a "granting authority"<sup>28</sup>;
- d. with respect to 14 countervailing duty investigations<sup>29</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 11 of the SCM Agreement by initiating the investigations without sufficient evidence of specificity<sup>30</sup>;
- e. with respect to 13 countervailing duty investigations<sup>31</sup>, China had failed to establish that, in 42 instances, the USDOC acted inconsistently with the obligations of the United States

<sup>19</sup> Panel Report, para. 8.1.viii.

<sup>20</sup> Magnesia Bricks and Seamless Pipe. (See table of USDOC investigations at p. 5 of this Report)

<sup>21</sup> Panel Report, para. 8.1.ix.

<sup>22</sup> Panel Report, para. 8.1.x.

<sup>23</sup> Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks. (See table of USDOC investigations at p. 5 of this Report)

<sup>24</sup> Panel Report, para. 8.1.iii.

<sup>25</sup> *Supra*, fn 12.

<sup>26</sup> Panel Report, para. 8.1.iv.

<sup>27</sup> *Supra*, fn 12.

<sup>28</sup> Panel Report, para. 8.1.v.

<sup>29</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks. (See table of USDOC investigations at p. 5 of this Report)

<sup>30</sup> Panel Report, para. 8.1.vi.

<sup>31</sup> Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels. (See table of USDOC investigations at p. 5 of this Report)

under Article 12.7 of the SCM Agreement by not relying on facts available on the record<sup>32</sup>; and

- f. with respect to one countervailing duty investigation<sup>33</sup>, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.2 of the SCM Agreement by making a positive determination of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority.<sup>34</sup>

1.10. Noting that China had failed to present sufficient evidence and arguments in support of its claims that the USDOC acted inconsistently with the obligations of the United States under Article 2.4 of the SCM Agreement by not basing its specificity determination on positive evidence, the Panel considered that the findings it had already made were sufficient to resolve the dispute between the parties regarding the USDOC's specificity determinations.<sup>35</sup> The Panel therefore made no findings with respect to China's claims under Article 2.4 of the SCM Agreement.

1.11. Finally, with respect to two countervailing duty investigations<sup>36</sup>, and in the light of the very limited argumentation provided by China in support of its claims, the Panel declined to make findings on whether the USDOC acted inconsistently with the obligations of the United States under the SCM Agreement when it determined that export restraints constituted financial contributions.<sup>37</sup>

1.12. Having found that the United States acted inconsistently with certain provisions of the SCM Agreement, the Panel recommended, pursuant to Article 19.1 of the DSU, that the United States bring its measures into conformity with its obligations under that Agreement.<sup>38</sup>

1.13. On 22 August 2014, China notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>39</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>40</sup> (Working Procedures). On 27 August 2014, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal<sup>41</sup> and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 9 September 2014, the United States and China each filed an appellee's submission.<sup>42</sup> On 15 September 2014, Brazil, Canada, the European Union, and Saudi Arabia each filed a third participant's submission.<sup>43</sup> Notifications of intention to appear at the oral hearing as a third participant were received from Australia, India, Japan, Korea, and Norway<sup>44</sup>, Turkey<sup>45</sup>, and Russia and Viet Nam.<sup>46</sup>

<sup>32</sup> Panel Report, para. 8.1.vii.

<sup>33</sup> Print Graphics. (See table of USDOC investigations at p. 5 of this Report)

<sup>34</sup> Panel Report, para. 8.1.viii.

<sup>35</sup> Panel Report, paras. 7.259 and 7.356.

<sup>36</sup> Magnesia Bricks and Seamless Pipe. (See table of USDOC investigations at p. 5 of this Report)

<sup>37</sup> Panel Report, para. 7.407.

<sup>38</sup> Panel Report, para. 8.3.

<sup>39</sup> WT/DS437/7 (attached as Annex 1 to this Report).

<sup>40</sup> WT/AB/WP/6, 16 August 2010.

<sup>41</sup> WT/DS437/8 (attached as Annex 2 to this Report).

<sup>42</sup> Pursuant to Rules 22 and 23(4), respectively, of the Working Procedures.

<sup>43</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>44</sup> On 15 September 2014, pursuant to Rule 24(2) of the Working Procedures.

<sup>45</sup> On 16 September 2014, pursuant to Rule 24(4) of the Working Procedures.

<sup>46</sup> On 14 October 2014, Russia and Viet Nam provided their delegation lists for the oral hearing to the Appellate Body Secretariat and the participants and third participants in these appellate proceedings. Without prejudice to rulings the Appellate Body may make in future appeals, we have interpreted Russia's and Viet Nam's actions as notifications expressing an intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures. While we wish to emphasize that strict compliance with Rule 24(4) of the Working Procedures requires *written* notification of such intention, we are satisfied that, in this case, the lack of strict compliance with Rule 24(4) did not raise any due process concerns.

1.14. The oral hearing in this appeal was held on 16 and 17 October 2014. The participants each made an opening oral statement. Third participants Australia, Brazil, Canada, India, Korea, Norway, Saudi Arabia, and Turkey made opening oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

1.15. By letter dated 20 October 2014, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its report in this dispute within the 60-day period or the 90-day period set out in Article 17.5 of the DSU. The Chair of the Appellate Body explained that this was due to, *inter alia*, the scheduling issues arising from the substantial workload of the Appellate Body in the second half of 2014, the overlap in the composition of the Divisions hearing the different appeals during this period, the number and complexity of the issues raised in these and concurrent appeal proceedings, as well as the additional time required for translation of the report for circulation in all three official languages. Consequently, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body report in this appeal would be circulated no later than 18 December 2014.<sup>47</sup>

## 2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

### 2.1 Claims of error by China – Appellant

#### 2.1.1 Articles 14(d) and 1.1(b) of the SCM Agreement – Benefit

##### 2.1.1.1 Interpretation of Article 14(d)

2.1. China argues that the Panel erred in finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Articles 14(d) and 1.1(b) of the SCM Agreement by rejecting private prices in China as benchmarks in its benefit analyses in the challenged determinations. China submits that the interpretative question before the Appellate Body is whether the legal standard for determining what constitutes a "government" provider – and in particular a "public body" – for purposes of the financial contribution inquiry under Article 1.1(a)(1) of the SCM Agreement should also apply when determining what constitutes a "government" provider for purposes of a "distortion" inquiry under Article 14(d) of the SCM Agreement.<sup>48</sup> China argues that the benefit determinations at issue raise this question because the USDOC rejected Chinese private prices as a benefit benchmark under Article 14(d) on the grounds that such prices were distorted by virtue of the Government of China's (GOC) allegedly "predominant" role in the market as a supplier of the goods in question. In particular, China asserts that, as it was undisputed that the GOC itself (i.e. the government in the "narrow sense") was not a provider of the goods in question, the USDOC treated entities owned and/or controlled by the GOC "as 'government' providers when concluding that the 'government's' role in the market was 'predominant'".<sup>49</sup>

2.2. According to China, in equating SOEs with "government" providers, the USDOC expressly relied in some cases on its characterization of SOEs as "public bodies", whereas in others it treated SOEs as "government" providers without explicitly identifying the basis for doing so. China emphasizes that "[i]n no case did the USDOC base its conclusion that SOEs were 'government' providers on the legal standard established in *US – Anti-Dumping and Countervailing Duties (China)* for determining whether a government-owned entity is a 'public body'".<sup>50</sup>

2.3. With respect to the term "government" in Articles 1.1(a)(1) and 14(d) of the SCM Agreement, China argues that the Panel erred in concluding that the legal standard for determining whether an entity is a "government" provider for purposes of the financial contribution inquiry under Article 1.1 does not also apply when evaluating the same question in respect of the distortion inquiry under Article 14(d).<sup>51</sup> China notes that the term "government" is defined in Article 1.1(a)(1) to mean "a government or any public body within the territory of a Member".

<sup>47</sup> WT/DS437/9.

<sup>48</sup> China's appellant's submission, para. 7.

<sup>49</sup> China's appellant's submission, para. 9.

<sup>50</sup> China's appellant's submission, para. 10.

<sup>51</sup> China's appellant's submission, heading II.B, p. 5.

China recalls that the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* establishes that the architecture of Article 1.1 "distinguishes between '[t]wo principal categories of entities ... those that are "governmental" in the sense of Article 1.1(a)(1), "a government or any public body" ... and "private body"'.<sup>52</sup> According to China, it follows from the architecture of Article 1.1 that any entity that is neither the government in the "narrow sense" nor a public body is, by definition, a private body.<sup>53</sup>

2.4. China submits that its position that a single definition of government should apply throughout the SCM Agreement is supported by the Appellate Body report in *US – Softwood Lumber IV*, where the Appellate Body held that it is possible to resort to alternative benchmarks under Article 14(d) where "the government's role *in providing the financial contribution* is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular".<sup>54</sup> In China's view, the Appellate Body identified the potential cause of "distortion" under Article 14(d) as the government's role in providing the "financial contribution". Thus, the "government" that provides the financial contribution and the "government" whose predominant role in the market may distort private prices are "one and the same".<sup>55</sup> For this reason, entities that are not part of the government in the "narrow sense" can be deemed "government" providers for purposes of the distortion inquiry only if they are properly found to be public bodies within the meaning of Article 1.1(a)(1). In the absence of such a finding, argues China, they cannot be deemed to be "government" providers when evaluating government predominance, nor can the prices at which they sell goods be deemed "government" prices capable of causing distortion for purposes of Article 14(d).

2.5. Moreover, China asserts that the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* support the view that government ownership and control *alone* are *insufficient* to conclude that the provision of goods by an SOE is the conduct of a government supplier for purposes of *both* the financial contribution analysis under Article 1.1(a)(1) and the distortion inquiry under Article 14(d).<sup>56</sup> In China's view, this is the only interpretation consistent with the fact that the SCM Agreement contains a single definition of "government", and with the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Softwood Lumber IV*.

2.6. China argues that the Panel rejected China's interpretative arguments, despite failing to address many of them. China adds that the affirmative rationales that the Panel offered for rejecting China's interpretation do not "withstand scrutiny".<sup>57</sup> China observes that the Panel began by addressing a question that was neither the focus of China's claims nor the central question before the Panel, namely, whether "the only circumstance under which an investigating authority can resort to an external benchmark is when the government's role as the provider of the financial contribution is so predominant that it distorts private prices in the market."<sup>58</sup> According to China, the actual question before the Panel was "whether in circumstances where an investigating authority *does rely* on the government's predominant role in the market as the basis for its resort to an alternative benchmark, must it apply the same legal standard for determining whether entities are 'government' providers that applies under Article 1.1(a)(1) of the SCM Agreement?"<sup>59</sup> For China, the answer to this question bears no relationship to the fact that an investigating authority might cite circumstances *other than* government predominance as a basis for a distortion finding. Therefore, China submits that the potential that factors *other than* government predominance might justify the resort to alternative benchmarks does not undermine the rationale supporting the proposition that there must be a single legal standard for identifying the

<sup>52</sup> China's appellant's submission, para. 19 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284).

<sup>53</sup> China's appellant's submission, para. 20 (referring to Panel Report, *US – Export Restraints*, para. 8.49).

<sup>54</sup> China's appellant's submission, para. 21 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 93). (emphasis added by China; additional fn text omitted)

<sup>55</sup> China's appellant's submission, para. 22.

<sup>56</sup> China's appellant's submission, para. 23 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 346).

<sup>57</sup> China's appellant's submission, para. 27.

<sup>58</sup> China's appellant's submission, para. 28 (quoting Panel Report, para. 7.189).

<sup>59</sup> China's appellant's submission, para. 31. (emphasis original)



"government" under Article 1.1(a)(1) and under Article 14(d) of the SCM Agreement. Furthermore, China argues that the Panel erred in rejecting the question of legal interpretation that China raised in this case on the basis of the approach taken by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>60</sup> China argues that the issue of whether or not SOEs are public bodies (and thus government) for purposes of the distortion inquiry under Article 14(d) was not properly before the Appellate Body in that dispute. Rather, China's claim under Article 14(d) in that dispute related to "whether record evidence that the government was the predominant supplier of a good [could] be sufficient, on its own, to establish market distortion".<sup>61</sup> Thus, the interpretative issue raised by China in these proceedings – whether the same standard for determining whether an entity is a "government" supplier must apply to both the financial contribution and the distortion inquiries – was not presented in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body therefore did not address this issue, "even in passing, much less decide it".<sup>62</sup>

2.7. China adds that the acceptance of the Panel's reasoning would raise "significant systemic concerns"<sup>63</sup> for WTO dispute settlement. Indeed, in concluding that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body implicitly resolved a legal question that was not before it, "the Panel in effect held that the Appellate Body had exceeded its mandate under Article 17.6 of the DSU to address issues of law covered in that panel report, and legal interpretations developed by the panel in that dispute."<sup>64</sup>

2.8. China submits that, having prevailed before the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* on the question of the proper interpretation of the term "public body", China decided in this dispute to pursue the logical implications of that ruling for purposes of the distortion inquiry under Article 14(d). China posits that, if it is inconsistent with Article 1.1(a)(1) for the USDOC to rely exclusively on government ownership and control to conclude that the provision of goods by an SOE is a financial contribution by a public body, then it must be inconsistent with Article 14(d) to rely on those same grounds to conclude that the provision of goods by an SOE is the conduct of "government" for purposes of the distortion inquiry.

2.9. Moreover, China asserts that the legal interpretation of Article 14(d) adopted by the Panel would lead to "absurd results".<sup>65</sup> Under the Panel's interpretation, an entity properly found to be a "private body" under Article 1.1(a)(1) when providing goods, could nonetheless simultaneously be deemed a "government" provider when engaged in the same conduct for purposes of the distortion analysis under Article 14(d).

2.10. China adds that this very situation actually occurs in the present dispute. On the one hand, in the 12 countervailing duty investigations at issue<sup>66</sup>, the Panel found that the United States acted inconsistently with Article 1.1(a)(1) when the USDOC found that SOEs are "public bodies" based solely on the grounds that these enterprises are (majority) owned, or otherwise controlled, by the GOC. On the other hand, for purposes of the distortion inquiry under Article 14(d), the Panel considered that it was entirely proper for the USDOC to treat these same SOEs as "government" providers. China argues that, contrary to the Panel's approach, if government ownership and control alone are an insufficient basis on which to deem the provision of goods by an SOE to be "governmental" conduct for purposes of the financial contribution inquiry, it likewise should be an insufficient basis on which to consider the provision of goods by an SOE to be "governmental" conduct for purposes of a distortion inquiry. Reaching the opposite conclusion would mean that there is something inherent in the distortion inquiry that justifies treating the same attributes of the entity (i.e. government ownership and control) differently in the context of the financial contribution and price distortion inquiries. China contends that no such distinction between the two inquiries exists.

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<sup>60</sup> China's appellant's submission, para. 38 (referring to Panel Report, paras. 7.194-7.196).

<sup>61</sup> China's appellant's submission, para. 42 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.38).

<sup>62</sup> China's appellant's submission, para. 45.

<sup>63</sup> China's appellant's submission, para. 48.

<sup>64</sup> China's appellant's submission, para. 48.

<sup>65</sup> China's appellant's submission, para. 49.

<sup>66</sup> *Supra*, fn 12.

2.11. China further argues that, once the term "government" for purposes of a distortion inquiry is divorced from the definition set forth in Article 1.1(a)(1), as it is under the Panel's interpretation, "an investigating authority is under no obligation to conform its definition of 'government' provider to any norm whatsoever."<sup>67</sup> Indeed, "there [would] be nothing to prevent the USDOC or any other investigating authority from choosing an entirely different standard for determining which entities can be deemed to be 'government' providers for purposes of a distortion inquiry."<sup>68</sup> China argues that this is an "untenable outcome" that can only be avoided by reversing the Panel and accepting China's interpretation that there is a single legal standard for defining "government" under Article 1.1(a)(1) and under Article 14(d) of the SCM Agreement.<sup>69</sup>

#### 2.1.1.2 Article 11 of the DSU

2.12. China argues that the Panel acted inconsistently with Article 11 of the DSU in finding that China had failed to establish the "factual premise" of its claims, that is, that the USDOC actually treated SOEs as public bodies and thus as part of the government in the collective sense in the context of the benefit analysis in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations.<sup>70</sup>

2.13. China submits that it had established a *prima facie* case of inconsistency, which, under a proper interpretation of Article 14(d) of the SCM Agreement, required establishing that: (i) the USDOC's price distortion findings were predicated on its equation of SOEs with government; and (ii) the USDOC's equation of SOEs with government was not made in accordance with the legal standard articulated in *US – Anti-Dumping and Countervailing Duties (China)*.

2.14. China adds that, given the Panel's acknowledgement that China had brought 12 separate "as applied" claims, the Panel should have concluded that China had established a *prima facie* case of inconsistency under the correct legal interpretation of Article 14(d). Moreover, China argues that the Panel's finding seems to be predicated on the Panel's view that, "because ... China had not established the 'factual premise' of its claim for *each and every* one of the investigations at issue *in the aggregate*, it was appropriate to reject China's as applied claims in respect of individual investigations where China had, by the Panel's own analysis, established the factual premise for its claims."<sup>71</sup> China emphasizes that the Panel's internal inconsistency is "at odds" with the Panel's duties under Article 11 of the DSU.<sup>72</sup>

2.15. China adds that the Panel's conclusion that China had failed to establish the factual premise for each of its "as applied" claims is directly contradicted by the Panel's own intermediate factual findings in respect of the OCTG and Solar Panels investigations. In particular, the Panel had found that, "in a few cases", the USDOC's findings of a predominant role of the government in the relevant market referred to the SOEs as "public bodies".<sup>73</sup> These "few cases", China notes, which include the OCTG and Solar Panels investigations, "were thus ones in which the evidence before the Panel *did* 'support China's assertion'".<sup>74</sup>

2.16. With respect to the benefit analysis in the OCTG and Solar Panels investigations, China notes that there was a sufficient basis for the Panel to find that China had established the factual premise of its claims, given that it was clear to the Panel that the USDOC had equated SOEs with government, and that it did so on the basis of the "unlawful" "public body" test based on ownership/control that was rejected by the Appellate Body.<sup>75</sup> China adds that, in the light of the undisputed evidence set out in the 2009 OCTG Issues and Decision Memorandum<sup>76</sup> and 2012 Solar

<sup>67</sup> China's appellant's submission, para. 56.

<sup>68</sup> China's appellant's submission, para. 55.

<sup>69</sup> China's appellant's submission, para. 56.

<sup>70</sup> China's appellant's submission, para. 61.

<sup>71</sup> China's appellant's submission, para. 67. (emphasis original)

<sup>72</sup> China's appellant's submission, para. 68.

<sup>73</sup> China's appellant's submission, para. 65 (quoting Panel Report, para. 7.180).

<sup>74</sup> China's appellant's submission, para. 66 (quoting Panel Report, para. 7.180). (emphasis original)

<sup>75</sup> China's appellant's submission, para. 72 (referring to Panel Report, paras. 7.180-7.184). See also paras. 74-75 and 77-78.

<sup>76</sup> China's appellant's submission, para. 74 (quoting Panel Report, para. 7.182, in turn quoting 2009 OCTG Issues and Decision Memorandum (Panel Exhibit CHI-45), p. 14).

Panels Preliminary Affirmative CVD Determination<sup>77</sup>, and in the light of the Panel's own contradictory findings that China had established the factual premise of its claim with respect to the benefit analysis in the OCTG and Solar Panels investigations, the Panel failed to make an objective assessment of the matter before it, in violation of Article 11 of the DSU.<sup>78</sup>

2.17. With respect to the benefit analysis in the Pressure Pipe and Line Pipe investigations, China argues that the Panel did not individually address whether China had established the factual premise of its claims. China observes that the Panel's only relevant finding regarding the benefit analysis in the Pressure Pipe investigation was that "it was a determination 'based on the market share of government-owned/controlled firms in domestic production alone'."<sup>79</sup> Regarding the benefit analysis in the Line Pipe investigation, the Panel's only relevant finding was that "it was a determination based on 'adverse facts available'."<sup>80</sup> China considers that the Panel's analyses are "at odds" with its obligation under Article 11 of the DSU, and in particular, with the requirement to consider each of China's "as applied" claims separately, and to provide "reasoned and adequate explanations" for its findings.<sup>81</sup>

2.18. China further argues that the Panel's finding that China had failed to establish the factual premise of its claim with respect to the Pressure Pipe and Line Pipe investigations was based on the fact that the USDOC did not *explicitly* equate SOEs with public bodies in its benefit analysis. According to China, under the Panel's approach, the *only* circumstance in which China could have established the factual premise of its claims would have been a scenario where the USDOC had *explicitly* characterized SOEs as "authorities" (i.e. public bodies).<sup>82</sup> China maintains that there are two fundamental problems with the Panel's approach. First, it is based on the incorrect premise that the USDOC could properly have equated SOEs with government without first finding that those SOEs are "public bodies" under the legal standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. Second, the Panel's approach ignores the fact that China could make a *prima facie* showing of inconsistency under a proper interpretation of Article 14(d) regardless of whether the USDOC *explicitly* referred to SOEs as "public bodies" in the investigations at issue. China considers that it could make this showing by demonstrating that "the USDOC equated SOEs with government 'implicitly based on its interpretation that entities majority-owned and controlled by the government are public bodies'."<sup>83</sup>

2.19. Furthermore, China argues that it presented a sufficient evidentiary basis to establish a *prima facie* case with respect to the benefit analysis in the Pressure Pipe and Line Pipe investigations. Regarding the Pressure Pipe investigation, China submits that the evidence on the record shows that the USDOC's finding that the relevant market was distorted by "the government's overwhelming involvement" in that market was predicated *exclusively* on the market share of government-controlled firms.<sup>84</sup> With respect to the Line Pipe investigation, China argues that the Issues and Decision Memorandum shows that the USDOC's finding that the market was distorted by "the government's overwhelming involvement" in that market was predicated exclusively on its finding that "government-owned producers" manufactured all the relevant product in China during the period of investigation.<sup>85</sup> As SOEs are not the government in the "narrow sense", the USDOC could only have lawfully equated SOEs with government in evaluating market distortion in both determinations if it did so on the basis of the legal standard articulated in *US – Anti-Dumping and Countervailing Duties (China)*. According to China, it is undisputed that the USDOC did not do so.

<sup>77</sup> China's appellant's submission, para. 77 (quoting Panel Report, para. 7.183, in turn quoting 2012 Solar Panels Preliminary Affirmative CVD Determination (Panel Exhibit CHI-105), pp. 17448-17449).

<sup>78</sup> China's appellant's submission, paras. 76 and 79 (referring to, respectively, Panel Report, paras. 7.182 and 7.183).

<sup>79</sup> China's appellant's submission, para. 80 (quoting Panel Report, para. 7.186, in turn referring to, *inter alia*, 2009 Pressure Pipe Issues and Decision Memorandum (Panel Exhibit CHI-12)).

<sup>80</sup> China's appellant's submission, para. 80 (quoting Panel Report, para. 7.186, in turn referring to, *inter alia*, 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19)).

<sup>81</sup> China's appellant's submission, para. 81. (fn omitted)

<sup>82</sup> China's appellant's submission, paras. 82 and 83 (referring to Panel Report, para. 7.184).

<sup>83</sup> China's appellant's submission, para. 86 (quoting Panel Report, para. 7.179). (additional fn text omitted)

<sup>84</sup> China's appellant's submission, para. 91 (quoting 2009 Pressure Pipe Issues and Decision Memorandum (Panel Exhibit CHI-12), p. 19; and referring to Panel Report, para. 7.186).

<sup>85</sup> China's appellant's submission, paras. 97 and 98 (quoting 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19), pp. 18-19).

2.20. For the foregoing reasons, China argues that the Panel's finding that China had failed to establish the factual premise of its claims in respect of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe determinations reflects a failure to make an objective assessment of the matter before it, in violation of Article 11 of the DSU.

#### **2.1.1.3 Application of Article 14(d)**

2.21. China argues that the Panel erred in its application of Article 14(d) of the SCM Agreement to the 12 USDOC determinations<sup>86</sup> at issue in this dispute. In particular, China asserts that the Panel's reasoning led it erroneously to apply to all 12 determinations the reasoning that the Appellate Body applied in upholding the USDOC's distortion findings in *US – Anti-Dumping and Countervailing Duties (China)*. In China's view, the Appellate Body's reasoning in that dispute "cannot provide a lawful basis" for the Panel's conclusion that China had failed to establish that the USDOC's determinations in the 12 investigations under challenge are inconsistent with Articles 14(d) and 1.1(b) of the SCM Agreement.<sup>87</sup> For this reason, if the Appellate Body were to agree with China's legal interpretation of Article 14(d), then China requests the Appellate Body to reverse the Panel's finding that the USDOC did not act inconsistently with Article 14(d) of the SCM Agreement in rejecting private prices in China as potential benchmarks in the determinations at issue on the grounds that such prices were distorted, as well as the Panel's finding that China's claims rest on an erroneous interpretation of Article 14(d).

2.22. China submits that the Panel's ultimate finding that China had failed to establish that the USDOC acted inconsistently with Article 14(d) and Article 1.1(b) of the SCM Agreement in respect of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations had two predicates: one legal and one factual. According to China, the Panel erred with respect to both predicates. First, the Panel's finding upholding the USDOC's rejection of private prices in China as potential benchmarks in respect of the 12 determinations under challenge was predicated on the Panel's erroneous interpretation of Article 14(d). Second, the Panel also erred in concluding that China had failed to establish the factual premise of its claims in respect of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations.

2.23. For these reasons, China requests the Appellate Body to reverse the Panel's ultimate finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Articles 14(d) and 1.1(b) of the SCM Agreement in respect of the benefit analysis in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations.

#### **2.1.1.4 Completion of the legal analysis**

2.24. China requests the Appellate Body to complete the legal analysis and find that the USDOC's determinations that SOEs provided inputs for less than adequate remuneration in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations are inconsistent "as applied" with Articles 14(d) and 1.1(b) of the SCM Agreement. In particular, China argues that the record evidence before the Panel in these four investigations is sufficient to establish a *prima facie* case of inconsistency with Article 14(d) in each case, which has not been rebutted by the United States.

2.25. According to China, the four benefit determinations referred to above conclusively establish that the USDOC's distortion findings in those cases were predicated exclusively on the conclusion that the "government" played a predominant role in the market as a supplier of the goods in question, and on the equation of SOEs with government on a basis inconsistent with the standard set forth in the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*.

2.26. China maintains that the four determinations at issue are not among the "several determinations" in which, according to the United States, the USDOC also cited the low level of imports and/or the existence of certain export restraints in support of its distortion findings.<sup>88</sup> China observes that this is not relevant to the four determinations under challenge, because it is undisputed that the USDOC did not cite these or any other facts in support of its distortion

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<sup>86</sup> *Supra*, fn 12.

<sup>87</sup> China's appellant's submission, para. 59.

<sup>88</sup> China's appellant's submission, para. 110 (referring to United States' first written submission to the Panel, paras. 164 and 165; and second written submission to the Panel, paras. 68 and 69).

findings. Moreover, China disagrees with the United States' argument before the Panel that, in the instances where the USDOC relied on facts available to find that SOEs played a predominant role in the market, those findings were consistent with Article 12.7 of the SCM Agreement, and consequently not inconsistent with Articles 1.1(b) and 14(d). In China's view, the potential that a particular finding may be consistent with Article 12.7 "does not ... insulate it from a finding of inconsistency in respect of another provision of the SCM Agreement".<sup>89</sup>

2.27. For the foregoing reasons, China requests the Appellate Body to complete the legal analysis and find that the USDOC's benefit determinations in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations are inconsistent with Article 14(d) and Article 1.1(b) of the SCM Agreement.

### 2.1.2 Article 12.7 of the SCM Agreement – Facts available

2.28. On appeal, China claims that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its assessment of China's "as applied" claims under Article 12.7 of the SCM Agreement. In particular, China submits that the Panel failed to apply the correct standard of review "to a *single one* of the 42 challenged instances that were within [its] terms of reference".<sup>90</sup> China maintains that the Panel, instead, engaged in a "cursory analysis" that was inconsistent with its obligations under Article 11 of the DSU in several respects.<sup>91</sup>

2.29. China explains that its appeal of the Panel's findings under Article 12.7 of the SCM Agreement does not present an issue of legal interpretation, because the Panel and the parties agreed that "facts available" determinations must be based on "facts" "that are 'available' on the record of the relevant investigation".<sup>92</sup> Referring to the Appellate Body report in *Mexico Anti-Dumping Measures on Rice*, China submits that "an investigating authority's discretion in the use of 'facts available' is not unlimited"<sup>93</sup>, as Article 12.7 permits an investigating authority to "fill in gaps" by using facts that are available on the record only if the information submitted by an interested party is incomplete.<sup>94</sup> Furthermore, the Appellate Body concluded that "'Article 6.8 of the *Anti-Dumping Agreement*, Annex II thereto, and Article 12.7 of the *SCM Agreement*' all require the 'reasoned and selective use of the facts available'".<sup>95</sup> Therefore, in China's view, when an investigating authority uses a finding of non-cooperation as an "excuse" to resort to "adverse inferences" or "assumptions", without any reference to the record evidence, its conclusions are "facially inconsistent" with the "reasoned and selective use of the facts available".<sup>96</sup>

2.30. Furthermore, China agrees with the standard of review identified by the Panel, namely, that "a panel should examine whether the investigating authority's determination is 'reasoned and adequate', based on the information contained in the record and the explanations given by the authority in its published report."<sup>97</sup> China also agrees with the Panel's statement that, in "[a]pplying this standard of review, the task of this Panel is 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."<sup>98</sup> Referring to the Appellate Body's observations in *US – Softwood Lumber VI (Article 21.5 – Canada)*, China submits that a panel reviewing an investigating authority's findings must examine whether the investigating authority's conclusions are reasoned and adequate. Moreover, the adequacy of an investigating authority's determination will depend in part on whether "the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive

<sup>89</sup> China's appellant's submission, para. 112.

<sup>90</sup> China's appellant's submission, para. 191. (emphasis original)

<sup>91</sup> China's appellant's submission, para. 191.

<sup>92</sup> China's appellant's submission, para. 189 (referring to the United States' first written submission to the Panel, para. 326; and Panel Report, para. 7.309).

<sup>93</sup> China's appellant's submission, para. 197 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294).

<sup>94</sup> China's appellant's submission, para. 198 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291).

<sup>95</sup> China's appellant's submission, para. 200 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 297).

<sup>96</sup> China's appellant's submission, para. 200. (fns omitted)

<sup>97</sup> China's appellant's submission, para. 220 (quoting Panel Report, para. 7.310 (fn omitted)).

<sup>98</sup> China's appellant's submission, para. 220 (quoting Panel Report, para. 7.311).

evidence before it to support the inferences made and conclusions reached by it."<sup>99</sup> China also recalls the Appellate Body's observation in *US – Countervailing Duty Investigation on DRAMS* that "an investigating authority must provide a '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', and that such a reasoned and adequate explanation 'should be discernible from the published determination itself.'"<sup>100</sup> China recalls the United States' argument before the Panel that "the sufficiency of an investigating authority's explanations is dealt with under the procedural obligations under Article 22 of the SCM Agreement, and not Article 12.7."<sup>101</sup> China asserts that the United States provided no support for the proposition that a "reasoned and adequate" explanation is not required to assess whether an investigating authority has complied with Article 12.7 of the SCM Agreement. Furthermore, China refers to the panel report in *China – Broiler Products*, where the panel examined the United States' claim that China acted inconsistently with Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement in its "facts available" determinations. China recalls the panel's observations in that dispute that "'facts available' determinations under both Article 6.8 and Article 12.7 'must have a logical relationship with the facts on the record and be a result of an evaluative, comparative assessment of those facts.'"<sup>102</sup> Based on the panel's statements in *China – Broiler Products*, and the United States' position and the Panel's findings in the present dispute, China submits that the "most fundamental" principle under Article 12.7 "is that an investigating authority resorting to 'facts available' under Article 12.7 must 'apply facts that are 'available'".<sup>103</sup>

2.31. Therefore, China argues that the Panel should have determined whether, with respect to each of the 42 challenged "instances", "the USDOC had in fact provided the necessary 'reasoned and adequate' explanation that would allow the Panel to assess whether the determination was based on facts."<sup>104</sup> China submits that the Panel should have engaged in an "in-depth examination" of the USDOC's determinations, such that the Panel was not "simply *accept[ing]* the conclusions of the competent authorities".<sup>105</sup> China argues that, instead of examining each of the 42 instances 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. In China's view, the Panel "selectively used" the few instances in which it disagreed with China's characterization of a particular determination in order to reject all of China's claims, including in those instances where the Panel did not take issue with China's position.<sup>106</sup>

2.32. China notes the Panel's findings that, in one of the challenged instances, the USDOC stated that it was making an "adverse finding", while, in six other instances, the USDOC referred only to the application of "adverse" facts available "without any reference to 'assumptions', 'adverse inferences' or 'similar terminology'".<sup>107</sup> China argues on this basis that, in considering China's argument regarding the terminology used in the conclusions of the USDOC's "adverse" facts available determinations, the Panel only looked at the seven instances where it disagreed with China, but did not address the "majority of the challenged instances" where it agreed with China regarding the nature of the terminology used.<sup>108</sup> Similarly, in concluding that China had not established that each reference to "adverse inferences" in the challenged determinations in fact equated to an assumption, the Panel "summarily dismissed" China's argument without suggesting

<sup>99</sup> China's appellant's submission, para. 202 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>100</sup> China's appellant's submission, para. 203 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186 (fn omitted)).

<sup>101</sup> China's appellant's submission, para. 204 (quoting United States' oral statement at the second Panel meeting, para. 69).

<sup>102</sup> China's appellant's submission, para. 205 (quoting Panel Report, *China – Broiler Products*, para. 7.357).

<sup>103</sup> China's appellant's submission, para. 208 (referring to United States' first written submission to the Panel, para. 326; and Panel Report, para. 7.309).

<sup>104</sup> China's appellant's submission, para. 221.

<sup>105</sup> China's appellant's submission, para. 221 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, in turn quoting Appellate Body Report, *US – Lamb*, para. 106 (emphasis original)).

<sup>106</sup> China's appellant's submission, para. 222.

<sup>107</sup> China's appellant's submission, para. 223 (quoting Panel Report, para. 7.318 (emphasis and fn omitted)).

<sup>108</sup> China's appellant's submission, para. 223 (referring to Panel Report, para. 7.318).

that it believed that the USDOC had identified, in any instance, a single fact that was available on the record to support the conclusion that it had reached.<sup>109</sup> Moreover, China asserts that the Panel failed to address those instances where the USDOC did, in fact, explicitly rely on "assumptions".<sup>110</sup> China also takes issue with the Panel's "casual acceptance" of the USDOC's "unsubstantiated references" regarding the use of the term "facts available" in its determinations as suggesting that the determinations were, in fact, based on facts.<sup>111</sup> According to China, by doing so, the Panel failed to carry out the "in-depth examination" it was required to conduct in order to determine whether the USDOC had provided a sufficient explanation of how it treated the facts and evidence on the record.<sup>112</sup>

2.33. In China's view, the USDOC's failure to provide "reasoned and adequate" explanations disclosing the factual basis for each of the challenged instances of the use of "adverse" facts available was "undisputed" before the Panel<sup>113</sup>, and notes that the United States did not respond to China's claims by identifying any factual analysis in the challenged determinations that China had "somehow overlooked".<sup>114</sup> Instead, the United States initially argued that it was China's responsibility to identify what facts the USDOC "should have relied upon in making its determinations".<sup>115</sup> In this respect, China recalls its argument that the United States was "impermissibly trying to shift the investigating authority's burden to China".<sup>116</sup> China further submits that the United States subsequently changed course and "cobbled together", on an *ex post* basis, certain "examples of the record evidence supporting the determinations" at issue on which, in the United States' view, "the USDOC *could* have relied".<sup>117</sup>

2.34. China takes issue with the Panel's observation that China failed to refer to the analysis carried out by the USDOC, or to address the specific facts of each of the challenged investigations.<sup>118</sup> China explains that it did not make reference to the analysis carried out by the USDOC for the "simple reason" that there was no analysis to cite.<sup>119</sup> Insofar as there was some analysis carried out by the USDOC elsewhere than in the challenged "adverse" facts available determinations, China submits that the Panel did not "bother[]" to identify what those analyses were or where they could be found".<sup>120</sup> To the extent the Panel was suggesting that "the determinations 'go well beyond the conclusions cited by China' because of the 'examples of record evidence supporting the determinations' at issue provided by the United States in Exhibit US-94"<sup>121</sup>, China alleges that the Panel acted inconsistently with Article 11 of the DSU by relying on evidence offered by the United States on an *ex post* basis in order to justify the USDOC's determinations.<sup>122</sup> China argues that "[t]here is no indication that the USDOC actually relied on any of the 'examples of record evidence' provided by the United States in any of the challenged determinations".<sup>123</sup> Moreover, China argues that the Panel's statement that China failed to address the specific facts of each challenged investigation suggests that the Panel agreed with the United States "that it was somehow China's burden to review record evidence that was *not cited by the USDOC in its determinations* in order to locate any potentially relevant evidence and then explain why that evidence did not support the USDOC's conclusions."<sup>124</sup>

<sup>109</sup> China's appellant's submission, para. 224.

<sup>110</sup> China's appellant's submission, para. 224. (fn omitted)

<sup>111</sup> China's appellant's submission, para. 227.

<sup>112</sup> China's appellant's submission, para. 227 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>113</sup> China's appellant's submission, heading IV.D.1, p. 62.

<sup>114</sup> China's appellant's submission, para. 212.

<sup>115</sup> China's appellant's submission, para. 213 (referring to United States' first written submission to the Panel, para. 339). (emphasis original)

<sup>116</sup> China's appellant's submission, para. 213.

<sup>117</sup> China's appellant's submission, para. 215 (referring to United States' oral statement at the second Panel meeting, paras. 64-68; and second written submission to the Panel, para. 148; and to Panel Exhibit USA-94). (emphasis original)

<sup>118</sup> China's appellant's submission, paras. 228-233 (referring to Panel Report, paras. 7.316 and 7.323).

<sup>119</sup> China's appellant's submission, para. 228.

<sup>120</sup> China's appellant's submission, para. 228.

<sup>121</sup> China's appellant's submission, para. 229 (referring to United States' second written submission to the Panel, para. 148).

<sup>122</sup> China's appellant's submission, paras. 228 and 229 (referring to Panel Report, para. 7.316).

<sup>123</sup> China's appellant's submission, para. 229.

<sup>124</sup> China's appellant's submission, para. 233. (emphasis original)

2.35. For these reasons, China requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU and to reverse the Panel's finding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record.

2.36. China further requests the Appellate Body to complete the legal analysis and find that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement in each of the 42 challenged instances. Noting that the Panel made no factual findings that would assist the Appellate Body in its completion exercise, China argues that the question is whether there are sufficient undisputed facts on the Panel record for the Appellate Body to do so. According to China, in circumstances where the investigating authority's lack of compliance with a provision of a WTO agreement is "evident" on the face of the investigating authority's determinations, "then those determinations provide more than sufficient undisputed facts on the record to permit the Appellate Body to complete the analysis."<sup>125</sup> China considers this to be the case in the present dispute, given that the United States failed to identify a single instance where the USDOC provided a "reasoned and adequate" explanation for its "adverse" facts available conclusions, and given that the United States took the position that the USDOC was not required to "explicitly cite" facts in its determinations.<sup>126</sup>

2.37. In China's view, "it is evident on the face of each of the challenged instances" that "the USDOC failed to provide an explanation that ... was 'sufficient to assess whether the USDOC based its adverse facts available determinations on facts'."<sup>127</sup> With respect to Instances 1, 3, 4, 10, 13, 16, 21, 22, 28, 31, 35, 36, and 39, China recalls the excerpts from the USDOC's issues and decisions memoranda and preliminary determinations that it identified in Panel Exhibits CHI-2 and CHI-125.<sup>128</sup> China submits that the citations it provided were "sufficient to establish that the USDOC failed to properly apply facts available under Article 12.7 ... because there was no explanation on the face of the determination[s] 'sufficient to assess whether the USDOC based its adverse facts available determinations on facts'."<sup>129</sup> China also notes that the United States did not include these 13 instances in Exhibit USA-94, and "made no other attempt to rebut China's claim".<sup>130</sup>

2.38. With respect to Instances 2, 5, 6, 7, 8, 9, 11, 12, 14, 15, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 34, 37, 38, 40, 41, and 42, China recalls the excerpts from the USDOC's issues and decisions memoranda and preliminary determinations identified by it in Exhibits CHI-2 and CHI-125.<sup>131</sup> China submits that the citations it provided were "sufficient to establish that the USDOC failed to properly apply facts available under Article 12.7 ... because there was no explanation on the face of the determination[s] 'sufficient to assess whether the USDOC based its adverse facts available determinations on facts'."<sup>132</sup> China submits that, although the United States provided certain "Examples of Record Evidence" supporting the USDOC's determinations for these instances in Exhibit USA-94, the record evidence cited by the United States "is not an explanation provided by the USDOC that is 'sufficient to assess whether the USDOC based its adverse facts available determinations on facts'."<sup>133</sup> Thus, in China's view, the United States' *ex post* identification of

<sup>125</sup> China's appellant's submission, para. 241.

<sup>126</sup> China's appellant's submission, para. 241.

<sup>127</sup> China's appellant's submission, para. 242 (quoting Panel Report, para. 7.311).

<sup>128</sup> China's appellant's submission, paras. 245, 254, 258, 287, 301, 315, 339, 343, 372, 386, 405, 409, and 423 (referring to Panel Exhibit CHI-2, comprising a table of citations for China's "adverse" facts available claims; and quoting Panel Exhibit CHI-125, comprising a table of relevant excerpts from the USDOC's "adverse facts available" findings).

<sup>129</sup> China's appellant's submission, paras. 246, 255, 259, 288, 302, 316, 340, 344, 373, 387, 406, 410, and 424 (quoting Panel Report, para. 7.311).

<sup>130</sup> China's appellant's submission, paras. 247, 256, 260, 289, 303, 317, 341, 345, 374, 388, 407, 411, and 425.

<sup>131</sup> China's appellant's submission, paras. 249, 262, 267, 272, 277, 282, 291, 296, 305, 310, 319, 324, 329, 334, 347, 352, 357, 362, 367, 381, 400, 413, 418, 427, 432, and 437 (referring to Panel Exhibit CHI-2; and quoting Panel Exhibit CHI-125).

<sup>132</sup> China's appellant's submission, paras. 250, 263, 268, 273, 278, 283, 292, 297, 306, 311, 320, 325, 330, 335, 348, 353, 358, 363, 368, 382, 401, 414, 419, 428, 433, and 438 (quoting Panel Report, para. 7.311).

<sup>133</sup> China's appellant's submission, paras. 252, 265, 270, 275, 280, 285, 294, 299, 308, 313, 322, 327, 332, 337, 350, 355, 360, 365, 370, 384, 403, 416, 421, 430, 435, and 440 (quoting Panel Report, para. 7.311).



certain evidence on the record, which may or may not have supported the USDOC's "adverse" facts available determinations had the USDOC actually relied on that evidence, was not sufficient to rebut China's claim that the USDOC failed to provide the "reasonable and adequate" explanation that was required.<sup>134</sup>

2.39. With respect to Instance 29, China recalls the excerpts from the USDOC's issues and decision memorandum in the Print Graphics investigation.<sup>135</sup> China submits that the citations it provided were "sufficient to establish that the USDOC failed to properly apply facts available under Article 12.7 ... because there was no explanation on the face of the determination 'sufficient to assess whether the USDOC based its adverse facts available determination[] on facts'."<sup>136</sup> China submits that this "appears to be the only 'instance' in Exhibit US-94 where the 'Example[] of Record Evidence Supporting Determination' provided by the United States was actually referenced by the USDOC in its [issues and decision memorandum], at least in part."<sup>137</sup> However, China maintains that the particular exhibit had been submitted by the petitioners to the USDOC in order to respond to an argument made by China, and that "[t]here is no indication that the USDOC was relying on this, or any other information submitted by petitioners, as 'facts' that were 'available'."<sup>138</sup>

2.40. With respect to Instances 32 and 33, China recalls the excerpts from the USDOC's issues and decisions memoranda and preliminary determinations identified by it in Exhibits CHI-2 and CHI-125.<sup>139</sup> China submits that the citations it provided were "sufficient to establish that the USDOC failed to properly apply facts available under Article 12.7 ... because there was no explanation on the face of the determination[s] 'sufficient to assess whether the USDOC based its adverse facts available determinations on facts'."<sup>140</sup> China argues that the United States' references in Exhibit USA-94 with respect to Instances 32 and 33 are not examples of record evidence supporting the USDOC's determinations, because they are not record evidence. China explains with regard to Instance 32 that the United States was referring to certain findings in the Line Pipe and Seamless Pipe investigations, and that those findings were themselves based on "adverse" facts available and subject to challenge in this dispute.<sup>141</sup> Analogous to Instance 32, the United States' references in Instance 33 are to findings in other investigations, namely, Line Pipe and Wire Strand. Thus, China recalls that the finding in the Line Pipe investigation, cited by the United States, was itself based on "adverse" facts available and is subject to challenge in this dispute.<sup>142</sup> China adds that the finding in the Wire Strand investigation was not based on "adverse" facts available supporting the USDOC conclusions at issue in Instance 33.

2.41. Based on the discussion of each of the instances it identified, China submits that its *prima facie* case that "the USDOC's 'adverse facts available' determinations were inconsistent with Article 12.7 stands unrebutted".<sup>143</sup> On this basis, China requests the Appellate Body to find that all of the USDOC's "adverse" facts available determinations are inconsistent with Article 12.7 of the SCM Agreement.

### 2.1.3 Article 2.1 of the SCM Agreement – Specificity

2.42. Regarding the Panel's findings on specificity under Article 2 of the SCM Agreement, China challenges three aspects of the Panel's analysis with respect to the interpretation and application of Article 2.1 – namely, the Panel's findings that: (i) the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c)<sup>144</sup>; (ii) the USDOC sufficiently

<sup>134</sup> China's appellant's submission, paras. 252, 265, 270, 275, 280, 285, 294, 299, 308, 313, 322, 327, 332, 337, 350, 355, 360, 365, 370, 384, 403, 416, 421, 430, 435, and 440.

<sup>135</sup> China's appellant's submission, para. 376 (referring to Panel Exhibit CHI-2; and quoting Panel Exhibit CHI-125).

<sup>136</sup> China's appellant's submission, para. 377 (quoting Panel Report, para. 7.311).

<sup>137</sup> China's appellant's submission, para. 379.

<sup>138</sup> China's appellant's submission, para. 379.

<sup>139</sup> China's appellant's submission, paras. 390 and 395 (referring to Panel Exhibit CHI-2; and quoting Panel Exhibit CHI-125).

<sup>140</sup> China's appellant's submission, paras. 391 and 396 (quoting Panel Report, para. 7.311).

<sup>141</sup> China's appellant's submission, para. 393 (referring to Instances 4 and 23).

<sup>142</sup> China's appellant's submission, para. 398 (referring to Instance 4).

<sup>143</sup> China's appellant's submission, para. 443.

<sup>144</sup> China's appellant's submission, para. 156 (referring to Panel Report, paras. 7.231, 7.258, and 8.1.v).

identified the subsidy programmes as required under Article 2.1(c)<sup>145</sup>; and (iii) China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 by not identifying the relevant granting authority.<sup>146</sup> If the Appellate Body were to reverse "any or all" of these findings by the Panel, China requests the Appellate Body to complete the legal analysis and find that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement in respect of 15 input specificity determinations in 12 of the countervailing duty investigations at issue.<sup>147</sup>

### 2.1.3.1 The Panel's interpretation and application of the first sentence of Article 2.1(c)

2.43. China argues that "the Panel erred in finding that 'the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c)'."<sup>148</sup> China argues that, in the present case, the USDOC did not examine the "principles" set forth in subparagraphs (a) and (b) of Article 2.1 of the SCM Agreement, and did not identify an "appearance of non-specificity" prior to its examination of the "other factors" under Article 2.1(c). According to China, the USDOC's consideration of the "other factors" under Article 2.1(c) in the absence of an "appearance of non-specificity" is contrary to the first sentence of that provision, which conditions any examination of these other factors upon an "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b) of Article 2.1 of the SCM Agreement.

2.44. According to China, the ordinary meaning of the first sentence of Article 2.1(c) is clear. The use of the word "if" indicates that the purpose of the first sentence "is to establish a condition to any consideration of the 'other factors' enumerated under Article 2.1(c)".<sup>149</sup> China maintains that, in order to consider the other factors set forth in Article 2.1(c), there must be an appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b). In addition, there must be "reasons to believe that the subsidy may in fact be specific". In China's view, both "elements of this condition" must be satisfied before an investigating authority can "consider" the other factors set forth under Article 2.1(c).<sup>150</sup> China claims that the Appellate Body interpreted the first sentence of Article 2.1 in precisely this manner in *US – Anti-Dumping and Countervailing Duties (China)*<sup>151</sup> and *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*.<sup>152</sup>

2.45. In addition, China contends that the fact that Article 2.1(c) applies only when there is an appearance of non-specificity is supported by the context provided by Article 2.1 as a whole. The "textual" and "logical" relationships among the three subparagraphs of Article 2.1 confirm that Article 2.1(c) is to be applied on the basis of an appearance of non-specificity resulting from the application of subparagraphs (a) and (b).<sup>153</sup> Indeed, the Appellate Body has observed that "subparagraphs (a) through (c) of Article 2.1 establish a set of principles that 'are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle'."<sup>154</sup> Within this framework, Article 2.1(a) establishes certain principles that would support a finding of specificity, whereas Article 2.1(b) establishes certain principles that would support a finding of non-specificity. China argues that the Appellate Body has indicated that any assessment of specificity under subparagraphs (a) and (b) "'should normally look at both' of these factors".<sup>155</sup>

<sup>145</sup> China's appellant's submission, para. 171 (referring to Panel Report, para. 7.243).

<sup>146</sup> China's appellant's submission, para. 178 (referring to Panel Report, para. 7.249).

<sup>147</sup> China's appellant's submission, para. 179. The 12 investigations are: Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels. (See table of USDOC investigations at p. 5 of this Report)

<sup>148</sup> China's appellant's submission, para. 156 (quoting panel Report, paras. 7.231, 7.258, and 8.1.v).

<sup>149</sup> China's appellant's submission, para. 123.

<sup>150</sup> China's appellant's submission, para. 123.

<sup>151</sup> China's appellant's submission, para. 125 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371).

<sup>152</sup> China's appellant's submission, para. 126. China notes that, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body observed that the first sentence of Article 2.1(c) "makes clear that 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". (Ibid. (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 876))

<sup>153</sup> China's appellant's submission, para. 131.

<sup>154</sup> China's appellant's submission, para. 132 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366).

<sup>155</sup> China's appellant's submission, para. 132 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 759).

China emphasizes that "subparagraph (c) is the part of the analytical framework established by Article 2.1 that comes *after* the application of subparagraphs (a) and (b)".<sup>156</sup>

2.46. On this basis, China argues that the Panel's interpretation and application of Article 2.1(c) is contrary to its ordinary meaning and context, as well as Appellate Body jurisprudence. China asserts that the two considerations that the Panel discussed in its Report – i.e. its proposed reordering of the first sentence and the Spanish version of the text – do not support the conclusion that Article 2.1(c) can be applied in the absence of an appearance of non-specificity. In China's view, these considerations support the opposite conclusion.

2.47. Regarding the Panel's proposed reordering of the first sentence of Article 2.1(c), China maintains that such reordering is "irrelevant" because, either way, the sentence would have the same meaning.<sup>157</sup> Even if the order of the two dependent clauses were reversed, "there would still be two parts to the condition that must be satisfied: reasons to believe that the subsidy may in fact be specific, and a prior appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)".<sup>158</sup>

2.48. Regarding the Spanish version of the text, China notes that, by consolidating the two dependent clauses of the English text into a single clause, the Spanish text confirms that the two dependent clauses in the English text form a single condition.<sup>159</sup> Moreover, the Spanish text confirms that the drafters did not intend the order of the two dependent clauses in the English text to have any significance. Indeed, the Spanish text "reverses the order of the two-part condition without changing its meaning".<sup>160</sup> Therefore, it is immaterial whether the requirement of an "appearance of non-specificity" comes before or after the requirement of "reasons to believe that the subsidy may in fact be specific". According to China, either way, both parts of the condition must be satisfied.

2.49. Additionally, China submits that the function that the United States attributes to the "notwithstanding" clause at the beginning of Article 2.1(c), which the Panel appears to have endorsed, is a function that "serves no purpose".<sup>161</sup> According to China, the position of the United States before the Panel was that "the purpose of the 'notwithstanding' clause is to indicate that an 'appearance of non-specificity' resulting from the application of subparagraphs (a) and (b) does not *preclude* consideration of the 'other factors' under Article 2.1(c)".<sup>162</sup> According to China, this means that "the United States does not consider the 'notwithstanding' clause to form part of the condition that must be satisfied before any evaluation of the 'other factors' may proceed."<sup>163</sup> In China's view, "[t]his interpretation amounts to giving the 'notwithstanding' clause no meaning at all, an outcome that is inconsistent with the principle of effective treaty interpretation."<sup>164</sup> China

<sup>156</sup> China's appellant's submission, para. 135. (emphasis original)

<sup>157</sup> China's appellant's submission, para. 139.

<sup>158</sup> China's appellant's submission, para. 139.

<sup>159</sup> China argues that:

... the Spanish text dispenses with the two dependent clauses and, instead, structures the first sentence as a single, uninterrupted thought: "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."

(China's appellant's submission, para. 140)

<sup>160</sup> China's appellant's submission, para. 141. China also notes that the use of the Spanish term "*aun cuando*" in Article 2.1(c) "clearly presupposes that an analysis under subparagraphs (a) and (b) has taken place and that this analysis has resulted in an 'appearance of non-specificity'". (Ibid., para. 142)

<sup>161</sup> China's appellant's submission, para. 149.

<sup>162</sup> China's appellant's submission, para. 144. (emphasis original)

<sup>163</sup> China's appellant's submission, para. 144.

<sup>164</sup> China's appellant's submission, para. 149 (referring to Appellate Body Reports, *Korea – Dairy*, para. 80; *US – Section 211 Appropriations Act*, para. 338; *Canada – Dairy*, para. 133; *Argentina – Footwear (EC)*, para. 88; and *US – Gasoline*, p. 23, DSR 1996:I, p. 21).

asserts that "the interpretation adopted by the Panel comes perilously close to rendering superfluous the entire first sentence of Article 2.1(c)."<sup>165</sup>

2.50. China takes issue with the Panel's reliance on the Appellate Body's finding in *US – Anti-Dumping and Countervailing Duties (China)* 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."<sup>166</sup> China argues that the Appellate Body did not mean to suggest that there are circumstances in which a panel or an investigating authority may apply subparagraph (c) in the absence of an appearance of non-specificity under subparagraphs (a) and (b). Rather, the Appellate Body stated that "Article 2.1(c) applies *only when there is an 'appearance' of non-specificity*."<sup>167</sup> In China's view, the Appellate Body clearly understood that the first sentence of Article 2.1(c) must be given effect, and that this sentence requires an "appearance of non-specificity" under subparagraphs (a) and (b) before any evaluation of the "other factors" under subparagraph (c) can be undertaken.

2.51. China further considers that the Panel erroneously concluded that the "unwritten nature" of the alleged input subsidies at issue was a "circumstance" that allowed the USDOC to reach a finding of specificity under Article 2.1(c) in the absence of an appearance of non-specificity under subparagraphs (a) and (b).<sup>168</sup> According to China, there is no support in the text of Article 2.1 or in Appellate Body jurisprudence for this proposition. Nor is there anything in the nature of "unwritten" subsidies that requires them to be examined exclusively under subparagraph (c) of Article 2.1. China asserts that "unwritten" subsidies can be analysed under subparagraphs (a) and (b) based on an examination of the granting authority's conduct in conditioning the eligibility for the subsidies at issue.

2.52. For these reasons, China considers that the Panel erred in finding that the USDOC did not act inconsistently with Article 2.1 of the SCM Agreement by analysing specificity exclusively under Article 2.1(c). China therefore requests the Appellate Body to reverse the Panel's interpretation and its consequential finding that the specificity determinations at issue are consistent with Article 2.1 of the SCM Agreement.

### **2.1.3.2 The Panel's interpretation and application of the term "subsidy programme" in Article 2.1(c)**

2.53. China argues that the Panel also erred in the interpretation and application of the term "subsidy programme" in Article 2.1(c) of the SCM Agreement. China submits that the USDOC's "end use" approach was premised on the "fiction" that each type of input is provided pursuant to its own input-specific subsidy programme.<sup>169</sup> According to China, the USDOC provided no evidentiary basis for the existence, scope, and content of these alleged "programmes".

2.54. China notes that the parties agreed before the Panel that any examination of the first of the "other factors" under Article 2.1(c) – i.e. the "use of a subsidy programme by a limited number of certain enterprises" – must begin with the identification of the relevant subsidy programme.<sup>170</sup> The parties also agreed that the dictionary meaning of the term "subsidy programme" is "a plan or outline of subsidies or a planned series of subsidies".<sup>171</sup> China notes that the Panel agreed with the

<sup>165</sup> China's appellant's submission, para. 150. China argues that, "[i]f the existence of 'reasons to believe that the subsidy may in fact be specific' is the *only* condition to the application of subparagraph (c), as the Panel appears to have found, this would amount to interpreting the first sentence as if it read 'if there are other factors to suggest that the subsidy may in fact be specific, other factors may be considered'". (Ibid. (emphasis original)) Nevertheless, "the drafters began subparagraph (c) with a condition that is based on an appearance of non-specificity resulting from the application of subparagraphs (a) and (b). Under established principles of treaty interpretation", China argues, "this condition must be given effect". (Ibid.)

<sup>166</sup> China's appellant's submission, para. 153 (quoting Panel Report, para. 7.229, in turn quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371).

<sup>167</sup> China's appellant's submission, para. 153 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371). (emphasis added by China)

<sup>168</sup> China's appellant's submission, para. 154 (referring to Panel Report, paras. 7.230 and 7.231).

<sup>169</sup> China's appellant's submission, para. 157.

<sup>170</sup> China's appellant's submission, para. 160 (referring to Panel Report, para. 7.237).

<sup>171</sup> China's appellant's submission, paras. 161 and 162.

ordinary meaning of the term "programme" and also "agreed with a prior panel that 'the use of the term "subsidy programme", as opposed to "subsidy", is not lacking in significance."<sup>172</sup> In China's view, this indicates that the term "subsidy programme" is not synonymous with the term "subsidy".

2.55. According to China, the Panel nonetheless "departed" from the dictionary meaning of the term "subsidy programme" and "proceeded to apply an interpretation that is inconsistent with its ordinary meaning".<sup>173</sup> In particular, China takes issue with the Panel's finding that "[t]he fact that, in Article 2, the term 'programme' is used only in the context of *de facto* specificity, combined with the fact that the Agreement provides no definition of the term, ... suggests that 'subsidy programme' should be interpreted broadly."<sup>174</sup> The Panel deprived the term "subsidy programme" of its ordinary meaning, and collapsed the distinction between a subsidy and a subsidy programme. What the Panel referred to as a "systematic activity or series of activities" – the consistent provision by the SOEs in question of inputs for less than adequate remuneration – when examining the determinations at issue does not constitute a "subsidy programme".<sup>175</sup> At most it could be a "series of subsidies".<sup>176</sup> Moreover, China alleges that the Panel did not examine whether the USDOC had identified evidence to support the conclusion that each of the alleged input subsidies was circumscribed in a way that distinguishes it as a planned series of subsidies.

2.56. In addition, China argues that the Panel failed to address China's argument that the USDOC had provided no evidentiary basis for its apparent assumption that each of the allegedly subsidized inputs was provided pursuant to its own input-specific subsidy programme.<sup>177</sup> By assuming that each of these types of inputs was provided pursuant to its own input-specific "subsidy programme", China considers that "the USDOC assumed the conclusion in its premise: that because the relevant 'subsidy programme' was limited to one type of input, and because the end users of that single input were 'limited in number', it followed that the alleged subsidy was 'use[d] ... by a limited number of certain enterprises'."<sup>178</sup> According to China, the Panel implicitly endorsed this "circular reasoning without ever questioning the basis for the USDOC's premise".<sup>179</sup> In China's view, had the Panel applied a proper interpretation of the term "subsidy programme", it would have examined each of the USDOC's specificity determinations at issue to evaluate whether the USDOC had identified sufficient evidence on the record to support the conclusion that each type of input was provided pursuant to a distinct subsidy programme.

2.57. For these reasons, China submits that the Panel's interpretation and application of the term "subsidy programme" in Article 2.1(c) of the SCM Agreement was in error and must be reversed. China also requests the Appellate Body to reverse the Panel's consequential finding that the specificity determinations at issue are consistent with Article 2.1(c) of the SCM Agreement.

### **2.1.3.3 The Panel's examination of China's claim regarding the identification of the relevant "granting authority"**

2.58. China argues that the Panel erred in its application of Article 2.1 of the SCM Agreement to China's claim concerning the USDOC's failure to identify the relevant "granting authority". According to China, it is undisputed that, in the determinations at issue, the USDOC did not identify the entity (or entities) that it considered to be the relevant "granting authority" (or authorities) in respect of each of the alleged input subsidies. China asserts that, without identifying the relevant granting authority (or authorities), it is not possible to identify the relevant jurisdiction (or jurisdictions) within which to situate the specificity analysis. This, in turn, is necessary for evaluating whether a particular subsidy is specific to certain enterprises "within the jurisdiction of the granting authority". China concludes that, because the USDOC failed to identify

<sup>172</sup> China's appellant's submission, para. 163 (quoting Panel Report, para. 7.238).

<sup>173</sup> China's appellant's submission, para. 165.

<sup>174</sup> China's appellant's submission, para. 165 (quoting Panel Report, para. 7.240).

<sup>175</sup> China's appellant's submission, para. 169 (quoting Panel Report, para. 7.242).

<sup>176</sup> China's appellant's submission, para. 169.

<sup>177</sup> China's appellant's submission, para. 170. China notes that the determinations at issue encompassed the provision of at least 10 different types of allegedly subsidized inputs, ranging from hot-rolled steel to chemicals to polysilicon. (Ibid.)

<sup>178</sup> China's appellant's submission, para. 170.

<sup>179</sup> China's appellant's submission, para. 170.

the relevant granting authority (or authorities), the USDOC's input specificity determinations cannot be consistent with Article 2.1 of the SCM Agreement.

2.59. China submits that the Panel's analysis of its claim regarding the identification of the relevant granting authority was "cursory in the extreme".<sup>180</sup> China submits that the Panel "dismiss[ed] China's claim in a single sentence: 'Looking at the USDOC's determinations, and the specific excerpts provided by the United States in particular, it appears to us that the relevant jurisdiction was at the very least implicitly understood to be China in the challenged investigations.'"<sup>181</sup> According to China, this one-sentence analysis led the Panel to conclude that China had failed to establish that the USDOC acted inconsistently with Article 2.1 of the SCM Agreement by failing to identify explicitly the relevant granting authority. In China's view, "[t]he Panel's conclusion represents a misapplication of Article 2.1."<sup>182</sup>

2.60. According to China, the Panel's conclusion that the relevant jurisdiction was at the very least implicitly understood to be China does not answer the question of whether the USDOC properly identified the relevant granting authority. Without evaluating this question, the Panel had no basis to evaluate whether the USDOC had properly situated its analysis of specificity within the jurisdiction of that granting authority. China states that it is the identification of the relevant granting authority that determines the jurisdiction in which the specificity analysis is situated.

2.61. China asserts that, if the Panel considered that the USDOC had "implicitly understood" the relevant granting authority to be the GOC, and on that basis that the relevant jurisdiction was China, the Panel's "assumption" was "belied by the *ex post* rationale that the United States provided during the course of the Panel proceedings".<sup>183</sup> The United States took the position that, because the USDOC identified SOEs as "public bodies" that provide inputs for less than adequate remuneration, the USDOC considered each SOE to be the "granting authority". China argues that, even assuming that the public body findings were sufficient to establish that the relevant SOEs were the granting authorities, the United States failed to explain how the USDOC situated its specificity analysis within the respective jurisdiction of the granting authorities.

2.62. Therefore, China argues that the Panel misapplied Article 2.1 of the SCM Agreement because it failed to assess whether the USDOC had identified the relevant granting authority and its jurisdiction, and also failed to evaluate whether the USDOC had provided a "reasoned and adequate" explanation as to why the subsidy was specific to certain enterprises located within that jurisdiction. Thus, China requests the Appellate Body to reverse the Panel's finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify explicitly the relevant granting authority, and therefore also the relevant jurisdiction, in the specificity determinations at issue.

#### 2.1.3.4 Completion of the legal analysis

2.63. In the event that the Appellate Body were to reverse any or all of the Panel's findings in respect of China's claims under Article 2.1(c) of the SCM Agreement, China requests the Appellate Body to complete the legal analysis with respect to 15 input specificity determinations in 12 different countervailing duty investigations.<sup>184</sup>

2.64. First, China argues that it is undisputed that, in the 15 specificity determinations at issue, the USDOC did not identify an "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b) of Article 2.1 before it undertook an examination under subparagraph (c). China states that the USDOC's failure to apply Article 2.1(c) on the basis of an appearance of non-specificity renders each of these specificity determinations inconsistent with

<sup>180</sup> China's appellant's submission, para. 174.

<sup>181</sup> China's appellant's submission, para. 174 (quoting Panel Report, para. 7.248).

<sup>182</sup> China's appellant's submission, para. 175.

<sup>183</sup> China's appellant's submission, para. 176.

<sup>184</sup> China's appellant's submission, para. 179. China indicates that the relevant specificity determinations are part of the following investigations: Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe (steel rounds; and green tubes), Aluminum Extrusions, Steel Cylinders (standard and high quality billets; hot-rolled steel; and seamless tube steel), and Solar Panels. (*Ibid.*) See also table of USDOC investigations at p. 5 of this Report.



Article 2.1 of the SCM Agreement. For this reason, China requests the Appellate Body to complete the legal analysis and find that the identified specificity determinations are inconsistent with this provision.

2.65. Second, China submits that the USDOC failed to identify and substantiate the existence of a "subsidy programme" in the determinations at issue, as that term is properly interpreted (i.e. a "planned series of subsidies").<sup>185</sup> China contends that, while in some determinations<sup>186</sup>, the USDOC purported to identify a "subsidy programme" relating to the provision of the input at issue, it failed to substantiate the existence of a "subsidy programme" based on positive evidence on the record. Moreover, in the remaining determinations, the USDOC applied the first factor of Article 2.1(c) without even purporting to identify the relevant "subsidy programme", much less substantiating the existence of such a programme. Thus, the Panel's conclusion in each instance that a "subsidy programme" was used by a limited number of certain enterprises is inconsistent with Article 2.1(c). China therefore requests the Appellate Body to complete the legal analysis and find that the identified specificity determinations are inconsistent with Article 2.1(c) of the SCM Agreement.

2.66. Third, China argues that it is apparent from the face of the relevant determinations that the USDOC did not identify what it considered to be the relevant granting authority (or authorities) in respect of the provision of each allegedly subsidized input. In the light of the failure of the United States to indicate where the USDOC identified the relevant granting authority in the determinations at issue, it is clear that the USDOC did not do so in its evaluation of whether each of the alleged input subsidies was specific to certain enterprises. Accordingly, China requests the Appellate Body to complete the legal analysis and find that these determinations are inconsistent with Article 2.1 of the SCM Agreement.

## **2.2 Arguments of the United States – Appellee**

### **2.2.1 Articles 14(d) and 1.1(b) of the SCM Agreement – Benefit**

#### **2.2.1.1 Interpretation of Article 14(d)**

2.67. The United States argues that the Panel did not err in its interpretation of Articles 14(d) and 1.1(b) of the SCM Agreement. In the United States' view, China's claim has no basis in the text of Article 1.1(b) or Article 14(d) and is contradicted by the approach of the Appellate Body in examining "benefit" in previous reports.<sup>187</sup> The United States recalls that China argued before the Panel that the USDOC's determinations concerning the benefit conferred when an SOE provided inputs for less than adequate remuneration were WTO-inconsistent if, in the same investigation, the USDOC 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 panel and Appellate Body reports to require the same analysis in these distinct aspects of a countervailing duty determination. The United States considers that China's argument would result in benefit calculations that are "artificially low or even zero".<sup>188</sup> In *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that 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.

2.68. The United States maintains that China's appeal is premised on an incorrect understanding of Article 14(d) of the SCM Agreement that is contrary to the Appellate Body's interpretation of this

<sup>185</sup> China's appellant's submission, para. 184.

<sup>186</sup> China's appellant's submission, para. 184 (referring to 2010 Wire Strand Issues and Decision Memorandum (Panel Exhibit CHI-52), p. 83 ("Provision of Wire Rod for LTAR Program"); 2009 Pressure Pipe Issues and Decision Memorandum (Panel Exhibit CHI-12), p. 4 ("Provision of SSC for LTAR Program"); 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19), p. 47 ("Provision of HRS for LTAR Program"); and 2011 Aluminum Extrusions Issues and Decision Memorandum (Panel Exhibit CHI-87), p. 89 ("Provision of Primary Aluminum for LTAR Program")).

<sup>187</sup> United States' appellee's submission, para. 25 (referring to Appellate Body Reports, *US – Softwood Lumber IV*, paras. 91 and 92; and *US – Anti-Dumping and Countervailing Duties (China)*, paras. 456 and 457).

<sup>188</sup> United States' appellee's submission, para. 28.

provision in *US – Softwood Lumber IV*. According to the United States, 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.

2.69. The United States notes that "the purpose of the benefit calculation is to determine whether the recipient is 'better off than it would otherwise have been absent [a] contribution'."<sup>189</sup> While in-country, private market benchmarks are the starting point in determining whether the financial contribution has made the recipient better off – 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. According to the United States, this is because, under such circumstances, the use of an in-country benchmark would result in a circular analysis, because it would simply be comparing the government price to itself. The United States submits that China's approach would prevent investigating authorities from properly analysing the ways in which the government can interfere in a given marketplace and distort prices, and would result in a benefit calculation that would not capture how much better off the recipient is made through a financial contribution. The United States maintains that, under China's interpretation, "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."<sup>190</sup> Therefore, the United States argues that China's position conflicts with the findings of the Appellate Body in *US – Softwood Lumber IV*.

2.70. Referring to the Appellate Body report in *US – Softwood Lumber IV*, the United States argues that the distortion analysis should not be focused only on the form of governmental involvement – such as whether it is a government entity regulating a particular market, a sole provider of the good, a competitor that provides goods for less than adequate remuneration, or otherwise. Rather, the inquiry must be flexible to take adequate account of the particular facts in order to determine whether the government is predominant in a given marketplace.<sup>191</sup>

2.71. The United States further submits that government ownership of SOEs changes the incentive for price competition between such entities. Where SOEs are predominant in a market, the same situation analysed by the Appellate Body in *US – Softwood Lumber IV* arises.<sup>192</sup> Thus, the United States considers that, under China's approach, it is not the market that serves as the benchmark for a benefit calculation, but rather the government price, which is exactly the result that the Appellate Body sought to avoid in *US – Softwood Lumber IV*.<sup>193</sup>

2.72. Moreover, the United States contends that China has failed to establish why the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* are not "persuasive" in the context of this dispute.<sup>194</sup> In the United States' view, the Panel correctly relied on the fact that the Appellate Body's benchmark findings in that dispute "did not concern whether or not SOEs are public bodies (and thus government) but rather whether the extent of SOE

<sup>189</sup> United States' appellee's submission, para. 34 (quoting Appellate Body Report, *Canada – Aircraft*, para. 157).

<sup>190</sup> United States' appellee's submission, para. 38. In order to illustrate that China's approach would lead to results that conflict with the aim of Article 14(d), the United States refers to a situation where, for a given product in a marketplace, five wholly government-owned entities produce input goods: one with a market share of 2%, and the four others hold the remaining market share of 98%. Under this scenario, the entity with 2% of the market is a "public body" for purposes of the financial contribution analysis, but the others, while wholly government owned, are not considered public bodies for financial contribution purposes. The United States highlights that, although the potential for government presence to distort prices in this market is evident, under China's argument, in spite of the government's 100% ownership of production, an authority could not find that the government is predominant in the marketplace and therefore use an out-of-country benchmark to determine whether a benefit is being conferred on a recipient. (Ibid., paras. 39 and 40)

<sup>191</sup> United States' appellee's submission, para. 37 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 100).

<sup>192</sup> In this regard, the United States observes that, in *US – Softwood Lumber IV*, the Appellate Body found that "[w]henver 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." (United States' appellee's submission, para. 41 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 100))

<sup>193</sup> United States' appellee's submission, para. 41.

<sup>194</sup> United States' appellee's submission, heading II.C, p. 11.



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".<sup>195</sup>

2.73. As the United States sees it, China is asking 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 seems to argue that the Appellate Body "did not understand its actions" in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>196</sup> The United States argues to the contrary that the Appellate Body was fully aware in that dispute that: (i) the USDOC applied an ownership standard in its analysis that certain SOEs constituted public bodies; and (ii) that the USDOC had treated SOE presence in the market as indicative of government presence in the market. Indeed, after conducting a full analysis, and notwithstanding its finding of WTO-inconsistency with respect to the USDOC's public body analysis, the Appellate Body still found that China had not demonstrated that the USDOC's benchmark determinations were WTO-inconsistent. Thus, for the United States, there is no question that the Appellate Body recognized that predominant government market share can be sufficient evidence of a market distorted by the government in a situation where it had previously determined that the USDOC's public body analyses were WTO-inconsistent. This means that the Appellate Body also recognized that, in the investigations that it found government ownership was insufficient for purposes of financial contribution, it was sufficient for determining when the government had a predominant role in the market for purposes of evaluating benefit.

2.74. The United States argues that the Panel 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".<sup>197</sup> The United States notes the Panel's statement that 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".<sup>198</sup> The United States argues that, in the light of the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body should find in this dispute that the United States did not act inconsistently with Article 14(d) of the SCM Agreement.

2.75. The United States recalls China's argument that, given that this issue was not before the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, if the Appellate Body had decided on this issue it would have exceeded its mandate under Article 17.6 of the DSU and raised "significant systemic concerns".<sup>199</sup> In response, the United States submits that, "by raising Article 17.6 of the DSU, China undermines its own point."<sup>200</sup> 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."<sup>201</sup> Thus, the Appellate Body could have relied on its approach to Article 1.1(a)(1) in reaching its conclusion under Article 1.1(b), but declined to do so.

2.76. The United States recalls China's argument that, if it does not apply 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"<sup>202</sup> in examining "benefit". According to the United States, the standard articulated by the Appellate Body in *US – Softwood Lumber IV* is the proper test for the benefit analysis.<sup>203</sup> The United States argues that the USDOC follows the guidance provided by the Appellate Body in that dispute by conducting a fact-specific

<sup>195</sup> United States' appellee's submission, para. 42 (quoting Panel Report, para. 7.194, in turn referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611)).

<sup>196</sup> United States' appellee's submission, para. 44.

<sup>197</sup> United States' appellee's submission, para. 47 (quoting Panel Report, para. 7.194).

<sup>198</sup> United States' appellee's submission, para. 47 (quoting Panel Report, para. 7.194, in turn referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611)).

<sup>199</sup> United States' appellee's submission, para. 49 (referring to China's appellant's submission, para. 48).

<sup>200</sup> United States' appellee's submission, para. 50.

<sup>201</sup> United States' appellee's submission, para. 50 (quoting Appellate Body Report, *EC – Poultry*, para. 156).

<sup>202</sup> United States' appellee's submission, para. 51 (quoting China's appellant's submission, para. 56).

<sup>203</sup> United States' appellee's submission, para. 52 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 102).

inquiry of whether a government has distorted the market in such a way that an out-of-country benchmark is required. The USDOC's examination of the government's ability to affect prices in the market takes into account numerous factors, including "government ownership, management interest, or other indicators of control of SOEs, the total volume and value of domestic production and the total volume and value of domestic consumption, imports, export tariffs and licensing".<sup>204</sup> The United States highlights that, in conducting this analysis, the USDOC reviews the "totality of the evidence".<sup>205</sup>

2.77. The United States argues that the Appellate Body should decline to change its previous interpretation of the benefit analysis as set out in the Appellate Body report in *US – Softwood Lumber IV*. The legal standard set forth in that report 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. On the basis of the above, the United States requests the Appellate Body to reject China's appeal.

### 2.2.1.2 Article 11 of the DSU

2.78. The United States argues that 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. The United States argues that China's claim under Article 11 must fail because China misunderstands the elements necessary for a claim under this provision and misinterprets the Panel's finding at issue. In any event, the United States argues that the record provides sufficient evidence to demonstrate that the Panel objectively assessed the facts in four of the investigations challenged on appeal.<sup>206</sup>

2.79. The United States begins by noting that, for China's claim under Article 11 of the DSU to succeed, "China must demonstrate that the Panel committed 'an egregious error that calls into question the [Panel's] good faith'."<sup>207</sup> The Appellate Body has "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.'"<sup>208</sup> The United States recalls the Appellate Body's explanation that "the weighing of evidence is within the discretion of the panel"<sup>209</sup>, 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.'"<sup>210</sup>

2.80. The United States contends that 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 are simply subsidiary to its claim that the Panel failed to apply correctly Article 14(d) of the SCM Agreement. In the United States' view, this is evidenced by China's repeated invocation of the phrase "under the correct interpretation" or the phrase "under the proper interpretation" of Article 14(d), which is the interpretation that the Panel rejected. The United States highlights that, by framing its claim under Article 11 of the DSU in this way, it is clear that China is presenting an Article 11 claim that is subsidiary to its substantive argument that the Panel incorrectly applied Article 14(d) of the SCM Agreement. For this reason, China's claim under Article 11 is improperly made and should be rejected.

2.81. The United States further submits that China attempts to recast its substantive argument under the guise of a claim under Article 11 of the DSU, an action which has been considered

<sup>204</sup> United States' appellee's submission, para. 52.

<sup>205</sup> United States' appellee's submission, para. 52.

<sup>206</sup> United States' appellee's submission, para. 26. The four challenged investigations are Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks. (See table of USDOC investigations at p. 5 of this Report)

<sup>207</sup> United States' appellee's submission, para. 55 (quoting Appellate Body Report, *EC – Hormones*, para. 133).

<sup>208</sup> United States' appellee's submission, para. 55 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>209</sup> United States' appellee's submission, para. 55 (referring to Appellate Body Report, *Korea – Dairy*, para. 137).

<sup>210</sup> United States' appellee's submission, para. 55 (quoting Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164).

"unacceptable" by the Appellate Body in previous disputes.<sup>211</sup> According to the United States, 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. For this reason, China's request should be denied, because the Appellate Body will not "interfere lightly" with a panel's fact-finding authority and, for a party to prevail on an Article 11 claim, the Appellate Body must be satisfied that the panel has exceeded its authority as the trier of facts.<sup>212</sup> In this regard, the Panel examined the evidence presented to it, systematically reviewed the issues and decision memorandum from each investigation<sup>213</sup>, and found that the evidence did not support China's assertion "in each challenged determination".<sup>214</sup> For the United States, the Panel's explanation of its reasoning demonstrates that it carefully reviewed the evidence presented, meeting the standard of Article 11 of the DSU.

2.82. In addition, the United States submits that China's contention that the Panel failed to comply with its obligations under Article 11 in four of the challenged investigations is unfounded. The United States 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 investigations is not contradicted by its intermediate factual findings. The United States maintains that China "misreads" the Panel Report when it perceives the Panel to have found that the evidence supported China's assertion that the USDOC based its market distortion analysis on a finding that SOEs are public bodies based on an approach rejected by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>215</sup> The United States highlights that, in fact, the Panel explained that it is only in "a few cases" that the USDOC's findings refer to SOEs as public bodies.<sup>216</sup>

2.83. With respect to the OCTG investigation, the United States recalls that the Panel quoted the following passage from the 2009 Issues and Decision Memorandum:

"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 [period of investigation] are not an appropriate tier one benchmark under section 351.511(a)(2)(i) of our regulations.<sup>217</sup>

2.84. The United States contends that nothing in this passage suggests that the USDOC's price distortion finding was predicated exclusively on equating GOC-owned or -controlled firms with government on the basis that they are "authorities" (i.e. public bodies) based on the approach rejected by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>218</sup>

<sup>211</sup> United States' appellee's submission, para. 60 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>212</sup> United States' appellee's submission, para. 60 (referring to Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>213</sup> United States' appellee's submission, para. 61 (referring to Panel Report, para. 7.180). The United States observes that:

[t]he 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).

(Ibid. (quoting Panel Report, para. 7.186))

<sup>214</sup> United States' appellee's submission, para. 61 (referring to Panel Report, para. 7.188).

<sup>215</sup> United States' appellee's submission, para. 64.

<sup>216</sup> United States' appellee's submission, paras. 64 and 65 (quoting panel Report, para. 7.180).

<sup>217</sup> United States' appellee's submission, para. 66 (quoting Panel Report, para. 7.182, in turn quoting 2009 OCTG Issues and Decision Memorandum (Panel Exhibit CHI-45), p. 14).

<sup>218</sup> The United States adds that further evidence of what the USDOC actually said about SOEs in connection with its price distortion analysis can be found in a subsection of the OCTG determination entitled "Extent of State Ownership in the PRC Steel Rounds Industry", which explains that the USDOC "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 warranted". (United States' appellee's submission, para. 67 (quoting 2009 OCTG Issues and Decision Memorandum (Panel Exhibit CHI-45), p. 4) (emphasis added by the United States))

2.85. Moreover, the United States maintains that the Panel's discussion of the Solar Panels investigation similarly does not suggest that there is a contradiction in the Panel's findings. The United States observes that, in the context of the price distortion analysis, the USDOC considered that, while some SOEs were public bodies, other SOEs were not necessarily public bodies. In the issues and decisions memoranda, the USDOC indicated that 37 (out of 47) SOEs, taken together, were the means "through which the GOC influences and distorts the domestic market".<sup>219</sup> In quoting this passage, the Panel recognized and emphasized that the USDOC considered that all 37 SOEs (both SOEs found to be public bodies and those found not to be public bodies) contributed to market distortion.<sup>220</sup> Therefore, for the United States, the Panel's examination in the OCTG and Solar Panels investigations provides no evidence of a contradiction in the Panel's findings, and no indication that the Panel ever agreed with China's factual argument.

2.86. With respect to the Pressure Pipe and Line Pipe investigations, the United States rejects China's argument that the Panel failed to evaluate China's "as applied" claims separately and on their own merits. The United States notes that the Panel examined the USDOC's determination in the Pressure Pipe investigation and found that the USDOC had based its determination "on 'the market share of government-owned/controlled firms in domestic production alone'", but that the Panel did not find that this demonstrated that the USDOC had "actually treated SOEs as public bodies and thus part of the government in the collective sense".<sup>221</sup> With respect to the Line Pipe investigation, the Panel examined the USDOC's determination and found that it was based on "adverse" facts available, but did not agree with China's contention that the USDOC "treated SOEs as public bodies and thus part of the government in the collective sense".<sup>222</sup>

2.87. The United States maintains that, "[w]hile the Panel's discussion of the Pressure Pipe and Line Pipe investigations is succinct, it is also sufficient."<sup>223</sup> The Panel explained that it had reviewed the issues and decisions 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. Accordingly, in the United States' view, it was unnecessary for the Panel to address extensively each investigation in the Panel Report in order to respond to China's argument.

2.88. The United States disagrees with China's argument 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."<sup>224</sup> For the United States, the Panel's discussion in its Report of only the "few cases" where there was any indication that the USDOC referred to certain SOEs as public bodies, and its decision not to discuss other cases where there was no indication whatsoever that the USDOC 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 merits.<sup>225</sup> Accordingly, in the United States' view, there is no basis to find that the Panel acted inconsistently with Article 11 of the DSU.

### 2.2.1.3 Application of Article 14(d)

2.89. For the reasons given above, the United States submits that 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.

<sup>219</sup> United States' appellee's submission, para. 69 (quoting Panel Report, para. 7.183, in turn quoting 2012 Solar Panels Preliminary Affirmative CVD Determination (Panel Exhibit CHI-105), pp. 17448-17449).

<sup>220</sup> United States' appellee's submission, para. 69 (referring to Panel Report, para. 7.183).

<sup>221</sup> United States' appellee's submission, para. 72 (quoting Panel Report, paras. 7.186 and 7.188).

<sup>222</sup> United States' appellee's submission, para. 73 (quoting Panel Report, para. 7.188).

<sup>223</sup> United States' appellee's submission, para. 74.

<sup>224</sup> United States' appellee's submission, para. 75 (quoting China's appellant's submission, para. 67).

<sup>225</sup> United States' appellee's submission, para. 75 (quoting China's appellant's submission, para. 68).

#### 2.2.1.4 Completion of the legal analysis

2.90. In the event that the Appellate Body were to reverse the Panel's finding that the USDOC's determinations are not inconsistent with Article 14(d) and 1.1(b) of the SCM Agreement, the United States argues that the Appellate Body should not complete the legal analysis with respect to the OCTG, Solar Panels, Line Pipe, and Pressure Pipe investigations, because there are insufficient undisputed facts on the record to permit the Appellate Body to do so.

2.91. The United States argues that, contrary to China's assertion, it is not correct that, in the context of completion, the Appellate Body only needs to determine whether the United States introduced evidence and argumentation sufficient to rebut China's *prima facie* case with respect to the OCTG, Solar Panels, Line Pipe, and Pressure Pipe investigations. The United States argues that the Panel did not explicitly find that China failed to make a *prima facie* case, but, rather, found that China's proposed interpretation of Article 14(d) of the SCM Agreement was incorrect and that China's factual argument that, in each of its determinations, the USDOC equated SOEs with public bodies, was not supported by the evidence on the record.<sup>226</sup>

2.92. Furthermore, the United States maintains that "China is also incorrect when it asserts that it is 'a simple matter for the Appellate Body to complete the analysis having resort only to the relevant determinations at issue'."<sup>227</sup> Indeed, completing the legal analysis would require a thorough examination of not only the USDOC's determinations, but also the evidence on the USDOC's administrative record that underlies the determinations at issue. The United States argues that the entirety of the USDOC's administrative record is *not* on the Panel record and, thus, all of the evidence that supports the USDOC's analyses is not before the Appellate Body in this dispute.

2.93. The United States maintains that, in order to examine the challenged determinations, it would be necessary to ascertain whether the evidence on the USDOC's administrative record supports the conclusion that the SOEs identified by the USDOC meet the standard to be deemed as public bodies. If they do, then the USDOC's benefit determinations should be upheld. In the United States' view, completing the legal analysis would require a holistic evaluation of the evidence on the USDOC's administrative record. The Panel did not make the factual findings "that would have been associated with such an evaluation", including assessing and weighing the evidence on the USDOC's administrative record.<sup>228</sup> In this case, the Appellate Body would be required to examine 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. The United States highlights that the Appellate Body has been hesitant in previous disputes to complete the analysis in similar situations, including when factual findings by the panel are absent and the participants have not addressed sufficiently the issues that the Appellate Body may need to examine if it were to complete the analysis.

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

#### 2.2.2 Article 12.7 of the SCM Agreement – Facts available

2.95. The United States submits that the Panel made an objective assessment of China's claims under Article 12.7 of the SCM Agreement that was consistent with the Panel's obligations under Article 11 of the DSU. According to the United States, China has failed to meet the "high standard" for establishing that the Panel acted inconsistently with Article 11 of the DSU because it has not demonstrated that "the Panel committed 'an egregious error that calls into question the [Panel's] good faith'."<sup>229</sup>

<sup>226</sup> United States' appellee's submission, para. 80 (referring to Panel Report, paras. 7.188 and 7.195).

<sup>227</sup> United States' appellee's submission, para. 81 (quoting China's appellant's submission, para. 109).

<sup>228</sup> United States' appellee's submission, para. 84.

<sup>229</sup> United States' appellee's submission, para. 154 (quoting Appellate Body Report, *EC – Hormones*, para. 133).

2.96. The United States takes issue with China's reliance on the Appellate Body reports in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS* to support its argument that, under the proper standard of review, the Panel was required to undertake an in-depth examination of the USDOC's determinations in order to decide whether the explanation provided by the USDOC was "reasoned and adequate".<sup>230</sup> According to the United States, in *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body articulated the proper standard of review to be applied by a panel when "examining *conclusions* reached by the investigating authority"<sup>231</sup> and when evaluating "how evidence on the record supported [the USDOC's] factual findings".<sup>232</sup> The United States stresses, however, that the Appellate Body in those disputes also made clear that "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."<sup>233</sup> The United States submits that, in the present dispute, China did not ask the Panel to inquire whether the USDOC's conclusions or determinations with respect to matters like financial contribution, benefit, and specificity were justified, or whether the USDOC relied on facts that were appropriate. Instead China put a "far more basic question" before the Panel, namely, whether the USDOC "relied on *any facts at all*".<sup>234</sup> The United States further argues that, even if it were necessary for the Panel to evaluate whether the USDOC's application of facts available was "reasoned and adequate", such evaluation "necessarily would relate to the challenge advanced by China".<sup>235</sup> For this reason, the United States agrees with the Panel's statement that, for the purpose of the Panel's assessment of China's claim under Article 12.7 of the SCM Agreement, "the level of explanation required is that sufficient to assess whether the USDOC based its adverse facts available determinations on facts".<sup>236</sup> According to the United States, the Panel correctly found that there was a sufficient basis in the USDOC's explanations for it to find that the USDOC had applied facts that were available on the administrative record.<sup>237</sup>

2.97. The United States also takes issue with China's reliance on the panel report in *China – Broiler Products*. According to the United States, the issue in *China – Broiler Products* was whether China's Ministry of Commerce's *conclusion* – an "all others" rate of 30.3% based on "facts available" – had a "logical relationship with the facts" and was a result of "an evaluative, comparative assessment of those facts".<sup>238</sup> By contrast, in the present dispute, "China did not allege before the Panel that facts that were available on the record did not support [the USDOC's] conclusion, or that the facts – as in *China – Broiler Products* – required a different conclusion".<sup>239</sup> Instead, China only argued that the USDOC "did not rely on *any facts at all*".<sup>240</sup> Therefore, the United States submits that it was not necessary for the present Panel to evaluate China's claims in the same manner that the panel in *China – Broiler Products* evaluated the United States' claim in that dispute.

2.98. With respect to China's claim that the Panel acted inconsistently with Article 11 of the DSU, the United States maintains that the Panel fulfilled its obligation under that provision to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its

<sup>230</sup> United States' appellee's submission, para. 157 (referring to China's appellant's submission, paras. 193, 202-203, and 221-222).

<sup>231</sup> United States' appellee's submission, para. 160 (referring to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93). (emphasis original)

<sup>232</sup> United States' appellee's submission, para. 161 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186).

<sup>233</sup> United States' appellee's submission, para. 164 (referring to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 and 95).

<sup>234</sup> United States' appellee's submission, para. 163 (referring to China's first written submission to the Panel, paras. 145 and 155; and second written submission to the Panel, para. 177). (emphasis original)

<sup>235</sup> United States' appellee's submission, para. 165.

<sup>236</sup> United States' appellee's submission, para. 165 (quoting Panel Report, para. 7.311).

<sup>237</sup> United States' appellee's submission, para. 166. According to the United States, the USDOC explained in its determinations that it was relying on "facts available", including relying on an "adverse inference" in selecting from among the "facts available". The United States maintains that there were, as was demonstrated in Panel Exhibits USA-94 through USA-133, facts available on the record relevant to the determinations for which "facts available" were applied. (Ibid.)

<sup>238</sup> United States appellee's submission, para. 168 (quoting Panel Report, *China – Broiler Products*, para. 7.357).

<sup>239</sup> United States appellee's submission, para. 170.

<sup>240</sup> United States appellee's submission, para. 170. (emphasis original)

factual findings have a proper basis in that evidence".<sup>241</sup> Moreover, the Panel "correctly declined to reject as *ex post* rationalization evidence from [the USDOC's] administrative record that was identified by the United States", and "appropriately refrained from making China's case for it".<sup>242</sup> The United States argues that China's claim under Article 11 of the DSU 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".<sup>243</sup> The United States notes that China argued before the Panel that the inconsistency of the USDOC's determinations with Article 12.7 of the SCM Agreement was "evident on the face of *each* of the challenged determinations".<sup>244</sup> Yet, in the course of its evaluation, the Panel went further than China requested, opting correctly to review the "full Issues and Decision Memoranda and Preliminary Determinations"<sup>245</sup>, as well as facts that were cited in Exhibit USA-94, rather than only the excerpts cited by China in its submissions and exhibits. The Panel therefore considered all of China's arguments and found that the facts did not support China's characterizations of the USDOC's "facts available" determinations. Moreover, the Panel's examination of the USDOC's determinations and the evidence on the USDOC's administrative record was "critical and searching" and "in-depth", "far more so than China's own cursory presentation of the evidence from [the USDOC's] record".<sup>246</sup> The United States reiterates that China "bears the onus of explaining why the alleged error meets the standard of review under Article 11".<sup>247</sup> The United States contends that China has not met its burden, as it has failed both to "identify specific errors regarding the objectivity of the [P]anel's assessment" and to "explain *why* the alleged error *meets* the standard of review under [Article 11 of the DSU]".<sup>248</sup>

2.99. The United States also takes issue with China's contention that the Panel was precluded from considering evidence on the administrative record of the investigations at issue because "[t]here is no indication that the USDOC actually relied on" the record evidence cited in Exhibit USA-94.<sup>249</sup> The United States maintains that the USDOC explained that it was resorting to "facts available" in each instance, and that 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 investigations at issue, and that they were "demonstrably relevant" to the determinations for which necessary information was missing due to the non-cooperation of interested parties.<sup>250</sup> Referring to the Appellate Body report in *US – Countervailing Duty Investigation on DRAMS*, the United States argues that, in the present dispute, 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".<sup>251</sup> Therefore, the Panel's decision not to reject the arguments of the United States as "*ex post* rationalizations" is not inconsistent with Article 11 of the DSU. In this regard, the United States notes the Appellate Body's finding in *US – Countervailing Duty Investigation on DRAMS* that the panel in that dispute erred in declining to consider certain record evidence not cited by the USDOC in its published determination.<sup>252</sup> The Appellate Body further observed 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'".<sup>253</sup> However, the United States asserts that China's argument in the present case is premised on the

<sup>241</sup> United States' appellee's submission, para. 173. (fn omitted)

<sup>242</sup> United States' appellee's submission, para. 173.

<sup>243</sup> United States' appellee's submission, para. 175.

<sup>244</sup> United States' appellee's submission, para. 182 (quoting China's appellant's submission, para. 209). (emphasis added by the United States)

<sup>245</sup> United States' appellee's submission, para. 182 (quoting Panel Report, para. 7.316).

<sup>246</sup> United States' appellee's submission, para. 183 (referring to Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>247</sup> United States' appellee's submission, para. 183 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.150, in turn referring to Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>248</sup> United States' appellee's submission, para. 183 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442 (emphasis original)).

<sup>249</sup> United States' appellee's submission, para. 189 (quoting China's appellant's submission, para. 229).

<sup>250</sup> United States' appellee's submission, para. 189.

<sup>251</sup> United States' appellee's submission, para. 190 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 165).

<sup>252</sup> United States' appellee's submission, para. 187 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 165).

<sup>253</sup> United States' appellee's submission, paras. 187 (quoting Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164 (emphasis original)).

incorrect notion that the USDOC was required to "explicitly cite in its determinations the facts that were available on [the USDOC's] administrative record" and which formed the basis for its "facts available" determinations.<sup>254</sup>

2.100. According to the United States, on appeal, China, "in effect, faults the Panel for not making China's case for it, which the Panel was not permitted to do".<sup>255</sup> The United States argues that the Panel was not required to engage in a review of factual and legal arguments that China did not make before the Panel, as the burden to make a *prima facie* case was on China as the complaining party.<sup>256</sup> The United States recalls the Appellate Body's observation that, "[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".<sup>257</sup> The United States highlights that China's factual arguments with respect to the 48 instances it challenged "amounted to a total of *fewer than five pages* in China's first written submission, accompanied by Exhibit CHI-2, which contained a list of citations to excerpts of [the USDOC's] issues and decisions memoranda and preliminary determinations".<sup>258</sup> Moreover, China's subsequent submissions "provided little, if any, additional discussion of the facts".<sup>259</sup> Therefore, the United States submits that 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. Contrary to China's arguments on appeal, the United States submits that the Panel would have erred had it gone on to address arguments that China did not make before the Panel.

2.101. The United States also argues that the first time China advanced arguments relating to the "reasoned and adequate" standard was in response to a Panel question following the first Panel meeting concerning whether China had failed to make a *prima facie* case.<sup>260</sup> Although China presented the "reasoned and adequate" line of argumentation "only late in the panel proceeding", the United States asserts that the Panel "was aware" of this argument and responded to it in the Panel Report.<sup>261</sup> According to the United States, the Panel disagreed with China, stating 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*".<sup>262</sup> The United States argues that, 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."<sup>263</sup> For these reasons, the United States submits that China has failed to establish that the Panel acted inconsistently with Article 11 of the DSU.

2.102. In the event the Appellate Body were to reverse the Panel's findings under Article 12.7 of the SCM Agreement, the United States submits that it would not be appropriate for the Appellate Body to accept China's request to complete the legal analysis. According to the United States, China did not present arguments to the Panel about "each instance" in which the USDOC used "adverse" facts available, but instead asserted only that the USDOC applied the same legal standard across the 42 challenged instances.<sup>264</sup> In the United States' view, "[i]n making its arguments the way it did", China "deprived" the Panel of performing its role as a "trier of facts" with respect to each challenged instance.<sup>265</sup> Therefore, 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 its task, as

<sup>254</sup> United States' appellee's submission, para. 188 (referring to China's appellant's submission, paras. 224-226 and 233).

<sup>255</sup> United States' appellee's submission, heading IV.B.3, p. 55.

<sup>256</sup> United States' appellee's submission, para. 194 (referring to Appellate Body Reports, *Japan – Agricultural Products II*, para. 129).

<sup>257</sup> United States appellee's submission, para. 195 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 566 (emphasis original)).

<sup>258</sup> United States' appellee's submission, para. 191 (referring to China's first written submission to the Panel, paras. 143-156). (emphasis original)

<sup>259</sup> United States' appellee's submission, para. 191.

<sup>260</sup> United States' appellee's submission, para. 197 (referring to China's response to Panel question No. 73, paras. 181-183).

<sup>261</sup> United States' appellee's submission, para. 198 (referring to Panel Report, para. 7.296).

<sup>262</sup> United States' appellee's submission, para. 199 (quoting Panel Report, para. 7.311). (emphasis added by the United States)

<sup>263</sup> United States' appellee's submission, para. 200.

<sup>264</sup> United States' appellee's submission, para. 205.

<sup>265</sup> United States' appellee's submission, para. 205 (referring to Appellate Body Report, *EC – Fasteners (China)*, para. 441).



this would be "at odds with 'the distinction between the respective roles of the Appellate Body and panels'".<sup>266</sup>

2.103. The United States also submits that a claim that the USDOC's "facts available" determinations were not sufficiently or adequately explained would have been "more appropriately" advanced under Article 22 of the SCM Agreement.<sup>267</sup> Pointing out that the Panel acknowledged this, but found questions concerning Article 22 to be outside its terms of reference, the United States asserts that the Panel did not address China's legal arguments or factual assertions that the USDOC failed to provide "sufficient detail" regarding the facts underlying the challenged "facts available" determinations.<sup>268</sup> Moreover, the United States argues that, in the event the Appellate Body were to agree to China's request for completion of the legal analysis, it would have to look at not only the limited excerpts from the USDOC's determinations identified by China, but also the evidence cited and reproduced in Exhibits USA-94 through USA-133. In order to complete the legal analysis, therefore, the Appellate Body would have to evaluate properly each challenged instance and undertake its own thorough examination of the evidence, which would require it 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 be reasonably drawn from an analysis of the evidence in its totality. Referring to the Appellate Body report in *US – Countervailing Duty Investigation on DRAMS*, the United States submits that the participants in the present dispute have not sufficiently addressed in their submissions the issues that the Appellate Body might need to examine if it were to complete the legal analysis.<sup>269</sup> The United States notes that it would be "impractical for the participants to address such issues" at this stage in the proceedings, "in light of the limited nature of – and the compressed time for – the Appellate Body's review, as provided in the DSU".<sup>270</sup>

2.104. Finally, the United States highlights that the entire body of the USDOC's administrative record for all of the investigations at issue was not placed before the Panel, and therefore is not on the record before the Appellate Body. Instead, the parties presented the Panel only with documents or portions of documents that each deemed most relevant to the arguments that China had presented. Noting that, in response to China's submission before the Panel that the USDOC did not base itself on facts on the record in the 42 challenged instances, the United States maintains that it only sought to disprove China's limited assertion by pointing to some, but not all, of the facts on record that were before the USDOC. The United States claims that it would have presented the Panel with different and additional evidence had it been called upon to defend the allegation put forth now by China on appeal, that is, that the USDOC's "adverse" facts available determinations were not "reasoned and adequate". Therefore, in the absence of a complete record of the investigations and China's changing claims under Article 12.7, the United States submits that there is insufficient evidence for the Appellate Body to complete the legal analysis as to whether the USDOC's "adverse" facts available determinations were "reasoned and adequate", as China requests the Appellate Body to do. For these reasons, the United States submits that the Appellate Body should not complete the legal analysis and should not find that the USDOC's "facts available" determinations are inconsistent with Article 12.7 of the SCM Agreement. Therefore, the United States requests the Appellate Body to reject China's claims on appeal and uphold the Panel's findings under Article 12.7 of the SCM Agreement.

### 2.2.3 Article 2.1 of the SCM Agreement – Specificity

2.105. The United States submits that, contrary to China's claim, the Panel did not err in its interpretation of Article 2.1(c) of the SCM Agreement. According to the United States, China's arguments on appeal are based "on the same erroneous interpretations" of the SCM Agreement that China pursued before the Panel.<sup>271</sup> The United States argues that the Panel correctly rejected China's arguments, and requests the Appellate Body to uphold the Panel's findings. If, however, the Appellate Body were to reverse the Panel's findings with respect to the identification of the

<sup>266</sup> United States' appellee's submission, para. 206 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 441).

<sup>267</sup> United States' appellee's submission, para. 207.

<sup>268</sup> United States' appellee's submission, para. 207 (quoting Panel Report, para. 7.311).

<sup>269</sup> United States' appellee's submission, para. 210 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 194-197).

<sup>270</sup> United States' appellee's submission, para. 210 (referring to Articles 17.5 and 17.6 of the DSU).

<sup>271</sup> United States' appellee's submission, para. 88.

"subsidy programme", then the United States submits that the Appellate Body should not complete the legal analysis and should not find that the USDOC's identification of the "subsidy programme" is inconsistent with Article 2.1 of the SCM Agreement.

### 2.2.3.1 The Panel's interpretation and application of the first sentence of Article 2.1(c)

2.106. The United States argues that the Panel properly interpreted Article 2.1 of the SCM Agreement as allowing investigating authorities to examine specificity exclusively under Article 2.1(c). The United States sees no merit in China's argument that, in every specificity analysis under Article 2.1, an investigating authority must examine a subsidy under subparagraphs (a) and (b) of Article 2.1 before examining it under Article 2.1(c). The United States notes that, contrary to China's position, the Panel's finding that subparagraph (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 provided by that provision within Article 2.1 of the SCM Agreement, as clarified by the Appellate Body in previous Appellate Body reports.

2.107. The United States asserts that the Panel's interpretation is consistent with the ordinary meaning of the first sentence of Article 2.1(c). In the United States' view, China disregards the structure of the first sentence of Article 2.1(c) in arguing 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.'"<sup>272</sup>

2.108. The United States argues that China's interpretation "fails to take into account the fact that the two phrases are treated differently within the structure of the sentence"<sup>273</sup> and that "the differing treatment of the two clauses conveys different meanings."<sup>274</sup> For the United States, "the ordinary meaning [of Article 2.1(c)] 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."<sup>275</sup>

2.109. The United States recalls that the Panel examined the Spanish and French versions of Article 2.1(c) and noted that the Spanish version places the "notwithstanding" clause after the clause "if there are reasons to believe that the subsidy may in fact be specific".<sup>276</sup> According to the United States, the Panel explained that the sentence structure in the Spanish version 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.'"<sup>277</sup> The United States concludes that "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."<sup>278</sup>

2.110. The United States asserts that China's interpretation of Article 2.1(c) reads the words "even when" (*aun cuando*) completely out of the sentence in the Spanish text. For the United States, 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."<sup>279</sup> In addition,

<sup>272</sup> United States' appellee's submission, para. 96 (quoting China's appellant's submission, para. 123). (emphasis added by the United States)

<sup>273</sup> United States' appellee's submission, para. 96.

<sup>274</sup> United States' appellee's submission, para. 97.

<sup>275</sup> United States' appellee's submission, para. 98. (emphasis original)

<sup>276</sup> United States' appellee's submission, para. 99 (referring to Panel Report, para. 7.227 and fn 300 thereto).

<sup>277</sup> United States' appellee's submission, para. 99 (quoting Panel Report, para. 7.227 (emphasis original)).

<sup>278</sup> United States' appellee's submission, para. 99. (emphasis original)

<sup>279</sup> United States' appellee's submission, para. 100. (emphasis original)

the United States disagrees with China that the Panel's interpretation would render the "notwithstanding" clause "*inutile*".<sup>280</sup> Rather, "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."<sup>281</sup>

2.111. The United States also notes that the Panel's interpretation of the first sentence of Article 2.1(c) is supported by the context provided by Article 2.1 and the SCM Agreement as a whole. The United States stresses that China's interpretation would "create a new requirement that all subsidies be distributed pursuant to 'legislation' or another source of an 'explicit[] limit[ation]' on the subsidy which can be evaluated under subparagraph (a)".<sup>282</sup> The United States submits that the Panel correctly considered the context provided by the first sentence of Article 2.1(c) and concluded that there is no order of analysis requirement whereby an investigating authority must evaluate Article 2.1(a) and (b) in every specificity analysis.

2.112. The United States maintains that the chapeau of Article 2.1 provides a framework for subparagraphs (a) through (c), which in no way indicates that each specificity analysis proceeds on the basis of an examination under all three subparagraphs. The United States argues that, 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.'"<sup>283</sup> The United States asserts that China's argument that investigating authorities must conduct an examination under each subparagraph reflects an interpretation that is more akin to a "rule", and is thus in conflict with the text of the chapeau of Article 2.1.<sup>284</sup>

2.113. The United States further notes that the Appellate Body has 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".<sup>285</sup> Thus, the United States maintains 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".<sup>286</sup>

2.114. In addition, the United States contends that China misconstrues the Appellate Body's findings in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* as supporting its restrictive interpretation of the first sentence of Article 2.1. According to the United States, the Appellate Body in that case indicated that an analysis of subparagraph (c) would "normally"<sup>287</sup> or "ordinarily"<sup>288</sup> follow an analysis of subparagraphs (a) and (b), but need not always follow this sequence. The United States considers that, "as a general matter, the structure of Article 2.1 only 'suggests' that the analysis will 'ordinarily' proceed in sequential order".<sup>289</sup> In the view of the United States, in arguing that the Appellate Body's discussion requires that "*all* specificity determinations must be assessed under Article 2.1(a) and (b)"<sup>290</sup>, China ignores the fact that, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body observed that an "analysis by the Panel under Article 2.1(b)

<sup>280</sup> United States' appellee's submission, para. 101 (quoting China's appellant's submission, para. 152 (emphasis original)).

<sup>281</sup> United States' appellee's submission, para. 101. (emphasis original)

<sup>282</sup> United States' appellee's submission, para. 103. (fn omitted)

<sup>283</sup> United States' appellee's submission, para. 104 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366).

<sup>284</sup> United States' appellee's submission, para. 106.

<sup>285</sup> United States' appellee's submission, para. 107 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371).

<sup>286</sup> United States' appellee's submission, para. 107.

<sup>287</sup> United States' appellee's submission, para. 109 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 796).

<sup>288</sup> United States' appellee's submission, para. 109 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 873).

<sup>289</sup> United States' appellee's submission, para. 111. The United States underlines that, because in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* there was *legislation* at issue, it was appropriate for that panel to examine such legislation under Article 2.1(a) and to proceed with its analysis under Article 2.1(c) on the basis of the findings made under subparagraphs (a) and (b). (Ibid.)

<sup>290</sup> United States' appellee's submission, para. 112 (referring to China's appellant's submission, paras. 127-130). (emphasis original)

was not necessary" in examining the claim at issue.<sup>291</sup> The United States asserts that there is therefore no merit in China's argument that the Appellate Body's analysis in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* supports its interpretation of the order of analysis in Article 2.1.

2.115. Lastly, the United States highlights that the Panel 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'."<sup>292</sup> The United States asserts that, due to the unwritten and informal nature of the subsidy programmes at issue, "the facts before the Panel embodied 'circumstances' where 'further consideration under the other subparagraphs [of Article 2.1] may be unnecessary'."<sup>293</sup> In the challenged investigations, there was therefore no reason to examine the subsidy programmes under subparagraphs (a) and (b). According to the United States, China would nevertheless have the investigating authority "conduct an empty analysis to satisfy a purely formalistic requirement".<sup>294</sup> For the United States, China's reading of Article 2.1 is not supported by the text of that provision or the context provided by the SCM Agreement as a whole and, thus, China's appeal should be rejected.

### **2.2.3.2 The Panel's interpretation and application of the term "subsidy programme" in Article 2.1(c)**

2.116. The United States argues that the Panel correctly concluded that a "subsidy programme" under Article 2.1(c) of the SCM Agreement may be evidenced by a systematic activity or series of activities. In response to China's argument that a "subsidy programme" must be interpreted to require the identification of a formally implemented "plan or outline"<sup>295</sup>, the United States argues that 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 as a 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."<sup>296</sup> In the view of the United States, the Panel correctly concluded that the subsidy programmes identified by the USDOC in the investigations at issue comported with this definition.

2.117. The United States disagrees with China's argument that a "subsidy programme" under Article 2.1(c) requires more than evidence of the systematic provision of a subsidy or subsidies, and, thus, that further evidence of a "plan" is necessary to comply with the requirements of the SCM Agreement. The United States contends that China's interpretation disregards the context of the term "subsidy programme" within Article 2.1 and the SCM Agreement as a whole, and would mean that subsidies are only countervailable if they are 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."<sup>297</sup>

2.118. The United States submits that 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.<sup>298</sup> 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. In the United States' view, "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."<sup>299</sup> For this reason, the United States argues that China's proposed interpretation of the term "subsidy programme" would require formal

<sup>291</sup> United States' appellee's submission, para. 112 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 876).

<sup>292</sup> United States' appellee's submission, para. 116 (quoting Panel Report, para. 7.229).

<sup>293</sup> United States' appellee's submission, para. 118 (quoting Panel Report, para. 7.229, in turn quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371).

<sup>294</sup> United States' appellee's submission, para. 118.

<sup>295</sup> United States' appellee's submission, para. 119 (quoting China's appellant's submission, paras. 159 and 169).

<sup>296</sup> United States' appellee's submission, para. 119.

<sup>297</sup> United States' appellee's submission, para. 120.

<sup>298</sup> United States' appellee's submission, para. 122.

<sup>299</sup> United States' appellee's submission, para. 122. (emphasis original)

implementation of the subsidy under both Articles 2.1(a) and 2.1(c), which would be inconsistent with the distinction between the analysis under the two provisions.

2.119. The United States contends that, under a proper interpretation of the term "subsidy programme"<sup>300</sup>, 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". Rather, there are various means by which a subsidy programme could be implemented and, thus, evidenced. According to the United States, 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.<sup>301</sup>

2.120. The United States also rejects China's argument that the Panel's interpretation "collapses" the term "subsidy programme" into the term "subsidy".<sup>302</sup> In fact, according to the United States, the Panel correctly applied the term "subsidy programme" to the USDOC's determinations at issue by concluding that the provision of those inputs for less than adequate remuneration was a systematic activity or series of activities that reflected the existence of a subsidy programme under Article 2.1(c) in the absence of any alleged written source for the implementation of the programme.

2.121. In addition, the United States disagrees with China that the Panel's application of the term "subsidy programme" deprives the term of its ordinary meaning. The United States maintains that, "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."<sup>303</sup>

2.122. The United States also disagrees with China's contention that the Panel failed to recognize that the USDOC "never substantiated on the basis of positive evidence on the record" the existence of subsidy programmes in the challenged investigations, and that those programmes were "merely asserted" by the USDOC.<sup>304</sup> The United States argues that the USDOC did not "merely assert" the existence of the subsidy programmes for the purposes of its analysis under Article 2.1(c). Rather, the record demonstrates that, for each investigation, far from being "merely asserted", the existence of the subsidy programmes is grounded in the facts on the record. The United States notes that, in each challenged investigation, the subsidy programmes that the USDOC investigated "were first identified in the application, which China does not dispute contained evidence as to the programs' existence".<sup>305</sup>

2.123. In sum, the United States asserts that China's restrictive interpretation of the term "subsidy programme" is not supported by the context of the term within Article 2 and the SCM Agreement as a whole, as such an interpretation would limit the subsidies that could be found to be *de facto* specific to those implemented according to a formal "plan or outline". The United States considers that the Panel arrived at a correct interpretation and application of the first factor of Article 2.1(c) and properly examined the USDOC's determinations. In particular, 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).

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<sup>300</sup> The United States rejects China's contention that there was no dispute in the proceedings before the Panel between the United States and China that "a series of subsidies, by itself" cannot constitute a "subsidy programme". According to the United States, in making this assertion, China largely relies on statements by the United States in another dispute concerning a different subsidy programme and different legal issues. (United States' appellee's submission, para. 124)

<sup>301</sup> United States' appellee's submission, para. 124.

<sup>302</sup> United States' appellee's submission, para. 125.

<sup>303</sup> United States' appellee's submission, para. 127 (referring to China's appellant's submission, para. 165).

<sup>304</sup> United States' appellee's submission, para. 132 (referring to China's appellant's submission, paras. 118 and 170).

<sup>305</sup> United States' appellee's submission, para. 133 (referring to China's response to Panel question No. 56, para. 145). By way of example, the United States refers to the Aluminum Extrusions determination, in which 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*". (Ibid., para. 133 (emphasis original))

Accordingly, the United States argues that China's appeal with respect to this aspect of Article 2.1(c) should be rejected.

### **2.2.3.3 The Panel's examination of China's claims regarding the identification of the relevant "granting authority"**

2.124. With respect to China's argument that "the identification of the relevant granting authority is a prerequisite to identifying the relevant jurisdiction", the United States argues that the Panel correctly found that no such requirement exists and that, as the USDOC's determinations indicate that the relevant jurisdiction for the specificity inquiry was China, the USDOC was not required to explicitly identify the granting authority.<sup>306</sup>

2.125. The United States rejects China's argument 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."<sup>307</sup> The United States contends that China's position is not supported either by the text of the chapeau of Article 2.1 or by the context provided by the SCM Agreement. The United States adds that the question of who provides the input is dealt with under Article 1 of the SCM Agreement and that "[t]he focus of the specificity analysis under Article 2.1 is on the universe of *users* of the subsidy, not on the 'granting authority'."<sup>308</sup> As a result, the United States argues that "the relevant jurisdiction of the granting authority for purposes of the specificity analysis is the jurisdiction where potential users are located."<sup>309</sup>

2.126. The United States notes that "China inserts a non-existent requirement into Article 2.1 when it argues that [the USDOC] must identify a 'granting authority' with respect to the provision of inputs for less than adequate remuneration."<sup>310</sup> According to the United States, "[t]he Panel correctly found that Article 2.1 merely requires that the jurisdiction of the [granting authority] 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."<sup>311</sup> The United States contends that, "[i]n each challenged determination, as part of its analysis under Article 1, [the USDOC] 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."<sup>312</sup> According to the United States, "[n]o further analysis was required under Article 2.1."<sup>313</sup>

2.127. In addition, the United States rejects China's arguments 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."<sup>314</sup> The United States observes that, in each specificity determination, the USDOC "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*."<sup>315</sup> According to the United States, China and the participating respondents were therefore aware in each investigation that the USDOC's analysis applied to this jurisdiction. The United States stresses that, in none of the challenged investigations, did China (or any other participating party) challenge the USDOC's consideration of all of China as the relevant jurisdiction for purposes of a *de facto* specificity analysis. Nor, the United States argues, has China alleged before the Panel or on appeal that this jurisdiction was somehow inappropriate.

2.128. The United States concludes that, because China's argument that an investigating authority must identify the "granting authority" in conducting the specificity analysis has no basis

<sup>306</sup> United States' appellee's submission, para. 136 (quoting China's appellant's submission, para. 173).

<sup>307</sup> United States' appellee's submission, para. 139 (quoting China's appellant's submission, para. 173).

<sup>308</sup> United States' appellee's submission, para. 139. (emphasis original)

<sup>309</sup> United States' appellee's submission, para. 139.

<sup>310</sup> United States' appellee's submission, para. 140.

<sup>311</sup> United States' appellee's submission, para. 140.

<sup>312</sup> United States' appellee's submission, para. 140.

<sup>313</sup> United States' appellee's submission, para. 140.

<sup>314</sup> United States' appellee's submission, para. 141 (quoting China's appellant's submission, para. 175).

<sup>315</sup> United States' appellee's submission, para. 141. (emphasis original)



in the text of the SCM Agreement, the Panel's analysis and interpretation of Article 2.1 of the SCM Agreement was correct and should be upheld.

#### 2.2.3.4 Completion of the legal analysis

2.129. The United States argues that, in the event the Appellate Body reverses the Panel's findings that the USDOC acted consistently with the obligations of the United States under Article 2.1 of the SCM Agreement, the Appellate Body should not complete the legal analysis. The United States observes that not all of the USDOC's administrative record that supports the specificity determinations is part of the Panel record. In the United States' view, the Appellate Body should decline to complete the legal analysis "whether or not there could be sufficient facts to complete the legal analysis".<sup>316</sup>

2.130. With respect to China's request for completion regarding the identification of the "subsidy programme", the United States rejects China's allegations that the USDOC "(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".<sup>317</sup> The United States stresses that the USDOC "*did* identify the subsidy programs in each investigation".<sup>318</sup> The United States further highlights that "there was evidence on the record supporting the existence of the subsidy programmes"<sup>319</sup>, and that "the Panel never purported to examine whether, consistent with Article 2.4 of the SCM Agreement, the determination was based on 'positive evidence'".<sup>320</sup>

2.131. According to the United States, "[b]ecause the Panel did not conduct its *own analysis* regarding whether [the USDOC's] determinations were consistent with the meaning of 'subsidy programmes' as interpreted by China, the Appellate Body would need to undertake this task."<sup>321</sup> Such an examination would, in the United States' view, require the Appellate Body to examine each specificity determination and consider and evaluate the relevant evidence. The United States observes that, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body declined to complete the analysis under similar circumstances because the participants had not addressed the relevant issues sufficiently.<sup>322</sup> For these reasons, the United States argues that the Appellate Body should not complete the legal analysis and should not find that the USDOC's identification of the "subsidy programme" is inconsistent with Article 2.1 of the SCM Agreement.

### 2.3 Claims of error by the United States – Other appellant

#### 2.3.1 Article 6.2 of the DSU – The Panel's terms of reference

2.132. The United States claims that the Panel erred in concluding, in its Preliminary Ruling issued on 8 February 2013<sup>323</sup>, that Section B.1(d) of China's panel request meets the requirements of Article 6.2 of the DSU. In particular, the United States submits that the Panel erred in finding that China's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". According to the United States, China's panel request does not "plainly connect" the "facts available" obligation in Article 12.7 of the SCM Agreement to the 22 investigations listed in the panel request.<sup>324</sup> The United States therefore requests the

<sup>316</sup> United States' appellee's submission, para. 150.

<sup>317</sup> United States' appellee's submission, para. 151 (referring to China's appellant's submission, para. 184).

<sup>318</sup> United States' appellee's submission, para. 151 (referring to United States' second written submission to the Panel, fn 160; and opening statement at the second Panel meeting, fn 40). (emphasis original)

<sup>319</sup> United States' appellee's submission, para. 151 (referring to China's response to Panel question No. 56, para. 145; and United States' second written submission to the Panel, para. 79).

<sup>320</sup> United States' appellee's submission, para. 151.

<sup>321</sup> United States' appellee's submission, para. 151. (emphasis original)

<sup>322</sup> United States' appellee's submission, para. 152 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 194-197).

<sup>323</sup> WT/DS437/4. The Panel's Preliminary Ruling was made "an integral part of the Panel's Final Report" (Panel Report, para. 1.16) as Annex A-8 thereto (WT/DS437/R/Add.1, pp. A-34 to A-46).

<sup>324</sup> United States' other appellant's submission, paras. 22 and 26 (referring to Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; and *China – Raw Materials*, para. 220).

Appellate Body to reverse the Panel's finding under Article 6.2 of the DSU, and to declare moot and of no legal effect the Panel's findings under Article 12.7 of the SCM Agreement because China's claims under this provision did not fall within the Panel's terms of reference.

2.133. According to the United States, China's panel request fails to "plainly connect" the challenged 22 investigations with Article 12.7 of the SCM Agreement because it fails to identify: (i) the instances of the use of facts available that China sought to challenge; and (ii) the relevant obligation that the United States is alleged to have breached. The United States emphasizes that it is "the combination of these two factors" that makes it "impossible to discern, from the face of the panel request, the claims that China sought to advance and the problem it sought to address in this dispute".<sup>325</sup>

2.134. With respect to China's failure "to adequately describe" in its panel request the "instances" of the use of "facts available"<sup>326</sup> by the USDOC, the United States highlights that the 22 investigations that were the "subject" of China's panel request "involved over 50 individual respondents, and approximately 650 different subsidies", and that, in the course of these investigations, the USDOC applied facts available "hundreds of times".<sup>327</sup> Yet, the United States submits that "China's panel request provides no description of the particular 'instances' in which it considered facts available to have been used and which applications of facts available were the source of the 'problem' that China sought to challenge."<sup>328</sup>

2.135. According to the United States, the inadequacy of China's identification of the subject of its claims "is evidenced, first, by the disagreement between the Panel and China as to what China, in fact, challenged in the panel request."<sup>329</sup> In this regard, the United States notes that, in response to the United States' request for a preliminary ruling, China attempted to narrow its claims to "each instance" in which the USDOC used "adverse" facts available for the purpose of reaching a finding of financial contribution, specificity, or benefit.<sup>330</sup> The United States argues that the Panel correctly found, however, that the panel request encompassed "each instance", and was not limited to those in which it was alleged that "adverse" facts available were used.<sup>331</sup> The United States further submits that China's panel request "was *not* limited to the instances of application of 'adverse' facts available, but rather on its face encompassed all uses of facts available".<sup>332</sup> Referring to the Appellate Body report in *US – Carbon Steel*, the United States asserts that China's panel request provided no notice to either the Panel or the United States that "China's claim solely, or primarily, concerned instances related to the use of 'adverse' facts available."<sup>333</sup>

2.136. Second, the United States argues that "ambiguity" with respect to the subject of China's "facts available" claims is also revealed by the claims pursued in China's subsequent written submissions and oral statements before the Panel.<sup>334</sup> Referring to Appellate Body jurisprudence, the United States notes that, although subsequent submissions and statements cannot "cure"<sup>335</sup> defects in a panel request, these documents "may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced".<sup>336</sup> According to the United States, China's first written submission to the Panel revealed that it was not in fact challenging "each" instance of the use of facts available. Instead, China selected "some" of those instances, representing a "mere fraction

<sup>325</sup> United States' other appellant's submission, para. 28.

<sup>326</sup> United States' other appellant's submission, heading III.B.1, p. 14.

<sup>327</sup> United States' other appellant's submission, para. 31.

<sup>328</sup> United States' other appellant's submission, para. 31.

<sup>329</sup> United States' other appellant's submission, para. 32.

<sup>330</sup> United States' other appellant's submission, para. 33 (referring to China's response to United States' preliminary ruling request, para. 7).

<sup>331</sup> United States' other appellant's submission, para. 33 (referring to Preliminary Ruling, para. 4.5).

<sup>332</sup> United States' other appellant's submission, para. 34. (emphasis original)

<sup>333</sup> United States' other appellant's submission, para. 34 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127).

<sup>334</sup> United States' other appellant's submission, para. 35.

<sup>335</sup> United States' other appellant's submission, para. 35 (referring to Appellate Body Reports, *China – Raw Materials*, para. 220; and *EC – Fasteners (China)*, para. 561).

<sup>336</sup> United States' other appellant's submission, para. 35 (quoting Appellate Body Report, *US – Carbon Steel*, para. 127; and referring to Appellate Body Reports, *China – Raw Materials*, para. 220; and *EC – Fasteners (China)*, para. 562).



– 48 in total – of the hundreds of possible instances of the use of facts available".<sup>337</sup> The United States asserts that it was impossible for the United States to have "predict[ed] the subject of China's numerous, individual facts available claims".<sup>338</sup>

2.137. Finally, the United States submits that, although China and the Panel referred to and described section B.1(d) of the panel request as setting out a "single" facts available claim, China's panel request, in fact, describes "a massive, indeterminate number of individual 'as applied' claims", of which China eventually presented facts and arguments relating to only 48 individual and specific applications of facts available.<sup>339</sup> For the United States, the "inconsistency" between China's assertions at the initial stages of the dispute and the instances identified in the latter stages is an "important factor[]" in the required holistic analysis" of whether China's panel request complies with the requirements of Article 6.2 of the DSU.<sup>340</sup>

2.138. Furthermore, the United States claims that China failed to identify the obligation in Article 12.7 of the SCM Agreement that the United States allegedly infringed, and that the Panel erred in its conclusion that China's reference to a specific paragraph of the SCM Agreement – namely, Article 12.7 – was sufficient to present the problem clearly.<sup>341</sup> Referring to the Appellate Body report in *US – Countervailing and Anti-Dumping Measures (China)*, the United States argues that "a panel request that fails to specify one of the multiple obligations under a relevant paragraph 'may be found wanting in respect of the degree of clarity required by Article 6.2.'"<sup>342</sup> In the present case, the United States contends that China's panel request provides no indication of which elements of Article 12.7 the United States was alleged to have infringed. More specifically, the United States argues that China's panel request does not indicate whether China was alleging: (i) that the USDOC wrongly found that the parties that failed to respond were interested Members or interested parties; and/or (ii) that the USDOC wrongly found that the interested parties refused access to or otherwise did not provide information; and/or (iii) that the USDOC wrongly found that the information was necessary; and/or (iv) that the USDOC failed to provide a reasonable period of time to submit the information; and/or (v) that the USDOC wrongly found that the respondents significantly impeded the investigation; and/or (vi) that the USDOC's preliminary or final determination, either affirmative or negative, was not based on "facts available". The United States submits that any of these could potentially be relevant for a claim under Article 12.7.

2.139. The United States also asserts that China's panel request "circularly" states that the United States breached Article 12.7 of the SCM Agreement because the "USDOC resorted to facts available, and used facts available, ... in manners ... inconsistent with that provision".<sup>343</sup> In the United States' view, the phrase "manners ... inconsistent with that provision" provides no information as to which instances China was challenging or how or why the United States is alleged to have breached Article 12.7. Moreover, the use of the plural word "manners" indicates that China acknowledges that there are "multiple ways in which an application of facts available might breach [Article 12.7]".<sup>344</sup> The United States asserts that, had the Panel conducted the required case-by-case analysis under Article 6.2 of the DSU, taking into account the "overall circumstances" identified by the United States, the Panel would have reached "a very different conclusion".<sup>345</sup>

2.140. The United States further argues that the reference to "adverse" facts available in the panel request is unhelpful, because the panel request does not limit the claims to the instances involving "adverse" facts available but, rather, only *includes* those instances.<sup>346</sup> The United States submits that, even if China's claims were limited to the instances of the use of "adverse" facts

<sup>337</sup> United States' other appellant's submission, para. 36. (fn omitted)

<sup>338</sup> United States' other appellant's submission, para. 36.

<sup>339</sup> United States' other appellant's submission, para. 37.

<sup>340</sup> United States' other appellant's submission, para. 38.

<sup>341</sup> United States' other appellant's submission, para. 41 (referring to Preliminary Ruling, para. 4.16).

<sup>342</sup> United States' other appellant's submission, para. 41 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.31).

<sup>343</sup> United States' other appellant's submission, para. 40 (quoting China's panel request, p. 4).

<sup>344</sup> United States' other appellant's submission, para. 40.

<sup>345</sup> United States' other appellant's submission, para. 42.

<sup>346</sup> United States' other appellant's submission, para. 44 (referring to China's panel request, fn 10).

available, there is nothing in China's panel request that "sheds light on how or why the use of 'adverse' facts available is alleged to be inconsistent with Article 12.7 of the SCM Agreement".<sup>347</sup>

2.141. Based on the above, the United States asserts that, "[d]ue to the vagueness in both the description of *what* China intended to challenge and *how* the United States was alleged to have breached its obligations, China's panel request failed to 'plainly connect' the 22 investigations [at issue] to Article 12.7 of the SCM Agreement."<sup>348</sup> According to the United States, by "obscur[ing] both sides of the ledger"<sup>349</sup>, China's panel request results in a situation similar to that in *China – Raw Materials*, where the Appellate Body found that the obligation to plainly connect the measures with the provisions that had allegedly been breached was not met because the panel requests did not make it clear "which allegations of error pertain[ed] to which particular measure or set of measures identified in the panel requests".<sup>350</sup>

2.142. The United States also refers to the Appellate Body's finding in *US – Countervailing and Anti-Dumping Measures (China)* that the term "double remedies" in the panel request at issue in that dispute "provided information about the aspect of the measure and the particular obligation alleged to have been infringed sufficient to 'plainly connect' the two".<sup>351</sup> The United States notes the Appellate Body's explanation that "the term 'double remedies' forms part of the identification of the measure ... the word 'double' in this term also gives an indication that *the problem* with 'double remedies' is that they result in the levying of countervailing duties exceeding the 'appropriate amounts in each case' in the sense of Article 19.3 of the SCM Agreement."<sup>352</sup> Relying on this explanation, the United States submits that "the description of the measure, and the aspect of the measure being challenged, is relevant to determining whether a panel request 'plainly connects' the measures to the obligations alleged to be infringed."<sup>353</sup> The United States also recalls the Appellate Body's statement that "simply specifying Article 19.3 or adopting its exact language in the panel request, without making a reference to 'double remedies', would not necessarily [present] the problem clearly" because there are multiple obligations in Article 19.3.<sup>354</sup> In the present case, the United States submits that, as with Article 19.3 of the SCM Agreement, Article 12.7 contains "a number of distinct elements related to the use of facts available", and that China's panel request makes no attempt to describe which of those elements have allegedly been breached by the USDOC's use of facts available.<sup>355</sup>

2.143. Finally, the United States recalls the Appellate Body's statements in *India – Patents (US)* that "[a]ll parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims" and that "[c]laims must be stated clearly."<sup>356</sup> The United States asserts that China "failed to meet this standard of clarity" because it described its "numerous as-applied 'facts available' allegations in a general and utterly vague manner".<sup>357</sup> According to the United States, if "this form of pleading" were allowed, a complainant would be able to make the "broadest possible claims, denying any meaningful notice to the responding Member, to third parties, or to the panel of the scope of the problem, much less the actual issues that will be addressed".<sup>358</sup> The United States submits that such an approach would significantly disrupt dispute settlement proceedings, "potentially interfering with the prompt resolution of disputes and diminishing confidence in the dispute settlement system".<sup>359</sup> The United States also asserts that China's "form of pleading"

<sup>347</sup> United States' other appellant's submission, para. 45.

<sup>348</sup> United States' other appellant's submission, para. 46. (emphasis original)

<sup>349</sup> United States' other appellant's submission, para. 48.

<sup>350</sup> United States' other appellant's submission, para. 47 (quoting Appellate Body Report, *China – Raw Materials*, para. 226).

<sup>351</sup> United States' other appellant's submission, para. 49 (referring to Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.28).

<sup>352</sup> United States' other appellant's submission, para. 51 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.28). (emphasis added by the United States)

<sup>353</sup> United States' other appellant's submission, para. 51.

<sup>354</sup> United States' other appellant's submission, para. 52 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.29).

<sup>355</sup> United States' other appellant's submission, para. 53.

<sup>356</sup> United States' other appellant's submission, para. 54 (quoting Appellate Body Report, *India – Patents (US)*, para. 94).

<sup>357</sup> United States' other appellant's submission, para. 54.

<sup>358</sup> United States' other appellant's submission, para. 54.

<sup>359</sup> United States' other appellant's submission, para. 54.

prejudiced the ability of the United States to prepare its defence within the timeframes of the DSU, requiring it to file a preliminary ruling request.

## 2.4 Arguments of China – Appellee

### 2.4.1 Article 6.2 of the DSU – The Panel's terms of reference

2.144. China submits that the Panel correctly concluded that, with respect to China's claims under Article 12.7 of the SCM Agreement, China's panel request satisfies the requirement under Article 6.2 of the DSU "to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". China maintains that the United States' allegations of error in this regard are "baseless" and should be rejected by the Appellate Body.<sup>360</sup>

2.145. First, China asserts that the Panel correctly concluded that China's panel request adequately identifies the "instances" of the use of "facts available" that were subject to challenge.<sup>361</sup> China argues that its panel request states that the claim it was bringing under Article 12.7 of the SCM Agreement arose "in respect of each instance in which the USDOC used facts available, including 'adverse' facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1".<sup>362</sup> In China's view, it was "a simple matter for the United States to identify the 'instances' of facts available subject to challenge" because the relevant measures at issue are the 19 final countervailing duty determinations and the three preliminary countervailing duty determinations listed in Appendix 1 to the panel request. China submits that "[t]hese are the only measures at issue in which the USDOC would have used facts available", and that, "[i]n each and every one of these determinations, the USDOC clearly identified those instances in which it used facts available for the purpose of reaching a finding of financial contribution, specificity, or benefit."<sup>363</sup>

2.146. China notes in this regard that each issues and decision memorandum (or *Federal Register* notice, in the case of preliminary determinations) includes a section entitled "Application of Facts Available and Use of Adverse Inferences", "or a similar title to the same effect".<sup>364</sup> China adds that, in those sections of the issues and decisions memoranda, "the USDOC describes in detail the circumstances that, in its view, justified its use of facts available, including 'adverse' facts available."<sup>365</sup> Moreover, "the USDOC often sets forth or elaborates upon its rationale for using 'adverse' facts available in the section of the [issues and decision memorandum] that addresses specific comments raised by interested parties during the course of the investigation."<sup>366</sup> In the light of such "consistent practices" by the USDOC, China observes that, after examining the issues and decisions memoranda and the relevant *Federal Register* notices, the Panel found that the instances in which the USDOC applied facts available were "readily identifiable".<sup>367</sup> China highlights that, as a result, the Panel stated, and the dissenting panelist agreed<sup>368</sup>, that it was "not persuaded by the United States' argument that 'it is not possible to discern what are those 'instances' in which China considers the investigating authority used facts available'".<sup>369</sup>

2.147. China points to the United States' reliance on China's alleged "narrowing of its claims" to only the instances of the use of "adverse" facts available by the USDOC. According to China, the United States' argument rests on the proposition that China's decision to "limit" its claims to 48 instances of the use of "adverse" facts available "somehow introduces ambiguity into a panel request that encompassed all such 'instances'".<sup>370</sup> China argues that the United States makes no attempt to "reconcile" this argument with the "well-established principle that a complaining party

<sup>360</sup> China's appellee's submission, para. 25.

<sup>361</sup> China's appellee's submission, heading III.A, p. 8.

<sup>362</sup> China's appellee's submission, para. 28 (quoting China's panel request, fn 10).

<sup>363</sup> China's appellee's submission, para. 29. (fn omitted)

<sup>364</sup> China's appellee's submission, para. 30 (referring to, as example, 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19), p. 3).

<sup>365</sup> China's appellee's submission, para. 30.

<sup>366</sup> China's appellee's submission, para. 30. (fn omitted)

<sup>367</sup> China's appellee's submission, para. 31 (quoting Preliminary Ruling, para. 4.4).

<sup>368</sup> China's appellee's submission, para. 31 (referring to Preliminary Ruling, para. 6.1).

<sup>369</sup> China's appellee's submission, para. 31 (quoting Preliminary Ruling, para. 4.4, in turn referring to United States' preliminary ruling request, para. 18).

<sup>370</sup> China's appellee's submission, para. 35.

is entitled to restrict the scope of a claim subsequent to the adoption of the terms of reference."<sup>371</sup> China submits that, by referring to "each instance" of the use of facts available in its panel request, it "precisely identified the relevant instances for purposes of its claim under Article 12.7", and that its subsequent decision to pursue its claims in relation to only 48 of those instances "does not retroactively make the language in China's panel request 'vague'".<sup>372</sup>

2.148. China further asserts that the Panel correctly concluded that China was not required to specify which of the obligations found in Article 12.7 of the SCM Agreement the USDOC is alleged to have breached. China recalls the Panel's explanation in its Preliminary Ruling that, in the circumstances of this case, China's panel request "sheds sufficient 'light on the nature of the obligation at issue' to satisfy Article 6.2 of the DSU".<sup>373</sup> China also notes the Panel's statement that "China had provided more detail in the relevant portion of its panel request than the complainants in *US – Certain EC Products* and *Thailand – H-Beams*", because "China had not 'merely listed the Article at issue, but ha[d] referenced the specific sub-paragraph of Article 12 under which it [brought] its claim (namely, 12.7 of the SCM Agreement)'".<sup>374</sup> China further recalls the Panel's statement that Article 12.7 "sets out a relatively limited range of circumstances in which it is permissible for an investigating authority to apply 'facts available'".<sup>375</sup>

2.149. China argues that the United States has not addressed the Panel's statement that "providing more precise details regarding what aspects of the resort to and use of facts available are challenged under Article 12.7 of the SCM Agreement could perhaps best be characterized as the arguments in support of the claim, rather than the summary of the claim itself."<sup>376</sup> China adds that it is well established that a complainant is not required to present its arguments in its panel request.<sup>377</sup> Moreover, China notes that the United States acknowledged before the Panel that "panels and the Appellate Body have ... repeatedly found that a complaining party is not required to provide arguments in the panel request".<sup>378</sup> In China's view, its panel request "clearly 'sets forth the complainant's view that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement'".<sup>379</sup> According to China, therefore, the only explanation for the United States' position on appeal is that "the United States believes that China was required to provide arguments in its panel request."<sup>380</sup>

2.150. China also contests the analogy drawn by the United States between China's panel request in the present case and the situation that arose in *US – Countervailing and Anti-Dumping Measures (China)* with respect to China's claim under Article 19 of the SCM Agreement. China argues that, in that dispute, the Appellate Body's analysis "focused on whether the general reference to Article 19 of the SCM Agreement in the panel request was 'sufficient to identify Article 19.3 as the legal basis of the claim'".<sup>381</sup> China submits that "[t]he circumstances are fundamentally different here, where China's identification of the relevant subparagraph at issue, Article 12.7, is undisputed."<sup>382</sup> Moreover, by referring to "so-called 'adverse' facts available" in the panel request, China submits that it "clearly indicated that it considered the USDOC's concept of 'adverse' facts available to be inconsistent with Article 12.7 of the SCM Agreement".<sup>383</sup> China recalls the Panel's statements that China's panel request provided "a higher level of precision with

<sup>371</sup> China's appellee's submission, para. 35 (referring to Appellate Body Report, *Japan – Apples*, para. 136). (additional fn text omitted)

<sup>372</sup> China's appellee's submission, para. 36.

<sup>373</sup> China's appellee's submission, para. 41 (quoting Preliminary Ruling, para. 4.16, in turn referring to Appellate Body Report, *US – Carbon Steel*, para. 130).

<sup>374</sup> China's appellee's submission, para. 41 (quoting Preliminary Ruling, para. 4.16).

<sup>375</sup> China's appellee's submission, para. 41 (quoting Preliminary Ruling, para. 4.16).

<sup>376</sup> China's appellee's submission, para. 43 (quoting Preliminary Ruling, para. 4.17).

<sup>377</sup> China's appellee's submission, para. 44 (referring to Preliminary Ruling of the panel in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 20; and Appellate Body Report, *EC – Bananas III*, para. 141).

<sup>378</sup> China's appellee's submission, para. 46 (quoting United States' response to Panel question No. 4, para. 7 (fns omitted)).

<sup>379</sup> China's appellee's submission, para. 46 (quoting United States' third party submission to the Panel in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 22 (fns omitted)).

<sup>380</sup> China's appellee's submission, para. 46.

<sup>381</sup> China's appellee's submission, para. 48 (quoting Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.25).

<sup>382</sup> China's appellee's submission, para. 48.

<sup>383</sup> China's appellee's submission, para. 50.

respect to one aspect of its claim, namely that China will challenge USDOC's use of 'adverse' facts available"<sup>384</sup>, and that "the United States was in a position to 'begin' preparing a defence" in response to China's claims relating to USDOC's application of "adverse" facts available.<sup>385</sup> According to China, in the light of the fact that China's first written submission to the Panel confirmed that the USDOC's use of so-called "adverse" facts available was the basis for China's challenge in all 48 instances, the United States' "claim of prejudice" is unfounded.<sup>386</sup>

2.151. Finally, China disagrees with the United States' position that, "[d]ue to the vagueness in both the description of *what* China intended to challenge and *how* the United States was alleged to have breached its obligations, China's panel request failed to 'plainly connect' the 22 investigations to Article 12.7 of the SCM Agreement."<sup>387</sup> China recalls its explanation before the Panel that the United States failed to identify any prior decision with respect to Article 6.2 of the DSU that was analogous to what the United States was asking the Panel to find in this case.<sup>388</sup> China distinguishes the present case from *China – Raw Materials*, where it was unclear which allegations of error pertained to which particular measures or set of measures. By contrast, China's panel request in the present dispute "plainly connects" the 22 challenged measures identified in Appendix 1 to the "single provision of the covered agreements by indicating that, in China's view, the United States acted inconsistently with Article 12.7 in 'each instance' in which the USDOC used facts available".<sup>389</sup> According to China, this is exactly what the Panel concluded when it rejected the United States' proposed analogy of this case with *China – Raw Materials*.<sup>390</sup>

2.152. For these reasons, China argues that the Appellate Body should reject the United States' appeal of the Panel's findings under Article 6.2 of the DSU.

## 2.5 Arguments of the third participants

### 2.5.1 Australia

2.153. Australia did not submit a third participant's submission pursuant to Rule 24(1) of the Working Procedures. In its opening statement at the oral hearing, Australia focused on China's appeal with respect to the Panel's findings under Articles 14(d) and 2.1(c) of the SCM Agreement. Australia argues that the term "government" has the same meaning in Article 14(d) and Article 1.1(a)(1) of the SCM Agreement. In Australia's view, the meaning of the term "government" in the above-mentioned provisions encompasses both "government" and "any public body within the territory of a Member". However, a finding that an entity is not a "government or public body" under Article 1.1(a)(1) would not automatically require competent authorities to disregard the activities or features of that entity when examining "prevailing market conditions" for the purposes of establishing government predominance in the market. According to Australia, governments can distort a market without providing a subsidy. For instance, price distortion may result from significant government regulations or restrictions on operators in the market. Hence, the behaviour of SOEs may be relevant for purposes of determining whether the government has a predominant role in the market, regardless of whether an SOE is a "public body". Furthermore, Australia submits that out-of-country benchmarks may be used for the purpose of calculating benefit under Article 14(d), where private prices are distorted. Such a distortion may occur because of the government's predominant role in the market as provider of the same or similar goods. In Australia's view, government ownership and control of an SOE could be relevant to whether the government has a predominant role in the market, but would depend on the particular circumstances of the market.

2.154. With respect to the order of analysis under Article 2.1 of the SCM Agreement, Australia observes that there is no requirement to consider subparagraphs (a) and (b) before turning to

<sup>384</sup> China's appellee's submission, para. 51 (quoting Preliminary Ruling, para. 4.16; and referring to European Union's third party comments on United States' preliminary ruling request, para. 16).

<sup>385</sup> China's appellee's submission, para. 51 (quoting Preliminary Ruling, fn 39 to para. 4.18).

<sup>386</sup> China's appellee's submission, para. 51.

<sup>387</sup> China's appellee's submission, para. 53 (quoting United States' other appellant's submission, para. 46 (emphasis original)).

<sup>388</sup> China's appellee's submission, para. 54 (referring to China's response to United States' preliminary ruling request, para. 30).

<sup>389</sup> China's appellee's submission, para. 56.

<sup>390</sup> China's appellee's submission, para. 57 (referring to Preliminary Ruling, para. 4.7).

subparagraph (c). In Australia's view, the "principles" contained in these three paragraphs should be considered holistically. Moreover, the language of Article 2.1(c) suggests that the principle in this paragraph could be applied irrespective of whether the other principles have been applied. According to Australia, the order of application or the weight given to each subparagraph may depend on the particular facts of the case, as suggested by the Appellate Body's findings in earlier disputes.

### 2.5.2 Brazil

2.155. Regarding China's claims under Articles 14(d) and 1.1(a)(1) of the SCM Agreement, Brazil argues that, given that Article 1.1(a)(1) explicitly indicates that both government (in the narrow sense) and any public body are referred to in the SCM Agreement solely as "government", the term "government" in Article 14(d) encompasses both the government and any public body, as defined in Article 1.1(a)(1).

2.156. Brazil maintains that the assessment of whether the entity suspected of making a financial contribution is characterized as "government" under Article 1.1(a)(1) is a separate and previous step to the assessment of the benefit earned under Article 14(d). In Brazil's view, an investigating authority can only assess the provision of goods by an entity under Article 14(d) once it has previously and properly characterized such entity as "government" under Article 1.1(a)(1). Thus, in order to establish whether an investigating authority has acted consistently with Article 14(d) in determining the existence of a "benefit", a panel must first determine whether such authority has rightfully characterized the relevant entity as "government" under Article 1.1(a)(1) of the SCM Agreement.

2.157. Brazil stresses that it is the responsibility of the investigating authority to determine, on a case-by-case basis, whether an entity, irrespective of being owned or controlled by the government, is actually vested with the authority to exercise governmental functions, and is thus a public body for the purposes of Article 1.1 of the SCM Agreement. According to Brazil, such assessment is a necessary step prior to the application of Article 14(d).

2.158. Brazil recalls that, in the context of the provision of goods, the adequacy of remuneration under Article 14(d) is to be determined in relation to prevailing market conditions in the country of provision. In conducting this analysis, the mere fact that the government is the significant provider of the goods does not, in and of itself, establish a presumption of market distortion either for the assessment of the adequacy of remuneration or for the calculation of the amount of subsidy conferred in Part V of the SCM Agreement. Rather, in Brazil's view, the benefit analysis should be carried out on a case-by-case basis and bearing in mind the findings of the Appellate Body in *US – Softwood Lumber IV*.

2.159. Brazil further submits that the characterization of an entity as "government" does not create the presumption that out-of-country benchmarks must be used in the assessment of the amount of benefit conferred. According to the established "predominance" test, an investigating authority may exclude in-country benchmarks only when the "government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods".<sup>391</sup> Brazil emphasizes that, in many cases, SOEs can act only as market participants, subject to the same conditions as private parties, instead of being geared towards attaining a government policy objective. In such circumstances, the government would not be using its power to influence prices through SOEs regardless of how significant their market share is. Brazil, therefore, argues that in-country benchmarks should not, for this reason alone, be discarded.

2.160. Regarding China's "as applied" claims under Article 12.7 of the SCM Agreement, Brazil submits that Article 12.7 does not allow an investigating authority to make determinations on the basis of mere assumptions or inferences. If there are no facts available on the record, an investigating authority cannot automatically reach a negative conclusion for the non-cooperating

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<sup>391</sup> Brazil's third participant's submission, para. 8 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 93). Brazil noted that the concept of predominance "does not refer exclusively to market shares, but may also refer to market power." (Ibid. (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444))

party simply because the necessary information was not provided.<sup>392</sup> In Brazil's view, the recourse to facts available is not unbound. Article 12.7 refers to the "use of 'the facts available' – and not merely to 'facts available'", which means that "all facts available to the authority would have to be considered in order to fill in the gap of the missing information".<sup>393</sup> Consequently, an investigating authority would not be allowed to choose those facts that would lead to a biased determination. Recalling the Appellate Body's statement in *Mexico – Anti-Dumping Measures on Rice* that "an investigating authority using the 'facts available' ... must take into account all the substantiated facts provided by an interested party"<sup>394</sup>, Brazil emphasizes that such a duty to consider all the facts available does not preclude an investigating authority from weighing information and evidence in order to reach a reasonable conclusion. Finally, Brazil expresses concerns with regard to the fact that the Panel "came across evidence that 'potentially raises concerns' regarding the consistency of some investigations by the USDOC ... with Article 12.7 ... but refrained from considering such elements in its assessment of facts".<sup>395</sup>

### 2.5.3 Canada

2.161. With respect to the application of the subparagraphs of Article 2.1 of the SCM Agreement, Canada submits that the consideration of "other factors" referred to in the first sentence of subparagraph (c) is not conditional on an appearance of non-specificity resulting from the prior application of subparagraphs (a) and (b). Canada considers that the wording in that sentence is intended to guide an investigating authority to conduct a *de facto* analysis under the second sentence of Article 2.1(c), even though an analysis of *de jure* elements may have revealed an appearance of non-specificity.

2.162. Canada considers that China's interpretation is not supported by the ordinary meaning of the first sentence in Article 2.1(c). The subordinate clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" indicates that, even where there is an appearance of non-specificity resulting from the application of subparagraphs (a) and (b), other factors may be considered if there are reasons to believe that the subsidy may in fact be specific. In Canada's view, the use of the concessive preposition "notwithstanding" indicates that one proposition may be true ("there are reasons to believe that the subsidy may in fact be specific") even though another proposition may also be true ("any appearance of non-specificity").

2.163. Furthermore, Canada maintains that the context of the first sentence of subparagraph (c) does not mandate a consideration of subparagraphs (a) and (b) in all cases. The chapeau of Article 2.1 refers to subparagraphs (a) to (c) as "principles", and the first sentence of subparagraph (c) repeats this term. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body emphasized that the use of the term "principles", instead of "rules", suggests that subparagraphs (a) through (c) "are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle".<sup>396</sup> According to Canada, this finding suggests that investigating authorities have a certain amount of flexibility in conducting the specificity analysis, including with respect to the sequence of the analysis. In addition, Canada argues that China misconstrues the case law where it alleges that the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* mandated a sequence, in particular, with respect to the application of Article 2.1(c). Canada notes that the Appellate Body indicated that the application of subparagraph (c) "will normally follow the application of the other two subparagraphs of Article 2.1."<sup>397</sup> For Canada, the Appellate Body's finding evidences that "the clause does not establish a *condition* to apply subparagraphs (a) and (b) first *in all cases*."<sup>398</sup>

<sup>392</sup> Brazil's third participant's submission, para. 11 (referring to Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.143).

<sup>393</sup> Brazil's third participant's submission, para. 12. (emphasis original)

<sup>394</sup> Brazil's third participant's submission, para. 12 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294).

<sup>395</sup> Brazil's third participant's submission, para. 14 (referring to Panel Report, para. 7.324).

<sup>396</sup> Canada's third participant's submission, para. 11 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366).

<sup>397</sup> Canada's third participant's submission, para. 12 (quoting Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 796). (emphasis added by Canada)

<sup>398</sup> Canada's third participant's submission, para. 12. (emphasis original)



2.164. Canada notes that China does not explain why a finding of "any appearance of non-specificity" under subparagraphs (a) and (b) before the application of "other factors" would be necessary for the determination of specificity in the underlying investigations. In Canada's view, a finding under subparagraphs (a) and (b) would merely be a statement of the negative, which would have no consequences for the application of subparagraph (c). Thus, Canada considers that neither the ordinary meaning nor the context of the first sentence of Article 2.1(c) of the SCM Agreement, as interpreted in prior Appellate Body reports, supports China's arguments.

2.165. As regards the question of whether a requirement exists to identify a granting authority under Article 2.1(c), Canada submits that the identification of a granting authority may not be necessary in every specificity analysis. The analysis under Article 2.1 focuses on determining whether a subsidy is limited to specific recipients, rather than on identifying the particular entity that constitutes the granting authority. The circumstances of a particular subsidy programme may make the identification of the granting authority unnecessary when conducting a specificity analysis. In this case, China did not explain the relevance of identifying a particular granting authority. Canada submits that, where it can be clearly established that a subsidy is limited to certain enterprises within a given jurisdiction, it may not be necessary for an investigating authority to identify explicitly the granting authority.

#### 2.5.4 European Union

2.166. Regarding China's claims under Articles 1.1(b) and 14(d) of the SCM Agreement, the European Union observes that these claims are predicated upon China's claims concerning the characterization of SOEs as public bodies. In the European Union's view, if China is correct that, as a factual point, the benefit determinations rest, in whole or in part, upon the public body determinations, and if the public body determinations are WTO-inconsistent, then China's claims would appear to be well founded. Referring to Appellate Body jurisprudence, if one determination by a municipal authority rests, in whole or in part, upon another WTO-inconsistent determination, then the measure at issue is WTO-inconsistent.<sup>399</sup> Such a finding cannot be avoided by arguing that the measure could lawfully rest upon other considerations. WTO adjudicators do not have the authority to recast municipal measures; that is something that can only be done by the municipal authority, eventually, in the context of a municipal compliance process. The European Union argues that, if, on the other hand, China had failed to demonstrate that the public body determinations are WTO-inconsistent, or if China had failed to demonstrate, as a matter of fact, that the benefit determinations rest, in whole or in part, upon the public body determinations, then the Panel would have been right to reject China's claims. The European Union considers that these are, in essence, questions of fact to be assessed separately with respect to each of the determinations at issue.

2.167. With respect to China's appeal of the Panel's findings under Article 2.1 of the SCM Agreement in the context of the specificity analysis, the European Union submits that China has not identified any error in the Panel Report. The European Union asserts that, even if the Appellate Body were to reach the stage of completing the analysis with respect to the issues on appeal, it should find that China has not demonstrated that any of the measures at issue are inconsistent with Article 2.1(c) of the SCM Agreement.

2.168. With respect to China's claim regarding the identification of the "subsidy programme", the European Union begins by noting that, although Article 1.1 of the SCM Agreement does not refer expressly to the term "programme", certain terms in Article 1.1 indicate that the definition extends both to a subsidy in the form of a subsidy to one enterprise, and to a subsidy in the form of a subsidy programme. For instance, the chapeau of Article 2.1 introduces the provisions regarding specificity by referring back to the "subsidy, as defined in paragraph 1 of Article 1", which confirms that the subsidy in question may be either a subsidy to one enterprise, or a subsidy to which an industry or group of enterprises or industries has access, that is, a subsidy programme.

2.169. The European Union argues that the issue of whether or not a subsidy "exists" – whether in the form of an individual subsidy or in the form of a subsidy programme – is governed by Article 1.1. By contrast, Article 2 is not concerned with the existence of a subsidy; rather, it

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<sup>399</sup> European Union's third participant's submission, para. 5 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).



assumes the existence of a subsidy, and addresses the question of whether or not that subsidy is specific. Thus, if an investigating authority finds that a subsidy programme exists *de jure* based on the express text of the subsidy programme, and the complaining Member wishes to contest that finding, it should do so under Article 1.1. Similarly, if an investigating authority finds that a subsidy programme exists *de facto*, not based on an express text but rather on the basis of other facts and evidence, and the complaining Member wishes to contest that finding, it should likewise do so under Article 1.1. According to the European Union, the essence of China's main complaint seems to be that no such subsidy programme exists. Consequently, in the European Union's view, China should have raised this matter under Article 1.1, not Article 2.

2.170. The European Union observes that there are many cases in which the existence of a subsidy can be established on the basis of an examination of *de facto* elements. For example, in the context of entrustment or direction of a private body within the meaning of Article 1.1(a)(1)(iv), an investigating authority usually does not examine an express text evidencing the subsidy, but must rely on a consideration of all of the facts. According to the European Union, there is no doubt that such a subsidy, once demonstrated to exist, is specific within the meaning of Article 2.1. But where does such a conclusion flow from, within the overall architecture of Article 2.1? In this respect, the European Union argues that the initial operative language regarding specificity is in Article 1.2, which merely cross-refers to Article 2. Although Articles 2.1 through 2.4 also contain operative language, this language complements, rather than displaces, the operative language of Article 1.2. Thus, the European Union is of the view that the individual subsidy in the above example would be determined to be specific pursuant to Article 1.2, in accordance with Article 2, and applying the principles set out in subparagraphs (a)-(c) of Article 2.1.

2.171. The European Union considers that Article 2.1 is mainly concerned with examining a subsidy in the form of a subsidy programme, as opposed to a subsidy to an individual enterprise. This is because the issue of specificity is generally not a "live issue" in the case of a subsidy to an individual enterprise.<sup>400</sup> For the European Union, such subsidies are "self-evidently specific".<sup>401</sup> Article 2.1 is designed to distinguish between measures that are not specific (such as general measures that apply to all enterprises) – to which the SCM Agreement is not to apply – and those measures that are specific. The European Union thus considers that the SCM Agreement was not intended to govern all governmental action, but rather only those governmental actions that are specific, within the meaning of Article 2.

2.172. The European Union stresses that subparagraphs (a) through (c) of Article 2.1 are to be read as "principles" instead of "rules". As a result, their application should generally lead to the conclusion that an individual *de facto* subsidy is specific pursuant to Article 1.2, in accordance with Article 2. According to the European Union, if one were to look at subparagraphs (a)-(c) as *rules*, it might be problematic to determine which provision would provide the basis for a finding of specificity with respect to a subsidy programme. The key to understanding how a determination of specificity regarding a subsidy programme is lawfully grounded in the SCM Agreement is the observation that the initial operative language is to be found in Article 1.2, and that subparagraphs (a)-(c) "are not rules, but *principles*".<sup>402</sup> For the European Union, these subparagraphs must therefore be applied with a certain amount of flexibility.

2.173. The European Union adds that, in assessing the question of the specificity of a *de facto* subsidy programme, it is particularly the principle in subparagraph (c) that speaks most immediately to this question. This is because subparagraph (c) refers to a subsidy that is "in fact ... specific". In the European Union's view, it seems more reasonable to speak of a *de facto* subsidy programme as being "in fact ... specific", rather than specific in the light of the principles set out in subparagraphs (a) and (b).

2.174. The European Union disagrees with China that subparagraph (c) contains two conditions for its applicability. First, the European Union agrees with the Panel that there is only one condition. This does not render the "appearance of non-specificity" phrase redundant. Rather, that phrase simply clarifies that a subsidy may be *de jure* non-specific, but *de facto* specific. Second,

<sup>400</sup> European Union's third participant's submission, para. 18.

<sup>401</sup> European Union's third participant's submission, para. 18.

<sup>402</sup> European Union's third participant's submission, para. 22. (emphasis original)

the European Union considers that China is reading subparagraphs (a)-(c) as *rules*, and seeking to apply them in an "excessively mechanistic" manner. However, since the text of the treaty expressly characterizes them as *principles*, they must be interpreted and applied as such, with the requisite degree of flexibility. Third, the European Union maintains that a *de facto* subsidy programme, by definition, does not reveal on its face that it is specific, because there is no express text to examine.

2.175. In the light of these considerations, the European Union is of the view that there are different types of *de facto* specificity that may be found to exist, in accordance with the principle in Article 2.1(c). The "notwithstanding" phrase merely clarifies that Article 2.1(c) also applies and may lead to a finding of specificity, even if no such specificity is apparent from an application of the principles in Article 2.1(a) and (b). In the case of a *de facto* subsidy programme, the principles in subparagraphs (a) and (b) have little relevance, if any, because the principle in Article 2.1(c) is the one that speaks most directly to such a fact pattern. That principle confirms that, when access to a *de facto* subsidy programme is limited to a certain number of enterprises, it is *de facto* specific within the meaning of Articles 1.2 and 2.1(c) of the SCM Agreement. Finally, the European Union indicates that it has a similar view regarding China's arguments relating to the identification of the granting authority under Article 2.1 of the SCM Agreement.

2.176. The European Union submits that the text of China's panel request "indicates the nature of the measures and the gist of what is at issue in a manner that presents the problem clearly".<sup>403</sup> With respect to the identity of the measure, China's panel request identified 22 countervailing investigations, as well as the duties in place, as the measures at issue and, in the context of its claim under Article 12.7 of the SCM Agreement, further specified that it was challenging each instance where the USDOC had resorted to facts available. China was not obliged to identify with more precision the specific aspects of the application of facts available made by the USDOC.<sup>404</sup> With respect to whether China's panel request presented the problem clearly, the European Union submits that "the problem" was summarized by reference to the obligation contained in Article 12.7 of the SCM Agreement, and that such reference was "not made in a circular or meaningless manner".<sup>405</sup> Noting that Article 12.7 could be interpreted as imposing "one single obligation (i.e. that investigating authorities 'may' have recourse to facts available provided that certain requirements have been satisfied) or multiple obligations (i.e. if each of the requirements contemplated in Article 12.7 is understood to amount to a separate and distinct obligation)", in the European Union's view, Article 12.7 provides for a "single obligation that is not distinct with respect to each of the scenarios contemplated by that provision".<sup>406</sup> Moreover, the European Union considers that the reference in China's panel request to "in manners that were inconsistent with [Article 12.7]" indicates that China was arguing that the "use of facts available by the USDOC in those instances violated all the requirements set out in the SCM Agreement", thereby "plainly connect[ing]" the measures at issue with the claims in a manner that presented the problem clearly.<sup>407</sup>

2.177. With respect to Article 12.7 of the SCM Agreement, the European Union submits that drawing an "[i]nference is a routine and necessary part of all economic law determinations" and that, "[a]s a matter of principle, WTO law permits appropriate authorities to put appropriate questions and draw inferences if full responses are not forthcoming".<sup>408</sup> The European Union explains that the concept of facts available under Article 12.7 may also involve inference of a fact not provided from other facts on the record even when there is no direct evidence on the record. Thus, the European Union disagrees with China insofar as it suggests that the term "available" in Article 12.7 precludes the use of inferences. Moreover, the European Union submits that "a measure at issue may be defended by referring not only to the text of the measure at issue, but also to supporting documents (such as an 'issues and decisions memorandum'), as well as, depending on the circumstances, the record itself."<sup>409</sup> The European Union adds that an

<sup>403</sup> European Union's third participant's submission, para. 55.

<sup>404</sup> European Union's third participant's submission, para. 56 (referring to Appellate Body Report, *US – Continued Zeroing*, paras. 169 and 170).

<sup>405</sup> European Union's third participant's submission, para. 57.

<sup>406</sup> European Union's third participant's submission, para. 57.

<sup>407</sup> European Union's third participant's submission, para. 58.

<sup>408</sup> European Union's third participant's submission, para. 34.

<sup>409</sup> European Union's third participant's submission, para. 38.

investigating authority cannot "lift the entire record into the text of the measure at issue".<sup>410</sup> The facts, evidence, and reasoning are "always presented in summary form in such measures".<sup>411</sup> According to the European Union, reiteratively posing the question "why" will always eventually bring the discussion beyond the text of the measure at issue itself to the facts and evidence on the record, and this does not necessarily mean that the measure at issue is WTO-inconsistent.<sup>412</sup>

### 2.5.5 India

2.178. India did not submit a third participant's submission pursuant to Rule 24(1) of the Working Procedures. In its opening statement at the oral hearing, India argued that the United States' "end-use approach" in determining whether the provision of an input supplied by the government is *de facto* specific is not in line with a proper interpretation of the first factor under Article 2.1(c) of the SCM Agreement, namely, "use of a subsidy programme by a limited number of certain enterprises". India observes that only goods that are in the nature of "general infrastructure" would not have "end-use" limitations. Thus, the United States' approach makes every provision of a good covered under Article 1.1(a)(1)(iii) to be *de facto* specific because it would not be possible to prove that the provision of a good is non-specific. This renders meaningless the need to have a specificity criterion for financial contributions under Article 1.1(a)(1)(iii).

2.179. India highlights that, with respect to Article 12.7 of the SCM Agreement, it is deeply concerned with the standard formulated by the Panel in its Report. According to India, the Panel stated that as long as an investigating authority sufficiently explains that the determinations were based on facts, it complies with Article 12.7. In India's view, the Panel's approach is at odds with the standard laid down by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, where the Appellate Body held that Article 12.7 requires an investigating authority to engage in a comparative evaluative approach in order to determine which facts among the facts available best fit the missing information. However, India contends that the United States chooses only those facts that lead to the least favourable result for the non-cooperating party and that the United States' approach does not involve any analysis of the entire set of facts on the record so as to determine which among them best suits the missing information. The United States' approach forecloses the possibility of considering facts from secondary sources which may lead to better results. India adds that various panels have recognized that Article 12.7 is not a tool for drawing adverse inferences in all cases of non-cooperation. India considers that an investigating authority is prohibited from using "the 'facts available' standard" in a "punitive manner" and that drawing adverse inferences by choosing from among the various facts available, without explaining "how and why" the adverse inference so drawn is "the most fitting or most appropriate", is inconsistent with Article 12.7 of the SCM Agreement.<sup>413</sup>

### 2.5.6 Korea

2.180. Korea did not submit a third participant's submission pursuant to Rule 24(1) of the Working Procedures. In its opening statement at the oral hearing, Korea focused on China's appeal of the Panel's findings under Article 2.1 of the SCM Agreement. Korea considers that the issue before the Appellate Body is whether the USDOC's determinations on *de facto* specificity, which were not examined under subparagraphs (a) and (b), are consistent with Article 2.1 of the SCM Agreement. Korea believes that a clearer guidance by the Appellate Body is necessary in order for the investigating authority to determine *de facto* specificity in a more consistent way with the object and purpose of Article 2.1 of the SCM Agreement. In answering the question of whether *de facto* specificity can be determined without first examining the elements regarding *de jure* specificity, Korea considers that it seems more logical that the determination of *de facto* specificity follows the examination of *de jure* specificity. In Korea's view, this is in line with the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*, which recognized a logical structure inherently embodied in Article 2.1. In Korea's view, "any appearance of non-specificity" can only be determined pursuant to the principles laid down in subparagraphs (a) and (b).

<sup>410</sup> European Union's third participant's submission, para. 38.

<sup>411</sup> European Union's third participant's submission, para. 38. (emphasis original)

<sup>412</sup> European Union's third participant's submission, para. 38.

<sup>413</sup> India's opening statement at the oral hearing.

### 2.5.7 Norway

2.181. Norway did not submit a third participant's submission pursuant to Rule 24(1) of the Working Procedures. In its opening statement at the oral hearing, Norway focused on China's appeals of the Panel's findings under Article 14(d) of the SCM Agreement. Norway argues that, although China may be correct in arguing that the term "government" in Article 14 should mean the same as "government" in Article 1.1(a)(1) of the SCM Agreement, such an argument is not dispositive for the interpretation of Article 14(d). This is because subsidization, as established under Article 1.1(a)(1), covers subsidies that are given both directly and indirectly by governments through funding mechanisms and private bodies. Subsidization that is found to take place under Article 1.1(a)(iv) is not private in character but is considered government subsidization provided by proxy. Once such subsidization is established, it is included as a government subsidy for purposes of calculating the amount of the subsidy under Article 14. Norway also argues that determining whether domestic prices should be excluded from the benchmark for purposes of calculating benefit requires a three-step approach. First, an investigating authority will have to determine according to Article 1.1(a)(1) the scope of subsidization. Second, an investigating authority should determine the extent of subsidized merchandise in comparison to non-subsidized merchandise. In this regard, the analysis of market shares in determining government predominance should be done on a case-by-case basis. In Norway's view, however, "predominance" implies a high threshold and not only refers to market shares but may also refer to market power. Third, investigating authorities have the burden of establishing with clear evidence that local non-subsidized prices are generally distorted. In Norway's view, distorted prices cannot be assumed simply based on extrapolations from market shares or the extent of subsidization.

### 2.5.8 Saudi Arabia

2.182. Regarding China's claims under Articles 1.1(b) and 14(d) of the SCM Agreement, Saudi Arabia considers that the SCM Agreement does not permit an investigating authority to reject in-country private prices as a benchmark to determine whether the governmental provision of a good confers a benefit merely because SOEs are a significant domestic supplier of the good at issue. An investigating authority must adhere to the Appellate Body's finding that domestic prices provide the "primary benchmark" to determine whether goods have been provided by a government for less than adequate remuneration and, thus, confer a benefit.<sup>414</sup> The Appellate Body has "emphasized that 'the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is *very limited*' – i.e. where there is evidence of 'market distortion'."<sup>415</sup> Saudi Arabia emphasizes that, in situations where such "very limited" circumstances arise, a cost-based benchmark is more accurate than international or third-country market prices because a cost-based benchmark reflects the exporting Member's "prevailing market conditions" and is less likely to nullify that Member's natural comparative advantages.<sup>416</sup>

2.183. Saudi Arabia maintains that, in determining whether the government is the "predominant" supplier of a good, an investigating authority must find that: (i) the *government* (or a public body as that term is properly defined) is (ii) the *predominant*, rather than only a significant, supplier of the good.<sup>417</sup> With respect to the first element, Saudi Arabia argues that the same standard for defining "government" or "public body" under Article 1.1(a)(1) must apply when examining whether the government is the predominant supplier of a good for purposes of the analysis under Article 14(d). Only the government – or public body – may be a "predominant supplier" whose sales of a good could distort domestic prices such that an alternative benchmark may be used in the benefit analysis. SOEs would not meet this standard merely by virtue of their ownership structure.

<sup>414</sup> Saudi Arabia's third participant's submission, para. 3 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 90).

<sup>415</sup> Saudi Arabia's third participant's submission, para. 5 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 102). (emphasis added by Saudi Arabia)

<sup>416</sup> Saudi Arabia's third participant's submission, para. 5 (referring to Appellate Body Reports, *US – Softwood Lumber IV*, paras. 102 and 109; and *US – Anti-Dumping and Countervailing Duties (China)*, paras. 483, 484, and 488).

<sup>417</sup> Saudi Arabia's third participant's submission, para. 8.

2.184. According to Saudi Arabia, defining "government" differently when determining government predominance, as opposed to the inquiry under Article 1.1(a)(1), would undermine the Appellate Body's original justification in *US – Softwood Lumber IV* for alternative benchmarks. That dispute addressed the situation where government predominance caused in-country private prices to be so aligned with the price of the government-provided financial contribution that the analysis under Article 14(d) would essentially have been a comparison of the government-offered price with itself.<sup>418</sup> Saudi Arabia argues that such concern does not necessarily arise where the enterprises whose prices predominate in the domestic market are not the government providing the financial contribution. In such a case, there would be no reason to presume that the price offered by the government would be the same as the market prices.

2.185. With respect to the existence of government predominance, Saudi Arabia contends that government sales may only serve as evidence of price distortion where they are "predominant" in the market. Significant market share alone is insufficient to establish government predominance, much less price distortion. This is because "predominance" refers to the ability of the government to exercise "influence on prices".<sup>419</sup> An entity's market power is clearly more important than its market share for a determination of price distortion. Saudi Arabia considers that an investigating authority "must reach its conclusions of price distortion 'based on all the evidence that is put on the record, including evidence regarding factors other than government market share'".<sup>420</sup>

2.186. Finally, Saudi Arabia maintains that "[m]arket distortion ... does not necessarily follow from government predominance".<sup>421</sup> An investigating authority must establish market distortion in order to reject domestic prices of SOEs. This is due to the fact that evidence of government predominance only establishes that domestic prices might be distorted and it cannot serve as a *per se* proxy for price distortion. Thus, in Saudi Arabia's view, the existence of price distortion must be demonstrated by the investigating authority.

#### 2.5.9 Turkey

2.187. Turkey did not submit a third participant's submission pursuant to Rule 24(1) of the Working Procedures. In its opening statement at the oral hearing, Turkey began by addressing China's appeal regarding the Panel's findings under Article 14(d) of the SCM Agreement. With respect to the use of out-of-country benchmarks for the calculation of benefit, Turkey expresses its support for the Panel's understanding that the predominant role of the government in the market cannot be considered the one and only reason causing market distortion that eventually leads to the use of out-of-country benchmarks. Turkey considers that a number of indicators, including the value and/or volume of imports, can be taken into account to evaluate the level of predominance of the government. In Turkey's view, the use of out-of-country benchmarks can be perfectly warranted in the event that the government is the only supplier of the particular good or when the government administratively controls all of the prices for the goods in the country. Turkey reiterates that the calculation of the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

2.188. Turkey underscores the legal parallelism between Article 6.8 of the Anti-Dumping Agreement and Article 12.7 of the SCM Agreement. According to Turkey, therefore, Annex II to the Anti-Dumping Agreement should be considered as a guideline for the use of "facts available" under Article 12.7 of the SCM Agreement. In Turkey's opinion, the last sentence of paragraph 7 of Annex II to the Anti-Dumping Agreement provides an investigating authority with the flexibility to use information that is less favourable to the party that does not cooperate by withholding relevant information. This means that an investigating authority has the discretion to choose the less favourable information in a spectrum of different information concerning the interested party. Nevertheless, according to Turkey, such discretion is not unlimited, as the investigating authority

<sup>418</sup> Saudi Arabia's third participant's submission, para. 11 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 93).

<sup>419</sup> Saudi Arabia's third participant's submission, para. 13 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444).

<sup>420</sup> Saudi Arabia's third participant's submission, para. 13 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443).

<sup>421</sup> Saudi Arabia's third participant's submission, para. 7.

is bound to make a comparison on whether the decision is less favourable vis-à-vis the decision which would be reached if the party had cooperated in the full sense. Moreover, Turkey emphasizes that such less favourable decisions are justified to the extent that the interested party actively withholds relevant information that was requested. Additionally, an investigating authority is also responsible for evaluating information gathered from secondary sources, to the extent that this is practicable. It is Turkey's view that, as a matter of legal interpretation, drawing adverse inferences through the use of the "facts available" methodology is warranted under the SCM Agreement.

### 3 ISSUES RAISED IN THIS APPEAL

3.1. The following issues are raised in this appeal:

- a. whether the Panel erred in finding that China's panel request, as it relates to its claims under Article 12.7 of the SCM Agreement, is not inconsistent with Article 6.2 of the DSU;
- b. with respect to the Panel's findings on the USDOC's determinations of benefit in respect of the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations, whether the Panel erred in finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement, and, specifically:
  - i. whether the Panel erred in its interpretation of Article 14(d) of the SCM Agreement in finding that China's claims rested on an erroneous interpretation of that provision;
  - ii. whether the Panel acted inconsistently with Article 11 of the DSU in finding that China had failed to establish the factual premise for its claims in respect of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations; and
  - iii. whether the Panel erred in its application of Article 14(d) and Article 1.1(b) and of the SCM Agreement in finding that China had failed to establish that the USDOC's benefit determinations in the relevant countervailing duty investigations are inconsistent with these provisions;
- c. with respect to the Panel's findings on the USDOC's determinations of *de facto* specificity under Article 2.1(c) of the SCM Agreement in respect of the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations:
  - i. whether the Panel erred in finding that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by analysing specificity exclusively under Article 2.1(c);
  - ii. whether the Panel erred in rejecting China's claims that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) of the SCM Agreement by failing to identify a "subsidy programme"; and
  - iii. whether the Panel erred in rejecting China's claims that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify a granting authority; and
- d. with respect to the Panel's findings under Article 12.7 of the SCM Agreement regarding the instances of the use of "adverse" facts available by the USDOC challenged by China in the Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations, whether the Panel failed



to make an objective assessment of the matter before it and therefore acted inconsistently with Article 11 of the DSU.

## 4 ANALYSIS OF THE APPELLATE BODY

### 4.1 Article 6.2 of the DSU – The Panel's terms of reference

4.1. In its other appeal, the United States claims that the Panel erred in concluding that China's panel request, as it relates to the "facts available" claims under Article 12.7 of the SCM Agreement, is consistent with Article 6.2 of the DSU. In particular, the United States submits that the Panel erred in finding that China's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required under Article 6.2. The United States explains that China's panel request does not "plainly connect" the "facts available" obligation in Article 12.7 of the SCM Agreement to the 22 investigations listed in the panel request.<sup>422</sup> The United States therefore requests us to reverse the Panel's finding under Article 6.2 of the DSU and to declare moot and of no legal effect the Panel's findings under Article 12.7 of the SCM Agreement.

4.2. We begin our analysis with a summary of the Preliminary Ruling issued by the Panel. We then identify the relevant requirements under Article 6.2 of the DSU, as reflected in Appellate Body jurisprudence, before assessing the participants' arguments on appeal.

#### 4.1.1 The Panel's Preliminary Ruling

4.3. On 14 December 2012, the United States requested a preliminary ruling on the consistency of China's panel request with Article 6.2 of the DSU, arguing that the section of China's panel request setting out its challenge under Article 12.7 of the SCM Agreement is inconsistent with Article 6.2 of the DSU.<sup>423</sup> The Panel, in its Preliminary Ruling<sup>424</sup>, stated that the "specific measures at issue" for the purposes of China's claims under Article 12.7 of the SCM Agreement are the 19 final and the three preliminary determinations listed in Appendix 1 to the panel request.<sup>425</sup> Next, the Panel found it to be clear, on the basis of the language used in China's panel request, that China was challenging "all" instances of the use of facts available, and not just "some" instances, across the 22 measures identified in Appendix 1.<sup>426</sup> The Panel also considered it clear that every final and preliminary determination listed in Appendix 1 was alleged to be inconsistent with "a single provision" of the SCM Agreement, namely, Article 12.7. On this basis, the Panel concluded that the panel request "plainly connects" the measures to the provision at issue.<sup>427</sup> In the Panel's view, the United States' position that China's panel request fails to provide "a brief summary" is related to its argument that China had not specified which of the obligations found within Article 12.7 of the SCM Agreement the US Department of Commerce (USDOC) is alleged to have breached.<sup>428</sup> The Panel, however, concluded that "Article 12.7 sets out a relatively limited range of circumstances in which it is permissible for an investigating authority to apply 'facts available'".<sup>429</sup> The Panel explained that providing more precise details of the sort the United States was suggesting "could perhaps best be characterized as the arguments in support of the claim, rather than the summary of the claim itself".<sup>430</sup> On the basis of the above, the Panel concluded

<sup>422</sup> United States' other appellant's submission, paras. 22 and 26 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

<sup>423</sup> The United States requested the Panel to issue its preliminary ruling before the filing of the first written submissions. The Panel accepted the United States' request.

<sup>424</sup> The Panel issued its Preliminary Ruling on 8 February 2013 in document WT/DS437/4. The Panel's Preliminary Ruling was made "an integral part of the Panel's Final Report" (Panel Report, para. 1.16) as Annex A-8 thereto (WT/DS437/R/Add.1, pp. A-34 to A-46).

<sup>425</sup> Preliminary Ruling, para. 4.2.

<sup>426</sup> Preliminary Ruling, para. 4.5.

<sup>427</sup> Preliminary Ruling, para. 4.7.

<sup>428</sup> Preliminary Ruling, para. 4.10 (referring to United States' preliminary ruling request, para. 22).

<sup>429</sup> Preliminary Ruling, para. 4.16.

<sup>430</sup> Preliminary Ruling, para. 4.17.

that China's panel request, as it relates to the "facts available" claims under Article 12.7 of the SCM Agreement, is consistent with Article 6.2 of the DSU.<sup>431</sup>

4.4. In order to assess the United States' claim on appeal that the Panel erred in finding that China's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly", we begin by identifying the relevant legal standard under Article 6.2 of the DSU.

#### 4.1.1.1 The relevant legal standard under Article 6.2 of the DSU

4.5. Article 6.2 of DSU provides, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

4.6. The requirements to identify the specific measure(s) at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly are central to the establishment of the jurisdiction of a panel. The measure(s) and the legal basis of the complaint – i.e. the claim(s) – constitute the "matter referred to the DSB", which forms the basis of the panel's terms of reference.<sup>432</sup> In defining the scope of the dispute, the panel request serves the function of establishing and delimiting the panel's jurisdiction<sup>433</sup>, but it also fulfils a due process objective. In the context of Article 6.2, due process consists in providing the respondent and third parties notice regarding the nature of the complainant's case<sup>434</sup> to enable them to respond accordingly.<sup>435</sup>

4.7. The Appellate Body has explained that, in order to respect "both the letter and the spirit" of Article 6.2 of the DSU, and particularly the fulfilment of its functions to establish a panel's jurisdiction and safeguard due process, a panel must determine whether the panel request is "sufficiently clear" or "sufficiently precise" on the basis of an "objective examination" and careful scrutiny of the panel request, read as a whole, and in the light of the exact language used therein.<sup>436</sup> Moreover, a panel must determine compliance with Article 6.2 "'on the face' of the panel request"<sup>437</sup> as it existed at the time of filing. Thus, parties' subsequent submissions and

<sup>431</sup> Preliminary Ruling, para. 5.1. We note that one panelist disagreed with the Panel majority's conclusion that China's panel request is consistent with the requirements under Article 6.2 of the DSU. While the dissenting panelist agreed with the Panel majority that China adequately identified the "instances" of the use of facts available in its panel request, he parted ways with the majority on the issue of whether China provided a summary of the legal basis of the complaint sufficient to present the problem clearly. (Ibid., paras. 6.1-6.18)

<sup>432</sup> Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 639 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72 and 73; *US – Carbon Steel*, para. 125; *US – Continued Zeroing*, para. 160; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; and *Australia – Apples*, para. 416); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6.

<sup>433</sup> Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Continued Zeroing*, para. 161; *EC and certain member States – Large Civil Aircraft*, para. 640.

<sup>434</sup> Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *US – Carbon Steel*, para. 126; *EC and certain member States – Large Civil Aircraft*, para. 640.

<sup>435</sup> Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161. See also Appellate Body Report, *Thailand – H-Beams*, para. 88. However, the Appellate Body has noted that determination of whether due process has been respected does not necessitate a separate examination of whether the parties suffered prejudice, considering that "[t]his due process objective [under Article 6.2] is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction." Thus, for example, the fact that a respondent's ability to begin preparing its defence is not prejudiced does not *ipso facto* mean that a panel request therefore meets the requirements of Article 6.2. (Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 640; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.7)

<sup>436</sup> Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108.

<sup>437</sup> Appellate Body Reports, *US – Continued Zeroing*, para. 161; *US – Carbon Steel*, para. 127).



statements during the panel proceedings cannot "cure" any defects in the panel request<sup>438</sup>, but they can be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.<sup>439</sup>

4.8. With respect to the requirement that a panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", the Appellate Body has explained that Article 6.2 of the DSU requires that the "legal basis of the complaint" – i.e. the *claim(s)* – be set out in the panel request in a manner that is "sufficient to present the problem clearly".<sup>440</sup> A claim, for the purposes of Article 6.2, refers to an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".<sup>441</sup> As the Appellate Body has explained, "[i]dentification of the treaty provisions claimed to have been violated by the respondent is always necessary" if the legal basis of the complaint is to be "presented at all".<sup>442</sup> While a panel request must set out the claim(s), there is no requirement in Article 6.2 that a complaining party include in its panel request arguments that seek "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".<sup>443</sup>

4.9. In order to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", the Appellate Body has explained that a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".<sup>444</sup> Thus, "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."<sup>445</sup> A "brief summary" of the legal basis of the complaint is to be distinguished from arguments in support of a particular claim. Together with the supporting evidence, arguments are put forth by a party in order to prove its claim. By contrast, a brief summary of the legal basis of the complaint "aims to explain succinctly how or why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".<sup>446</sup> Whether such a brief summary is "sufficient to present the problem clearly" is to be assessed on a case-by-case basis, keeping in mind the nature of the measure(s) at issue, and the manner in which it is (or they are) described in the panel request, as well as the nature and scope of the provision(s) of the covered agreements alleged to have been violated.

4.10. In sum, Article 6.2 serves a crucial function in WTO dispute settlement proceedings as it lays down the requirements for a panel request, which, in turn, establishes and delimits a panel's jurisdiction. Under Article 6.2, a complainant must identify the specific measure(s) at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The panel request serves not only to establish and delimit the jurisdiction of the panel, but also to meet due process requirements. Due process in this context consists in providing the respondent and third parties notice regarding the complainant's case in order to enable them to

<sup>438</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>439</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>440</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

<sup>441</sup> Appellate Body Report, *Korea – Dairy*, para. 139.

<sup>442</sup> Appellate Body Report, *Korea – Dairy*, para. 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89, 92, and 93).

<sup>443</sup> Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156).

<sup>444</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

<sup>445</sup> Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

<sup>446</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 130. (italics original; underlining added) In *EC – Selected Customs Matters*, the Appellate Body also stated that "Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly". (Ibid., para. 153 (referring to Appellate Body Reports, *EC – Bananas III*, para. 143; *India – Patents (US)*, para. 88; *Korea – Dairy*, para. 139; and *Dominican Republic – Import and Sale of Cigarettes*, para. 121))

respond accordingly. A panel must determine whether a panel request meets the requirements of Article 6.2 on a case-by-case basis, considering the particular context in which the measure(s) exist and operate.<sup>447</sup> This assessment must be based on an objective examination of the panel request as a whole<sup>448</sup>, as it existed at the time of filing, and in the light of the language used therein. Subsequent submissions by parties cannot cure defects in a panel request, but they may be consulted in order to confirm or clarify the meaning of the words used in the panel request. With respect to the legal basis of the complaint, the identification of the treaty provision(s) alleged to have been violated by the respondent is always necessary; however, more may be required depending on the provision(s) at issue. Although what constitutes a "brief summary ... sufficient to present the problem clearly" is to be determined in the specific context of a given dispute, a panel request need not set out the arguments in support of a claim.

#### **4.1.1.2 Whether China's panel request fails to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly"**

4.11. With these considerations in mind, we turn to examine the United States' claim that China's panel request does not provide "a brief summary of the legal basis of the complaint" as it fails to "plainly connect" the "facts available" obligation in Article 12.7 of the SCM Agreement to the 22 investigations listed in the panel request.<sup>449</sup> For the United States, China's failure to "plainly connect" the measures at issue to Article 12.7 of the SCM Agreement results from a combination of two factors, namely: (i) China's failure to identify the instances of the use of facts available that it was seeking to challenge; and (ii) China's failure to identify the relevant obligation that the United States is alleged to have breached.<sup>450</sup> The United States emphasizes that it is "the combination of these two factors" that made it impossible to discern, from the face of the panel request, the claims that China was seeking to advance.<sup>451</sup>

4.12. China, on the other hand, submits that the Panel was correct in finding that China's panel request is consistent with Article 6.2 of the DSU and that we should reject the United States' allegations that China failed, in its panel request, to identify the instances of the use of facts available and to identify the relevant obligation that the United States is alleged to have breached.<sup>452</sup> In China's view, the Panel correctly concluded that China was challenging each instance of the use of facts available by the USDOC and that these instances are clearly identifiable in the USDOC's determinations.<sup>453</sup> Moreover, China argues that the Panel correctly concluded that China was not required to specify which of the requirements found in Article 12.7 of the SCM Agreement the USDOC is alleged to have breached, and that any such details would amount to arguments, which do not need to be set out in the panel request.<sup>454</sup> China submits that it "plainly connected" the 22 challenged measures identified in Appendix 1 to its panel request to a "single provision of the covered agreements by indicating that ... the United States acted inconsistently with Article 12.7 in 'each instance' in which the USDOC used facts available for the purpose of reaching a finding of financial contribution, benefit, or specificity in those determinations".<sup>455</sup>

4.13. We begin by surveying the text of China's panel request and the Panel's findings relating to the measures at issue in this dispute. Section A of China's panel request identifies the specific measures at issue as "the preliminary and final countervailing duty measures identified in Appendix 1". Appendix 1, in turn, lists 22 separate countervailing duty investigations conducted by the USDOC between 2008 and 2012, as well as 44 *Federal Register* notices of initiation, preliminary determinations, and final determinations. The narrative in section A of China's panel request states:

<sup>447</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

<sup>448</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.8 and 4.9.

<sup>449</sup> United States' other appellant's submission, paras. 22 and 26.

<sup>450</sup> United States' other appellant's submission, para. 28.

<sup>451</sup> United States' other appellant's submission, para. 28.

<sup>452</sup> China's appellee's submission, para. 25 (referring to United States' other appellant's submission, para. 28).

<sup>453</sup> China's appellee's submission, paras. 28-35.

<sup>454</sup> China's appellee's submission, paras. 38-44.

<sup>455</sup> China's appellee's submission, para. 56.

The measures include the determination by the USDOC to initiate the identified countervailing duty investigations, the conduct of those investigations, any preliminary or final countervailing duty determinations issued in those investigations, any definitive countervailing duties imposed as a result of those investigations, as well as any notices, annexes, decision memoranda, orders, amendments, or other instruments issued by the United States in connection with the countervailing duty measures identified in Appendix 1.

4.14. Based on its assessment of the language used in China's panel request, the Panel found that the "specific measures at issue" in relation to China's claims under Article 12.7 are "the 19 final and three preliminary countervailing duty determinations listed in Appendix 1 to the panel request".<sup>456</sup> The Panel further stated that "the measures at issue in relation to the facts available claims include the Issues and Decisions Memoranda and Federal Register Notices, which are incorporated by reference into the final and preliminary determinations respectively."<sup>457</sup> These findings by the Panel have not been challenged by the United States on appeal. It is uncontested, therefore, that China's panel request satisfies the requirements under Article 6.2 of the DSU as far as the identification of the specific measures at issue is concerned. Thus, the key issue before us is whether Section B.1(d)(1) of China's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

4.15. We note, as the United States suggests, that China's panel request is required to plainly connect Article 12.7 of the SCM Agreement to the measures at issue – i.e. the 19 final and three preliminary countervailing duty determinations listed in Appendix 1 to China's panel request.<sup>458</sup> Indeed, it is the measures at issue that are to be "plainly connected" to Article 12.7, and not the instances of the use of facts available in which the USDOC allegedly acted inconsistently with that provision. We have therefore limited our examination to the question of whether, as the United States alleges, "the inadequacy of the description in China's panel request of the 'instances' of [the] USDOC's use of facts available contributed to its failure to 'plainly connect' the challenged measures with the obligation in Article 12.7 of the SCM Agreement."<sup>459</sup>

4.16. Section B of China's panel request is entitled "Legal Basis of the Complaint". Section B.1 sets out the "as applied" claims put forth by China. Section B.1(d)(1), together, with the relevant titles and chapeaux, reads as follows:

#### B. LEGAL BASIS OF THE COMPLAINT

China considers that the countervailing duty measures specified above are inconsistent with the obligations of the United States under, *inter alia*, Article VI of the GATT 1994, Articles 1, 2, 10, 11, 12, 14, and 32 of the SCM Agreement, and Article 15 of the *Protocol on the Accession of the People's Republic of China* (the "Protocol of Accession").

##### 1. "As Applied" Claims

China considers that the initiation and conduct of the identified countervailing duty investigations, as well as the countervailing duty determinations, orders, and any definitive countervailing duties imposed pursuant thereto, are inconsistent, at a minimum, with the obligations of the United States specified below.

...

(d) In connection with all of the identified countervailing duty investigations in which the USDOC has issued a preliminary or final countervailing duty determination:

<sup>456</sup> Preliminary Ruling, para. 4.2.

<sup>457</sup> Preliminary Ruling, para. 4.4 (referring to China's panel request, p. 1). The Panel observed that "[t]he panel request expressly states that the preliminary and countervailing duty measures include 'any notices [and] decision memoranda ... issued by the United States in connection with the ... measures'. (Ibid., fn 15 thereto)

<sup>458</sup> See e.g. United States' other appellant's submission, para. 28.

<sup>459</sup> United States' other appellant's submission, para. 4.

(1) Article 12.7 of the SCM Agreement, because the USDOC resorted to facts available, and used facts available, including so-called "adverse" facts available, in manners that were inconsistent with that provision.[\*]

[\*fn original]<sup>460</sup> This claim arises in respect of each instance in which the USDOC used facts available, including "adverse" facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1.

4.17. With respect to the first alleged deficiency identified by the United States, namely, China's failure "to identify the instances of the use of facts available" that it was seeking to challenge, we note that footnote 10 to section B.1(d)(1) makes clear that China was challenging, as inconsistent with the United States' obligations under Article 12.7 of the SCM Agreement, "*each instance* in which the USDOC used facts available, including 'adverse' facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1".<sup>460</sup> Given the ordinary meaning of the term "each", we agree with the Panel that China's panel request makes clear that *all* instances of the use of facts available were being challenged by China.<sup>461</sup>

4.18. Furthermore, we note that footnote 10 to section B.1(d)(1) of China's panel request clarifies that China's claims under Article 12.7 of the SCM Agreement relate to "*each instance in which the USDOC used facts available ... to support its findings of financial contribution, specificity, and benefit* in the investigations and determinations identified in Appendix 1".<sup>462</sup> Although it may be true, as the United States argues, that the USDOC "applied facts available (of various types) hundreds of times"<sup>463</sup>, footnote 10 specifies that China's claims under Article 12.7 concern those instances where the USDOC used facts available "to support its findings of financial contribution, specificity and benefit" in the context of the measures at issue, which, as noted above, are clearly identified in Appendix 1 to China's panel request. Therefore, we do not agree with the United States that "China's panel request provides no description of the particular 'instances' in which it considered facts available to have been used and which applications of facts available were the source of the 'problem' that China sought to challenge."<sup>464</sup> Although the number of instances that could fall within the ambit of the description provided in footnote 10 may well be quite large, it cannot be said that these instances are "unspecified".<sup>465</sup>

4.19. We also have difficulty accepting the United States' argument that China's failure to identify adequately the instances of the use of facts available that it was seeking to challenge is "evidenced" by "[t]he inconsistency between China's assertions at the initial stages of the dispute (*i.e.*, that *all* instances of the use of *facts available* would be challenged), and the instances identified in the latter stages (*i.e.*, that only 48 instances of *adverse facts available* were being challenged)".<sup>466</sup> The Appellate Body has recognized that "listing general or over-inclusive legal claims in a panel request runs the risk of having such claims excluded from the panel's terms of reference if, as a consequence, the panel request fails to present the problem clearly".<sup>467</sup> However, we recall that a complainant has the prerogative to narrow or abandon its claims, and thereby reduce the scope of its disagreement and dispute, at any stage of a proceeding.<sup>468</sup> In our view, whether a complainant narrows or abandons its claims is an issue different from an assessment of the consistency of a panel request with the requirements under Article 6.2 of the DSU, which must

<sup>460</sup> Emphasis added.

<sup>461</sup> Preliminary Ruling, para. 4.5.

<sup>462</sup> Emphasis added.

<sup>463</sup> United States' other appellant's submission, para. 31.

<sup>464</sup> United States' other appellant's submission, para. 31.

<sup>465</sup> United States' other appellant's submission, para. 53.

<sup>466</sup> United States' other appellant's submission, para. 38. (emphasis original) See also para. 32; and United States' response to Panel question No. 75, para. 132, wherein the United States requested the Panel to reconsider its Preliminary Ruling in its assessment of China's challenge under Article 12.7 of the SCM Agreement because "the Panel's [Preliminary Ruling] was, on its face, based on a certain factual premise – that China was challenging all uses of facts available. Given that this premise has been shown to be incorrect, the Panel could determine it would be appropriate to reconsider the finding based on the new, correct information demonstrating that China's case is actually far different from the one China alleged it had presented on the face of its panel request."

<sup>467</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.46.

<sup>468</sup> Appellate Body Report, *Japan – Apples*, para. 136.

be assessed in the light of the language used in the panel request as it stood at the time it was filed.<sup>469</sup>

4.20. Moreover, as stated above, while parties' subsequent submissions and statements during the panel proceedings cannot "cure" any defects in the panel request<sup>470</sup>, they may be consulted to the extent that they may confirm or clarify the meaning of the words used in the panel request.<sup>471</sup> In our view, however, the United States does not rely on China's subsequent submissions for the limited purpose of confirming or clarifying the meaning of the words used in China's panel request. Instead, we understand the United States to be arguing that China's decision to pursue its Article 12.7 claims with respect to only the instances of the use of "adverse" facts available somehow establishes that the reference to "each instance" of the use of facts available in China's panel request was insufficient for the purposes of Article 6.2. As discussed, however, the fact that China limited the number of instances it sought to challenge after filing the panel request does not affect the level of clarity required under Article 6.2, which must instead be assessed in the light of the language used in the panel request as it stood at the time it was filed.

4.21. We now turn to the second alleged inconsistency identified by the United States, namely, China's failure to identify the relevant obligation that the United States is alleged to have breached.<sup>472</sup> The United States asserts that China's panel request, with respect to its challenge under Article 12.7 of the SCM Agreement, does not indicate whether China was alleging that: (i) the USDOC wrongly found that the parties that failed to respond were interested Members or interested parties; (ii) the USDOC failed to provide a reasonable period of time to submit the information; (iii) the USDOC wrongly concluded that the interested parties refused access to or otherwise did not provide information; (iv) the USDOC wrongly considered that the information was "necessary"; (v) the USDOC wrongly found that the respondents significantly impeded the investigation; and/or (vi) the USDOC's preliminary or final determination, either affirmative or negative, was not based on "facts available".<sup>473</sup> According to the United States, "[a]ny of these could potentially be relevant for a claim under Article 12.7."<sup>474</sup>

4.22. In our view, the text of China's panel request makes clear that its challenge with respect to the instances of the use of "adverse" facts available across the measures at issue identified in footnote 10 and Appendix 1 was being brought under one specific provision of the SCM Agreement, namely, paragraph 7 of Article 12. The identification of Article 12.7 of the SCM Agreement in China's panel request therefore meets the requirement under Article 6.2 of the DSU to present the "legal basis of the complaint".<sup>475</sup> However, this, in and of itself, may not always be sufficient to establish compliance with Article 6.2 given that the panel request must also provide a "brief summary" of the claim "sufficient to present the problem clearly", which must be assessed on a case-by-case basis. For example, "to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."<sup>476</sup> In a given case, therefore, an assessment of the conformity of a panel request with the requirements of Article 6.2

<sup>469</sup> Although made in a different context, we consider relevant the Appellate Body's general observation in *US – Countervailing and Anti-Dumping Measures (China)* that "[s]ubsequently dropping claims does not add to, or detract from, an independent assessment of whether the remaining claims are identified in a manner that is sufficient to present the problem clearly, in accordance with Article 6.2 of the DSU." (Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.49)

<sup>470</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>471</sup> Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Carbon Steel*, para. 127; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9.

<sup>472</sup> We recall that, according to the United States, it is the combination of China's failure to identify the instances of the use of facts available that it was seeking to challenge, together with its failure to identify the relevant obligation that the United States is alleged to have breached, that resulted in its failure to "plainly connect[]" the facts available obligation in Article 12.7 to the 22 measures at issue listed in Appendix 1 to the panel request.

<sup>473</sup> United States' other appellant's submission, para. 39.

<sup>474</sup> United States' other appellant's submission, para. 39.

<sup>475</sup> Preliminary Ruling, paras. 4.16 and 4.17.

<sup>476</sup> Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

may require taking into account the nature and scope of the provision(s) of the covered agreement alleged to have been violated.<sup>477</sup>

4.23. Regarding the nature and scope of Article 12.7 of the SCM Agreement, we note that this provision enables an investigating authority to make "preliminary and final determinations, affirmative or negative, ... on the basis of the facts available", "[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation." Recourse to facts available is therefore permissible only under the limited circumstances where an interested Member or interested party: (i) refuses access to necessary information within a reasonable period of time provided by an investigating authority; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation. It follows from these scenarios involving non-cooperation contemplated in Article 12.7 that an investigating authority can act inconsistently with Article 12.7 in different ways, for example, when it is alleged to have requested information that is not "necessary" or wrongly found that an interested Member or interested party significantly impeded an investigation.

4.24. The fact that under Article 12.7 an investigating authority can resort to the facts available in different scenarios involving non-cooperation of an interested Member or party, and that an investigating authority can act inconsistently with Article 12.7 in different ways, does not, however, mean that Article 12.7 therefore contains multiple, distinct obligations. Article 12.7 "permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination".<sup>478</sup> With respect to the different scenarios involving non-cooperation envisaged under Article 12.7, the Appellate Body has stated that Article 12.7 imposes *the* obligation on an investigating authority to use those "facts available" that reasonably replace the information that an interested party failed to provide, with a view to arriving at an accurate determination.<sup>479</sup> We disagree, therefore, with the United States to the extent that it suggests that Article 12.7 of the SCM Agreement sets out multiple, distinct obligations.

4.25. Having discussed the nature and scope of Article 12.7, we note that the text of section B.1(d)(1) of China's panel request indicates that China took issue with the "manners" in which the USDOC "resorted to facts available, and used facts available, including so-called 'adverse' facts available". In our view, this language indicates that China's challenge, as presented in its panel request, concerned the consistency of each instance in which the USDOC used facts available with the different "manners" in which an investigating authority can act inconsistently with Article 12.7 when resorting to, and using, facts available. The "problem" therefore, for the purpose of Article 6.2, was the "manners" in which the USDOC "resorted to" and "used facts available".

4.26. Finally, we note that Article 6.2 of the DSU requires that the *claims*, and not the *arguments*, be set out in a panel request in a way that is "sufficient to present the problem clearly".<sup>480</sup> A "claim", for the purposes of Article 6.2, refers to an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".<sup>481</sup> "Arguments", by contrast, are statements put forth by a complaining party "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision".<sup>482</sup>

4.27. In the present case, given the nature and scope of Article 12.7 discussed above, as well as the text of section B.1(d)(1) of China's panel request read as a whole, we agree with the Panel that "providing more precise details regarding what aspects of the resort to and use of facts available [were being] challenged under Article 12.7 ... could perhaps best be characterized as the arguments in support of [China's] claim, rather than the summary of the claim itself."<sup>483</sup> Since

<sup>477</sup> Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Report, *Korea – Dairy*, para. 124); *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.

<sup>478</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.

<sup>479</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

<sup>480</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

<sup>481</sup> Appellate Body Report, *Korea – Dairy*, para. 139.

<sup>482</sup> Appellate Body Report, *Korea – Dairy*, para. 139. (fn omitted)

<sup>483</sup> Preliminary Ruling, para. 4.17.

China's challenge arose in respect of all instances of the use of facts available by the USDOC, as indicated in footnote 10, China's panel request identified its claim – i.e. its allegation that the United States had violated Article 12.7 of the SCM Agreement in each instance in which the USDOC used facts available. Requiring further detail in the narrative in the present case would amount to "arguments" as to why the measures at issue are in breach of Article 12.7. Such arguments need not be presented in a panel request in order for it to comply with Article 6.2 of the DSU. We therefore find that China's panel request, as it relates to its challenge under Article 12.7 of the SCM Agreement, presents a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required under Article 6.2 of the DSU.

4.28. For the foregoing reasons, we uphold the Panel's finding, in paragraph 5.1 of the Panel's Preliminary Ruling and paragraph 1.16 of the Panel Report, that China's panel request, as it relates to its claims under Article 12.7 of the SCM Agreement, is not inconsistent with Article 6.2 of the DSU and that China's claims under Article 12.7 were thus within the Panel's terms of reference.

## **4.2 Article 14(d) and Article 1.1(b) of the SCM Agreement – Benefit**

4.29. We now turn to China's appeal of the Panel's findings concerning the rejection by the USDOC, in the countervailing duty investigations at issue, of in-country private prices in China as benchmarks for calculating the benefit conferred by the provision of inputs to the companies under investigation.

4.30. China seeks review of the Panel's interpretation and application of Article 14(d) and Article 1.1(b) of the SCM Agreement in relation to the USDOC's decision, in the investigations at issue, to reject in-country private prices in China as benchmarks on the grounds that such prices were distorted. In addressing China's arguments on appeal, we begin by setting out the Panel's findings. Thereafter, we address China's claim that the Panel erred in concluding that China's claims were based on an erroneous interpretation of Article 14(d) of the SCM Agreement, as well as China's claim that the Panel acted inconsistently with Article 11 of the DSU in finding that China had failed to establish the "factual premise" for its claims in respect of the benefit determinations by the USDOC in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations. Finally, we examine China's claim that the Panel erred in finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China as benchmarks in respect of the benefit determinations by the USDOC in the relevant countervailing duty investigations.

### **4.2.1 The Panel's findings**

4.31. Before the Panel, China claimed that the USDOC's determinations that state-owned enterprises (SOEs) provided inputs for less than adequate remuneration are inconsistent with Article 14(d) and Article 1.1(b) of the SCM Agreement in the following 12 countervailing duty investigations<sup>484</sup>: Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.<sup>485</sup> China argued that "the USDOC premised its recourse to an out-of-country benchmark in each of the 12 investigations under challenge on an impermissible equation of SOEs with the government."<sup>486</sup> China further explained that "the USDOC's equation of SOEs with the government [was] explicitly or implicitly based on its interpretation that entities majority-owned and controlled by the government are public bodies."<sup>487</sup>

4.32. The Panel found that the evidence before it did not support China's assertion.<sup>488</sup> Referring to the USDOC's reasoning as set out in the challenged determinations, the Panel noted that it was

<sup>484</sup> Panel Report, para. 7.156 (referring to Panel Exhibit CHI-1, comprising a table of citations for China's "public body", "benefit", "input specificity", and "land specificity" claims, including relevant portions of the USDOC's issues and decisions memoranda for final determinations and of *US Federal Register* notices for preliminary determinations).

<sup>485</sup> See table of USDOC investigations at p. 5 of this Report.

<sup>486</sup> Panel Report, para. 7.179.

<sup>487</sup> Panel Report, para. 7.179.

<sup>488</sup> Panel Report, para. 7.180.

"only in a few cases" that the USDOC's findings of a predominant role of the government in the relevant market referred to the SOEs as public bodies.<sup>489</sup> The Panel also rejected China's argument that the USDOC applied the "same framework" in each investigation for evaluating whether market prices for a particular input in China were distorted, noting instead that the analysis in each determination was "somewhat different" depending on the facts before the USDOC.<sup>490</sup> The Panel also considered that China's claim that the USDOC based its findings solely on the lack of information regarding state ownership was "not accurate" since, in several investigations, the USDOC applied adverse facts available because the Government of China (GOC) failed to provide relevant information relating to domestic production and/or consumption.<sup>491</sup> The Panel, therefore, concluded that China had not established the basic factual premise of its claims, namely, that in *each* challenged determination the USDOC treated SOEs as public bodies, and thus part of the government in the collective sense, in the context of the benefit analysis.<sup>492</sup>

4.33. The Panel then explained that it understood China's position to be that the Appellate Body report in *US – Softwood Lumber IV* established that "the *only* circumstance under which an investigating authority can resort to an external benchmark is when the government's role as the provider of the financial contribution is so predominant that it distorts private prices in the market."<sup>493</sup> The Panel disagreed with China, finding instead that neither the panel nor the Appellate Body in that dispute "provide[d] an exhaustive list of the circumstances under which an authority can resort to out-of-country benchmarks".<sup>494</sup>

4.34. Next, the Panel noted that the Appellate Body was faced with a "very similar situation" in *US – Anti-Dumping and Countervailing Duties (China)* as in this dispute.<sup>495</sup> The Panel pointed out that, in that dispute, the Appellate Body's findings under Article 14(d) of the SCM Agreement did not concern whether or not SOEs are public bodies (and thus government) but, rather, whether the extent of SOE involvement in the marketplace supported a determination that the use of out-of-country benchmarks was appropriate because prices in that market were distorted.<sup>496</sup>

4.35. The Panel considered the USDOC's benchmark analysis in the investigations at issue in this dispute to be "very similar" to the approach followed by the USDOC in the benefit determinations reviewed by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>497</sup> Therefore, the Panel considered it appropriate "to rely on the Appellate Body's reasoning that 'given the evidence regarding the government's predominant role as the supplier of the goods [...] and having considered evidence of other factors, [...] the USDOC could, consistently with Article 14(d) of the SCM Agreement, determine that private prices were distorted and could not be used as benchmarks for assessing the adequacy of remuneration'".<sup>498</sup>

4.36. For the foregoing reasons, the Panel concluded that, "apart from the fact that China ha[d] not sufficiently substantiated the factual premises of its 'as applied' claims for each investigation challenged, China's claims also fail[ed] on the grounds that [these claims rested] on an erroneous interpretation of Article 14(d) of the SCM Agreement."<sup>499</sup> Accordingly, the Panel found that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China as benchmarks in the investigations at issue.<sup>500</sup>

<sup>489</sup> Panel Report, para. 7.180.

<sup>490</sup> Panel Report, para. 7.186.

<sup>491</sup> Panel Report, para. 7.187.

<sup>492</sup> Panel Report, para. 7.188.

<sup>493</sup> Panel Report, para. 7.189. (emphasis added)

<sup>494</sup> Panel Report, para. 7.192.

<sup>495</sup> Panel Report, para. 7.194 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611).

<sup>496</sup> Panel Report, para. 7.194 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611).

<sup>497</sup> Panel Report, para. 7.195.

<sup>498</sup> Panel Report, para. 7.195 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 456).

<sup>499</sup> Panel Report, para. 7.196.

<sup>500</sup> Panel Report, para. 7.197.



#### **4.2.2 Whether the Panel erred in finding that China had failed to establish that the United States acted inconsistently with Article 14(d) and Article 1.1(b) of the SCM Agreement**

4.37. China argues on appeal that the Panel erred in finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benchmarks in its benefit analysis. China contends that the legal standard for determining what constitutes "government" – and, in particular, a "public body" – for purposes of the financial contribution inquiry under Article 1.1(a)(1)(iii) of the SCM Agreement should also apply when determining what constitutes "government" for purposes of the selection of a benefit benchmark under Article 14(d) of the SCM Agreement.<sup>501</sup> In China's view, the USDOC's benefit determinations at issue raise this question because the USDOC rejected in-country prices in China as a benefit benchmark under Article 14(d) on the grounds that such prices were distorted by virtue of the GOC's allegedly "predominant" role in the market as a supplier of the goods in question. China submits that, if government ownership and control are an insufficient basis on which to deem the provision of goods by an SOE to be "governmental" conduct for purposes of the public body and financial contribution inquiries, it follows that these factors must likewise be an insufficient basis for finding the provision of goods by an SOE to be "governmental" conduct for purposes of a benchmark inquiry.<sup>502</sup>

4.38. For China, the Panel's ultimate finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement has two predicates: one legal and the other factual. According to China, the Panel erred with respect to both of these predicates. First, the Panel erred in its interpretation of Article 14(d) of the SCM Agreement. Second, the Panel acted inconsistently with Article 11 of the DSU in concluding that China had failed to establish that, in the benefit analysis in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations, the USDOC treated SOEs as public bodies, and thus as part of the government in the collective sense. China therefore requests that we reverse the Panel's ultimate finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement in respect of the benefit analysis in each of those four investigations.<sup>503</sup>

##### **4.2.2.1 Whether the Panel erred in its interpretation of Article 14(d) of the SCM Agreement**

4.39. China argues that the Panel erred in concluding that the legal standard for determining whether an entity is "government" for purposes of the financial contribution inquiry under Article 1.1(a)(1)(iii) of the SCM Agreement does *not* also apply when evaluating the same question for selecting a benefit benchmark under Article 14(d) of the SCM Agreement.<sup>504</sup> As noted above, we understand China to argue that there must be a *single* legal standard for defining the "government", including a public body, that provides the financial contribution under Article 1.1(a)(1), and for defining the "government", including a public body, whose predominant role in the market may be found to distort private prices under Article 14(d).<sup>505</sup>

4.40. China further argues that the possibility that factors *other than* government predominance might justify resorting to alternative benchmarks does *not* undermine in any way China's position that there must be a single legal standard for defining "government" under Article 1.1(a)(1) and under Article 14(d). China considers that its interpretative position is supported by the Appellate Body's findings in *US – Softwood Lumber IV*<sup>506</sup>, because they established that the "government" that provides the financial contribution and the "government" whose predominant role in the

<sup>501</sup> China's appellant's submission, para. 7.

<sup>502</sup> China's appellant's submission, para. 53.

<sup>503</sup> China's Notice of Appeal, para. 9; appellant's submission, para. 106.

<sup>504</sup> China's appellant's submission, para. 18.

<sup>505</sup> China's appellant's submission, para. 11.

<sup>506</sup> China's appellant's submission, para. 34 (quoting Appellate Body Report, *US – Softwood Lumber IV*, paras. 93 and 101).

market may distort private prices are one and the same "government", engaged in the same conduct, i.e. providing goods.<sup>507</sup>

4.41. The United States counters that China's appeal is premised on an incorrect understanding of Article 14(d) of the SCM Agreement that is contrary to the Appellate Body's interpretation of this provision in *US – Softwood Lumber IV*. According to the United States, 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. In *US – Softwood Lumber IV* and *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that 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 the marketplace. In the United States' view, the Panel thus properly concluded that there was nothing in the text of Article 14(d) or in prior WTO panel and Appellate Body reports to require the same analysis in these distinct aspects of a countervailing duty investigation. Moreover, the United States submits that China's approach would prevent investigating authorities from properly analysing the ways in which a government can interfere in a given marketplace and distort prices, and would result in a benefit calculation that would not capture how much better off the recipient is through a financial contribution. Therefore, the United States argues that China's position conflicts with the findings of the Appellate Body in *US – Softwood Lumber IV*.

4.42. We agree with China that there is a single legal standard that defines the term "government" under the SCM Agreement. We note that the term "government", as defined in Article 1.1(a)(1) of the SCM Agreement, encompasses both the government in the "narrow sense" and "any public body within the territory of a Member".<sup>508</sup> As a consequence, in order to find that a financial contribution within the meaning of Article 1.1(a)(1) exists, investigating authorities must determine whether such financial contribution has been provided by a government in the narrow sense, or by a public body. We further note that a financial contribution may also be provided by a private body entrusted or directed by the government pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement. In the context of determining whether a benefit has been conferred by a government's provision of goods, Article 14(d) of the SCM Agreement establishes that investigating authorities are required to determine whether such provision of goods by the government has been made for less than adequate remuneration.

4.43. Unlike China, however, we do not consider that the fact that the SCM Agreement establishes a single definition for the term "government" means that, under Article 14(d), a proper analysis for selecting a benefit benchmark is dependent on an examination of whether any relevant entities in the market fall within the definition of "government", including on the basis of a finding that an SOE is a public body. As will be explained below, China's argument that there is a single standard for defining the term "government" does not answer the question of whether the prices of goods provided by private or government-related entities<sup>509</sup> in the country of provision are to be considered as market determined for purposes of selecting a benefit benchmark.<sup>510</sup> We observe, in this respect, that the term "government" appears *only* in the first sentence of Article 14(d), which establishes that "the provision of goods ... by a *government* shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration".<sup>511</sup> The first sentence of Article 14(d) thus provides guidance for assessing whether the provision of goods confers a benefit, following a previous affirmative determination that such provision of goods constitutes a financial contribution under Article 1.1(a)(1)(iii) that was carried out by a "government" as defined in Article 1.1(a)(1).

4.44. The benefit analysis under Article 1.1(b), and under Article 14(d) in turn, implies a comparison because no benefit is conferred to a recipient "unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution".<sup>512</sup> In the

<sup>507</sup> China's appellant's submission, para. 35.

<sup>508</sup> See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 286.

<sup>509</sup> We use the term "government-related entities" to refer to all government bodies, whether national or regional, public bodies, and any other government-owned entities for which there has not been a "public body" determination.

<sup>510</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 89).

<sup>511</sup> Emphasis added.

<sup>512</sup> Appellate Body Report, *Canada – Aircraft*, para. 157.

context of Article 14(d), a determination of whether the remuneration paid for a government-provided good is "less than adequate" therefore requires the selection of a benchmark against which the price for the government-provided good, which was at issue under the Article 1.1(b) analysis, must be compared.<sup>513</sup>

4.45. The second sentence of Article 14(d) of the SCM Agreement prescribes that the adequacy of remuneration for government-provided goods or services "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase".<sup>514</sup> In *US – Softwood Lumber IV*, the Appellate Body remarked that the meaning of the phrase "in relation to", in the second sentence of Article 14(d), is not limited to "in comparison with". Instead, it connotes a broader sense of "relation, connection, reference" to prevailing market conditions in the country of provision.<sup>515</sup> The second sentence of Article 14(d) thus clarifies that the relevant benchmark must be determined "in relation to prevailing market conditions", and that such conditions are those existing "in the country of provision".<sup>516</sup>

4.46. In *US – Carbon Steel (India)*, the Appellate Body emphasized the market orientation of the inquiry under Article 14(d) of the SCM Agreement and found that "prevailing market conditions" in the context of Article 14(d) "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices".<sup>517</sup> As the Appellate Body stated in *EC and certain member States – Large Civil Aircraft*, "the language found in the second sentence of Article 14(d) 'highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, *under market conditions*, be exchanged'".<sup>518</sup> Because Article 14(d) "requires that the assessment of the adequacy of remuneration for a government-provided good must be made in relation to *prevailing market conditions in the country of provision*", it follows that any benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in question in the country of provision.<sup>519</sup> Proper benchmark prices would normally emanate from the market for the good in question in the country of provision. To the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d). Such in-country prices could emanate from a variety of sources, including private or government-related entities.<sup>520</sup>

4.47. In *US – Carbon Steel (India)*, the Appellate Body further found that investigating authorities bear the responsibility of conducting the necessary analysis in order to determine, on the basis of information supplied by petitioners and respondents in a countervailing duty investigation, whether the proposed benchmark prices are market determined such that they can be used to assess whether remuneration is less than adequate. The chapeau of Article 14 requires investigating authorities to explain adequately, consistent with the guidelines set out in Article 14, the application of the methodology to calculate the amount of benefit that is conferred by a government-provided financial contribution.<sup>521</sup> However, what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benefit benchmark will vary depending upon the circumstances of the case, the characteristics of the market being

<sup>513</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.

<sup>514</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.149.

<sup>515</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 89. (fn omitted)

<sup>516</sup> We recall that Article 14(d) also indicates that prevailing market conditions in the country of provision include "price, quality, availability, marketability, transportation and other conditions of purchase or sale".

<sup>517</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150.

<sup>518</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 975). (emphasis added)

<sup>519</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 89). (emphasis original)

<sup>520</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.

<sup>521</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152. The Appellate Body has further explained that the obligation under Article VI:3 "encompasses a requirement to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record". (Ibid. (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602)) As we see it, the obligation under Article 14 of the SCM Agreement to calculate the amount of a subsidy in terms of the benefit to the recipient encompasses the same requirement.

examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.<sup>522</sup> In all cases, in arriving at a proper benchmark, an investigating authority must explain the basis for its conclusions in its determinations.<sup>523</sup>

4.48. The Appellate Body observed in *US – Carbon Steel (India)* that, depending on the circumstances, some types of prices may, from an evidentiary standpoint, be more easily found to constitute market-determined prices in the country of provision. In this regard, the Appellate Body has "considered that the *primary* benchmark, and therefore the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the price at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision".<sup>524</sup> This is so because "private prices in the market of provision will *generally* represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods."<sup>525</sup> However, the Appellate Body has not suggested that there is, in the abstract, a hierarchy between in-country prices from different sources that can be relied upon in arriving at a proper benchmark. This is because the issue of "whether a price may be relied upon for benefit benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether the price is a market-determined price reflective of prevailing market conditions in the country of provision."<sup>526</sup>

4.49. The Appellate Body pointed out in *US – Carbon Steel (India)* that, while in-country private prices may serve as the *starting point* of the analysis under Article 14(d), this does not mean that, having identified such prices, the analysis must necessarily end there. Prices of goods provided by government-related entities other than the entity providing the financial contribution at issue must also be examined to determine whether they are market determined and can therefore form part of a proper benchmark. The reason why the prices of goods provided by government-related entities for which there has not been a "public body" determination need to be examined in selecting a benefit benchmark under Article 14(d) is because there is no legal presumption under this provision that in-country prices from any particular source can or should be discarded in a benchmark analysis. Rather, Article 14(d) requires an analysis of the market in the country of provision to determine whether particular in-country prices can be relied upon in arriving at a proper benchmark.<sup>527</sup>

4.50. Although prices found to exist in the market for the good in question in the country of provision should normally be taken into account in identifying a proper benchmark, the Appellate Body has explained that there may be circumstances in which the use of such in-country prices would not be appropriate. In *US – Carbon Steel (India)*, for example, the Appellate Body observed that "it would not be appropriate to rely on such prices when they are not market determined."<sup>528</sup> The Appellate Body recognized that "a government, in its role as a provider of a good, may *distort* in-country private prices for that good by setting an artificially low price with which the prices of private providers in the market align."<sup>529</sup> In such circumstances, those prices cannot be said to be market determined. We emphasize that the ability of a government provider to have such an influence on in-country private prices presupposes that it has sufficient market power to do so.<sup>530</sup>

<sup>522</sup> Like the Appellate Body in *US – Carbon Steel (India)*, we also consider it important to emphasize that, to the extent that an investigating authority has recourse to facts available in conducting the necessary analysis for the purpose of arriving at a proper benchmark, any such recourse must conform to the requirements under Article 12.7 of the SCM Agreement. (Appellate Body Report, *US – Carbon Steel (India)*, fn 743 to para. 4.153)

<sup>523</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.153.

<sup>524</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 90). (emphasis original)

<sup>525</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 90). (emphasis added in *US – Carbon Steel (India)*)

<sup>526</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>527</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>528</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

<sup>529</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 100). (emphasis added)

<sup>530</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444). We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself.

The Appellate Body explained that, in such a situation, "the government's role in providing the financial contribution [may be] so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular."<sup>531</sup> Because this would lead to a calculation of benefit that is artificially low, or even zero, the right of Members to countervail subsidies could be undermined or circumvented in such a scenario.

4.51. As explained in more detail below, in conducting the necessary analysis to determine whether in-country prices are distorted, an investigating authority may be called upon to examine various aspects of the relevant market. Although a government's predominant role as a supplier in the market makes it likely that prices will be distorted, the distortion of in-country prices must be established on the basis of the particular facts underlying each countervailing duty investigation. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body emphasized that "an investigating authority cannot, based simply on a finding that the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share."<sup>532</sup> In that dispute, the Appellate Body indicated that an investigating authority may reject in-country prices if there is *price distortion* and, thus, that the analysis is not limited to determining whether the government is a predominant supplier.<sup>533</sup> In this regard, the Appellate Body clarified that its reasoning in *US – Softwood Lumber IV* excluded the application of a *per se* rule according to which an investigating authority could properly conclude in every case, and regardless of any other evidence, that the fact that the government is the predominant supplier establishes that there is price distortion.

4.52. Therefore, the Appellate Body has cautioned against equating the concept of government predominance with the concept of price distortion, and has highlighted that the link between the two concepts is an evidentiary one. Thus, there does not exist "a threshold above which the fact that the government is the predominant supplier in the market alone becomes sufficient to establish price distortion, but clearly, the more predominant a government's role in the market is, the more *likely* this role will result in the distortion of private prices."<sup>534</sup> In *US – Carbon Steel (India)*, the Appellate Body held that, in conducting the necessary analysis to determine whether in-country prices are distorted or market determined, an investigating authority may be called upon to examine, depending on the relevant circumstances, "the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It could also require assessing the behaviour of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices."<sup>535</sup>

4.53. As indicated by the Appellate Body, the analysis referred to above may lead an investigating authority to conclude that in-country prices cannot be relied upon for determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, and that an alternative benchmark should be employed.<sup>536</sup> In considering the question of what types of alternative benchmarks could be relied upon in a manner consistent with Article 14(d), the Appellate Body found in *US – Softwood Lumber IV* that, where an investigating authority employs an alternative benchmark, "it is under an obligation to ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)."<sup>537</sup> The Appellate Body thus "underscored the importance of making appropriate

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<sup>531</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 93).

<sup>532</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

<sup>533</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

<sup>534</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 444. (emphasis original)

<sup>535</sup> Appellate Body Report, *US – Carbon Steel (India)*, fn 754 to para. 4.157.

<sup>536</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.158.

<sup>537</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.158 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 106).

adjustments to ensure that alternative benchmarks reflect prevailing market conditions in the country of provision".<sup>538</sup>

4.54. In the light of these considerations, we note that in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body examined a claim by China relating to the USDOC's rejection of in-country private prices in China as benchmarks for hot-rolled steel provided by certain SOEs to the investigated companies. In that dispute, the findings by the Appellate Body did not hinge on whether or not the entities that provided hot-rolled steel constituted "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement but, rather, on whether the USDOC had correctly reached the conclusion that price distortion in the market, due to governmental intervention, warranted recourse to an alternative benchmark. As we have stated above, while we agree with China that there is a single definition of the term "government" for purposes of the SCM Agreement, we do not consider that the Panel erred by rejecting China's claim partly on the basis that "a government can distort prices in other ways than through its role as a provider of the financial contribution."<sup>539</sup> As noted above, China's argument that there is a single standard for defining the term "government" does not answer the question of whether a proposed in-country price is a market-determined price for the same or similar goods in the country of provision, and thus whether it may serve as a benchmark for determining benefit.

4.55. China further argues that the Panel erred in rejecting the question of legal interpretation that China raised in this dispute on the basis of the approach taken by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>540</sup> According to China, the issue of whether or not SOEs are public bodies (and thus government) for purposes of the selection of a benefit benchmark under Article 14(d) was not properly before the Appellate Body in that dispute. Given that the interpretative issue raised by China in these proceedings – i.e. whether the same standard for determining whether an entity is a "government" supplier must apply to both the financial contribution and the distortion inquiries – was not raised in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body did not address this issue, "even in passing, much less decide it".<sup>541</sup> In China's view, the acceptance of the Panel's reasoning would raise "significant systemic concerns" for WTO dispute settlement.<sup>542</sup>

4.56. The United States contends that China has failed to establish why the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* are not "persuasive" in the context of this dispute.<sup>543</sup> In the United States' view, the Panel correctly relied on the fact that the Appellate Body's benchmark findings in that dispute "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 [A]rticle 14(d) that prices in that market were distorted and thus the use of out-of-country benchmarks was appropriate".<sup>544</sup>

4.57. The Panel referred to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* where, having found that the USDOC's findings on "financial contribution" were inconsistent with Article 1.1(a)(1) of the SCM Agreement because they were based on an erroneous interpretation of the term "public body", the Appellate Body nevertheless upheld the USDOC's use of out-of-country benchmarks in the same determinations.<sup>545</sup> The Panel further noted that "[t]he Appellate Body's benchmark findings did not concern whether or not SOEs are public bodies (and thus government) but, rather, whether the extent of SOE involvement in a

<sup>538</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.158 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 108).

<sup>539</sup> Panel Report, para. 7.193. (emphasis added)

<sup>540</sup> China's appellant's submission, para. 38 (referring to Panel Report, paras. 7.194-7.196).

<sup>541</sup> China's appellant's submission, para. 45.

<sup>542</sup> China's appellant's submission, para. 48.

<sup>543</sup> United States' appellee's submission, heading II.C, p. 11.

<sup>544</sup> United States' appellee's submission, para. 42 (quoting Panel Report, para. 7.194, in turn referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611).

<sup>545</sup> Panel Report, para. 7.194 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611).

marketplace supported a determination consistent with [A]rticle 14(d) that prices in that market were distorted and thus the use of out-of-country benchmarks was appropriate."<sup>546</sup>

4.58. These observations by the Panel were central to its finding that China's claim rested on an "erroneous interpretation" of Article 14(d) and, consequently, for rejecting China's claim that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement. Indeed, in reaching its conclusion, the Panel found it "appropriate to rely on the Appellate Body's reasoning" in *US – Anti-Dumping and Countervailing Duties (China)*, because the USDOC's benchmark analysis in the 12 investigations at issue in the present dispute is "very similar" to the approach followed in the USDOC's determinations reviewed in that dispute.<sup>547</sup>

4.59. While we agree with China that, in *US – Anti-Dumping and Countervailing Duties (China)*, the focus of the analysis was not on the interpretative issue raised by China in this dispute, the Appellate Body clarified several issues in that dispute that are relevant for addressing China's claims in the present case. In particular, the Appellate Body emphasized that what allows an investigating authority to reject in-country prices is *price distortion*, not the fact that the government, as a provider of goods, is the predominant supplier *per se*.<sup>548</sup> In upholding the panel's findings in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered it significant that the USDOC had examined evidence regarding another factor (i.e. the role of imports in the market) and concluded that the government, acting through SOEs, played a predominant role in the market. The Appellate Body explained that price distortion must be established on a case-by-case basis and that an investigating authority cannot base a finding of price distortion merely on a finding that the government is a predominant supplier, and cannot refuse to consider evidence relating to factors other than government market share.

4.60. We thus consider that the Panel correctly relied on the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* in rejecting China's argument that "SOE presence in the market could support a distortion finding only if the SOEs at issue were properly found to be public bodies within the meaning of Article 1.1(a)(1)."<sup>549</sup> In our view, China's argument is premised on the understanding that it is sufficient for purposes of establishing a *prima facie* case of inconsistency under Article 14(d) with respect to each of the USDOC's benefit determinations at issue to show that: (i) the USDOC's price distortion findings were predicated on its equation of SOEs with government; and (ii) the USDOC's equation of SOEs with government was not made in accordance with the legal standard articulated in *US – Anti-Dumping and Countervailing Duties (China)* for a proper finding that such entities constitute "public bodies".

4.61. We reject China's argument that recourse to an alternative benchmark is inconsistent with Article 14(d) if it is established that the SOEs at issue were equated with government without meeting the legal standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. Instead of hinging on whether a government-owned entity has been properly found to constitute a public body, a finding of inconsistency with Article 14(d) in the selection of a benefit benchmark depends on whether or not the investigating authority at issue conducted the necessary market analysis in order to evaluate whether the proposed benchmark prices are market determined such that they can be used to assess whether the remuneration is less than adequate.

4.62. In conducting the analysis required under Article 14(d), investigating authorities may have to examine the *structure* of the relevant market, including the nature of the entities operating in that market, their respective market shares, as well as any entry barriers.<sup>550</sup> However, evidence relating to government ownership of SOEs and their respective market shares does not, in and of itself, provide a sufficient basis for concluding that in-country prices are distorted. In addition, investigating authorities may be required to assess "the *behaviour* of the entities operating in that

<sup>546</sup> Panel Report, para. 7.194 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611).

<sup>547</sup> Panel Report, para. 7.195.

<sup>548</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

<sup>549</sup> Panel Report, para. 7.162 (referring to China's opening statement at the second Panel meeting, para. 17).

<sup>550</sup> Appellate Body Report, *US – Carbon Steel (India)*, fn 754 to para. 4.157.



market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices".<sup>551</sup> Thus, investigating authorities may be called upon to examine the conditions of competition in the relevant market in order to assess whether the government is influencing the pricing conduct of any government-related or private entities. The specific type of analysis that an investigating authority must conduct for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including additional information that an investigating authority may seek in order to base its determination on positive evidence on the record.<sup>552</sup> In any event, in all cases, in arriving at a proper benchmark, an investigating authority must provide a reasoned and adequate explanation of the basis for its conclusions in its determination.<sup>553</sup> Once an investigating authority has properly established and explained that in-country prices are distorted, it is warranted to have recourse to an alternative benchmark for the benefit analysis under Article 14(d).

4.63. Thus, while we agree with China that there is a single definition of the term "government" for purposes of the SCM Agreement, it does not follow that, in determining the appropriate benefit benchmark under Article 14(d), investigating authorities are required to limit their analysis to an examination of the role played in the market by government-related entities that have been properly found to be government in the narrow sense or public bodies. As noted above, the pricing behaviour of entities operating in the market, including government-related entities that have not been found to be public bodies, may be relevant to examine whether the government acts through such government-related entities so as to exert market power and distort in-country prices. However, as stated above, "Article 14(d) establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis" without an analysis of whether or not they are market determined.<sup>554</sup>

4.64. Therefore, the selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of in-country prices from any particular source, including government-related prices other than the financial contribution at issue.<sup>555</sup> This is because the issue of "whether a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision."<sup>556</sup> As a consequence, prices of government-related entities other than those of the entity providing the financial contribution at issue need to be examined to determine whether they are market determined and can therefore form part of a proper benchmark.

4.65. In sum, we reject China's argument that recourse to an alternative benchmark is inconsistent with Article 14(d) if it is established that the SOEs at issue were equated with government without meeting the legal standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* for purposes of determining whether an entity is a public body. Instead of hinging on whether a government-owned entity has been properly found to constitute a public body, a finding of inconsistency with Article 14(d) in the selection of a benefit benchmark depends on whether or not the investigating authority properly evaluated whether the prices proposed as the benefit benchmark are market determined such that they can be used to establish whether the remuneration is less than adequate. Thus, while we agree with China that there is a single definition of the term "government" for purposes of the SCM Agreement, it does not follow that, in determining the appropriate benefit benchmark under Article 14(d), investigating authorities are required to limit their analysis to an examination of the role played in the market by government-related entities that have been properly found to constitute government in the narrow sense or public bodies.

<sup>551</sup> Appellate Body Report, *US – Carbon Steel (India)*, fn 754 to para. 4.157. (emphasis added)

<sup>552</sup> We note that, depending of the particular circumstances at hand, an investigating authority may not be required to conduct a market analysis addressing all the elements mentioned above as examples of relevant inquiries. Such situations may include where the government is the sole provider of the good in question, and where the government administratively controls all of the prices for the goods at issue.

<sup>553</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.153.

<sup>554</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>555</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>556</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

4.66. We turn next to examine China's claim that the Panel acted inconsistently with Article 11 of the DSU in its examination of China's benefit claims.

#### 4.2.2.2 China's claim under Article 11 of the DSU

4.67. China argues that the Panel acted inconsistently with Article 11 of the DSU in finding that China had failed to establish the "factual premise" of its claims, i.e. that the USDOC actually treated SOEs as public bodies and thus as part of the government in the collective sense in the context of the benefit analysis in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations.<sup>557</sup>

4.68. China submits that it had established a *prima facie* case of inconsistency before the Panel, which, under a proper interpretation of Article 14(d) of the SCM Agreement, required establishing that: (i) the USDOC's price distortion findings were predicated on its equation of SOEs with government; and (ii) the USDOC's equation of SOEs with government was not made in accordance with the legal standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>558</sup> China adds that, given the Panel's acknowledgement that China had brought 12 separate "as applied" claims, the Panel should have concluded with regard to each of these claims that China had established a *prima facie* case of inconsistency under the correct legal interpretation of Article 14(d).

4.69. China contends that the Panel's conclusion that China had failed to establish the factual premise for each of its "as applied" claims is contradicted by the Panel's own intermediate factual findings in respect of the OCTG and Solar Panels investigations. In particular, the Panel had found that, "in a few cases", the USDOC's findings of a predominant role of the government in the relevant market referred to the SOEs as "public bodies".<sup>559</sup> As China notes, these "few cases", which include the OCTG and Solar Panels investigations, "were thus ones in which the evidence before the Panel *did* 'support China's assertion'".<sup>560</sup> With respect to the benefit analysis in the Pressure Pipe and Line Pipe investigations, China argues that the Panel did not individually address whether China had established the factual premise of its claims.<sup>561</sup> China asserts that it had presented a sufficient evidentiary basis to establish a *prima facie* case with respect to the benefit analysis in the Pressure Pipe<sup>562</sup> and Line Pipe<sup>563</sup> investigations.

4.70. The United States responds that 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. The United States argues that China's claim under Article 11 must fail because China misunderstands the elements necessary for a claim under this provision and misinterprets the Panel's finding at issue. The United States notes that, for China's claim under Article 11 of the DSU to succeed, "China must demonstrate that the Panel committed 'an egregious error that calls into question the [Panel's] good faith'".<sup>564</sup> The Appellate Body has "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

<sup>557</sup> China's appellant's submission, para. 61.

<sup>558</sup> China's appellant's submission, paras. 70 and 71.

<sup>559</sup> China's appellant's submission, para. 65 (quoting Panel Report, para. 7.180).

<sup>560</sup> China's appellant's submission, para. 66 (quoting Panel Report, para. 7.180). (emphasis original)

<sup>561</sup> China's appellant's submission, para. 81.

<sup>562</sup> Regarding the Pressure Pipe investigation, China submits that the evidence on the record shows that the USDOC's finding that the relevant market was distorted by "the government's overwhelming involvement" in that market was predicated *exclusively* on the market shares of government-controlled firms. (China's appellant's submission, paras. 90 and 91 (quoting Panel Report, para. 7.186, in turn referring to 2009 Pressure Pipe Issues and Decision Memorandum (Panel Exhibit CHI-12)))

<sup>563</sup> With respect to the Line Pipe investigation, China argues that the Issues and Decision Memorandum shows that the USDOC's finding that the market was distorted by "the government's overwhelming involvement" in that market was predicated exclusively on its finding that "government-owned producers" manufactured all the relevant products in China during the period of investigation. (China's appellant's submission, paras. 97 and 98 (quoting 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19)), pp. 18-19))

<sup>564</sup> United States' appellee's submission, para. 55 (quoting Appellate Body Report, *EC – Hormones*, para. 133).

provision of the covered agreements."<sup>565</sup> The United States contends that China has failed to meet the high standard for establishing that the Panel acted inconsistently with Article 11 of the DSU.

4.71. In addition, the United States argues that China's contention that the Panel failed to comply with its obligations under Article 11 in four of the challenged investigations is unfounded. The United States argues that the Panel's finding that China had failed to establish the factual premises for its claims with respect to the OCTG and Solar Panels investigations is not contradicted by the Panel's intermediate factual findings. With respect to the Pressure Pipe and Line Pipe investigations, the United States rejects China's argument that the Panel failed to evaluate China's "as applied" claims separately and on their own merits. The United States maintains that, "[w]hile the Panel's discussion of the Pressure Pipe and Line Pipe investigations is succinct, it is also sufficient."<sup>566</sup> The Panel explained that it had reviewed the issues and decisions 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 benefit benchmark analysis.

4.72. We understand China's claim under Article 11 of the DSU to be premised on its interpretation of Article 14(d) of the SCM Agreement. Indeed, China considers that, "under the correct interpretation of Article 14(d) of the SCM Agreement", in order to establish a *prima facie* case of inconsistency, a complainant must establish that: (i) the USDOC's price distortion findings were predicated on its equation of SOEs with government; and (ii) the USDOC's equation of SOEs with government was not made in accordance with the legal standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* for a lawful finding that such entities constitute "public bodies".<sup>567</sup> As explained above, we do not agree with China's interpretation of Article 14(d).<sup>568</sup> In order to establish a *prima facie* case of inconsistency under Article 14(d), it is neither necessary nor sufficient to demonstrate that the SOEs at issue were equated with government without meeting the legal standard for a finding that such entities constitute "public bodies" articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. Rather than hinging on whether an SOE has been properly found to be a "public body", a finding of inconsistency with Article 14(d) in the selection of benefit benchmarks depends on whether or not the investigating authority properly evaluated whether prices proposed as a benefit benchmark are market determined such that they can be used to establish whether remuneration is less than adequate.

4.73. Having rejected China's arguments concerning the Panel's findings regarding the legal predicate of China's claims, we see no need to make additional findings with respect to China's claim regarding the factual predicate of its claims under Article 11 of the DSU in order to provide a positive solution to this dispute.

4.74. We now turn to examine China's claim that the Panel erred in its application of Article 14(d) of the SCM Agreement to the determinations at issue.

#### 4.2.2.3 The Panel's application of Article 14(d) of the SCM Agreement

4.75. China argues that the Panel erred in its application of Article 14(d) of the SCM Agreement to the 12 USDOC determinations at issue in this dispute by applying the reasoning that the Appellate Body provided in upholding the USDOC's benefit findings in *US – Anti-Dumping and Countervailing Duties (China)*. In China's view, the Appellate Body's reasoning in that dispute "cannot provide a lawful basis" for the Panel's conclusion that China had failed to establish that the relevant USDOC's benefit determinations are inconsistent with Article 14(d) and Article 1.1(b) of the SCM Agreement.<sup>569</sup> For this reason, China requests us to reverse the Panel's finding, in paragraph 7.195 of the Panel Report, upholding the USDOC's rejection of private prices as potential benchmarks in the challenged investigations on the grounds that such prices were distorted.<sup>570</sup> China also requests us to reverse the Panel's finding, in paragraph 7.197, and the

<sup>565</sup> United States' appellee's submission, para. 55 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>566</sup> United States' appellee's submission, para. 74.

<sup>567</sup> China's appellant's submission, paras. 70 and 71.

<sup>568</sup> *Supra*, para. 4.61.

<sup>569</sup> China's appellant's submission, para. 59.

<sup>570</sup> China's Notice of Appeal, para. 7; appellant's submission, para. 104.

Panel's ultimate finding, in paragraph 8.1.iv of the Panel Report, that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices as benefit benchmarks in respect of the countervailing duty investigations in OCTG, Solar Panels, Pressure Pipe, and Line Pipe.<sup>571</sup>

4.76. We begin by noting the Panel's statement that the Appellate Body in *US – Softwood Lumber IV* "did not provide an exhaustive list of the circumstances under which an authority can resort to out-of-country benchmarks".<sup>572</sup> We recall that, in the light of the issues presented in that dispute, the Appellate Body *limited* its examination to the situation of government predominance in the market, and merely *noted* the panel's additional examples of situations in which it would not be possible to use in-country prices, i.e.: (i) where the government is the only supplier of the particular goods in the country; and (ii) where the government administratively controls all of the prices for those goods in the country.<sup>573</sup>

4.77. Moreover, in rejecting China's argument that "SOE presence in the market could support a distortion finding only if the SOEs at issue were properly found to be public bodies within the meaning of Article 1.1(a)(1)"<sup>574</sup>, the Panel found support in the reasoning set out in the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>575</sup> This is in line with the Appellate Body's findings in that case, to the extent that the Panel understood these findings as indicating that the selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of in-country prices from any particular source, and that a proper finding that recourse to an alternative benchmark is justified requires an investigating authority to properly evaluate whether the proposed benchmark prices are market determined or distorted by governmental intervention.<sup>576</sup>

4.78. Nonetheless, we do not consider that the Panel applied the standard required by Article 14(d) of the SCM Agreement, as properly interpreted, to the determinations challenged by China.<sup>577</sup> Instead, without properly examining the USDOC's analysis in each of the challenged determinations, the Panel found that China had failed to establish that "the USDOC could, consistently with Article 14(d) of the SCM Agreement, determine that private prices were distorted and could not be used as benchmarks for assessing the adequacy of remuneration".<sup>578</sup> It further found that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for the relevant challenged investigations.

4.79. The Panel failed to examine properly each of the challenged determinations in the light of the legal standard applicable under Article 14(d). In particular, the Panel failed to conduct a case-by-case analysis of whether the USDOC had properly examined whether the relevant in-country prices were market determined or were distorted by governmental intervention. The Panel simply assumed that, because the Appellate Body had faced a similar situation in *US – Anti-Dumping and Countervailing Duties (China)*, China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement. In the light of our interpretation of Article 14(d) set out above, the Panel's analysis and reasoning is not sufficient to support a conclusion that the USDOC properly rejected

<sup>571</sup> China's Notice of Appeal, para. 9; appellant's submission, para. 106.

<sup>572</sup> Panel Report, para. 7.192.

<sup>573</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 98.

<sup>574</sup> Panel Report, para. 7.162 (referring to China's opening statement at the second Panel meeting, para. 17).

<sup>575</sup> The Panel noted that "the Appellate Body's benchmark findings [in that dispute] 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 [A]rticle 14(d) that prices in that market were distorted and thus the use of out-of-country benchmarks was appropriate." (Panel Report, para. 7.194 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and 611))

<sup>576</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>577</sup> *Supra*, paras. 4.44-4.53.

<sup>578</sup> Panel Report, para. 7.195 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 456).

in-country prices in China as benchmarks for purposes of the benefit analysis in the challenged investigations.

4.80. For the foregoing reasons, we reverse the Panel's finding, in paragraph 7.195 of the Panel Report, upholding the USDOC's rejection of private prices as potential benchmarks in the investigations under challenge on the grounds that such prices were distorted. We also reverse the Panel's conclusion, in paragraph 7.197 of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for the relevant challenged investigations. Consequently, we reverse the Panel's ultimate finding, in paragraph 8.1.iv of the Panel Report, that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China in respect of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations.<sup>579</sup>

#### 4.2.3 Completion of the legal analysis

4.81. Having reversed the Panel's finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement, we turn to examine China's request to complete the legal analysis and find that the USDOC determinations that SOEs provided inputs for less than adequate remuneration in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations are inconsistent "as applied" with Article 14(d) and Article 1.1(b) of the SCM Agreement. According to China, the record evidence before the Panel in these four investigations was sufficient to establish a *prima facie* case of inconsistency with Article 14(d) in each case.<sup>580</sup> In response, the United States argues that we should not complete the legal analysis with respect to the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations, because there are insufficient undisputed facts on the record to permit us to do so.<sup>581</sup>

4.82. In previous cases, the Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.<sup>582</sup> The Appellate Body has completed the analysis when sufficient factual findings by the panel and undisputed facts on the panel record allowed it to do so.<sup>583</sup> The Appellate Body has not completed the legal analysis in situations where the factual findings by the panel and undisputed facts on the panel record were insufficient for the Appellate Body to conduct its own analysis.<sup>584</sup> Other reasons that have prevented the Appellate Body from completing the legal analysis include "the complexity of the issues, the absence of full exploration of the issues before the panel, and, consequently, considerations for parties' due process rights".<sup>585</sup>

<sup>579</sup> We note that, in its Notice of Appeal and its appellant's submission, China requests us to reverse the Panel's findings, in paragraphs 7.197 and 8.1.iv of the Panel Report, only with respect to the OCTG, Solar Panels, Pressure Pipe and Line Pipe countervailing duty investigations. (See China's Notice of Appeal, para. 9; and appellant's submission, para. 106)

<sup>580</sup> China's appellant's submission, paras. 108 and 113.

<sup>581</sup> United States' appellee's submission, para. 78.

<sup>582</sup> See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-136; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

<sup>583</sup> See e.g. Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:I, p. 18; *Canada – Periodicals*, p. 24, DSR 1997:I, p. 469; *EC – Poultry*, para. 156; *EC – Hormones*, para. 222; *US – Shrimp*, paras. 123 and 124; *Japan – Agricultural Products II*, para. 112; *US – FSC*, para. 133; *Australia – Salmon*, paras. 117 and 118; *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, para. 352; *EC and certain member States – Large Civil Aircraft*, paras. 1174-1178; and *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1272-1274.

<sup>584</sup> See e.g. Appellate Body Reports, *EC – Hormones*, para. 251; *Korea – Dairy*, paras. 92 and 102; *Canada – Autos*, paras. 133 and 145; *US – Hot-Rolled Steel*, paras. 180 and 236; *US – Softwood Lumber IV*, para. 118; *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 157 and 161; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 219 and 220; *US – Upland Cotton*, para. 693; *US – Zeroing (EC)*, paras. 228 and 243; *EC – Selected Customs Matters*, para. 286; *US – Continued Zeroing*, para. 194; *US – Anti-Dumping and Countervailing Duties (China)*, para. 537; *EC and certain member States – Large Civil Aircraft*, paras. 736, 990, and 993; and *US – COOL*, para. 481.

<sup>585</sup> Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224 (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, fn 537 to para. 339).

4.83. In the present case, we note that the question before us is whether the USDOC's benefit determinations at issue are consistent with Article 14(d) and Article 1.1(b) of the SCM Agreement, as properly interpreted. As noted above, an analysis of this issue calls for an evaluation of the reasoning and explanations provided by the USDOC in its determinations. Accordingly, in addressing this particular issue in the present dispute, as long as we can conduct our completion analysis on the basis of the plain text of the USDOC's determinations, the absence of factual findings by the Panel or an evaluation by the Panel of the relevant USDOC's determinations does not necessarily prevent us from completing the legal analysis.

4.84. Regarding the legal standard to be applied under Article 14(d) and under Article 1.1(b), we recall, first, that the "chapeau of Article 14 requires investigating authorities to explain adequately, consistent with the guidelines set out in Article 14, the application of the methodology applied to calculate the amount of benefit that is conferred by a government-provided financial contribution."<sup>586</sup> Moreover, in all cases, in arriving at a proper benchmark, an investigating authority must explain the basis for its conclusions in its determination.

4.85. Second, we recall that Article 14(d) of the SCM Agreement "establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis."<sup>587</sup> This is because the question of whether "a price may be relied upon for benchmarking purposes under Article 14(d) is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision."<sup>588</sup> Prices of government-related entities other than the entity providing the financial contribution at issue, must, therefore, also "be considered to assess whether they are market determined and can therefore form part of a proper benchmark."<sup>589</sup>

4.86. Third, we recall that, "[i]n conducting the necessary analysis to determine whether proposed in-country prices can be relied upon in arriving at a proper benchmark, an investigating authority may be called upon to examine various aspects of the relevant market."<sup>590</sup> As the Appellate Body has explained, "what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record."<sup>591</sup>

4.87. Turning now to the countervailing duty investigations at issue in the present dispute, we note the Panel's finding that, in each of the underlying investigations challenged by China, "the USDOC determined that the relevant input suppliers were public bodies on the grounds that these suppliers were majority-owned or otherwise controlled by the [GOC], either on the basis of the evidence on the record or by assuming such government ownership or control when the USDOC applied facts available."<sup>592</sup> The Panel held that, in the 12 countervailing duty investigations challenged by China, the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in determining that the relevant "SOEs were public bodies based solely on the grounds that these enterprises were (majority) owned, or otherwise controlled, by the GOC."<sup>593</sup> The United States has not challenged these findings by the Panel on appeal. Nor does the United States contest that in 12 of the countervailing duty investigations at issue in this dispute the USDOC "applied an ownership-based control test" in determining whether Chinese SOEs were public bodies.<sup>594</sup>

4.88. With these considerations in mind, we turn to examine the explanations provided by the USDOC for its price distortion findings in each of the four countervailing duty investigations with

<sup>586</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152.

<sup>587</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>588</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>589</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>590</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.

<sup>591</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.

<sup>592</sup> Panel Report, para. 7.61.

<sup>593</sup> Panel Report, para. 7.75.

<sup>594</sup> See Panel Report, para. 7.63.

respect to which China requests that we complete the legal analysis, beginning with the OCTG countervailing duty investigation.

#### 4.2.3.1 The OCTG countervailing duty investigation

4.89. In the context of the OCTG countervailing duty investigation, the USDOC reasoned that:

Based on the GOC's failure to provide the requested information, we determine that the GOC has failed to act to the best of its ability and, consequently, an adverse inference is warranted in accordance with section 776(b) of the Act. As [adverse facts available], we are assuming that 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 warranted.<sup>595</sup>

4.90. The USDOC further explained that:

[W]e are relying on [adverse facts available] to determine that GOC authorities play a significant role in the PRC market for steel rounds and billets and that prices for steel rounds and billets are distorted. Consequently, we determine that the prices actually paid in the PRC for steel rounds and billets during the [period of investigation] are not appropriate tier one benchmarks.<sup>596</sup>

4.91. We first recall that government-related prices other than the financial contribution at issue must not be *a priori* excluded from the possible candidates for selecting a proper benefit benchmark under Article 14(d). However, in this determination, the USDOC did not consider whether the prices of GOC-owned or -controlled firms "as such" were or were not market determined. The USDOC appears simply to have accepted, without any examination, that those government-related prices were automatically distorted by governmental intervention.

4.92. In addition, the USDOC's distortion finding appears to assume that any entity "owned or controlled" by the GOC could be treated as a public body (and thus "government" in the sense of Article 1.1(a)(1) of the SCM Agreement) in deciding whether the role of the "government" in the market as a provider of the relevant goods was "significant". We recall, however, that "mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body."<sup>597</sup>

4.93. Accordingly, we find that the USDOC's analysis and explanation for rejecting in-country prices in China in its benchmark analysis in the OCTG countervailing duty investigation is inconsistent with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement.

#### 4.2.3.2 The Solar Panels countervailing duty investigation

4.94. In the context of the selection of a benefit benchmark in the Solar Panels countervailing duty investigation, the USDOC provided the following reasoning in support of its finding of price distortion in the market:

[T]he Department has preliminarily determined that *all the producers of polysilicon purchased by the respondents during the [period of investigation] are "authorities"* within the meaning of section 771(5)(B) of the [US Tariff Act of 1930]. Because the GOC did not provide the production volumes for any of the polysilicon producers in the PRC, the Department cannot determine, on the basis of production volumes, what percentage of total domestic production or total domestic consumption is accounted for by the producers determined to be "authorities". Therefore, *we have determined whether polysilicon consumption in the PRC is dominated by the GOC based on the*

<sup>595</sup> 2009 OCTG Issues and Decision Memorandum (Panel Exhibit CHI-45), p. 4. See also Panel Report, para. 7.182.

<sup>596</sup> 2009 OCTG Issues and Decision Memorandum (Panel Exhibit CHI-45), p. 14. See also Panel Report, para. 7.182.

<sup>597</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.



*number of producers that are "authorities". In 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 total universe of 47 producers in the PRC. Therefore, we determine that the GOC is the predominant provider of polysilicon in the PRC and that its significant presence in the market distorts all transaction prices. As such, we cannot rely on domestic prices in the PRC as a "tier-one" benchmark. For the same reasons, we determine that import prices into the PRC cannot serve as a benchmark.*<sup>598</sup>

4.95. The essence of the above findings by the USDOC is that 37 producers (30 public bodies and seven entities where the GOC maintained an ownership or management interest) out of the total 47 producers of polysilicon in China are the entities through which the GOC influenced and distorted the domestic market of polysilicon. Although the role of these 37 producers in the relevant market could, in principle, suggest that the presence in that market of these government-related entities could be "significant" or "predominant", we recall that, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body emphasized that "an investigating authority cannot, based simply on a finding that the government is the predominant supplier of the relevant goods, refuse to consider evidence relating to factors other than government market share."<sup>599</sup> The Appellate Body further clarified that its reasoning in *US – Softwood Lumber IV* excluded the application of a *per se* rule, according to which an investigating authority could properly conclude in every case, and regardless of any other evidence, that the fact that the government is the predominant supplier means that private prices are distorted.<sup>600</sup> The Appellate Body has therefore cautioned against equating the concept of government predominance with the concept of price distortion, and has highlighted that the link between the two concepts is an evidentiary one.

4.96. In the determination at issue, the USDOC did not explain whether and how the relevant 37 producers possessed and exerted market power such that other in-country prices were distorted. Nor did the USDOC explain whether the prices of the 37 government-related entities themselves were market determined.

4.97. Accordingly, we find that the USDOC's analysis and explanation for rejecting in-country prices in its benchmark analysis in the Solar Panels countervailing duty investigation is inconsistent with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement.

#### 4.2.3.3 The Pressure Pipe countervailing duty investigation

4.98. In the context of the Pressure Pipe countervailing duty investigation, the USDOC provided the following reasoning in support of its finding of price distortion in the market:

[W]e found that SOEs account for approximately 82 percent of the [Stainless Steel Coil] production in the PRC during the [period of investigation] (and approximately 71 percent of production if available data on import volume are included) ... Consequently, because of the government's overwhelming involvement in the PRC's SSC market, we found that the use of private producer prices in China would be akin to comparing the benchmark to itself ...<sup>601</sup>

4.99. On this basis, the USDOC concluded that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's actions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration."<sup>602</sup>

<sup>598</sup> Panel Report, para. 7.183 (quoting 2012 Solar Panels Preliminary Affirmative CVD Determination (Panel Exhibit CHI-105), p. 17449). (emphases added by the Panel)

<sup>599</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

<sup>600</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 442 and 443 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 100).

<sup>601</sup> 2009 Pressure Pipe Issues and Decision Memorandum (Panel Exhibit CHI-12), p. 19.

<sup>602</sup> 2009 Pressure Pipe Issues and Decision Memorandum (Panel Exhibit CHI-12), p. 19.

4.100. We recall, however, that Article 14(d) of the SCM Agreement "establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis."<sup>603</sup> In this investigation, the USDOC appears simply to have assumed that the prices of the government-related entities were automatically distorted due to their relationship with the government, given that the USDOC did not explain whether those prices were market determined or distorted by governmental intervention.

4.101. Moreover, we note that these findings by the USDOC provide relevant information, including regarding the market shares of government-owned entities. The market shares of the SOEs could, in principle, be relied upon to support a finding that the presence of the government through government-related entities is "significant" or "predominant", in line with the Appellate Body's understanding of these two situations in *US – Anti-Dumping and Countervailing Duties (China)*. However, we note that the USDOC did not explain in its determination whether and how the mentioned market shares held by SOEs actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers aligned their prices with those of the government-provided goods.

4.102. Accordingly, we find that the USDOC's analysis and explanation for rejecting in-country prices in China in its benchmark analysis in the Pressure Pipe countervailing duty investigation is inconsistent with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement.

#### **4.2.3.4 The Line Pipe countervailing duty investigation**

4.103. In the context of the Line Pipe countervailing duty investigation, the USDOC reasoned that:

... due to the GOC's refusal to provide the [USDOC] with the ownership information it requested concerning [hot-rolled steel] suppliers, we are unable to rely on the aggregate production data supplied by the GOC. As a result ... we are applying [adverse facts available] and assuming that government-owned producers manufactured all [hot-rolled steel] produced in the PRC during the [period of investigation].<sup>604</sup>

4.104. In the light of this finding made in the context of facts available, we note that the USDOC found that, "because of the government's overwhelming involvement in the [hot-rolled steel] market, the use of private producer prices in the PRC would be akin to comparing the benchmark to itself".<sup>605</sup> On this basis, the USDOC concluded that "prices stemming from private transactions within China cannot give rise to a price that is sufficiently free from the effects of the GOC's actions, and therefore cannot be considered to meet the statutory and regulatory requirement for the use of market-determined prices to measure the adequacy of remuneration."<sup>606</sup>

4.105. We note that, through the application of "adverse" facts available, the USDOC assumed that government-owned producers manufactured *all* hot-rolled steel produced in China during the period of investigation. The USDOC's distortion finding appears to have been predicated on the USDOC's determination that entities "owned or controlled" by the government can be treated as "GOC authorities", and that prices of goods provided by such entities can be discarded in a benchmark analysis solely on the basis of government ownership or control. Yet, as noted above, the relevant inquiry for purposes of finding a proper benchmark under Article 14(d) of the SCM Agreement is whether or not certain in-country prices are distorted, rather than whether such prices originate from a particular source (e.g. government-owned entities). In addition, a finding of government ownership and control of certain entities alone cannot serve as the sole basis for establishing price distortion. Furthermore, government-related prices cannot be discarded in a benchmark analysis without an examination of whether or not they are market determined.

<sup>603</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>604</sup> 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19), p. 19.

<sup>605</sup> 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19), p. 19.

<sup>606</sup> 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19), p. 19.

4.106. Accordingly, we find that the USDOC's analysis and explanation for rejecting "prices stemming from private transactions" in China in its benchmark analysis in the Line Pipe countervailing duty investigation is inconsistent with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement.

#### 4.2.4 Overall conclusion

4.107. We recall that we have reversed the Panel's finding, in paragraph 7.195 of the Panel Report, upholding the USDOC's rejection of private prices as potential benchmarks in the investigations at issue on the grounds that such prices were distorted. We also reverse the Panel's conclusion, in paragraph 7.197 of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China as benchmarks for the relevant challenged investigations. Similarly, we have reversed the Panel's ultimate finding, in paragraph 8.1.iv of the Panel Report, that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China in respect of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations. We find, instead, that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benefit benchmarks in the context of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations.

#### 4.3 Article 2.1 of the SCM Agreement – Specificity

4.108. China challenges on appeal the Panel's analysis regarding determinations of *de facto* specificity made by the USDOC in the following 12 countervailing duty investigations: Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.<sup>607</sup> In these investigations, the USDOC based its determinations of *de facto* specificity on the first factor listed in Article 2.1(c) of the SCM Agreement, namely, the "use of a subsidy programme by a limited number of certain enterprises". China appeals three aspects of the Panel's analysis regarding the USDOC's determinations of *de facto* specificity. First, China argues that the Panel erred in its interpretation and application of Article 2.1 when it found that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 by analysing specificity exclusively under Article 2.1(c) of the SCM Agreement.<sup>608</sup> Second, China submits that the Panel erred in the interpretation and application of the term "subsidy programme" in Article 2.1(c) by finding that the consistent provision by the SOEs in question of inputs for less than adequate remuneration provided an objective basis for the USDOC to identify sufficiently a subsidy programme under Article 2.1(c).<sup>609</sup> Third, China argues that the Panel erred in its application of Article 2.1 when it found that "the relevant jurisdiction was at the very least implicitly understood to be China"<sup>610</sup> in the challenged investigations, and that China had therefore failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by not identifying the relevant granting authority.<sup>611</sup>

<sup>607</sup> See table of USDOC investigations at p. 5 of this Report. In each of these investigations, the USDOC made a finding of *de facto* specificity with respect to one or several inputs.

<sup>608</sup> China's appellant's submission, para. 5.

<sup>609</sup> China's appellant's submission, paras. 169 and 170.

<sup>610</sup> China's appellant's submission, para. 175 (quoting Panel Report, para. 7.248).

<sup>611</sup> China's appellant's submission, para. 175. As part of its challenge before the Panel, China also argued that the USDOC failed to consider the factors set out in the last sentence of Article 2.1(c) of the SCM Agreement relating to the diversification of the relevant economy and the duration of the relevant subsidy programme. The Panel found that the USDOC failed to comply with Article 2.1(c) by not taking those factors into account in determining that the subsidies at issue are *de facto* specific. (Panel Report, para. 7.256) The United States has not appealed this finding by the Panel.

### 4.3.1 The USDOC's analysis of specificity exclusively under Article 2.1(c) of the SCM Agreement

#### 4.3.1.1 The Panel's findings

4.109. Before the Panel, China argued that the USDOC's determinations of *de facto* specificity in the 12 countervailing duty investigations at issue<sup>612</sup> are inconsistent with Article 2.1 of the SCM Agreement because the USDOC failed to make its determinations on the basis of positive evidence establishing that the alleged provision of inputs for less than adequate remuneration was specific to an enterprise or industry or groups thereof.<sup>613</sup>

4.110. The Panel began by examining China's argument that "subparagraphs (a) and (b) have primacy in the overall structure of Article 2.1 and must feature in any Article 2.1 analysis"<sup>614</sup>, and that an evaluation of "other factors" referred to in the first sentence of Article 2.1(c) is conditional on an appearance of non-specificity resulting from prior application of subparagraphs (a) and (b) of that provision.<sup>615</sup> China explained, in this regard, that "subsidies will normally be administered pursuant to legislation, and it therefore makes sense for an evaluation of specificity to start with any written instrument."<sup>616</sup>

4.111. The Panel disagreed with China, noting that, while the structure of Article 2.1 suggests a sequence for the application of subparagraphs (a), (b), and (c) in which the application of the principles in subparagraphs (a) and (b) precedes the application of the principle in subparagraph (c), this "logical structure" does not, in the Panel's view, "translate into procedural rules that investigating authorities must follow in each specificity analysis under that provision".<sup>617</sup> Referring to the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, the Panel noted, instead, that the Appellate Body recognized a "certain degree of flexibility ... in the application of the principles in Article 2.1"<sup>618</sup> and the importance of taking into account the "various legal and factual aspects of a subsidy in any given case", as well as the "nature and content of measures challenged in a particular case" when applying these principles.<sup>619</sup> The Panel further recalled 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".<sup>620</sup>

4.112. With respect to the USDOC's specificity determinations at issue, the Panel noted that it was undisputed that the USDOC's findings were not based on "an explicit limitation of access by the granting authority or the legislation pursuant to which the granting authority operates; nor [were] they based on criteria or conditions that were spelled out in law, regulation, or other official document."<sup>621</sup> Rather, it was the "unwritten nature of the subsidies that the USDOC found to exist that led [the USDOC] to consider 'other factors' under subparagraph (c)."<sup>622</sup> On this basis, the Panel concluded that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 by analysing specificity exclusively under Article 2.1(c) of the SCM Agreement.

<sup>612</sup> China originally challenged determinations of *de facto* specificity made by the USDOC in 14 countervailing duty investigations, but the Panel found that the preliminary determinations in two of these investigations were outside its terms of reference. (See Panel Report, para. 7.29) China has not challenged this finding by the Panel on appeal.

<sup>613</sup> See Panel Report, paras. 7.218 and 7.200.

<sup>614</sup> Panel Report, para. 7.207 (referring to China's second written submission to the Panel, fn 130 to para. 117).

<sup>615</sup> Panel Report, para. 7.225 (referring to China's second written submission to the Panel, para. 125).

<sup>616</sup> Panel Report, para. 7.228 (referring to China's second written submission to the Panel, para. 119). The Panel noted, in this regard, that China's position was linked to China's view concerning what can constitute a "subsidy programme". (Ibid., para. 7.228)

<sup>617</sup> Panel Report, para. 7.229 (referring to Appellate Body Report, *US – Large Civil Aircraft* (2<sup>nd</sup> complaint), para. 796).

<sup>618</sup> Panel Report, para. 7.229.

<sup>619</sup> Panel Report, para. 7.229 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371).

<sup>620</sup> Panel Report, para. 7.229 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371).

<sup>621</sup> Panel Report, para. 7.230.

<sup>622</sup> Panel Report, para. 7.230.

#### **4.3.1.2 Whether the Panel erred in finding that the USDOC did not act inconsistently with Article 2.1 of the SCM Agreement by analysing specificity exclusively under Article 2.1(c)**

4.113. On appeal, China argues that the Panel erred in its interpretation and application of Article 2.1 of the SCM Agreement when it found that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 by analysing specificity exclusively under Article 2.1(c) of the SCM Agreement. China points out that, in the present case, the USDOC did not examine the principles set forth in subparagraphs (a) and (b) of Article 2.1, and did not identify an appearance of non-specificity prior to its examination of the "other factors" under subparagraph (c) of Article 2.1. China contends that the USDOC's consideration of the "other factors" under Article 2.1(c) in the absence of an "appearance of non-specificity" is contrary to the first sentence of Article 2.1(c), which conditions any examination of such "other factors" upon an "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b) of Article 2.1. According to China, the Panel's contrary conclusion resulted from "a failure to interpret Article 2.1(c) in accordance with its ordinary meaning and in accordance with the context of Article 2.1 as a whole, as well as a failure to apply relevant Appellate Body precedent".<sup>623</sup>

4.114. The United States responds that the Panel correctly interpreted Article 2.1 to allow investigating authorities to examine specificity exclusively under Article 2.1(c) of the SCM Agreement. The United States contends that "there is no merit to China's argument" that, in every specificity analysis under Article 2.1, an investigating authority must examine a subsidy under subparagraphs (a) and (b) before examining it under subparagraph (c).<sup>624</sup> In the United States' view, the chapeau of 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."<sup>625</sup> The United States observes that, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body 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."<sup>626</sup> On this basis, the United States contends 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".<sup>627</sup>

4.115. Article 2.1 of the SCM Agreement provides:

#### *Article 2* *Specificity*

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:

(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.

(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, regulation, or other official document, so as to be capable of verification.

<sup>623</sup> China's appellant's submission, para. 121.

<sup>624</sup> United States' appellee's submission, para. 93.

<sup>625</sup> United States' appellee's submission, para. 104.

<sup>626</sup> United States' appellee's submission, para. 107 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties*, para. 371).

<sup>627</sup> United States' appellee's submission, para. 107.

(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 of the length of time during which the subsidy programme has been in operation.

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[\*fn original] <sup>2</sup> Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

[\*\*fn original] <sup>3</sup> In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

4.116. China's appeal raises the question of whether, in certain circumstances, it may be permissible for an investigating authority to proceed directly to a specificity analysis under Article 2.1(c), or whether an application of the principles set out in subparagraphs (a) and (b) is always required before an analysis can be conducted under subparagraph (c). Before addressing China's arguments on appeal, we turn to review the analytical framework and structure of the specificity analysis under Article 2.1 of the SCM Agreement in the light of relevant Appellate Body jurisprudence.

4.117. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body observed that the chapeau of Article 2.1 "frames the central inquiry as to whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority and provides that, in an examination of whether this is so, the 'principles' set out in subparagraphs (a) through (c) 'shall apply'." <sup>628</sup> The Appellate Body emphasized that "the use of the term 'principles' – 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." <sup>629</sup> In that dispute, the Appellate Body also held 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." <sup>630</sup>

4.118. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body indicated 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)." <sup>631</sup> The Appellate Body similarly observed that "the structure of Article 2.1 suggests a sequence for their application in which application of the principles in subparagraphs (a) and (b) precedes the application of the principle in subparagraph (c). In other words, one will *normally* reach subparagraph (c) after it has been determined that there are no explicit limitations as to which enterprises or industries have access to the subsidy." <sup>632</sup> Although these passages introduce the notion of a sequence in conducting the specificity analysis, the use of the words "ordinarily" and "normally" indicate that the Appellate Body did not consider that investigating authorities are required to follow a strict sequential order of subparagraphs (a) through (c) of Article 2.1 *in each and every case*. Rather, the Appellate Body emphasized that there is a logical progression in the type of evidence that should be examined under each subparagraph of Article 2.1 and, thus, that the specificity analysis should "ordinarily" proceed in a certain sequence. However, as explained in more detail below, the Appellate Body did not exclude the possibility that, under certain circumstances, an investigating authority could properly conduct the specificity analysis without examining the subparagraphs of Article 2.1 in a strict sequential order. Indeed, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body indicated that, despite the fact that the specificity analysis under subparagraphs (a) through (c) will *ordinarily* proceed in a

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<sup>628</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366.

<sup>629</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366.

<sup>630</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371.

<sup>631</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 873. (emphasis added)

<sup>632</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 796. (emphasis added)



sequential order, "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*."<sup>633</sup>

4.119. The Appellate Body indicated that the specificity analysis should *normally* begin by examining the evidence that is relevant for determining *de jure* specificity pursuant to subparagraphs (a) and (b) of Article 2.1. Under subparagraph (a), the inquiry focuses on establishing whether the granting authority, or the legislation pursuant to which the granting authority operates, *explicitly* limits access to the subsidy at issue to certain enterprises. Subparagraph (b), in turn, establishes that specificity "shall not exist" if 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, the subsidy, provided that eligibility is automatic, that such criteria or conditions are strictly adhered to, and that they are clearly spelled out in law, regulation, or other official document so as to be capable of verification.<sup>634</sup>

4.120. In the context of determining whether a subsidy is *de jure* specific, the language in subparagraphs (a) and (b) directs an investigating authority to scrutinize any explicit limitation of access to a subsidy or look for the existence of objective conditions or criteria governing eligibility for a subsidy. In cases where an examination of the nature and content of the challenged measure indicates that access to a subsidy is *explicitly* limited to certain enterprises or, alternatively, if there are "criteria or conditions" governing the eligibility for a subsidy that are spelled out in *law, regulation, or other official document*, an investigating authority will normally begin by examining this evidence in the light of subparagraphs (a) and (b) in order to determine whether the subsidy is *de jure* specific. This analysis under subparagraphs (a) and (b) may lead an investigating authority to conclude that a subsidy is *de jure* specific within the meaning of Article 2.1(a), or that a subsidy is *not de jure* specific because there are objective criteria or conditions that are clearly spelled out in law, regulation, or other official document.

4.121. Turning to an examination of *de facto* specificity<sup>635</sup>, we note that the first sentence of Article 2.1(c) provides that "[i]f, 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." We begin by noting that the word "if", at the beginning of the first sentence of Article 2.1(c), is ordinarily used to introduce a condition that may either be fulfilled or not fulfilled.<sup>636</sup> By contrast, the preposition "notwithstanding", which introduces the subordinate clause in the first sentence of Article 2.1(c), is relevantly defined as "[i]n spite of, without regard to or prevention by".<sup>637</sup> In the context of the first sentence of Article 2.1(c), this clause suggests that, *in spite of* any appearance that a subsidy is not specific following an application of the principles set out in subparagraphs (a) and (b), an investigating authority may still examine "other factors" and find that the subsidy at issue is *de facto* specific. For instance, in a situation where the evidence suggests that a subsidy is not *de jure* specific because the conditions set out in subparagraph (b) are satisfied, subparagraph (c) of Article 2.1 clarifies that the specificity inquiry does not necessarily end at that point because,

<sup>633</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371. (emphasis added)

<sup>634</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 367. We note that footnote 2 to subparagraph (b) of Article 2.1 further explains that "[o]bjective criteria or conditions ... are neutral, ... do not favour certain enterprises over others, and ... are economic in nature and horizontal in application, such as the number of employees or size of enterprise."

<sup>635</sup> In examining whether a measure is *de facto* specific under subparagraph (c), an investigating authority should focus its examination on evidence that relates to the factors listed under that provision. We recall that Article 2.1(c) lists the following factors for consideration: (i) use of a subsidy programme by a limited number of certain enterprises; (ii) predominant use by certain enterprises; (iii) the granting of disproportionately large amounts of subsidy to certain enterprises; and (iv) the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.

<sup>636</sup> The term "if" is defined as "introducing a condition where the question of fulfilment or non-fulfilment is left open: given the hypothesis or proviso that, in the event that." (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1321) An investigating authority must also consider the two factors referred to in the last sentence of Article 2.1(c).

<sup>637</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1952.



"notwithstanding any appearance of non-specificity" resulting from the application of Article 2.1(a) and (b), a subsidy may nevertheless be found to be "in fact" specific.<sup>638</sup>

4.122. Looking further at the structure of Article 2.1(c), we note that the clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" is a subordinate clause, suggesting to us that the word "if" at the beginning of the first sentence of Article 2.1(c) does not relate directly to the "appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)". Thus, the application of the principles laid down in subparagraphs (a) and (b) does not necessarily constitute a condition that must be met in order to consider "other factors" under subparagraph (c). This, in our view, is also confirmed by the use of the term "appearance" in this clause, as opposed to the term "finding" or "determination", which suggests that an examination of the factors listed in subparagraph (c) does not presuppose a formal finding or determination under subparagraphs (a) and (b) by an investigating authority applying the principles laid out in these subparagraphs. We thus consider that the word "if" in the first sentence of Article 2.1(c) relates to the phrase "there are reasons to believe that the subsidy may in fact be specific". Thus, as held by the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, "[t]he analysis under Article 2.1(c) proceeds where there are 'reasons to believe that the subsidy may in fact be specific'".<sup>639</sup>

4.123. Moreover, as noted above, the Appellate Body has indicated that, despite the fact that the specificity analysis under subparagraphs (a) through (c) will *ordinarily* proceed in a sequential order, "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*".<sup>640</sup> The Appellate Body has therefore clarified that, in certain situations, investigating authorities are *not* required to examine specificity with respect to the subsidy at issue under all three subparagraphs. Rather, depending on the type of evidence that is present in a given case, an investigating authority may be able to limit the specificity analysis to *de jure* elements under subparagraphs (a) and (b) or to *de facto* elements under subparagraph (c). However, we consider it important to emphasize that, in previous disputes, the Appellate Body has also "cautioned 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".<sup>641</sup>

4.124. With these considerations in mind, we now turn to examine China's arguments regarding the interpretation of Article 2.1(c) of the SCM Agreement. China argues that the USDOC's consideration of the "other factors" under Article 2.1(c) of the SCM Agreement in the absence of an "appearance of non-specificity" is contrary to the first sentence of Article 2.1(c), which conditions any examination of these factors upon an "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b) of Article 2.1. According to China, the Panel's contrary conclusion resulted from "a failure to interpret Article 2.1(c) in accordance with its ordinary meaning and in accordance with the context of Article 2.1 as a whole, as well as a failure to apply relevant Appellate Body precedent".<sup>642</sup>

4.125. In essence, China's interpretative position is that the first sentence of Article 2.1(c) *conditions* an examination of *de facto* specificity upon an "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b). We recall that the word "if" in the first sentence of subparagraph (c) relates to the phrase "there are reasons to believe that the subsidy may in fact be specific", rather than to the subordinate clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)". Thus, the application of the principles laid down in subparagraphs (a) and (b) does not necessarily constitute a condition that must be fulfilled in order to examine "other factors" under subparagraph (c). We further recall that "there may be instances in which the evidence under

<sup>638</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 370.

<sup>639</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 797.

<sup>640</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371. (emphasis added)

<sup>641</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 945 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371). (emphasis added)

<sup>642</sup> China's appellant's submission, para. 121.

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*."<sup>643</sup> We therefore do not agree with China that the first sentence of Article 2.1(c) of the SCM Agreement conditions an assessment of the *de facto* factors listed under that subparagraph upon the application of subparagraphs (a) and (b).

4.126. We note that the Panel found that "[t]he word 'if' in Article 2.1(c) refers to the clause 'there are reasons to believe that the subsidy may in fact be specific'."<sup>644</sup> In this regard, the Panel further observed that "Article 2.1(c) conditions the possibility to consider other factors upon the existence of 'reasons to believe that the subsidy may in fact be specific'".<sup>645</sup> Moreover, with respect to the interpretation of the subordinate clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)", the Panel indicated that such clause establishes 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'".<sup>646</sup> We consider that these interpretative findings by the Panel are in keeping with our own interpretation of the first sentence of Article 2.1(c). Accordingly, we disagree with China that the Panel erred in its interpretation of Article 2.1(c) of the SCM Agreement.

4.127. We now turn to China's argument regarding the Panel's application of Article 2.1 of the SCM Agreement to the challenged USDOC determinations. According to China, the Panel erroneously concluded that the "unwritten nature" of the alleged input subsidies at issue was a "circumstance" that allowed the USDOC to reach a finding of specificity under Article 2.1(c) in the absence of an "appearance of non-specificity" under subparagraphs (a) and (b).<sup>647</sup> In China's view, there is nothing in the nature of "unwritten subsidies" that requires them to be examined exclusively under subparagraph (c). China asserts that "unwritten subsidies" can be analysed under subparagraphs (a) and (b) based on an examination of the granting authority's conduct in conditioning eligibility for the alleged subsidies.<sup>648</sup>

4.128. In addressing China's claim, the Panel recalled the Appellate Body's finding 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".<sup>649</sup> In the Panel's view, the set of facts before it embodied the "circumstances" described by the Appellate Body.<sup>650</sup> According to the Panel, it is undisputed that the USDOC's findings were *not* based on an *explicit* limitation of access to the subsidy by the granting authority or the legislation pursuant to which the granting authority operates within the meaning of subparagraph (a); nor on criteria or conditions that are *spelled out* in law, regulation, or other official document within the meaning of subparagraph (b). In the Panel's view, it was the "unwritten nature" of the subsidies that the USDOC found to exist that led it to consider "other factors" under subparagraph (c).<sup>651</sup> On this basis, the Panel found that the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c).<sup>652</sup>

4.129. While we do not preclude that there may be circumstances where "unwritten measures" providing subsidies may be analysed under the principles set forth in subparagraphs (a) and (b), we note that an analysis under these provisions focuses on *explicit* limitation of access to the subsidy to certain enterprises. While the subsidy measure at issue may be unwritten, in order to

<sup>643</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371. (emphasis added)

<sup>644</sup> Panel Report, para. 7.226.

<sup>645</sup> Panel Report, para. 7.226.

<sup>646</sup> Panel Report, para. 7.227. (emphasis original)

<sup>647</sup> China's appellant's submission, para. 154 (quoting Panel Report, para. 7.230).

<sup>648</sup> China's appellant's submission, paras. 154 and 155.

<sup>649</sup> Panel Report, para. 7.229 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371).

<sup>650</sup> Panel Report, para. 7.230.

<sup>651</sup> Panel Report, para. 7.230.

<sup>652</sup> Panel Report, paras. 7.231, 7.258, and 8.1.v.

be *de jure* specific, the granting authority or the legislation pursuant to which the granting authority operates must *explicitly* limit access to the subsidy at issue. Such explicit limitation, in our view, would ordinarily be found in written instruments. This is borne out in subparagraph (b), which establishes that the criteria or conditions governing the eligibility for a subsidy that should be examined pursuant to this provision "must be *clearly spelled out* in law, regulation, or other official document".<sup>653</sup> By contrast, a *de facto* specificity analysis under subparagraph (c) would appear to be most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are *not* explicitly provided for in a law or regulation.

4.130. As indicated above, we do not agree with China that Article 2.1 calls for a strict sequential analysis of its three subparagraphs in each and every case. As we see it, in an investigation where there is no evidence that allows for a *de jure* assessment, the application of Articles 2.1(a) and (b) would serve no purpose, and we consequently see no reason why an investigating authority would, in such instances, be precluded from proceeding directly to Article 2.1(c) to conduct its specificity analysis.<sup>654</sup> Having said that, we emphasize that, in previous disputes, the Appellate Body has also "cautioned 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".<sup>655</sup>

4.131. In the present case, we recall that China challenged before the Panel the USDOC's determinations of *de facto* specificity with respect to *the provision of inputs* in 12 countervailing duty investigations. The Panel indicated that the unwritten nature of the subsidies led the USDOC to examine whether those subsidies are specific under the "other factors" listed in subparagraph (c). The Panel also observed that it is *undisputed* that the USDOC's findings were not based on an explicit limitation of access to the subsidy by the granting authority or the legislation pursuant to which the granting authority operates; nor were they based on criteria or conditions that are spelled out in law, regulation, or other official document.<sup>656</sup> Given that China has not pointed to any evidence that was before the USDOC of the kind that would ordinarily be examined in determining *de jure* specificity under subparagraphs (a) and (b), we see no error in the Panel's assessment of China's claim.

4.132. In the light of these considerations, we uphold the Panel's finding, in paragraphs 7.231, 7.258, and 8.1.v of the Panel Report, that, given the nature of the subsidies that the USDOC found to exist, the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c).

#### 4.3.2 "Use of a subsidy programme" under Article 2.1(c) of the SCM Agreement

##### 4.3.2.1 The Panel's findings

4.133. The Panel turned to examine China's claim that the USDOC failed to identify a "subsidy programme" in any of the challenged specificity determinations. The Panel began by noting that the challenged USDOC determinations were made under the first of the "other factors" listed in Article 2.1(c) of the SCM Agreement, namely, the "use of a subsidy programme by a limited number of certain enterprises". The Panel attributed significance to the use of the term "subsidy programme" as opposed to "subsidy". The Panel observed that the word "programme" is defined as "[a] plan or outline of (esp. intended) activities; a planned series of activities or events".<sup>657</sup> In the Panel's view, this "ordinary meaning" must be read in the light of the context of Article 2.1(c), as well as of the object and purpose of the SCM Agreement as a whole. The Panel pointed out that subparagraph (c) is concerned with facts, as opposed to *de jure* elements under subparagraph (a), adding that, in Article 2, the term "programme" is used only in the context of *de facto* specificity

<sup>653</sup> Emphasis added.

<sup>654</sup> The fact that the financial contribution at issue is the provision of a good does not, *ipso facto*, mean that direct recourse to subparagraph (c) is necessarily warranted. For instance, if there are written legal instruments regarding the provision of a good that would be relevant in assessing the specificity of the subsidy, an investigating authority would ordinarily be expected to start its analysis under subparagraphs (a) and (b).

<sup>655</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 945 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371). (emphasis added)

<sup>656</sup> Panel Report, para. 7.230.

<sup>657</sup> Panel Report, para. 7.239 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), p. 2371).

and that this, combined with the fact that the SCM Agreement provides no definition of the term, suggests that "subsidy programme" should be interpreted broadly given that "'subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit'".<sup>658</sup>

4.134. The Panel noted that, in each of the challenged investigations, in the absence of any written instrument, the USDOC concluded that the consistent provision by the SOEs in question of inputs for less than adequate remuneration constitutes a type of systematic activity or series of activities, and that, as a result, the provision of such inputs constitutes a subsidy programme. The Panel found that this evidence of systematic activity (or a series of systematic activities) "provided an objective basis for the USDOC to sufficiently identify subsidy programmes for the purposes of the first of the 'other factors' under Article 2.1(c) of the SCM Agreement in the relevant specificity determinations".<sup>659</sup>

#### **4.3.2.2 Whether the Panel erred in its interpretation and application of the term "subsidy programme" in Article 2.1(c) of the SCM Agreement**

4.135. China argues that the Panel erred in the interpretation and application of the term "subsidy programme" in Article 2.1(c) of the SCM Agreement. China contends that any examination of the first of the "other factors" under Article 2.1(c) must begin with the identification of the relevant "subsidy programme". China asserts that the USDOC provided no evidentiary basis for the existence, scope, and content of these alleged "programmes". The parties agreed that the ordinary meaning of "subsidy programme" refers to "a plan or outline of subsidies or a planned series of subsidies".<sup>660</sup> Nonetheless, according to China, the Panel "departed from the ordinary meaning of this term" and interpreted it in a manner that collapsed the distinction between a "subsidy" and a "subsidy programme".<sup>661</sup>

4.136. China contends that what the Panel referred to as a "systematic activity or series of activities" – i.e. the consistent provision by the SOEs in question of inputs for less than adequate remuneration – in examining the determinations at issue does not constitute a "subsidy programme"; at most, it could be a "series of subsidies".<sup>662</sup> Moreover, China alleges that the Panel did not examine whether the USDOC had identified evidence to support the conclusion that each of the alleged input subsidies was circumscribed in a way that distinguishes it as a planned series of subsidies. For these reasons, China submits that the Panel's interpretation and application of the term "subsidy programme" in Article 2.1(c) are in error and must be reversed. China also requests that we reverse the Panel's consequential finding that the specificity determinations at issue are consistent with Article 2.1(c) of the SCM Agreement.

4.137. The United States counters that the Panel correctly concluded that a "subsidy programme" under Article 2.1(c) may be evidenced by a systematic activity or series of activities. In response to China's argument that a "subsidy programme" must be interpreted to require the identification of a formally implemented "plan or outline", the United States argues that 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 as a whole.

4.138. The United States also rejects China's argument that the Panel's interpretation "collapses" the term "subsidy programme" into the term "subsidy".<sup>663</sup> In fact, according to the United States, the Panel correctly applied the term "subsidy programme" to the USDOC's determinations at issue by concluding that the provision of these inputs for less than adequate remuneration is a systematic activity or series of activities that reflects the existence of a subsidy programme under Article 2.1(c) in the absence of any alleged written source for the implementation of the

<sup>658</sup> Panel Report, para. 7.240 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.32).

<sup>659</sup> Panel Report, para. 7.243.

<sup>660</sup> China's appellant's submission, paras. 160-162. China notes that the Panel also "agreed with a prior panel that 'the use of the term 'subsidy programme', as opposed to 'subsidy', is not lacking in significance and must be given effect'." (Ibid., para. 163)

<sup>661</sup> China's appellant's submission, paras. 165 and 167.

<sup>662</sup> China's appellant's submission, para. 169 (quoting Panel Report, para. 7.242).

<sup>663</sup> United States' appellee's submission, para. 125.

programme.<sup>664</sup> The United States disagrees with China's argument that a "subsidy programme" under Article 2.1(c) requires more than evidence of the systematic provision of a subsidy or subsidies and, thus, further evidence of a "plan" is necessary to comply with the requirements of the SCM Agreement.<sup>665</sup>

4.139. The United States also disagrees with China's contention that the Panel failed to recognize that the USDOC "never substantiated on the basis of positive evidence on the record" the existence of subsidy programmes in the challenged investigations, and that the existence of the programmes was "merely asserted" by the USDOC.<sup>666</sup> The United States argues that the USDOC did not "merely assert" the existence of subsidy programmes for the purposes of its analysis under Article 2.1(c); rather, the record demonstrates that, for each investigation, far from being "merely asserted", the existence of the subsidy programme is grounded in the facts on the record.<sup>667</sup> The United States notes that, in all the challenged investigations, the subsidy programmes that the USDOC investigated "were first identified in the application, which China does not dispute contained evidence as to the programs' existence".<sup>668</sup> For these reasons, the United States considers that the Panel arrived at a correct interpretation and application of the first factor of Article 2.1(c) and properly examined the USDOC's determinations. Accordingly, the United States argues that China's appeal with respect to this aspect of Article 2.1(c) should be rejected.

4.140. As the Appellate Body has previously found, the starting point of an analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1.<sup>669</sup> This is supported by the fact that the chapeau of Article 2.1 establishes that "a subsidy, as defined in paragraph 1 of Article 1", is the measure under scrutiny for purposes of determining whether it is specific.<sup>670</sup> A determination that a given measure constitutes a financial contribution that confers a benefit therefore informs the scope and content of the analysis required to establish *de facto* specificity.<sup>671</sup> Importantly, however, a specificity analysis under Article 2.1 focuses not only on whether a subsidy has been provided to particular recipients, "but focuses also on all enterprises or industries eligible to receive that same subsidy".<sup>672</sup> As such, an inquiry into whether a particular subsidy is specific to certain enterprises may require determining "what other enterprises or industries also have access to that same subsidy under that subsidy scheme".<sup>673</sup> It is relevant therefore to consider not only the *actual*, but also the *past* and *potential* recipients of a particular subsidy.

4.141. That the *de facto* specificity of a subsidy is to be assessed in an even broader analytical framework is borne out in the first factor listed in Article 2.1(c) – "use of a subsidy programme by a limited number of certain enterprises". The ordinary meaning of the word "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done".<sup>674</sup> The reference to "use of a subsidy programme" suggests that it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind. Evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. A subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises. This is so particularly in the context of Article 2.1(c), where the inquiry focuses on whether there are reasons

<sup>664</sup> United States' appellee's submission, para. 126.

<sup>665</sup> United States' appellee's submission, para. 120 (referring to China's appellant's submission, para. 169).

<sup>666</sup> United States' appellee's submission, para. 132 (quoting China's appellant's submission, paras. 118 and referring to para. 170).

<sup>667</sup> United States' appellee's submission, para. 132 (quoting China's appellant's submission, para. 118).

<sup>668</sup> United States' appellee's submission, para. 133 (referring to China's response to Panel question No. 56, para. 145).

<sup>669</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 747.

<sup>670</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 747.

<sup>671</sup> See Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 750.

<sup>672</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 753.

<sup>673</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 753.

<sup>674</sup> Oxford English Dictionary online, definition of "programme", *n.* entry 4, available at: <<http://www.oed.com/view/Entry/152225?rskey=qPZpOH&result=1#eid>>.

to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in, for example, a law, regulation, or other official document.

4.142. An examination of the existence of a plan or scheme regarding the use of the subsidy at issue may also require assessing the operation of such plan or scheme over a period of time. We see support for this proposition in the last sentence in Article 2.1(c), which establishes that, "[i]n applying this subparagraph, account shall be taken of ... the length of time during which the subsidy programme has been in operation." We also observe that, in the context of non-actionable subsidies under Part IV of the SCM Agreement, Article 8.3 established that a subsidy programme referred to in Article 8.2 was to be "notified in advance of its implementation".<sup>675</sup> Article 8.3 indicated that Members were to provide the Committee "with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme." This reference also provides further support to our understanding that the term "subsidy programme", as used in the SCM Agreement, refers to a plan or scheme regarding the subsidy at issue.

4.143. The mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement. In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a *systematic* series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.

4.144. In any event, we recall that the *existence* of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*. It stands to reason, therefore, that the relevant "subsidy programme", under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1.

4.145. We disagree with China to the extent it suggests that, in order to establish that the "use of a subsidy programme is limited to certain enterprises", an investigating authority is required to identify a subsidy plan or scheme implemented through legislation, regulation, or explicit acts or pronouncements by a granting authority. As noted, an analysis of *de jure* specificity under subparagraph (a) of Article 2.1 requires examining whether the granting authority, or the legislation pursuant to which the granting authority operates, *explicitly* limits access to a subsidy. Subparagraph (b), in turn, calls for an assessment of objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, which must be clearly spelled out in law, regulation, or other official document. By contrast, the focus of the analysis under the first factor of Article 2.1(c) is on *de facto* specificity, the *use* of a subsidy programme, and, in particular, whether the use of a subsidy programme is by a "limited number of certain enterprises".

4.146. An analysis under Article 2.1(a) and Article 2.1(b) of whether a subsidy is *de jure* specific involves a consideration of legislation or of a granting authority's acts or pronouncements that explicitly limit access to the subsidy.<sup>676</sup> If the examination under Articles 2.1(a) and (b) yields an appearance of non-specificity, we would expect that an investigating authority would normally have an appropriate understanding of the subsidy programme at issue when proceeding to an analysis under Article 2.1(c) of whether, notwithstanding such appearance of non-specificity, the relevant subsidy programme is, in fact, used by a limited number of certain enterprises. Nevertheless, the fact that the first factor in Article 2.1(c) refers to a "subsidy programme" does *not* mean that a *de facto* specificity inquiry requires identification of an explicit subsidy programme implemented through law or regulation, or through other explicit means. Rather, the relevant inquiry with respect to the first of the "other factors" under Article 2.1(c) seeks to determine

<sup>675</sup> Pursuant to Article 31 of the SCM Agreement Article 8 is no longer in force. We note that Article 8, as part of the original disciplines set out in the SCM Agreement, provides an indication of the intended scope of the term "subsidy programme". (see Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 666)

<sup>676</sup> The same could be said about an analysis of whether a granting authority, or the legislation pursuant to which it operates, establishes objective criteria or conditions under Article 2.1(b).

whether the subsidy at issue is, in fact, specific by considering whether the relevant subsidy programme is used by a limited number of certain enterprises. By its very nature, such an analysis normally focuses on evidence other than of the kind found in written documents or express acts or pronouncements by a granting authority.

4.147. With these considerations in mind, we turn to examine China's claim that the Panel erred in finding that "the consistent provision by the SOEs in question of inputs for less than adequate remuneration" "provided an objective basis for the USDOC to sufficiently identify subsidy programmes for the purposes of the first of the 'other factors' under Article 2.1(c) of the SCM Agreement in the relevant specificity determinations".<sup>677</sup>

4.148. We recall the Panel's finding that, in each of the challenged investigations, "[i]n the absence of any written instrument", the USDOC concluded that the consistent provision by the SOEs in question of inputs for less than adequate remuneration constitutes a type of systematic activity or series of activities, and, as a result, that the provision of such inputs constitutes a "subsidy programme".<sup>678</sup> The Panel found that this evidence of systematic activity (or a series of systematic activities) "provided an objective basis for the USDOC to sufficiently identify subsidy programmes for the purposes of the first of the 'other factors' under Article 2.1(c) of the SCM Agreement in the relevant specificity determinations".<sup>679</sup>

4.149. We agree with the Panel to the extent it suggested that, in the absence of any written instrument or explicit pronouncement, evidence of a "systematic activity or series of activities" may provide a sufficient basis to establish the existence of an unwritten subsidy programme in the context of assessing *de facto* specificity under the first factor of Article 2.1(c) of the SCM Agreement.

4.150. We find it troubling, however, that the Panel did not provide any case-specific discussion or references to the USDOC's determinations of *de facto* specificity at issue prior to reaching its conclusion. Indeed, the entirety of the Panel's assessment of China's "as applied" claims with respect to the USDOC's determinations is set out in a single paragraph, as follows:

In each of the challenged investigations, the application alleges that a specific input is being provided by SOEs for less than adequate remuneration. In the absence of any written instrument or explicit pronouncement, the USDOC concluded that this type of systematic activity or series of activities – the consistent provision by the SOEs in question of inputs for less than adequate remuneration – constituted a subsidy programme.<sup>680</sup>

4.151. By not providing case-specific discussion or references to the USDOC's determinations of specificity challenged by China, we consider that the Panel failed to apply Article 2.1(c), as properly interpreted, to those determinations. Accordingly, we reverse the Panel's finding, in paragraphs 7.243, 7.258, and 8.1.v of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify a subsidy programme in each of the specificity determinations at issue.

4.152. Having reversed the Panel's finding, we recall China's request that we complete the legal analysis in respect of 15 specificity determinations in the following 12 countervailing duty investigations: Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

4.153. According to China, the USDOC failed to identify and substantiate the existence of a "subsidy programme" in the determinations at issue, as that term is properly interpreted

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<sup>677</sup> Panel Report, paras. 7.242 and 7.243, respectively.

<sup>678</sup> Panel Report, para. 7.242.

<sup>679</sup> Panel Report, para. 7.243.

<sup>680</sup> Panel Report, para. 7.242.



(i.e. a "planned series of subsidies"). China contends that, while in some determinations<sup>681</sup> the USDOC purported to identify a "subsidy programme" relating to the provision of the input at issue, it failed to substantiate the existence of a "subsidy programme" based on positive evidence on the record. In other determinations, according to China, the USDOC applied the first factor of Article 2.1(c) without even purporting to identify the relevant "subsidy programme", much less substantiating the existence of such a programme.

4.154. The United States responds that, if we were to reverse the Panel's findings with respect to the identification of the "subsidy programme", then we should not complete the legal analysis and should not find that the USDOC's identification of the "subsidy programme" is inconsistent with Article 2.1 of the SCM Agreement. The United States disagrees with China's contention that the Panel failed to recognize that the USDOC "never substantiated on the basis of positive evidence on the record" the existence of subsidy programmes in the challenged investigations, and that the existence of such programmes was "merely asserted" by the USDOC.<sup>682</sup> The United States argues that the USDOC did not "merely assert" the existence of the subsidy programmes for the purposes of its analysis under Article 2.1(c); rather, according to the United States, the record demonstrates that, for each investigation, far from being "merely asserted", the existence of the subsidy programmes is grounded in the facts on the record. The United States notes that, in each challenged investigation, the subsidy programmes that the USDOC investigated "were first identified in the application, which China does not dispute contained evidence as to the programs' existence".<sup>683</sup>

4.155. The Appellate Body has, in some disputes, completed the legal analysis with a view to facilitating the prompt and effective resolution of a given dispute.<sup>684</sup> However, the Appellate Body has done so only if the factual findings of the panel and the undisputed facts on the panel record provided it with a sufficient basis for conducting its own analysis.<sup>685</sup> Thus, the Appellate Body has not completed the legal analysis where there were insufficient factual findings in the panel report or a lack of undisputed facts on the panel record.<sup>686</sup> In addition, the Appellate Body has declined to complete the legal analysis in the light of the complexity of the legal issues involved, the absence of full exploration of the issues that were before the panel, and, consequently, considerations pertaining to the parties' due process rights.<sup>687</sup> The Appellate Body has also declined to complete the legal analysis in circumstances where it would require addressing claims that the panel "had not examined at all"<sup>688</sup>, or where completion was not required to resolve the dispute.<sup>689</sup>

<sup>681</sup> China's appellant's submission, para. 184 (referring to 2010 Wire Strand Issues and Decision Memorandum (Panel Exhibit CHI-52), p. 83 ("Provision of Wire Rod for LTAR Program"); 2009 Pressure Pipe Issues and Decision Memorandum (Panel Exhibit CHI-12), p. 4 ("Provision of SSC for LTAR Program"); 2008 Line Pipe Issues and Decision Memorandum (Panel Exhibit CHI-19), p. 47 ("Provision of HRS for LTAR Program"); and 2011 Aluminum Extrusions Issues and Decision Memorandum (Panel Exhibit CHI-87), p. 89 ("Provision of Primary Aluminum for LTAR Program")).

<sup>682</sup> United States' appellee's submission, para. 132 (quoting China's appellant's submission, para. 118 and referring to para. 170).

<sup>683</sup> United States' appellee's submission, para. 133 (referring to China's response to Panel question No. 56, para. 145). By way of example, the United States refers to the Aluminum Extrusions determination, in which 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". (Ibid., para. 133 (emphasis original))

<sup>684</sup> See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117 and 118; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

<sup>685</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 209, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *Canada – Autos*, paras. 133 and 144; *Korea – Various Measures on Beef*, para. 128; *EC – Asbestos*, para. 79; and *EC – Export Subsidies on Sugar*, para. 337.

<sup>686</sup> See Appellate Body Reports, *US – Section 211 Appropriations Act*, para. 343; and *EC – Asbestos*, para. 78.

<sup>687</sup> See Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.224; *EC – Export Subsidies on Sugar*, para. 339 and fn 537 thereto; *US – Upland Cotton*, paras. 532 and 533; *EC – Bananas III*, para. 155; and *Chile – Price Band System*, para. 186.

<sup>688</sup> Appellate Body Report, *EC – Asbestos*, para. 79. See also Appellate Body Report, *EC – Poultry*, para. 107.

<sup>689</sup> For example, in *US – Steel Safeguards*, the Appellate Body noted that it had already upheld the panel's findings that the measures at issue in that dispute were inconsistent with the GATT 1994 and several provisions of the Agreement on Safeguards. As a result, it did not consider it "necessary ... to complete the analysis". (Appellate Body Report, *US – Steel Safeguards*, para. 431)

4.156. We note that, as part of its challenge before the Panel, China also argued that the USDOC failed to consider the two factors set out in the last sentence of Article 2.1(c) of the SCM Agreement relating to the "diversification of the economic activities within the jurisdiction of the granting authority" and the "length of time during which the subsidy programme has been in operation". The Panel found that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) of the SCM Agreement by failing to take these two factors into account in each of the determinations of *de facto* specificity challenged by China. The Panel's findings relate to both the USDOC's identification of the "jurisdiction of the granting authority" and the nature and scope of the relevant "subsidy programme". These findings by the Panel were not challenged by the United States on appeal and they therefore stand. In the light of these findings, and having laid out the legal standard that applies under Article 2.1(c) insofar as it relates to the first factor under Article 2.1(c), we see limited value, for purposes of resolving the dispute between the parties, in completing the legal analysis with respect to the issue of whether the USDOC sufficiently identified and substantiated the existence of a "subsidy programme" in each of the determinations at issue.

4.157. Moreover, it would seem to us that much of the evidence regarding the existence of the alleged subsidy programmes in this dispute has not been subject to the Panel's scrutiny. China alleges, for example, that the Panel failed to examine whether the USDOC had provided an evidentiary basis for its "apparent assumption" that each of the allegedly subsidized inputs was provided pursuant to its own input-specific subsidy programme.<sup>690</sup> By "assuming" that each of these types of inputs was provided pursuant to its own input-specific "subsidy programme", China considers that "the USDOC assumed the conclusion in its premise: that because the relevant 'subsidy programme' was limited to one type of input, and because the end users of that single input were 'limited in number', it followed that the alleged subsidy was 'use[d] ... by a limited number of certain enterprises'."<sup>691</sup> As noted, the Panel, however, did not refer to any of the challenged countervailing duty determinations on the record in reaching its finding that the provision of inputs was "systematic". Nor do we consider the participants to have addressed sufficiently, in their submissions, the issues of whether the USDOC sufficiently identified and substantiated the existence of a "subsidy programme" in each of the determinations at issue. In these circumstances, we do not complete the legal analysis with respect to this particular aspect of China's appeal.

### **4.3.3 The "jurisdiction of the granting authority" under Article 2.1 of the SCM Agreement**

#### **4.3.3.1 The Panel's findings**

4.158. With respect to China's allegation that the USDOC failed to identify a "granting authority" in each of the challenged determinations of *de facto* specificity, the Panel found that the reference to the phrase "within the jurisdiction of the granting authority" in the chapeau of Article 2.1 of the SCM Agreement indicates that "specificity may only exist within the territory of a Member" and that, "in certain countries, subsidies may be granted not only by the central authorities, but also by other subdivisions".<sup>692</sup> For the Panel, therefore, the chapeau of Article 2.1 of the SCM Agreement situates the assessment of a limitation of access to a subsidy within the jurisdiction of the granting authority.<sup>693</sup>

4.159. Based on its examination of the USDOC's determinations of *de facto* specificity in the underlying investigations, the Panel observed that "the relevant jurisdiction was at the very least implicitly understood to be China in the challenged investigations."<sup>694</sup> For this reason, the Panel found that China had failed to establish that the USDOC acted inconsistently with the obligations of

<sup>690</sup> China's appellant's submission, para. 170. China notes that the determinations at issue encompassed the provision of at least ten different types of allegedly subsidized inputs, ranging from hot-rolled steel to chemicals to polysilicon. (Ibid.)

<sup>691</sup> China's appellant's submission, para. 170.

<sup>692</sup> Panel Report, para. 7.247.

<sup>693</sup> Panel Report, para. 7.247.

<sup>694</sup> Panel Report, para. 7.248.

the United States under Article 2.1 of the SCM Agreement by failing to identify explicitly a granting authority and, hence, the relevant jurisdiction in the specificity determinations at issue.<sup>695</sup>

#### **4.3.3.2 Whether the Panel erred in finding that the relevant jurisdiction was at the very least implicitly understood to be China in the challenged determinations**

4.160. China argues that the Panel erred in its application of Article 2.1 of the SCM Agreement to China's claim concerning the USDOC's failure to identify a "granting authority" in the specificity determinations at issue. According to China, it is undisputed that the USDOC did not identify the entity (or entities) that it considered to be the granting authority (or authorities) of each of the alleged input subsidies. China asserts that, without identifying the granting authority (or authorities), it is not possible to identify the jurisdiction (or jurisdictions) within which to situate the specificity analysis. In China's view, this, in turn, is necessary for evaluating whether a particular subsidy is specific to certain enterprises "within the jurisdiction of the granting authority". China concludes that, because the USDOC did not identify a granting authority (or authorities), it acted inconsistently with Article 2.1 of the SCM Agreement.

4.161. China submits that the Panel's analysis of its claim regarding the identification of a granting authority was "cursory in the extreme".<sup>696</sup> China argues that the Panel "dismiss[ed] China's claim in a single sentence: 'Looking at the USDOC's determinations, and the specific excerpts provided by the United States in particular, it appears to us that the relevant jurisdiction was at the very least implicitly understood to be China in the challenged investigations'".<sup>697</sup> According to China, the Panel's conclusion that the relevant jurisdiction was at the very least implicitly understood to be China does not answer the question of whether the USDOC properly identified a granting authority. In China's view, the Panel therefore had no basis to evaluate whether the USDOC had properly situated its analysis of specificity within the jurisdiction of that granting authority. China considers that it is the "identification" of the granting authority that determines the jurisdiction in which the specificity analysis is situated.<sup>698</sup> Therefore, China argues that the Panel misapplied Article 2.1 because it failed to assess whether the USDOC had identified the granting authority and its jurisdiction. Accordingly, China requests that we reverse the Panel's finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify explicitly the granting authority, and therefore also the relevant jurisdiction, in the USDOC's determinations of *de facto* specificity at issue.

4.162. The United States responds that the Panel correctly found that the USDOC's determinations indicate that the relevant jurisdiction for the specificity inquiry was China, and that the USDOC was not required, in addition, explicitly to identify the granting authority.<sup>699</sup> The United States rejects China's argument 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."<sup>700</sup> The United States submits that China's position is not supported either by the text of the chapeau of Article 2.1 or by the context provided by the SCM Agreement. The United States notes that China inserts "a non-existent requirement into Article 2.1 when it argues that [the USDOC] must identify a 'granting authority' with respect to the provision of inputs for less than adequate remuneration".<sup>701</sup> According to the United States, "[t]he Panel correctly found that Article 2.1 merely requires that the jurisdiction of the [granting authority] 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."<sup>702</sup>

4.163. In addition, the United States observes that, in each determination of *de facto* specificity, the USDOC "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

<sup>695</sup> Panel Report, paras. 7.249, 7.258, and 8.1.v.

<sup>696</sup> China's appellant's submission, para. 174.

<sup>697</sup> China's appellant's submission, para. 174 (quoting Panel Report, para. 7.248).

<sup>698</sup> China's appellant's submission, para. 175.

<sup>699</sup> United States' appellee's submission, para. 136 (quoting China's appellant's submission, para. 173).

<sup>700</sup> United States' appellee's submission, para. 139 (quoting China's appellant's submission, para. 173).

<sup>701</sup> United States' appellee's submission, para. 140.

<sup>702</sup> United States' appellee's submission, para. 140.

number of users *within China*".<sup>703</sup> The United States adds that China and the interested parties in each investigation were therefore aware that the USDOC's analysis applied to this jurisdiction, i.e. China. The United States stresses that, in none of the challenged investigations, did China (or any interested party) challenge the USDOC's finding that China was the relevant jurisdiction for purposes of the *de facto* specificity analysis. Nor, the United States argues, did China allege before the Panel or now on appeal that the USDOC erred in its conclusion that the jurisdiction of the granting authority in this case is China.

4.164. We begin our analysis by noting that the chapeau of Article 2.1 of the SCM Agreement "frames the central inquiry as a determination as to whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority".<sup>704</sup> The purpose of the inquiry under this provision is to determine whether the subsidy that was found to exist pursuant to Article 1.1 is specific. We recall that "the analysis under Article 2.1 focuses on ascertaining whether access to the subsidy in question is limited to a particular class of eligible *recipients*".<sup>705</sup> An essential part of the specificity analysis requires the proper identification of the *jurisdiction* of the granting authority.

4.165. In situations where the granting authority is the central government, the scope of the jurisdiction is usually the entire territory of the relevant Member. Conversely, in a situation where the granting authority is a regional or local government, the scope of the jurisdiction is usually limited to the territory of that regional or local government. It is important to determine whether the jurisdiction at issue covers the entire territory of the relevant WTO Member or is limited to a designated geographical region within that territory because, as indicated by the panel in *EC and certain member States – Large Civil Aircraft*, "if the granting authority was a regional government, a subsidy available to enterprises throughout the territory over which that regional government had jurisdiction would not be specific."<sup>706</sup> Conversely, if the granting authority was the central government, a subsidy available to the very same enterprises would be specific.

4.166. The above considerations, in our view, suggest that an essential part of the specificity analysis under Article 2.1 requires a proper determination of whether the relevant *jurisdiction* is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level.

4.167. We recall that the chapeau of Article 2.1 defines the specificity inquiry as one that seeks "to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific" to certain enterprises within the jurisdiction of the granting authority. By explicitly linking this provision with Article 1.1 of the SCM Agreement, the chapeau of Article 2.1 indicates that an investigating authority's determination under Article 1.1 as to the existence of a subsidy will *inform* the assessment of whether such subsidy is specific to certain enterprises "within the jurisdiction of the granting authority". Indeed, in determining whether a financial contribution exists, investigating authorities must inquire into the nature of the financial contribution at issue and determine whether such contribution was provided by the "government", by "any public body within the territory of a Member", or by a "private body" entrusted or directed by the government. Such assessment, in our view, will inform the identification of the jurisdiction of the granting authority.

4.168. We understand China to argue that an investigating authority must determine the identity of the granting authority involved in the distribution of subsidies *before* it can identify the relevant jurisdiction of the granting authority. While an analysis of the jurisdiction of the granting authority could start with an identification of the granting authority, we do not see why the order of analysis suggested by China would always be required. Rather, as we see it, the identification of the jurisdiction of the granting authority involves a holistic analysis of the relevant facts and evidence in each case. Indeed, the notion of jurisdiction is linked to, and does not exist in isolation from, the granting authority. Thus, a proper identification of the jurisdiction of the granting authority will require an analysis of both the "granting authority" and its "jurisdiction" in a conjunctive manner. We therefore do not read Article 2.1 in a manner that focuses on the identity of the "granting authority" independently from its "jurisdiction". A holistic analysis of the jurisdiction of the granting

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<sup>703</sup> United States' appellee's submission, para. 141. (emphasis original)

<sup>704</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366.

<sup>705</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 756. (emphasis original)

<sup>706</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1231.

authority is what provides the framework within which specificity is to be analysed. In sum, provided that an investigating authority adequately substantiates any finding it makes as to whether the jurisdiction covers the entire territory of the relevant WTO Member or is limited to a designated geographical region within that territory, in conducting this holistic assessment it would normally also identify the granting authority.<sup>707</sup>

4.169. We also consider that the chapeau of Article 2.1 does not require an investigating authority to identify the jurisdiction of the granting authority in an explicit manner or in any specific form, as long as it is discernible from the determination. This identification of the jurisdiction of the granting authority is merely a preliminary step providing a framework to conduct the specificity analysis. In this regard, it has to be kept in mind that the analysis of specificity focuses on the question of whether access to a subsidy is limited to a particular class of recipients.

4.170. With these considerations in mind, we recall that China requests that we reverse the Panel's finding, in paragraphs 7.249, 7.258, and 8.1.v of the Panel Report, that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify explicitly a granting authority, and *ergo* the relevant jurisdiction, in the specificity determinations at issue. While we have disagreed above with China's argument that identification of the jurisdiction for purposes of the specificity analysis must always be preceded by identification of the granting authority, we agree with China that the Panel conducted an extremely cursory analysis in assessing China's claim. As noted by China, in applying Article 2.1 to the USDOC's specificity determinations, the Panel "dismiss[ed] China's claim in a single sentence".<sup>708</sup> Referring to excerpts of the USDOC's determinations of *de facto* specificity provided by the United States, the Panel reasoned simply that "it appear[ed] ... that the relevant jurisdiction was at the very least implicitly understood to be China in the challenged investigations."<sup>709</sup> This was the only basis for the Panel's ultimate conclusion that China had failed to establish that the USDOC acted inconsistently with Article 2.1 of the SCM Agreement by failing to identify explicitly the relevant granting authority, and *ergo* the relevant jurisdiction, in the specificity determinations at issue.<sup>710</sup>

4.171. We find it troubling that, in addressing China's "as applied" claims in relation to the USDOC's determinations at issue, the Panel concluded that the relevant jurisdiction was "at the very least implicitly understood to be China in the challenged investigations"<sup>711</sup> without any case-specific discussion of the USDOC's determinations at issue or any other evidence on the record, despite the fact that relevant evidence had been presented to the Panel.<sup>712</sup> By not providing case-specific discussion or references to the USDOC's determinations of specificity challenged by China, we consider that the Panel failed to apply Article 2.1(c), as properly interpreted, to those determinations. Accordingly, we reverse the Panel's finding, in paragraphs 7.249, 7.258, and 8.1.v. of the Panel Report, that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify a granting authority, and *ergo* the relevant jurisdiction, in each of the specificity determinations at issue.

4.172. Having reversed the Panel's finding, we now turn to examine whether we are in a position to complete the legal analysis. China requests us to complete the legal analysis in respect of 15 determinations of *de facto* specificity in the following 12 countervailing duties investigations:

<sup>707</sup> Similarly, we note that the Appellate Body indicated in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* that, "[w]hile 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*." (Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 756 (emphasis original))

<sup>708</sup> China's appellant's submission, para. 174.

<sup>709</sup> Panel Report, para. 7.248. See also para. 7.246.

<sup>710</sup> Panel Report, paras. 7.249, 7.258, and 8.1.v.

<sup>711</sup> Panel Report, para. 7.248.

<sup>712</sup> We note that the Panel even acknowledged that relevant evidence had been submitted to it when it indicated that "[i]n support of this claim, the United States refers to specific excerpts from applications, initiation checklists, questionnaires and questions posed by the USDOC, preliminary determinations, Issues and Decision Memoranda, and final determinations, some of which are contained in Exhibit CHI-122." (Panel Report, para. 7.246)

Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.<sup>713</sup> In particular, China argues that each of these specificity determinations is inconsistent with Article 2.1 of the SCM Agreement because the USDOC did not identify a granting authority in its evaluation of whether each of the alleged input subsidies was specific to certain enterprises located "within the jurisdiction of the granting authority".<sup>714</sup>

4.173. We recall the Panel's finding that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) of the SCM Agreement by failing to take into account, in each of the determinations of *de facto* specificity challenged by China, "the extent of diversification of the economic activities within the jurisdiction of the granting authority" and the "length of time during which the subsidy programme has been in operation". In the light of these findings by the Panel, which relate both to the USDOC's identification of the jurisdiction of the granting authority and to the nature and scope of the relevant "subsidy programme", and, having laid out the legal standard that applies under Article 2.1(c) insofar as it relates to the first factor under Article 2.1(c), we see limited value, for purposes of resolving the dispute between the parties, in completing the legal analysis with respect to the issue of whether the USDOC sufficiently identified the jurisdiction of the granting authority in each of the determinations at issue.

#### 4.4 Article 12.7 of the SCM Agreement – Facts available

##### 4.4.1 Introduction

4.174. China seeks review by the Appellate Body of the Panel's analysis of China's claims under Article 12.7 of the SCM Agreement. China argues that the Panel acted inconsistently with its obligations under Article 11 of the DSU in concluding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record.<sup>715</sup> In particular, according to China, the Panel failed to examine, with respect to each challenged "adverse" facts available determination<sup>716</sup>, whether there was a reasoned and adequate explanation, discernible from the USDOC's published determination, providing the factual basis for the USDOC's conclusion. China therefore requests that we reverse the Panel's finding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement in the 42 challenged instances.<sup>717</sup> China further requests that we complete the legal analysis and find, instead, that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement in each of the 42 challenged instances by not relying on the facts available on the record with respect to the 13 countervailing duty investigations at issue, namely, Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels.<sup>718</sup>

4.175. In response, the United States argues that the Panel made an objective assessment of China's claims, as required under Article 11 of the DSU, and properly evaluated whether the USDOC "*actually applied facts* in its application of 'facts available'".<sup>719</sup> Given that "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"<sup>720</sup>, "and the particular claims made"<sup>721</sup>, the United States submits that the Panel rightly found that the USDOC had applied facts that were

<sup>713</sup> China's appellant's submission, para. 179. See table of USDOC investigations at p. 5 of this Report.

<sup>714</sup> China's appellant's submission, para. 188.

<sup>715</sup> Panel Report, para. 7.325.

<sup>716</sup> China explained at the hearing that it uses the term "'adverse' facts available" in the sense it is used by the USDOC. See also China's first written submission to the Panel, paras. 143-145.

<sup>717</sup> Panel Report, paras. 7.325 and 8.1.vii.

<sup>718</sup> See table of USDOC investigations at p. 5 of this Report.

<sup>719</sup> United States' appellee's submission, para. 158 (referring to China's first written submission to the Panel, paras. 145 and 155; and second written submission to the Panel, para. 177). (emphasis original)

<sup>720</sup> United States' appellee's submission, para. 164 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95, in turn referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184).

<sup>721</sup> United States' appellee's submission, para. 164 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93). (underlining added by the United States)

available on the USDOC's administrative record.<sup>722</sup> The United States further maintains that the Panel considered all the evidence presented to it, and ensured that its factual findings had a proper basis in that evidence.<sup>723</sup> According to the United States, the Panel correctly opted to review the "full Issues and Decision Memoranda and Preliminary Determinations"<sup>724</sup>, 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 United States submits moreover that China has failed to identify specific errors regarding the objectivity of the Panel's assessment and to explain why any of the alleged errors rise to an error of law under Article 11 of the DSU.

4.176. Regarding the meaning of Article 12.7 of the SCM Agreement, the Panel observed that the provision is "an essential tool which permits authorities to carry out investigations despite the non-cooperation of interested parties by replacing missing information with the facts available".<sup>725</sup> Quoting from the Appellate Body report in *Mexico – Anti-Dumping Measures on Rice*, the Panel recalled that "Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation" and "permits the use of facts on record solely for the purpose of replacing information that may be missing in order to arrive at an accurate subsidization or injury determination."<sup>726</sup>

4.177. Turning to the applicable standard of review, the Panel referred to the Appellate Body reports in *US – Countervailing Duty Investigation on DRAMS* and *US – Softwood Lumber VI (Article 21.5 – Canada)* and recalled that "panel[s] should examine whether the investigating authority's determination is 'reasoned and adequate', based on the information contained in the record and the explanations given by the authority in its published report."<sup>727</sup> The Panel described its task therefore as being "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".<sup>728</sup> The Panel reasoned that, for the purposes of assessing China's claims 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."<sup>729</sup> The Panel did not see any "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".<sup>730</sup>

4.178. Having set out the Panel's approach in this case, we recall that the Appellate Body stated in *Mexico – Anti-Dumping Measures on Rice* and in *US – Carbon Steel (India)* that Article 12.7 "permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination".<sup>731</sup> Accordingly, the Appellate Body has explained that "there has to be a connection between the 'necessary information' that is missing and the particular 'facts available' on which a determination under Article 12.7 is based."<sup>732</sup> Therefore, "an investigating authority must use those 'facts available' that 'reasonably replace' the information that an interested party failed to provide', with a view to

<sup>722</sup> United States' appellee's submission, para. 166. According to the United States, the USDOC explained in its determinations that it was relying on "facts available", including relying on an "adverse inference" in selecting from among the "facts available". The United States maintains that there were, as was demonstrated in Panel Exhibits USA-94 through USA-133, facts available on the record relevant to the determinations for which "facts available" were applied. (Ibid.)

<sup>723</sup> United States' appellee's submission, para. 173 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 185).

<sup>724</sup> United States' appellee's submission, para. 182 (quoting Panel Report, para. 7.316).

<sup>725</sup> Panel Report, para. 7.308.

<sup>726</sup> Panel Report, para. 7.308 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293).

<sup>727</sup> Panel Report, para. 7.310 (referring to Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, paras. 186-188; and *US – Softwood Lumber VI (Article 21.5-Canada)*, para. 93).

<sup>728</sup> Panel Report, para. 7.311.

<sup>729</sup> Panel Report, para. 7.311. Both parties agree with this statement by the Panel. (China's appellant's submission, paras. 190 and 220; United States' appellee's submission, para. 165)

<sup>730</sup> Panel Report, para. 7.311. According to the Panel, "[w]hether the USDOC has disclosed in 'sufficient detail the findings and conclusions 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." (Ibid.)

<sup>731</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293).

<sup>732</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.



arriving at an accurate determination."<sup>733</sup> The Appellate Body has further explained that "the facts available" refers to those facts that are in the possession of the investigating authority and on its written record.<sup>734</sup> As determinations made under Article 12.7 are to be made on the basis of "the facts available", "they cannot be made on the basis of non-factual assumptions or speculation."<sup>735</sup> Furthermore, in reasoning and evaluating which facts available can reasonably replace the missing information, "all substantiated facts on the record must be taken into account" by an investigating authority.<sup>736</sup>

4.179. The Appellate Body has explained that ascertaining the "reasonable replacements for the missing 'necessary information' involves a process of reasoning and evaluation" on the part of the investigating authority.<sup>737</sup> Where there are several facts available to an investigating authority that it needs to choose from, "it would seem to follow naturally that the process of reasoning and evaluation would involve a degree of comparison" in order to arrive at an accurate determination.<sup>738</sup> The evaluation of the "facts available" that is required, and the form it may take, depend on the particular circumstances of a given case, including the nature, quality, and amount of evidence on the record and the particular determinations to be made.<sup>739</sup> Whereas the explanation and analysis provided in a published report must be sufficient to allow a panel to assess how and why the "facts available" employed by the investigating authority are "reasonable" replacements for the missing "necessary information", the nature and extent of the explanation and analysis required will necessarily vary from determination to determination.<sup>740</sup>

#### 4.4.2 Whether the Panel acted inconsistently with Article 11 of the DSU

4.180. Regarding the scope of China's appeal, we note that China does not appeal the Panel's interpretation of Article 12.7 of the SCM Agreement.<sup>741</sup> Nor does China take issue with the standard of review or the "analytical framework" identified by the Panel.<sup>742</sup> Instead, China argues that the Panel engaged in a " cursory analysis" that was inconsistent with the Panel's obligations under Article 11 of the DSU.<sup>743</sup> In particular, China faults the Panel for failing to examine each of the 42 instances of the USDOC's use of "adverse" facts available in order to determine whether the USDOC had disclosed how its conclusions were supported by facts on the record. According to China, the Panel made only limited references to the "adverse" facts available determinations subject to challenge, and "selectively used" the few instances in which it disagreed with China's characterization of a particular "adverse" facts available determination in order to reject all of China's claims under Article 12.7 of the SCM Agreement.<sup>744</sup> China further contends that the Panel's analysis of China's claims bears no relationship to the "in-depth" examination that was required in respect of each of the instances challenged by China.<sup>745</sup> Finally, China asserts that the Panel acted inconsistently with Article 11 of the DSU by relying on evidence provided by the United States in Exhibit USA-94 on an *ex post* basis in order to justify the USDOC's determinations.<sup>746</sup> China

<sup>733</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294). (emphasis added in *US – Carbon Steel (India)*)

<sup>734</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417.

<sup>735</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417 (referring to Panel Report, *China – GOES*, para. 7.302). (additional fn text omitted). We note, in this regard, that Article 12.6 of the SCM Agreement permits an investigating authority to carry out investigations in the territory of other Members and on the premises of a firm, provided that the respective conditions specified in that provision are met.

<sup>736</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294).

<sup>737</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.424.

<sup>738</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.431 and 4.435. The Appellate Body also stated that determinations under Article 12.7 cannot be made on the basis of procedural circumstances alone, such as non-cooperation, and that Article 12.7 should not be used to punish non-cooperating parties by intentionally choosing adverse facts for that purpose. (Ibid., paras. 4.419 and 4.422)

<sup>739</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>740</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>741</sup> China's appellant's submission, para. 189.

<sup>742</sup> China's appellant's submission, para. 221. See also paras. 190 and 220.

<sup>743</sup> China's appellant's submission, para. 191.

<sup>744</sup> China's appellant's submission, para. 222.

<sup>745</sup> China's appellant's submission, para. 222.

<sup>746</sup> China's appellant's submission, paras. 228 and 229 (referring to Panel Report, para. 7.316).

emphasizes, in this regard, that there was no indication that the USDOC actually relied "in any of the challenged determinations" on the evidence submitted by the United States to the Panel.<sup>747</sup>

4.181. Although China does not appeal the articulation of the standard of review and the "analytical framework" identified by the Panel, China argues that, in the context of reviewing "*factual components* of the findings made by investigating authorities", a panel is required to examine whether an investigating authority's conclusions are "reasoned and adequate".<sup>748</sup> Referring to the Appellate Body report in *US – Softwood Lumber VI (Article 21.5 – Canada)*, China observes that "the adequacy of an investigating authority's determination will depend, in part, on 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.'"<sup>749</sup> China submits, therefore, that "[i]t is only by reviewing the investigating authority's published explanation for its determination that a panel can discern whether an investigating authority *properly 'appl[ied] facts that are 'available'*".<sup>750</sup>

4.182. We agree with China that, in the context of reviewing "*factual components* of the findings made by investigating authorities", a panel is required to examine whether an investigating authority's conclusions are "reasoned and adequate". We recall, however, that the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* and in *US – Countervailing Duty Investigation on DRAMS* explained that "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."<sup>751</sup> The Appellate Body has further explained that "[w]hat is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made".<sup>752</sup> The standard of review to be applied by a panel therefore depends, in part, on the particular provision of a covered agreement that is at issue – in this case, Article 12.7 of the SCM Agreement – and the specific claim(s) put forth by a complainant. In the present case, in order to comply with the requirements under Article 12.7 of the SCM Agreement, the USDOC was required to provide an explanation that was sufficient to establish that it had engaged in a process of reasoning and evaluation of the various facts before it in order to determine which of the facts available could reasonably replace the missing "necessary" information. While the explanation and analysis provided must be sufficient to establish that the "facts available" employed by the investigating authority are "reasonable" replacements for the missing "necessary information", the nature and extent of the explanation and analysis required will necessarily vary from determination to determination.<sup>753</sup>

4.183. At the oral hearing in this appeal, China clarified that it was claiming that the USDOC did not demonstrate that its "adverse" facts available determinations were actually based on the facts on the record before it. China explained that, if the determinations at issue were not based at all on facts on the record, then the question of whether those facts are the best or most appropriate and fitting facts would not even arise. China's clarifications are consistent with the Panel's statement 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".<sup>754</sup>

4.184. With these considerations in mind, we further note that China stated in its panel request that its "as applied" challenge under Article 12.7 arises "in respect of each instance in which the USDOC used facts available, including 'adverse' facts available, to support its findings of financial contribution, specificity, and benefit in the investigations and determinations identified in Appendix 1" to the panel request.<sup>755</sup> The Panel found that the "specific measures at issue" in

<sup>747</sup> China's appellant's submission, para. 229.

<sup>748</sup> China's appellant's submission, para. 202 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (emphasis original)).

<sup>749</sup> China's appellant's submission, para. 202 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>750</sup> China's appellant's submission, para. 208 (quoting United States' first written submission to the Panel, para. 326; and referring to Panel Report, para. 7.309). (emphasis added by China)

<sup>751</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184).

<sup>752</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>753</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>754</sup> Panel Report, para. 7.311.

<sup>755</sup> China's panel request, fn 10.

relation to China's claims under Article 12.7 "are the 19 final and three preliminary countervailing duty determinations listed in Appendix 1 to the panel request".<sup>756</sup> In relation to these measures, the Panel held that "the panel request is clear that all 'instances' of the use of facts available will be challenged".<sup>757</sup> Subsequently, in its first written submission, China limited its claims under Article 12.7 to the instances of the use of "adverse" facts available by the USDOC. As noted by the Panel, "China's challenge specifically concerns whether the USDOC based 42 'adverse facts available' determinations on *facts*."<sup>758</sup> Moreover, China's claims under Article 12.7 were brought "on an 'as applied' basis, with respect to each of the 42 challenged adverse facts available determinations".<sup>759</sup>

4.185. China alleged that, in each of the 42 instances of the use of "adverse" facts available by the USDOC, the USDOC either "assumed" the ultimate legal conclusion of its inquiry, or "based its conclusion on evidence or conclusions drawn from a different investigation", without relying on facts available on the record.<sup>760</sup> China further argued that "the mere existence of a particular fact on the record of an investigation is insufficient to fulfil the requirements of Article 12.7", and that, instead, "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".<sup>761</sup>

4.186. The United States argues on appeal that the question before the Panel was not whether the USDOC was justified in resorting to facts available, or whether it relied on facts that were the most appropriate.<sup>762</sup> Instead, according to the United States, China's claim raised the "far more basic" question of whether the USDOC relied on "*any facts at all*"<sup>763</sup>, and, as a result, the Panel was not required to assess whether the USDOC's "adverse" facts available determinations were "reasoned and adequate".<sup>764</sup>

4.187. While China's challenge focuses on whether the USDOC's "adverse" facts available determinations were based, at all, on the facts on the record, it does not follow from this that the Panel was not required to scrutinize the analysis and explanation provided by the USDOC in support of its facts available determinations. As discussed above, the Panel stated that, "under the applicable standard of review, a panel should examine whether the investigating authority's determination is 'reasoned and adequate'"<sup>765</sup>, and, in the light of this standard of review, the Panel's task in the present case 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".<sup>766</sup> The United States does not take issue with these statements by the Panel. Contrary to what the United States appears to suggest, the question before the Panel was not whether there were *any* facts on the record that could have supported the USDOC's "adverse" facts available determinations; rather, as the Panel explicitly stated, the question was whether the USDOC *based* its 42 "adverse" facts available determinations on facts.<sup>767</sup> The latter question necessitates an assessment of the explanation and analysis provided by the USDOC as the basis for its "adverse" facts available determinations. We therefore disagree with the United States that the Panel was not required to examine whether the USDOC provided a "reasoned and adequate" explanation of its "adverse" facts available determinations in order to evaluate China's claims under Article 12.7. As noted above, the explanation in the determinations

<sup>756</sup> Preliminary Ruling, para. 4.2.

<sup>757</sup> Preliminary Ruling, para. 4.5.

<sup>758</sup> Panel Report, para. 7.307. (emphasis original) China initially challenged 48 instances of the USDOC's use of "adverse" facts available; however, the Panel found that the preliminary determinations of the USDOC in the Wind Towers and Steel Sinks investigations were outside its terms of reference. As a result, the number of instances challenged by China and falling within the Panel's terms of reference was reduced to 42. (Ibid., fn 357 to para. 7.284)

<sup>759</sup> Panel Report, para. 7.315.

<sup>760</sup> Panel Report, para. 7.290 (referring to China's first written submission to the Panel, paras. 128-156).

<sup>761</sup> Panel Report, para. 7.296 (referring to China's response to Panel question No. 103, para. 53).

<sup>762</sup> United States' appellee's submission, para. 163.

<sup>763</sup> United States' appellee's submission, para. 163. (emphasis original)

<sup>764</sup> United States' appellee's submission, para. 163 (referring to Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)* and *US – Countervailing Duty Investigation on DRAMS*).

<sup>765</sup> Panel Report, para. 7.310 (referring to Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, paras. 186-188; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>766</sup> Panel Report, para. 7.311. (emphasis added)

<sup>767</sup> Panel Report, para. 7.307.

should be sufficient to allow a panel to assess how and why the available facts employed by the investigating authority were reasonable replacements for the missing information.

4.188. As we see it, China's claim under Article 11 of the DSU essentially relies on three arguments. First, China argues that the Panel failed to examine and address each of the 42 instances challenged by China. Second, China asserts that, in the instances that it did examine, the Panel's analysis falls short of the "objective assessment" that it was required to make under Article 11. Finally, China submits that the Panel acted inconsistently with Article 11 to the extent that it relied on examples of record evidence supporting the USDOC's determinations at issue provided by the United States on an *ex post* basis. Before turning to address China's claim, we recall that panels are required to assess the consistency of facts available determinations with the SCM Agreement in accordance with the standard of review set out in Article 11 of the DSU, as informed in this case by Article 12.7 of the SCM Agreement.<sup>768</sup> Article 11 of the DSU requires a panel to make an "objective assessment of the matter before it". The Appellate Body has stated that the "matter" before the panel in the context of Article 11 is the same as the "*matter* referred to the DSB" for the purpose of Article 7 of the DSU, and comprises of "the measure at issue (and the claims made by the complaining Member)".<sup>769</sup> The Appellate Body has further explained that, in accordance with Article 11 of the DSU, a panel, in reviewing an investigating authority's actions, "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'".<sup>770</sup>

4.189. Although the precise contours of the standard of review to be applied in a given case are a function of the substantive provisions of the covered agreements at issue, as well as the particular claims made, Article 11 of the DSU requires, *inter alia*, that panels scrutinize whether the reasoning of an investigating authority is coherent and internally consistent, and carry out an "in-depth examination" of the explanations provided by an investigating authority.<sup>771</sup> In the context of Article 12.7 of the SCM Agreement, such an "in-depth examination" by a panel would entail, *inter alia*, assessing whether an investigating authority's published report provided an explanation that sufficiently disclosed its process of reasoning and evaluation such that the panel could assess how the authority chose from the facts available those that could reasonably replace the missing information. As we see it, China's claims in the present case do not relate to the USDOC's process of reasoning and evaluation and its consistency with the requirements of Article 12.7; instead, they focus on whether the USDOC engaged at all in a process of reasoning and evaluation in selecting reasonable replacements for the missing information.

4.190. With respect to China's first argument in support of its claim under Article 11, it appears to us that, instead of examining China's arguments and evidence in relation to the 42 instances it challenged, the Panel limited its analysis to only *some* instances of the USDOC's use of "adverse" facts available. For example, the Panel noted that "one of the 42 instances challenged by China [did] not apply adverse facts available."<sup>772</sup> Similarly, relying on certain examples from the 42 challenged instances, the Panel found that "the *terminology* used in the conclusions of the determinations" was not as homogenous as China suggested.<sup>773</sup> The Panel added that, in certain "adverse" facts available determinations, the term "adverse inferences" was used in the context of formulations that did not render it obvious that the determination concerned was not based on facts.<sup>774</sup> Based on its analysis, the Panel found that it was not "evident on the face of the evidence provided by China that one and the same legal standard was applied across the 42 challenged adverse facts available determinations."<sup>775</sup> The Panel explained that, "[s]ince it is not *entirely evident* that one and the same legal standard was applied across the 42 challenged adverse facts available determinations, China's failure to address the specific facts of each of the challenged

<sup>768</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 91 (referring to Appellate Body Report, *US – Lead and Bismuth II*, para. 51).

<sup>769</sup> Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 176. (emphasis original)

<sup>770</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93 (quoting Appellate Body Report, *US – Lamb*, para. 106 (emphasis original)).

<sup>771</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>772</sup> Panel Report, para. 7.317 (referring to 2011 Drill Pipe Issues and Decision Memorandum (Panel Exhibit CHI-80), p. 10, designated as Instance 33 by China in Panel Exhibit CHI-125).

<sup>773</sup> Panel Report, para. 7.318. (emphasis added)

<sup>774</sup> Panel Report, paras. 7.319 and 7.320.

<sup>775</sup> Panel Report, para. 7.317 (referring to China's response to Panel question No. 7, para. 24).

investigations is problematic for its claim."<sup>776</sup> Such statements by the Panel suggest that the Panel's analysis was primarily directed at ascertaining whether China had successfully established that the USDOC applied the same "legal standard" across the 42 instances of the use of "adverse" facts available. It is clear, however, that China's claims were brought on an "as applied" basis and that the Panel did not address each of the instances of the USDOC's use of "adverse" facts available challenged by China.

4.191. We note, however, and as China points out in its appellant's submission, that China placed all of the relevant issues and decisions memoranda and notices relating to the preliminary determinations, in their entirety, on the Panel record.<sup>777</sup> China also provided the Panel with a table (Exhibit CHI-2) listing the pages in the memoranda where, according to China, the USDOC discussed each challenged instance of the use of "adverse" facts available. Moreover, China provided a further table (Exhibit CHI-125) listing relevant excerpts from the USDOC's issues and decisions memoranda and the notices relating to the preliminary determinations that, in its view, demonstrate that the USDOC "consistently use[d]" its findings of non-cooperation to reach "the legal conclusion at issue without any reference to facts on the record".<sup>778</sup> China also provided "some case-specific discussion in support of its claim with regard to three of the challenged investigations, namely Line Pipe, OCTG and Print Graphics."<sup>779</sup> Responding to China's allegations, the United States provided the Panel with several exhibits (Exhibits USA-94 through USA-133) that identified "facts that were available on the record of the investigations at issue", and which were, according to the United States, "demonstrably relevant to the determinations for which necessary information was missing due to the noncooperation of interested parties".<sup>780</sup>

4.192. In the light of the arguments and evidence provided by the parties, the Panel was required to scrutinize each instance of the use of "adverse" facts available challenged by China in order to address properly China's claims under Article 12.7 of the SCM Agreement.

4.193. As a further argument in support of its claim under Article 11 of the DSU, China submits, with regard to instances of the use of "adverse" facts available that the Panel did discuss in its Report, that the Panel's analysis does not amount to the "in-depth examination" required under Article 11 of the DSU.<sup>781</sup> Instead, according to China, the Panel simply accepted the USDOC's "references to the use of the term 'facts available'" without inquiring whether the USDOC "*actually applie[d]*" the facts available.<sup>782</sup> For its part, the United States submits that the Panel determined that the evidence put forth by China was insufficient to support its claim, and that, in doing so, the Panel took into account all of the evidence and arguments presented by the parties, and its assessment met or even exceeded the requirements of Article 11 of the DSU.<sup>783</sup> The United States further argues that the Panel went further and considered all of China's arguments only to find that the facts did not support China's characterizations of the USDOC's determinations.

4.194. Focusing on the language used by the USDOC in its "adverse" facts available determinations, the Panel concluded that "the terminology used in the conclusions of the determinations, on which China relies heavily, is not as homogenous as China suggests."<sup>784</sup> The Panel pointed out that not all conclusions of the "adverse" facts available determinations challenged by China refer to "assumptions", "adverse inferences", or similar terms.<sup>785</sup> Thus, in one instance, the Panel observed that the USDOC stated that it was making an "*adverse finding*"<sup>786</sup>,

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<sup>776</sup> Panel Report, para. 7.323 (referring to China's response to Panel question No. 7, para. 24). (emphasis added)

<sup>777</sup> China's appellant's submission, para. 231.

<sup>778</sup> China's appellant's submission, para. 231 (quoting China's response to Panel question No. 73, para. 181; and referring to Panel Exhibit CHI-125, comprising a table of relevant excerpts from the USDOC's "adverse facts available" findings).

<sup>779</sup> Panel Report, para. 7.289 (referring to China's first written submission to the Panel, paras. 147-153; and opening statement at the first Panel meeting, paras. 70-72 and 76).

<sup>780</sup> United States' appellee's submission, para. 189. (fn omitted)

<sup>781</sup> China's appellant's submission, para. 222.

<sup>782</sup> China's appellant's submission, para. 227. (emphasis original)

<sup>783</sup> United States' appellee's submission, para. 175.

<sup>784</sup> Panel Report, para. 7.318.

<sup>785</sup> Panel Report, para. 7.318.

<sup>786</sup> Panel Report, para. 7.318 (quoting 2009 Lawn Groomers Issues and Decision Memorandum (Panel Exhibit CHI-31), p. 15, designated as Instance 11 in Panel Exhibit CHI-125). (emphasis added by the Panel)

and in six other instances the USDOC referred only to "the application of adverse facts available".<sup>787</sup> The Panel also noted that:

7.319. Secondly, certain adverse facts available determinations that do use the term "adverse inferences" use it in the context of one of the following formulations: "*in selecting from among the facts otherwise available*, we have employed adverse inferences";<sup>[402]</sup> "we have employed adverse inferences *in selecting from among the facts otherwise available*";<sup>[403]</sup> "we have employed an adverse inference *in selecting from among the facts otherwise available*";<sup>[404]</sup> and "we have applied an adverse inference *in our choice of the facts available*".<sup>[405]</sup><sup>788</sup>

7.320. We do not consider it evident on the face of the statement "we have applied an adverse inference in our choice of the facts available"<sup>[406]</sup>, for instance, that the determination concerned is not based on facts. That statement, on its face, suggests exactly the opposite. China attempts to address such variations in terminology by stating, without reference to the analysis carried out by the USDOC, that, "[n]otwithstanding [the USDOC's] repeated assertions that it is applying facts available, the 'facts' are conspicuously absent from its analysis".<sup>[407]</sup>

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[fns original]

<sup>402</sup> Pressure Pipe, Exhibit CHI-12, p. 42, designated as instance 2 in Exhibit CHI-125.

(emphasis added)

<sup>403</sup> Line Pipe, Exhibit CHI-19, p. 6, designated as instances 5 and 6 in Exhibit CHI-125.

(emphasis added)

<sup>404</sup> Citric Acid, Exhibit CHI-24, p. 8, designated as instance 9 in Exhibit CHI-125.

(emphasis added)

<sup>405</sup> Steel Cylinders, Exhibit CHI-99, p. 10, designated as instance 38 in Exhibit CHI-125.

(emphasis added)

<sup>406</sup> Steel Cylinders, Exhibit CHI-99, p. 10.

<sup>407</sup> China's opening statement at the first meeting of the Panel, para. 71.

4.195. Based on the above, it seems to us that the Panel focused, in large part, on the words employed by the USDOC in its determinations rather than on whether the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement in connection with the challenged instances of the use of "adverse" facts available that were discussed by the Panel in its Report. In its analysis of the terminology used by the USDOC, the Panel appears to suggest that it was responding to China's arguments contained in its second written submission, wherein China "relie[d] heavily" on the terminology used by the USDOC.<sup>789</sup> We, however, do not see China's arguments before the Panel as being confined to the terminology used by the USDOC. In paragraph 177 of its second written submission, for example, China stated that the USDOC "repeatedly relies on 'assumptions', 'adverse inferences', and similar terminology in order to reach a particular conclusion".<sup>790</sup> However, China further explained that, "[i]n none of the 48 instances at issue does the USDOC identify a single 'fact' that was 'available' on the record to support the conclusion that it reached".<sup>791</sup>

4.196. Yet, rather than assessing whether the USDOC had "provided sufficient explanation of the challenged adverse facts available determinations to assess whether the USDOC based these determinations on facts"<sup>792</sup>, as it set out to do, the Panel focused on the language and the formulations used by the USDOC in its determinations. The Panel stated, for example, that it did "not consider it *evident on the face* of the statement 'we have applied an adverse inference in our

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<sup>787</sup> Panel Report, para. 7.318 (referring to 2010 Wire Strand Issues and Decision Memorandum (Panel Exhibit CHI-52), p. 13, designated as Instances 17-19 in Panel Exhibit CHI-125; 2011 Drill Pipe Issues and Decision Memorandum (Panel Exhibit CHI-80), p. 10, designated as Instance 33 in Panel Exhibit CHI-125; and 2012 Solar Panels Preliminary Affirmative CVD Determination (Panel Exhibit CHI-105), p.p. 17451 and 17445, designated as Instances 39 and 42 in Panel Exhibit CHI-125).

<sup>788</sup> Emphasis original.

<sup>789</sup> Panel Report, para. 7.318.

<sup>790</sup> China's second written submission to the Panel, para. 177.

<sup>791</sup> China's second written submission to the Panel, para. 177.

<sup>792</sup> Panel Report, para. 7.311.

choice of the facts available' ... that the determination concerned is not based on facts."<sup>793</sup> The Panel did not, however, critically examine such statements in the USDOC's determinations and memoranda in order to assess whether the USDOC had complied with the obligations under Article 12.7. The Panel also stated that it did not consider China "to have established that each reference to 'adverse inferences' in the challenged determinations *in fact equates* to an 'assumption'".<sup>794</sup> The Panel was required to assess whether the USDOC's analysis in the underlying investigations was sufficient to establish that its "adverse" facts available determinations were made on the basis of the facts available as required under Article 12.7. Instead of conducting this analysis, the Panel appears to have simply relied on language in the USDOC's determination referring to application of facts available in order to reject China's claims.

4.197. Regarding China's argument that the Panel also acted inconsistently with Article 11 of the DSU to the extent that it relied on evidence provided by the United States on an *ex post* basis, we note that, based on its review of Exhibit USA-94 (setting out the facts available on the record, which, according to the United States, are "relevant to the determinations for which 'facts available' were applied"<sup>795</sup>, as well as the relevant excerpts from the USDOC's documents identified by the United States) and the full set of issues and decisions memoranda and the notices relating to the preliminary determinations provided by China as exhibits, the Panel observed that "the USDOC's adverse facts available determinations go well beyond the conclusions cited by China" and "were made in a wide variety of different factual scenarios".<sup>796</sup> The Panel did not specify what it meant when it referred to "a wide variety of different factual scenarios". Nor is it clear whether, if at all, the Panel relied on the references to the facts on the record provided by the United States in Exhibit USA-94. We therefore consider the Panel's discussion of Exhibit USA-94 to be a further example of the cursory nature of its analysis.

4.198. For the foregoing reasons, we find that the Panel acted inconsistently with its obligations under Article 11 of the DSU in assessing China's claims under Article 12.7 of the SCM Agreement. Consequently, we reverse the Panel's finding, in paragraphs 7.325 and 8.1.vii of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record.

#### 4.4.3 Completion of the legal analysis

4.199. Should we find that the Panel erred in finding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record, China requests us to complete the legal analysis and find that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement in each of the 42 instances of the use of "adverse" facts available challenged by China.<sup>797</sup> Having reversed the Panel's findings under Article 12.7 of the SCM Agreement, we now turn to consider whether we can complete the legal analysis as requested by China.

4.200. The Appellate Body has, in some disputes, completed the legal analysis with a view to facilitating the prompt and effective resolution of the dispute.<sup>798</sup> However, the Appellate Body has done so only if the factual findings of the panel and the undisputed facts on the panel record provided it with a sufficient basis to do so.<sup>799</sup> Thus, the Appellate Body has not completed the legal analysis where there were insufficient factual findings in the panel report or a lack of undisputed

<sup>793</sup> Panel Report, para. 7.320 (quoting 2012 Steel Cylinders Issues and Decision Memorandum (Panel Exhibit CHI-99), p. 10). (emphasis added)

<sup>794</sup> Panel Report, para. 7.322. (emphasis added)

<sup>795</sup> United States' appellee's submission, para. 166.

<sup>796</sup> Panel Report, para. 7.316.

<sup>797</sup> China's appellant's submission, paras. 238-241.

<sup>798</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 117 and 118; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

<sup>799</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 209, 210, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *Canada – Autos*, paras. 133 and 144; *Korea – Various Measures on Beef*, para. 128; *EC – Asbestos*, para. 79; and *EC – Export Subsidies on Sugar*, para. 337.



facts on the panel record.<sup>800</sup> In addition, the Appellate Body has declined to complete the legal analysis in the light of the complexity of the legal issues involved, the absence of full exploration of the issues before the panel, and, consequently, considerations pertaining to the parties' due process rights.<sup>801</sup> The Appellate Body has also declined to complete the legal analysis in circumstances where it would require addressing claims "which the panel had not examined at all"<sup>802</sup>, or where completion was not required to resolve the dispute.<sup>803</sup>

4.201. Turning to the case before us, China argues that, "in a circumstance where the investigating authority's compliance with a WTO agreement provision is evident, and in fact *must* be evident, on the face of its own determinations, then those determinations provide more than sufficient undisputed facts on the record to permit the Appellate Body to complete the analysis."<sup>804</sup> China considers this to be the case in the present dispute given that, in its view, the United States failed to identify a single instance where the USDOC provided a "reasoned and adequate" explanation for its "adverse" facts available conclusions, and given that the United States took the position that the USDOC was not required to "explicitly cite" facts in its determinations.<sup>805</sup> Following an exposition of why the Appellate Body can and should complete the legal analysis in the present case, China sets out to demonstrate, with respect to each of the 42 challenged instances, that the USDOC failed to provide an explanation that was "sufficient to assess whether the USDOC based its adverse facts available determinations on facts".<sup>806</sup>

4.202. The United States, conversely, submits that we should reject China's request to complete the legal analysis because China did not present before the Panel arguments about each instance in which the USDOC used "adverse" facts available and thereby deprived the Panel from performing its role as a "trier of facts" with respect to each challenged instance.<sup>807</sup> The United States also points out that, in the event we were to agree to China's request for completion, we would have to examine, not only the limited excerpts from the USDOC's determinations identified by China, but also the evidence cited and reproduced in Exhibit USA-94 and Exhibits USA-95 through USA-133.<sup>808</sup> According to the United States, in order to complete the legal analysis, therefore, we would have to evaluate each of the 42 challenged instances of the use of "adverse" facts available, including issues that were not sufficiently addressed by the parties before the Panel, such as the probative value of certain pieces of evidence, the relevance of particular facts, and inferences that may be reasonably drawn from an analysis of the evidence in its totality.<sup>809</sup>

4.203. Finally, the United States points out that the entire body of the USDOC's administrative record for each investigation at issue was not placed before the Panel, and that, in responding to China's claim that the USDOC did not base itself on facts on the record in the 42 challenged instances, the Panel sought only to disprove China's limited assertion by pointing to some, but not all, of the facts on the record before the USDOC.<sup>810</sup> According to the United States, in the absence of a complete record of the investigations and the shifting focus of China's claims under

<sup>800</sup> See Appellate Body Reports, *US – Section 211 Appropriations Act*, para. 343; and *EC – Asbestos*, paras. 78 and 81.

<sup>801</sup> See Appellate Body Reports, *Canada – Renewable Energy / Feed-in Tariff Program*, para. 5.224; *EC – Export Subsidies on Sugar*, para. 339 and fn 537 thereto.

<sup>802</sup> Appellate Body Report, *EC – Asbestos*, para. 79.

<sup>803</sup> For example, in *US – Steel Safeguards*, the Appellate Body noted that it had already upheld the panel's findings that the measures at issue were inconsistent with the GATT 1994 and several provisions of the Agreement on Safeguards. As a result, it did not consider it "necessary ... to complete the analysis and determine whether the USITC report provided a reasoned and adequate explanation that imports of tin mill products and stainless steel wire had increased within the meaning of Article 2.1 of the *Agreement on Safeguards*". (Appellate Body Report, *US – Steel Safeguards*, para. 431)

<sup>804</sup> China's appellant's submission, para. 241. (emphasis original)

<sup>805</sup> China's appellant's submission, para. 241.

<sup>806</sup> China's appellant's submission, para. 242 (quoting Panel Report, para. 7.311).

<sup>807</sup> United States' appellee's submission, paras. 205 and 206.

<sup>808</sup> United States' appellee's submission, para. 208.

<sup>809</sup> United States' appellee's submission, paras. 209 and 210 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 197).

<sup>810</sup> United States' appellee's submission, para. 212.

Article 12.7, there is insufficient evidence for us to evaluate whether the USDOC's "adverse" facts available determinations were "reasoned and adequate".<sup>811</sup>

4.204. With respect to China's arguments, we note that, on appeal, China presents an instance-by-instance discussion of why, in its view, the USDOC acted inconsistently with Article 12.7 in each of the 42 instances it challenged.<sup>812</sup> Before the Panel, however, China did not present detailed argumentation with respect to each of these instances. Instead, it advanced some general arguments relating to the USDOC's use of "adverse" facts available, including a discussion of two instances of the USDOC's practice in the OCTG and Line Pipe investigations as examples, and submitted Exhibit CHI-2 wherein it provided citations to the portions of the USDOC's "adverse" facts available determinations where, in its view, a discussion of the relevant facts would have been expected.<sup>813</sup>

4.205. At the same time, we do not agree with the United States that all that it was required to do in order to rebut China's claims under Article 12.7 of the SCM Agreement was to point to some evidence on the USDOC's record that supported the USDOC's "adverse" facts available determinations.<sup>814</sup> The issue before the Panel was not whether there were *any* facts on the record that supported the USDOC's determinations but, instead, "whether the *USDOC provided sufficient explanation* of the challenged adverse facts available determinations to assess whether the USDOC based these determinations on facts."<sup>815</sup>

4.206. We note that China requests us to complete the legal analysis with respect to all the 42 instances across the 13 investigations that were at issue before the Panel. We recall, in this regard, that the evaluation of the "facts available" that is required, and the form it may take, depends on the particular circumstances of a given case, including the nature, quality, and amount of the evidence on the record and the particular determinations to be made.<sup>816</sup> Moreover, whereas the explanation and analysis provided in a published report must be sufficient to allow a panel to assess how and why the "facts available" employed by the investigating authority are "reasonable" replacements for the missing "necessary information", the nature and extent of the explanation and analysis required will necessarily vary from determination to determination.<sup>817</sup>

4.207. We also note that the 42 instances challenged by China, and with respect to which it requests that we complete the legal analysis, include several instances wherein the USDOC relied on "adverse" facts available in support of its public body, benefit, specificity and export restraints determinations. The Panel found, however, with respect to China's claim under Article 1.1(a)(1) of the SCM Agreement, that "in the 12 countervailing duty investigations challenged by China the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement when the USDOC found that SOEs were public bodies based solely on the grounds that these enterprises were (majority) owned, or otherwise controlled, by the Government of China."<sup>818</sup> The Panel also found that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) of the SCM Agreement in making its specificity determinations in the context of these investigations.<sup>819</sup> The United States does not challenge these findings on appeal. Nor does the United States challenge the Panel's finding that "the USDOC's initiation of two countervailing duty investigations [–i.e. Magnesia Bricks and Seamless Pipe–] in respect of certain export restraints is inconsistent with Article 11.3 of the SCM Agreement."<sup>820</sup> These findings therefore stand. Furthermore, we have found above that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement in making its benefit

<sup>811</sup> United States' appellee's submission, paras. 211-213.

<sup>812</sup> The 42 instances challenged by China, and discussed in its appellant's submission, relate to the following 13 investigations: Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels. (China's appellant's submission, paras. 244-440)

<sup>813</sup> China's first written submission to the Panel, paras. 143-156; Panel Exhibit CHI-2, comprising a table of citations for China's "adverse" facts available claims. See also China's appellant's submission, para. 245.

<sup>814</sup> United States' appellee's submission, para. 212.

<sup>815</sup> Panel Report, para. 7.311. (emphasis added)

<sup>816</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>817</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>818</sup> Panel Report, para. 7.75.

<sup>819</sup> Panel Report, para. 8.1.v.

<sup>820</sup> Panel Report, para. 7.406.

determinations in the context of the investigations in OCTG, Line Pipe, Pressure Pipe, and Solar Panels. Consequently, having laid out the legal standard that applies under Article 12.7, we see limited value, for purposes of resolving the dispute between the parties, in completing the legal analysis with respect to the instances in which the USDOC used "adverse" facts available in the investigations at issue.

4.208. We further recall our finding above that the Panel acted inconsistently with Article 11 of the DSU in finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement. We do not consider that the participants have addressed sufficiently, in their submissions, the issues that we might need to examine if we were to complete the legal analysis in this case, including, for example, whether the USDOC's evaluation of the "facts available" was sufficient in the light of the particular circumstances of each case, including the nature, quality, and amount of the evidence and information on the record and the particular determinations to be made.<sup>821</sup> Completing the legal analysis in such circumstances would, in our view, raise due process concerns.

4.209. For all these reasons, we do not complete the legal analysis with respect to each of the 42 instances of the use of "adverse" facts available challenged by China.

#### 4.5 Articles 10 and 32.1 of the SCM Agreement – Consequential claims

4.210. In the event that we reverse the Panel's findings and complete the legal analysis with respect to any of the claims of error raised by China on appeal, China further requests that we complete the legal analysis with respect to China's claims of consequential violations under Articles 10 and 32.1 of the SCM Agreement.<sup>822</sup>

4.211. We recall our finding above that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benefit benchmarks in the context of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations.<sup>823</sup> We note that the Appellate Body has treated claims under Articles 10 and 32.1 of the SCM Agreement as consequential claims in the sense that, where it has not been established that the essential elements of the subsidy within the meaning of Article 1 of the SCM Agreement are present, the right to impose a countervailing duty has not been established and, as a consequence, the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the SCM Agreement.<sup>824</sup> Accordingly, we find that the USDOC's benefit determinations in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations, which we have found to be inconsistent with Article 14(d) and Article 1.1(b) of the SCM Agreement, are also inconsistent with the United States' obligations under Articles 10 and 32.1 of the SCM Agreement.

## 5 FINDINGS AND CONCLUSIONS

5.1. For the reasons set out in this Report, the Appellate Body:

- a. upholds the Panel's finding, in paragraph 5.1 of the Panel's Preliminary Ruling and paragraph 1.16 of the Panel Report, that China's panel request, as it relates to its claims under Article 12.7 of the SCM Agreement, is not inconsistent with Article 6.2 of the DSU and that China's claims under Article 12.7 were thus within the Panel's terms of reference;

<sup>821</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.421.

<sup>822</sup> China's Notice of Appeal, para. 18. In the Notice of Appeal, China requests the Appellate Body to complete the legal analysis with respect to China's claims of consequential violations under Articles 10 and 32.1 of the SCM Agreement "in respect of which the Panel exercised judicial economy". (Ibid.) We note, however, that the Panel did not exercise judicial economy with respect to China's claims of consequential violations under Articles 10 and 32.1 of the SCM Agreement. The Panel found, in paragraphs 7.413 and 8.1.x. of the Panel Report, that the United States had acted inconsistently with Articles 1, 2, and 11 of the SCM Agreement, and that, as a consequence, the United States had also acted inconsistently with Articles 10 and 32.1 of the SCM Agreement. (See Panel Report, para. 7.413)

<sup>823</sup> *Supra*, para. 4.107.

<sup>824</sup> Appellate Body Reports, *US – Softwood Lumber IV*, para. 143; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

- b. with respect to the Panel's findings, in paragraphs 7.195, 7.197, and 8.1.iv of the Panel Report, on the USDOC's determinations of benefit in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations:
  - i. reverses the Panel's finding, in paragraph 7.195 of the Panel Report, upholding the USDOC's rejection of private prices as potential benchmarks in the investigations at issue on the grounds that such prices were distorted;
  - ii. reverses the Panel's finding, in paragraphs 7.197 and 8.1.iv of the Panel Report, that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benefit benchmarks in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations at issue; and
  - iii. completes the legal analysis and finds that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations and, consequently, with Article 10 and Article 32.1 of the SCM Agreement;
- c. with respect to the Panel's findings, in paragraphs 7.231, 7.243, 7.249, 7.258, and 8.1.v of the Panel Report, on the USDOC's determinations of *de facto* specificity under Article 2.1(c) of the SCM Agreement in respect of the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations:
  - i. upholds the Panel's finding, in paragraphs 7.231, 7.258, and 8.1.v of the Panel Report, that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 by analysing specificity exclusively under Article 2.1(c) of the SCM Agreement;
  - ii. reverses the Panel's finding, in paragraphs 7.243, 7.258, and 8.1.v of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify a "subsidy programme"; and finds that it is unable to complete the legal analysis in this regard; and
  - iii. reverses the Panel's finding, in paragraphs 7.249, 7.258, and 8.1.v of the Panel Report, that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to identify a "granting authority"; and finds that it is unable to complete the legal analysis in this regard; and
- d. with respect to the Panel's findings, in paragraphs 7.325 and 8.1.vii of the Panel Report, in respect of the USDOC's use of "adverse" facts available in the Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations, reverses the Panel's finding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record; and finds that it is unable to complete the legal analysis in this regard.

5.2. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under the SCM Agreement into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 12th day of December 2014 by:

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Peter Van den Bossche  
Presiding Member

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Ujal Singh Bhatia  
Member

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Seung Wha Chang  
Member

**ANNEX 1**

WORLD TRADE  
ORGANIZATION

**WT/DS437/7**

28 August 2014

(14-4945)

Page: 1/7

Original: English

**UNITED STATES – COUNTERVAILING DUTY MEASURES  
ON CERTAIN PRODUCTS FROM CHINA****NOTIFICATION OF AN APPEAL BY CHINA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 22 August 2014, from the Delegation of the People's Republic of China, is being circulated to Members.

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1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6) ("Working Procedures"), China hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretation in the Panel Report in *United States – Countervailing Duty Measures on Certain Products From China* (WT/DS437) ("Panel Report").

2. The measures at issue are certain preliminary and final countervailing duty measures identified in Appendix 1. These measures were issued by the United States Department of Commerce ("USDOC"). The measures include the determination by the USDOC to initiate the identified countervailing duty investigations, the conduct of those investigations, any preliminary or final countervailing duty determinations issued in those investigations, any definitive countervailing duties imposed as a result of those investigations, as well as any notices, annexes, decision memoranda, orders, amendments, or other instruments issued by the United States in connection with the countervailing duty measures identified in Appendix 1.

3. The issues that China raises in this appeal relate to the Panel's findings and conclusions in respect of the consistency of the challenged measures with various provisions of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), as set forth herein.

4. Pursuant to Rules 20(1) and 21(1) of the Working Procedures, China files this Notice of Appeal together with its Appellant's Submission with the Appellate Body Secretariat.

5. Pursuant to Rule 20(2)(d)(iii) of the Working Procedures, this Notice of Appeal provides an indicative list of the paragraphs of the Panel Report containing the alleged errors of law and legal interpretation by the Panel in its report, without prejudice to China's ability to rely on other paragraphs of the Panel Report in its appeal.

## I. Review of the Panel's Findings under Article 14(d) of the SCM Agreement

6. China seeks review by the Appellate Body of the Panel's interpretation and application of Article 14(d) and Article 1(b) of the SCM Agreement as they relate to the USDOC's decision in the determinations at issue to reject in-country private prices in China as benchmarks on the grounds that such prices were distorted. The Panel's errors of law and legal interpretation include:

- The Panel erred in concluding that the legal standard for determining what constitutes a "government" provider for purposes of the financial contribution inquiry under Article 1.1(a)(1) of the SCM Agreement does not also apply for purposes of determining what constitutes a "government" provider for purposes of a distortion inquiry under Article 14(d) of the SCM Agreement. As a consequence, the Panel erred in concluding that China's benefit-related claims failed on the grounds that they rested on an erroneous interpretation of Article 14(d) of the SCM Agreement.<sup>1</sup>
- The Panel erred in applying the Appellate Body's reasoning in *US – Anti-Dumping and Countervailing Measures (China)* to uphold the USDOC's rejection of private prices as potential benchmarks in the cases under challenge on the grounds that such prices were distorted.<sup>2</sup>
- The Panel failed to make an objective assessment of the matter before it, including an objective assessment of the facts of the case, as required by Article 11 of the DSU, in concluding that China failed to establish the factual premise for its claims in respect of four of the USDOC determinations under challenge: OCTG, Solar Panels, Pressure Pipe and Line Pipe.<sup>3</sup>

7. For these reasons, China requests that the Appellate Body reverse the Panel's finding in paragraph 7.195 of the Panel Report upholding the USDOC's rejection of private prices as potential benchmarks in the cases under challenge on the grounds that such prices were distorted, as well as the Panel's finding in 7.196 of the Panel Report that China's claims "rest on an erroneous interpretation of Article 14(d)".

8. China requests that the Appellate Body reverse the Panel's finding in paragraphs 7.188 and 7.196 of the Panel Report that China did not sufficiently substantiate the factual premises of its "as applied" claims in respect of four of the USDOC determinations under challenge: OCTG, Solar Panels, Pressure Pipe and Line Pipe.

9. Accordingly, China requests that the Appellate Body reverse the Panel's finding in paragraph 7.197 and the Panel's ultimate finding in paragraph 8.1(iv) of the Panel Report that China failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices as benchmarks in respect of four of the USDOC determinations under challenge: OCTG, Solar Panels, Pressure Pipe and Line Pipe.

9. China requests that the Appellate Body complete the legal analysis to find, instead, that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China in respect of four of the USDOC determinations under challenge: OCTG, Solar Panels, Pressure Pipe and Line Pipe.

## II. Review of the Panel's Findings under Article 2.1 of the SCM Agreement

10. China seeks review by the Appellate Body of the Panel's interpretation and application of Article 2.1 of the SCM Agreement as it relates to the USDOC input specificity determinations under challenge. In particular, the Panel's errors of law and legal interpretation include:

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<sup>1</sup> Panel Report, paras. 7.189-7.196.

<sup>2</sup> Panel Report, paras. 7.194-7.195.

<sup>3</sup> Panel Report, paras. 7.179-7.188, 7.196.



- The Panel erred in its interpretation and application of Article 2.1 when it found that "the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c)".<sup>4</sup>
- The Panel erred in its interpretation and application of the term "subsidy programme" in Article 2.1(c) when it found that "the consistent provision by the SOEs in question of inputs for less than adequate remuneration" provided an objective basis for the USDOC to sufficiently identify subsidy programmes for the purposes of the first of the "other factors" under Article 2.1(c) in the relevant specificity determinations.<sup>5</sup>
- The Panel erred in its application of Article 2.1 when it found that "the relevant jurisdiction was at the very least implicitly understood to be China in the challenged investigations", and that China had therefore failed to establish that the USDOC acted inconsistently with Article 2.1 by failing to identify the relevant granting authority.<sup>6</sup>

11. For these reasons, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.231, 7.243, 7.249, 7.258, and 8.1.v of the Panel Report in relation to the three aforementioned errors.

12. Accordingly, China requests that the Appellate Body reverse the Panel's finding in paragraph 7.258 and the Panel's ultimate finding in paragraph 8.1(v) of the Panel Report that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement by failing to apply the first of the "other factors" under Article 2.1(c) in light of a prior "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b); by failing to identify a "subsidy programme"; or by failing to identify a "granting authority", with respect to 12 countervailing duty investigations, namely Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders and Solar Panels.

13. If the Appellate Body were to reverse any or all of the Panel's findings and conclusions in respect of China's claims under Article 2.1(c), China requests that the Appellate Body complete the legal analysis in respect of those claims to find, instead, that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 of the SCM Agreement in respect of 15 input specificity determinations in Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders and Solar Panels.<sup>7</sup>

### III. Review of the Panel's Findings under Article 12.7 of the SCM Agreement

14. China seeks review by the Appellate Body of the Panel's analysis of China's claims under Article 12.7 of the SCM Agreement.

15. The Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU in concluding that China had not established that in 42 challenged instances the USDOC acted inconsistently with the United States' obligations under Article 12.7 by not relying on facts available on the record.<sup>8</sup> In particular, the Panel failed to apply the proper standard of review by failing to examine, with respect to each challenged "adverse facts available" determination, whether there was a reasoned and adequate explanation, discernible from the published determination itself, providing the factual basis for the USDOC's conclusion.<sup>9</sup>

<sup>4</sup> Panel Report, paras. 7.224-7.231.

<sup>5</sup> Panel Report, paras. 7.232-7.243.

<sup>6</sup> Panel Report, paras. 7.244-7.249.

<sup>7</sup> Before the Panel, China challenged a single input specificity determination in each investigation except for Drill Pipe, where it challenged two input specificity determinations, and Steel Cylinders, where it challenged three input specificity determinations. The same 15 input specificity determinations are the subject of China's appeal.

<sup>8</sup> Panel Report, para. 7.325.

<sup>9</sup> Panel Report, paras. 7.307-7.325.

16. Accordingly, China requests that the Appellate Body reverse the Panel's finding in paragraph 7.325 and the Panel's ultimate finding in paragraph 8.1(vii) of the Panel Report that China had not established that in 42 instances the USDOC acted inconsistently with the United States' obligations under Article 12.7 of the SCM Agreement by not relying on facts available on the record with respect to 13 countervailing duty investigations, namely Pressure Pipe, Line Pipe, Citric Acid, Lawn Groomers, OCTG, Wire Strand, Magnesite Bricks, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, Steel Cylinders and Solar Panels.<sup>10</sup>

17. China requests that the Appellate Body complete the legal analysis to find, instead, that the USDOC acted inconsistently with the obligations of the United States under Article 12.7 of the SCM Agreement by not relying on facts available on the record in each of the 42 challenged instances in the aforementioned 13 countervailing duty investigations.

#### **IV. Consequential Violations**

18. If the Appellate Body reverses the Panel's findings and completes the legal analysis with respect to any of the foregoing claims of error, China further requests that the Appellate Body complete the analysis with respect to China's claims of consequential violations under Articles 10 and 32.1 of the SCM Agreement in respect of which the Panel exercised judicial economy.

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<sup>10</sup> Panel Report, para. 8.1(vii).

## APPENDIX 1

### Investigation C-570-931 ("Pressure Pipe")

- *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 74 Federal Register 4936 (28 January 2009).
- *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China*: Countervailing Duty Order, 74 Federal Register 11712 (19 March 2009).

### Investigation C-570-936 ("Line Pipe")

- *Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 73 Federal Register 70961 (24 November 2008).
- *Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China*: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 74 Federal Register 4136 (23 January 2009).

### Investigation C-570-938 ("Citric Acid")

- *Citric Acid and Certain Citrate Salts From the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 74 Federal Register 16836 (13 April 2009).
- *Citric Acid and Certain Citrate Salts From the People's Republic of China*: Notice of Countervailing Duty Order, 74 Federal Register 25705 (29 May 2009).

### Investigation C-570-940 ("Lawn Groomers")

- *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 74 Federal Register 29180 (19 June 2009).
- *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China*: Countervailing Duty Order, 74 Federal Register 38399 (3 August 2009).

### Investigation C-570-942 ("Kitchen Shelving")

- *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 74 Federal Register 37012 (27 July 2009).
- *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China*: Countervailing Duty Order, 74 Federal Register 46973 (14 September 2009).

### Investigation C-570-944 ("OCTG")

- *Certain Oil Country Tubular Goods from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination, 74 Federal Register 64045 (7 December 2009).
- *Certain Oil Country Tubular Goods from the People's Republic of China*: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 75 Federal Register 3203 (20 January 2010).

**Investigation C-570-946 ("Wire Strand")**

- *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 75 Federal Register 28557 (21 May 2010).
- *Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China*: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order, 75 Federal Register 38977 (7 July 2010).

**Investigation C-570-955 ("Magnesia Bricks")**

- *Certain Magnesia Carbon Bricks From the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 75 Federal Register 45472 (2 August 2010).
- *Certain Magnesia Carbon Bricks from the People's Republic of China*: Countervailing Duty Order, 75 Federal Register 57442 (21 September 2010).

**Investigation C-570-957 ("Seamless Pipe")**

- *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, 75 Federal Register 57444 (21 September 2010).
- *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China*: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 75 Federal Register 69050 (10 November 2010).

**Investigation C-570-959 ("Print Graphics")**

- *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 75 Federal Register 59212 (27 September 2010).
- *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order, 75 Federal Register 70201 (17 November 2010).

**Investigation C-570-966 ("Drill Pipe")**

- *Drill Pipe From the People's Republic of China*: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, 76 Federal Register 1971 (11 January 2011).
- *Drill Pipe From the People's Republic of China*: Countervailing Duty Order, 76 Federal Register 11758 (3 March 2011).

**Investigation C-570-968 ("Aluminum Extrusions")**

- *Aluminum Extrusions From the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 76 Federal Register 18521 (4 April 2011).
- *Aluminum Extrusions From the People's Republic of China*: Countervailing Duty Order, 76 Federal Register 30653 (26 May 2011).

**Investigation C-570-978 ("Steel Cylinders")**

- *High Pressure Steel Cylinders From the People's Republic of China*: Initiation of Countervailing Duty Investigation, 76 Federal Register 33239 (8 June 2011).

- *High Pressure Steel Cylinders From the People's Republic of China*: Final Affirmative Countervailing Duty Determination, 77 Federal Register 26738 (7 May 2012).
- *High Pressure Steel Cylinders From the People's Republic of China*: Countervailing Duty Order, 77 Federal Register 37384 (21 June 2012).

**Investigation C-570-980 ("Solar Panels")**

- *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*: Initiation of Countervailing Duty Investigation, 76 Federal Register 70966 (16 November 2011).
- *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China*: Preliminary Affirmative Countervailing Duty Determination, 77 Federal Register 17439 (26 March 2012).

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For the avoidance of doubt, the measures include any modifications or amendments to the measures identified above, even if those modifications or amendments are not specifically listed.

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## ANNEX 2

WORLD TRADE  
ORGANIZATION

WT/DS437/8

28 August 2014

(14-4949)

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Original: English

**UNITED STATES – COUNTERVAILING DUTY MEASURES  
ON CERTAIN PRODUCTS FROM CHINA****NOTIFICATION OF AN OTHER APPEAL BY THE UNITED STATES  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following notification, dated 27 August 2014, from the Delegation of the United States, is being circulated to Members.

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Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Countervailing Duty Measures on Certain Products from China* (WT/DS437/R and Add.1).

The United States seeks review by the Appellate Body of the Panel's legal conclusion that section B.1.(d) of China's panel request is not inconsistent with Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").<sup>1</sup> This finding is in error and is based on an erroneous application of Article 6.2 of the DSU to China's panel request. In particular, the Panel erred in finding that China's panel request provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The panel request's description of the applications of facts available it intended to challenge, together with the description of the obligation at issue, were not sufficient to meet the requirement of Article 6.2. The United States respectfully requests the Appellate Body to reverse the Panel's findings and conclude that section B.1.(d) of China's panel request is not consistent with DSU Article 6.2. As a consequence, the United States further requests the Appellate Body to declare moot the Panel's findings with respect to Article 12.7 of the *Agreement on Subsidies and Countervailing Measures*<sup>2</sup> as these claims were outside the terms of reference of the Panel.

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<sup>1</sup> Preliminary Ruling by the Panel, WT/DS437/4, para. 4.20, as incorporated by Panel Report, para. 1.16; Panel Report, Annex A-8, WT/DS437/R/Add.1.

<sup>2</sup> See Panel Report, paras. 7.307-7.325, 8.1(vii).